

Slocum Realty Corp. v Schlesinger
2011 NY Slip Op 33661(U)
June 9, 2011
Supreme Court, Nassau County
Docket Number: 014458-10
Judge: Timothy S. Driscoll
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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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**SLOCUM REALTY CORP., CHESTNOR PROPERTIES
CORP., SERVICE APARTMENTS, INC., CHARLOTTE
BERMAN, LEELA BERMAN, TODD BERMAN, ANNE
JENNINGS, DEBORAH KAHM, DONNA Z. LIFLAND,
THOMAS A. LIFLAND, ESTHER LIMAN, DAVID
SCHWARTZ, AS TRUSTEE OF THE DAVID
SCHWARTZ FAMILY TRUST, BEVERLY F.
ZIMMERMAN, and THOMAS A. LIFLAND, AS
TRUSTEE OF TRUST B UNDER LAST WILL &
TESTAMENT OF MURRAY FELDMAN DATED
AUGUST 1, 1974, individually and on behalf of FOREST &
GARDEN APARTMENTS COMPANY a/k/a FOREST &
GARDEN APTS. CO., KINGS HAMPTON CO. a/k/a
KINGS HAMPTON COMPANY and KINGS ROOSEVELT
COMPANY,**

Plaintiffs,

- against

**RICHARD SCHLESINGER, ADAM SCHLESINGER,
JASON SCHLESINGER, LESLIE SCHLESINGER, JOAN
SCHLESINGER ROBEY, JOAN SCHLESINGER ROBEY,
JASON SCHLESINGER and RICHARD SCHLESINGER,
AS TRUSTEES OF THE SCHLESINGER FAMILY TRUST
A/K/A TRUST ESTABLISHED BY AGREEMENT WITH
RICHARD SCHLESINGER DATED AS OF MARCH 1,
1989, CEEBRAID-SIGNAL CORPORATION, CEEBRAID-
SIGNAL CORPORATION OF NEW YORK, CEEBRAID-
SIGNAL INVESTMENT COMPANY, L.P., CEEBRAID-
SIGNAL MANAGEMENT GROUP, LTD., CEEBRAID-
SIGNAL MANAGEMENT COMPANY LTD. and
ROBERT SCHWARTZ,**

Defendants.

**TRIAL/IAS PART: 20
NASSAU COUNTY**

**Index No: 014458-10
Motion Seq. Nos. 1 & 2
Submission Date: 5/2/11**

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The following papers have been read on these motions:

**Notice of Motion, Affidavit in Support,
 Affirmation in Support and Exhibits.....x
 Order to Show Cause, Affirmation in Support and Exhibits.....x
 Defendants' Affirmation in Opposition and Exhibit.....x
 Defendants' Affidavit in Opposition and Exhibits.....x
 Defendants' Memorandum of Law in Opposition.....x
 Affirmation in Opposition to Order to Show Cause and Exhibits...x**

This matter is before the Court for decision on 1) the motion filed by Plaintiffs Slocum Realty Corp., Chestnor Properties Corp., Service Apartments, Inc., Esther Liman, Deborah Kahm, Thomas Lifland, individually and as trustee of Trust B under Last Will & Testament of Murray Feldman dated August 1, 1974, Donna Z. Lifland, Beverly F. Zimmerman, David Schwartz as trustee of the David Schwartz Family Trust, Anne Jennings, Charlotte Berman, Todd Berman and Leela Berman (collectively "Forest & Garden Plaintiffs") on January 26, 2011, and 2) the Order to Show Cause filed by Defendants on February 15, 2011, both of which were submitted on May 2, 2011. For the reasons set forth below, the Court 1) denies the motion of the Forest & Garden Plaintiffs, without prejudice; and 2) denies, as moot, Defendants' Order to Show Cause.

BACKGROUND

A. Relief Sought

The Forest & Garden Plaintiffs move for an Order, pursuant to CPLR § 3212, granting summary judgment to the Forest & Garden Plaintiffs on the Third Cause of Action in the Verified Complaint ("Complaint"), and severing the remaining causes of action for further proceedings.

Defendants move for an Order holding the motion of the Forest & Garden Plaintiffs in abeyance, pending their compliance with outstanding discovery requests.

