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SUPREME COURT OF THE STATE OF NEW YORK
K COUNTY

Index Number : 105837/2004

REILLY, EDWARD J.

vs.

JJF ASSOCIATES LLC

SEQUENCE NUMBER : 007

SUMMARY JUDGEMENT

_____
Justice

PART 19

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum decision.

FILED

NOV 21 2011

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 11/17/11

Saliann Scarpulla, J.S.C.

SALIANN SCARPULLA

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

---------- X

EDWARD J. REILLY and RICHARD MARCUS,

Plaintiff,

- against-

JJF ASSOCIATES, LLC,

Defendants.

---------- X

Index No.: 105837/2004
Submission Date: 06/29/11

For Plaintiff:	For Defendants:
Wayne Greenwald, P.C.	Murphy & O'Connell
475 Park Avenue South, 26th Floor	40 Wall Street
New York, NY 10016	New York, NY 10005

Papers considered in review of this motion for summary judgment:

Notice of Motion 1
Affidavit Opposing Motion 2
Affirmation in Opposition to Motion. 3
Mem of Law in Opposition to Motion 4
Reply Mem in Support of Motion. 5
Affidavit in Reply to Answer 6

HON. SALIANN SCARPULLA, J.:

In this action to recover real estate broker's fees, defendant JJF Associates, LLC ("JJF") moves for summary judgment dismissing the complaint. In 1998, JJF was seeking a new tenant for a commercial storefront space it owned at 948-950 Second Avenue (the "Second Avenue premises"). On or about April 9, 1999, JJF entered into a letter agreement with plaintiff Edward Reilly ("Reilly") for Reilly to procure Martell's Restaurant ("Martell's") as a tenant for the Second Avenue premises.

The letter agreement' reference line states:

> Lease Agreement (the "Lease") between JJF Associates ("Owner") and Martell's Restaurant ("Tenant") with respect to premises on ground floor and basement at 948-950 Second Avenue, New York, NY (the "Premises").

At the time the parties executed the letter agreement, Martell's was a restaurant operating at 83rd Street and Second Avenue in Manhattan. Jon McNamee, an allegedly successful Manhattan restauranteur, was one of the owners of Martell's.

In the letter agreement, Reilly represented that he was the sole broker, other than plaintiff Richard Marcus ("Marcus"), involved in obtaining Martell's as a tenant. Attached to the end of the letter was a detailed listing of the broker's commission rates for every year of the proposed lease.

Though Marcus was not a party to the letter agreement, he testified at his deposition that he entered into a separate oral agreement with JJF to secure a tenant for the Second Avenue premises. He also testified that he sent JJF a bill for his services and that JJF never contested it. Further, Reilly avers that Marcus introduced Reilly to JJF.

In April 2009, JJF's attorney, Ed Martin ("Martin"), drafted a lease for the Second Avenue premises. In the lease, Martin listed the tenant as "73 JJF Corp." According to JJF's general manager, Patrick Murphy ("Murphy"), Jon McNamee and two other Martell's employees had formed 73 JJF Corp. After Martin sent the lease draft to Martell's attorney, Terrence Flynn ("Flynn"), for review, Flynn requested that Martin change the lessee's name from "73 JJF Corp." to "948 JJF Corp." Murphy claims that he

had been informed, by an unnamed source, that Jon McNamee would not be involved in 948 JJT Corp.

According to Murphy, JJF subsequently informed Reilly that a higher security deposit would be required from 948 JJT Corp. because "of the substantial change in the quality of the proposed tenant . . ." Murphy alleges that he also informed JJF that a new fee arrangement was necessary, but that Reilly refused to accept the proposed new fee.

On June 1, 1999, JJF and 948 JJT Corp. signed a lease agreement for the Second Avenue premises. Paragraph 58A of the lease stated:

> Tenant shall use and occupy the Demised Premises as and for the operation of a restaurant and bar of the same character as the Martell's restaurant at 83rd Street and Third Avenue in Manhattan and for no other purpose.

Paragraph 51 of the lease stated that Reilly and Marcus were the exclusive brokers for the lease. The day after the parties signed the lease, 948 JJT Corp. was incorporated.

In 1999, JJF submitted bankruptcy schedules listing Martell's Restaurant as a tenant at the Second Avenue premises. According to plaintiffs, there was a Martell's sign in front of the premises. Defendants do not contest this assertion.

In April 2004, Reilly and Marcus commenced this action alleging that JJF owed them commissions because they fully performed under the April 9, 1999 letter agreement. Reilly and Marcus also allege an account stated claim because they sent statement and commission bills to JJF, to which JJF did not object. Lastly, Reilly and Marcus allege a claim for unjust enrichment.