B. The Parties' History

Plaintiffs seek to recover for, *inter alia*, breach of contract, breach of fiduciary duty, fraud and misrepresentation. Their claims emanate from the business dealings of three real estate partnerships: 1) Forest & Garden Apartments Company a/k/a Forest & Garden Apts. Co. ("Forest & Garden"), 2) Kings Hampton Co. a/k/a Kings Hampton Company ("Kings Hampton"), and 3) King Roosevelt Company ("Kings Roosevelt"), which own apartments in Queens and Kings Counties. Forest & Garden owns apartment buildings located at 83-75 to 83-

83 118th Street and 118-62 to 118-66 Metropolitan Avenue in Kew Gardens.¹ All of the buildings have been converted to co-operatives.

The Complaint refers to Defendants Joan Schlesinger Robey, Jason Schlesinger and Richard Schlesinger, as Trustees of The Schlesinger Family Trust, also known as Trust Established by Agreement with Richard Schlesinger dated as of March 1, 1989 as the “Schlesinger Trust” (Compl. at ¶ 44). The Complaint refers to Defendants Richard Schlesinger, Adam Schlesinger, Jason Schlesinger, Leslie Schlesinger, Joan Schlesinger Robey, the Schlesinger Trust and Robert Schwartz, collectively, as the “Schlesinger Defendants” (*id.* at ¶ 61).

In the third cause of action, Plaintiffs allege that the Schlesinger Defendants breached the Forest & Garden Limited Partnership Agreement dated June 1, 1989 (“F&G Agreement”). Plaintiffs maintain that Richard Schlesinger drew commissions as Managing General Partner of Forest & Garden to which he was not entitled under the F&G Agreement.

The F&G Partnership Agreement provides as follows at Article 3, titled “Premises:”

The sole purpose of the Partnership shall be to hold title to, manage and operate the property described as the land and buildings located at 83-75 to 83-83 118th Street, and 118-62 to 118-66 Street [sic], Metropolitan Avenue, Kew Gardens, in the County of Queens, State of New York. Said property is sometimes referred to hereinafter as the “Real Property”.

The F&G Agreement further provides that 1) Defendant Richard Schlesinger (“Richard”) is one of the Managing General Partners (F&G Agreement at § 9(b)); 2) as a Managing General Partner, he is entitled to be paid “an aggregate of four (4%) percent of all gross rents and other gross income received by the Partnership [which payments] shall be made monthly” (*id.* at § 9(c)); and, 3) as a Managing General Partner, he “shall be entitled to be paid commissions or other compensation, at prevailing rates, for the rental of apartments, and for services affected in arranging a refinancing of the property or its sale” (*id.* at § 9(d)). The F&G Agreement also provides that Managing General Partners “shall have the right to employ entities which are

¹ The Forest & Garden Limited Partnership Agreement (Ex. C to Goldberg Aff. in Supp.) describes the second address as “118-62 to 118-66 Street [sic], Metropolitan Avenue, Kew Gardens,” but paragraph 65 of the Complaint (*Id.* at Ex. A) cites that same address as “118-62 to 118-66 66th Street, Metropolitan Avenue, Kew Gardens.” Based on the Forest Garden Financial Statements (Ex. D to Goldberg Aff. in Supp.), and the Affirmation in Support of Plaintiffs’ counsel, the Court gleans that the correct address is 118-62 to 118-66, Metropolitan Avenue, Kew Gardens.

affiliated with them, or any of them, or of which they or any of them are the owners or one of the owners, for the purpose of performing advertising and marketing services, construction services and sub-contracting services for or in connection with the real property owned by the Partnership, provided such entities are paid for their services at rates which are comparable to those generally charged at the time by competitive firms for similar work performed in that area where the real property is located (*id.*).”

The moving Plaintiffs have submitted an Affidavit in Support of Certified Public Accountant Alan Needleman (“Needleman”). Needleman affirms that he reviewed financial statements of Forest & Garden’s financial statements (“Statements”) for the years 2007 and 2008 (Ex. D to Needleman Aff. in Supp.). Needleman submits that those Statements reflect that a loan in the amount of \$2 million had been made to an affiliate of one of the general partners, and refers specifically to language on page 7 of the Statements reflecting that loan. Following his review of the Statements, Needleman requested particulars regarding the loan and received a letter from Richard Schlesinger (Ex. G to Needleman Aff. in Supp.) asserting that the reference to a loan was erroneous, and that “[t]he \$2,000,000 was a payment due to the General Partner partially in arrears and partially in advance for fees due against apartment sales.” Needleman affirms that Richard attached a schedule (*id.*) which reflected that the General Partner fee consisted of 25% of the gain on the sale of co-operative apartments in the buildings owned by Forest & Garden. Richard calculated that gain based on a reduction in basis, which increased the amount of gain and concomitantly, the General Partner’s fee. Needleman responded to Richard by letter dated October 28, 2009 (*id.* at Ex. H) in which Needleman asked Richard, *inter alia*, to explain his assertion that the \$2 million at issue did not represent a loan. In this letter, and in a prior letter (*id.* at Ex. F), Needleman asked Richard to provide documentation, including agreements, on which Richard relied “in arriving at the general partner fee of 25% of gain on sale of cooperative apartment shares plus basis reduction” (October 28, 2009 letter at p. 2). Richard responded via e-mail dated November 13, 2010 (*id.* at Ex. I), which included an excerpt from the sections of the F&G Agreement that address the compensation of the Managing General Partners, cited *supra*.

Richard affirms that he is the Managing Director of Ceebraid Signal Management Group (“CS Management”), the management company for Forest & Garden, Kings Hampton and Kings Roosevelt. Richard outlines his extensive involvement in the real estate business generally, and

in these entities specifically.

Richard opposes Plaintiffs' application, and reaffirms his position that the approximately \$2 million payment was inaccurately characterized as a loan. That payment was, rather, a payment due to the Managing General Partner "partially in arrears and partially in advance for fees due against apartment sales" (Richard Aff. in Opp. at ¶ 6, citing letter annexed as Ex. 1). Richard submits that, based on his extensive experience in the real estate industry, the provision in the F&G Agreement entitling Managing General Partners to receive commissions "at prevailing rates" supports Coop Conversion Fees between 25 and 50% of the gains on sale. He avers that \$1,853,988.00 of the approximately \$2 million payment to the Managing General Partner related to these Coop Conversion Fees, and the remaining amounts related to monies owed to CS Management for other services.

Richard submits, further, that the payment of Coop Conversion Fees qualifies as "commissions" under § 9(d) of the F&G Agreement. In support, Richard notes that 1) the Managing Partners have derived substantial financial benefits from converting and selling cooperative units; and 2) Plaintiff Chestnor Properties Corp. has been receiving Coop Conversion Fee payments for more than ten (10) years in connection with the sale of individual cooperative units at Kings Hampton and Kings Roosevelt. Richard affirms that the operating agreements for Kings Hampton and Kings Roosevelt (Exs. H and I to Ds' OSC) were drafted at the same time as the F&G Agreement, and contain similar language as that contained in § 9(d) of the F&G Agreement.

C. The Parties' Positions

Plaintiffs submit that the F&G Agreement is unambiguous, and provides no support for Richard's claim to entitlement of a payment in the sum of \$2,025,934, characterized by Defendants as a "General Partner Fee" (Goldberg Aff. in Supp. at ¶ 16). Plaintiffs contend that Forest & Garden is entitled to a return of these monies, which should be distributed among the Forest & Garden partners according to their respective interests in that company.

Defendants oppose Plaintiffs' motion submitting, *inter alia*, that 1) Plaintiffs have not adequately asserted the absence of material issues of fact, and their submissions demonstrate that there exist "substantial disagreements regarding the nature of the payments allegedly made to [Richard]" (Ds' Memorandum of Law at pp. 7-8); 2) it is disputed whether the terms of the F&G Partnership Agreement, and the agreements of Kings Hampton and/or Kings Roosevelt,

permit the collection of Coop Conversion Fees; 3) discovery is necessary to determine relevant issues, including the parties' intent in drafting the relevant agreements and the course of conduct regarding payment of Coop Conversion Fees at Forest & Garden, Kings Hampton and Kings Roosevelt; 4) there exist issues of disputed fact relevant to Defendants' affirmative defenses, which include their assertions that Plaintiffs' claims are barred by the equitable doctrines of estoppel and laches; and 5) Defendants are entitled to discover relevant facts, solely within Plaintiffs' knowledge, that may be relevant to their opposition to Plaintiffs' motion.

RULING OF THE COURT

A. Summary Judgment Standards

Pursuant to CPLR § 3212(e), summary judgment may be granted as to one or more causes of action, or part thereof, in favor of any one or more parties, to the extent warranted, on such terms as may be just. The court may also direct 1) that the cause of action as to which summary judgment is granted shall be severed from any remaining cause of action; or 2) that the entry of the summary judgment shall be held in abeyance pending the determination of any remaining cause of action.

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of a triable issue of fact. *Id.*

B. Relevant Contract Principles

Agreements are to be construed in accordance with the parties' intent. When parties set down their agreement in a clear complete document, their writing should be enforced according to its terms. *Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475 (2004), quoting *W.W.W. Assoc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990). Where the parties' intent is discernible from the plain meaning of the language of the contract, there is no need to look further. *Evan v. Famous Music Corp.*, 1 N.Y.3d 452, 458 (2004).