JJF now moves for summary judgment dismissing the complaint, arguing that Reilly and Marcus are not entitled to any commission because they failed to procure Martell's as a tenant and thus, did not fulfill the terms of the April 9, 1999 letter agreement. JJF further argues that the account stated claim fails because JJF and plaintiffs did not have a prior course of dealing. Finally, JJF argues that the court should dismiss plaintiffs' unjust enrichment claim because plaintiffs have not alleged that JJF took any property or thing of value from either Reilly or Marcus.[1]

In opposition, Reilly and Marcus argue that Martell's Restaurant was in fact the Second Avenue Premises tenant. They further argue that a prior course of dealing is not necessary for the account stated claim. Plaintiffs also maintain that JJF has not shown, as a matter of law, that it did not receive a statement of account or that JJF objected to a statement it received. Finally, Reilly and Marcus argue that triable issues of fact remain on the unjust enrichment claim because both Reilly and Marcus testified that they conferred a benefit on JJF by finding a tenant and that they have not been compensated for this service.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any

[1] In June 2009, Justice Lehner granted Reilly summary judgment on the breach of contract claim. However, Justice Lehner later granted JJF's motion to reargue and ultimately denied Reilly summary judgment.

material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

Here, JJF has failed to make out a *prima facie* showing of entitlement to judgment dismissing the complaint as a matter of law. JJF argues that plaintiffs are not entitled to commissions because they did not secure Martell's as a tenant for the Second Avenue premises. However, Reilly and Marcus have submitted documents showing that JJF listed Martell's as its tenant in it bankruptcy filings. Further, JJF does not dispute that there was a Martell's sign in front of the Second Avenue premises. Though 948 JJF Corp.'s name, not Martell's, was on the lease, neither party has submitted sufficient evidence to show whether Martell's Restaurant operated under the 948 JJF Corp. name. *See Masullo v. 1199 Hous. Corp.*, 63 A.D.3d 430, 432 (1st Dept. 2009). These conflicting submissions give rise to issues of fact as to whether Reilly and Marcus performed under the letter agreement.

Moreover, JJF has not made a *prima facie* showing that Reilly and Marcus failed to secure McNamee's involvement in the tenant at the Second Avenue premises, or that McNamee's involvement was even required under the letter agreement.[2] The letter

[2] Murphy testified at his deposition that he had never met Martell's owner, McNamee, or even knew who he was. On this motion, however, Murphy now affirms that he wanted Martell's as a tenant because it was a successful restaurant and because McNamee "was well known in the trade as a commercially successful restaurant

agreement does not state that McNamee's involvement in the tenant leasing the Second Avenue premises was necessary. Further, JJF did not submit any records showing 948 JJF Corp.'s ownership structure. The only evidence relating to 948 JJF Corp.'s ownership structure was Murphy's unsupported statement that he had been informed that McNamee would not be involved as an owner or operator of 948 JJF Corp. This unsupported assertion is insufficient to show that McNamee was not involved in the tenant leasing the Second Avenue premises. *See Suppiah v Kalish,* 76 A.D.3d 829, 832-33(1st Dept. 2010) (inadmissible hearsay is insufficient to make a *prima facie* showing of entitlement to summary judgment).

JJF also argues that plaintiffs have provided no evidence indicating that either of them had any part in procuring 948 JJF Corp. as a tenant. This argument is meritless. Reilly stated in his affidavit that with Marcus' help he procured 948 JJF Corp. as a tenant. Reilly's uncontradicted, sworn statement is sufficient to make out a *prima facie* case.

As to Marcus claim to a commission, though Marcus did not sign the letter agreement, the letter agreement and lease executed by JJF referred to Marcus's involvement in the lease. Further, Marcus testified at his deposition that he entered into an oral agreement with JJF to procure a tenant for the 948-950 Second Avenue premises. Though JJF may deny this assertion, this is an issue of fact that a jury must decide. *See Masullo,* 63 A.D.3d at 432.

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operator."

Nor is JJF entitled to summary judgment dismissing the account stated claim. JJF does not deny that it received invoices from Reilly, nor does it show, as a matter of law, that it contested these invoices within a reasonable amount of time. *See Bay Ridge Lumber Co. v. Summit Renovation Corp.*, 271 A.D.2d 559, 560 (2d Dept. 2000).[3]

Finally, the Court will not dismiss plaintiffs' unjust enrichment cause of action. To maintain an unjust enrichment cause of action, "a plaintiff must allege that it conferred a benefit upon the defendant, and that the defendant will obtain such benefit without adequately compensating plaintiff therefor." *Nakamura v. Fuji*, 253 A.D.2d 387, 390 (1st Dept. 1998). Plaintiffs allege they provided a tenant for JJF at JJF's request, and that JJF did not compensate them for this service. JJF does not deny that plaintiffs procured the tenant, and that they have benefitted from the lease JJF entered into with the tenant. Thus plaintiffs' unjust enrichment claim is viable.

In accordance with the foregoing, it is hereby

[3] JJF argues that there is no account stated because JJF and plaintiffs did not have a prior course of dealing. Where, as here, the parties executed a written agreement setting forth the agreement to make payment for services, a prior course of dealing is unnecessary to create an account stated. *See, e.g., Bay Ridge Lumber Co.*, 271 A.D.2d at 560.

ORDERED that defendant JJF Associates, LLC's motion for summary judgment is denied, and the parties shall proceed to trial. This constitutes the decision and order of the Court.

Dated: New York, New York
November 7, 2011

ENTER:

Saliann Scarpulla, J.S.C.