Under New York law, the initial interpretation of a contract is a matter of law for the

court to decide. *International Multifoods Corp. v. Commercial Union Ins. Co.*, 309 F.3d 76, 83 (2d Cir.), citing *K. Bell & Assocs., Inc. v. Lloyd's Underwriters*, 97 F.3d 632, 637 (2d Cir. 1990), quoting *Readco, Inc. v. Marine Midland Bank*, 81 F.3d 295, 299 (2d Cir. 1996). Whether a contract is ambiguous is a question of law for the court. *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (2002); *Gennis v. Pomona Park Bd. of Managers*, 36 A.D.3d 661, 663 (2d Dept. 2007), quoting *Perciasepe v. Premuroso*, 208 A.D.3d 511, 511-512 (2d Dept. 1994). A contract is ambiguous if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more meanings. *New York City Off-Track Betting Corp. v. Safe Factory Outlet, Inc.*, 28 A.D.3d 175, 177 (1st Dept. 2006), *rearg. den.*, 2006 N.Y. App. Div. LEXIS 11351 (1st Dept. 2006), quoting *Feldman v. National Westminster Bank*, 303 A.D.3d 271 (1st Dept. 2003), *app. den.*, 100 N.Y.2d 505 (2003).

Where a contract is straightforward and unambiguous, its interpretation presents a question of law for the court to be made without resort to extrinsic evidence. *Ruttenberg v. Davidge Date Sys. Corp.*, 215 A.D.2d 191, 193 (1st Dept. 1995). When, however, the meaning of a contract is ambiguous and the intent of the parties becomes a matter of inquiry, a question of fact is presented that cannot be resolved on motion papers alone. *Id.*, quoting *Eden Music Corp. v. Times Sq. Music Publs.*, 127 A.D.2d 161, 194 (1st Dept. 1987). Where interpretation of a contract is susceptible to varying reasonable interpretations, and intent must be gleaned from disputed evidence or from inferences outside the written words, resolution by the fact finder is required. *Time Warner Entertainment Co., L.P. v. Brustowsky*, 221 A.D.2d 268 (1st Dept. 1995), *app. den.*, 89 N.Y.2d 809 (1997).

C. Application of these Principles to the Instant Action

The Court denies Plaintiff's motion, based on its conclusion that there is an issue of fact as to what the parties to the Agreement intended when they agreed that Richard, as Managing Partner, was entitled to a fee/commission on the sale of the property. The Forest & Garden Agreement is ambiguous insofar as the interpretation of Section 9(d) is concerned. Specifically, the Court cannot discern, solely from the four corners of that Agreement, whether the language entitling the Managing General Partners to be paid "commissions, or other compensation, at prevailing rates, for the rental of apartments, and for services affected in arranging a refinancing of the property or its sale" contemplated the payment of Coop Conversion fees. In light of the similarities among the Forest & Garden, Kings Hampton and Kings Roosevelt Agreements,

Defendants' allegations that Chestnor Properties Corp. received Coop Conversion fees for units sold by Kings Hampton and Kings Roosevelt since 1999, and Defendants' affirmative defenses, the Court concludes that the interpretation of the Forest & Garden Agreement is susceptible to varying reasonable interpretations, and the parties' intent must be gleaned from disputed evidence or from inferences outside the language of the Agreement. Accordingly, resolution by the fact finder is required and an award of summary judgment is inappropriate at this juncture.

In light of the foregoing, the Court denies Plaintiffs' motion, without prejudice to their moving for similar relief following the completion of discovery. In light of the Court's denial of Plaintiffs' motion, the Court denies Defendants' Order to Show Cause as moot.

All matters not decided herein are hereby denied.

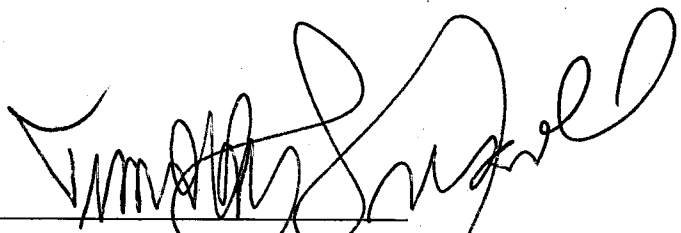
This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear before the Court on July 6, 2011 at 9:30 a.m. for a Preliminary Conference.

ENTER

DATED: Mineola, NY

June 9, 2011



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

JUN 13 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**