

Dysal, Inc. v Hub Props. Trust
2011 NY Slip Op 34304(U)
September 22, 2011
Supreme Court, Suffolk County
Docket Number: 19140/2009
Judge: Ralph T. Gazzillo
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SHORT FORM ORDER

Supreme Court - State of New York
IAS PART 6 - SUFFOLK COUNTY

COPY

MOTION DATE: 09-22-2010
ADJ. DATE: 12-02-2010
MOT. SEQ: 003 MD
004 MG

PRESENT:

Hon. RALPH T. GAZZILLO
A.J.S.C.

-----X		
DYSAL, INC., d/b/a CORPORATE REALTY CONSULTANTS,	:	GERMANO & CAHILL, PC
	:	Attorneys for Plaintiff
	:	4250 Veterans Memorial Hwy.
Plaintiff(s),	:	Suite 275
- against -	:	Holbrook, NY 11741
	:	
HUB PROPERTIES TRUST, JOHN A. MANNIX, as PRESIDENT,	:	THE SHAPIRO FIRM, LLP
	:	Attorneys for Defendants
	:	500 Fifth Avenue, 14 th Floor
	:	New York, NY 10110
Defendant(s).	:	
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Upon the following papers numbered 1 to 18 read on this motion (#003) made pursuant to CPLR §3212 for summary judgment, Notice of Motion and supporting papers 1 - 12 , Memorandum of Law in support of defendant's motion for summary judgment, Notice of Cross motion (#004) pursuant to CPLR §3212 for summary judgment and supporting papers numbered 13-18, the Memorandum of Law in opposition to defendants motions for summary judgment, it is;

ORDERED, that the motion is denied in its entirety as follows; and it is further

ORDERED, that the cross motion is granted in its entirety as follows; and it is further

ORDERED that the Court will conduct a hearing to determine whether any adjustments to the commission due to the plaintiff pursuant to the Commission Agreement dated May 3, 2001 are required on October 7, 2011 at 9:30.

ORDERED, that counsel for plaintiff shall serve a copy of this Order with Notice of Entry upon counsel for defendant, pursuant to CPLR §§2103(b)(1), (2) or (3), within thirty (30) days of the date the order is entered and thereafter file the affidavit(s) of service with the Clerk of the Court.

This is an action to recover a commission due pursuant to a real estate commission agreement made between the plaintiff and the defendant's predecessor in interest dated May 3, 2001. Plaintiff, Dysal, Inc., d/b/a Corporate Realty Consultants (hereinafter "Dysal") entered into a Commission Agreement with AS of Periton, LLC, (hereinafter "Periton") whereby Dysal agreed to provide real estate services to Periton in connection with the extension and expansion of existing lease of a commercial building located at 167 Sully's Trail, Pittsford, NY to Allstate Insurance Company.

The subject Commission Agreement, dated May 3, 2001, provides that Dysal is due:

“A commission equal to the sum of five percent of the gross rental for the entire lease term on the new space and five percent of the gross rental for the extended lease term on the existing space, notwithstanding any lease provisions. Said commission is to be paid 1/3rd upon lease agreement/amendment execution, 1/3rd on July 2, 2001 and 1/3rd on occupancy ...”

Further, the Commission Agreement provided that:

“If the tenant remains in possession beyond the termination date of this amendment, “lease event”, a further commission will be due based upon the same computation as in paragraph #1 (even if the terms of this lease event do not exactly conform to any option in the lease, in such occurrence, the commission shall be calculated on actual terms of the lease event of the lease event). The commission is payable when such lease event commences.

Thereafter, in June of 2001 Periton executed a amended lease with Allstate which, inter alia, substantially expanded the square footage leased by Allstate and extended the term of the lease through August 31, 2008. In addition, the lease agreement (denominated “First Amendment to Building 167 Lease and Building 175 Lease”) provided, in pertinent part, that:

“All of the covenants, terms and conditions set forth herein shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors, legal representatives, and assigns.”

Further, the amended lease agreement stated that the parties :

“Each represent to the other parties hereto that each has not dealt with any broker, agent or finder in connection with this Amendment other than John Hoblin of Corporate Realty Consultants (the “Broker”). AS Periton shall pay any commission owed to the Broker pursuant to a separate agreement between AS Periton and the Broker. AS of Periton, Sully’s Trail and Tenant each agrees to hold the other parties hereto harmless from and indemnify the other parties against any cost, expense or liability for any compensation, commission, fee, charge or damages, including reasonable attorneys’ fees, as a result of any claim of any broker, agent or finder ... claiming under or through the indemnifying party with respect to this Amendment or a negotiation of this Amendment”

In 2004, Periton sold the building to Hub Properties Trust (hereinafter “Hub”) the defendant herein. In connection with the sale of the property, defendant’s executed an Assignment and Assumption of Leases between Periton and Hub dated November 30, 2004. With regard to the assumption of Periton’s obligations, that document states:

“...Assignee hereby assumes, and agrees to perform and observe all of the obligations, covenants, duties and obligations of the Assignor under the Leases, and indemnifies, defends Assignor and holds Assignor harmless from and against all liabilities, damages, actions, causes of action, losses, costs and expenses arising out of or in connection with the Leases to the extent the same arises after

the date hereof, *including, without limitation any obligation for payment of any deferred leasing commissions payable after the date of this Assignment with respect to any of the Leases.*" (emphasis added.)

On or about October, 2008, Allstate executed an amendment and renewal of the amended lease (which expired on August 31, 2008) with Hub, albeit for a somewhat smaller portion of the premises (21,216 sf) than was leased under the first amended lease agreement (27,990 sf). The renewal of the lease extended the term of the lease through January 31, 2014 and specifically indicated that the amendment was the "Second Amendment" to the lease. The renewed lease denominated the June 2001 lease the "First Amendment" and designated the Commencement Date as May 1, 1998, the date of the original lease of the subject property with Allstate.

There is no dispute between the parties as to existence of the terms of the relevant documents and, appropriately, each has moved for summary judgment (see, *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 at 404). The gravamen of Defendant's motion is that the Commission Agreement was made between Dysal and Periton, not Hub, that the "demised" premises were reduced in size from that leased in the May 2003 amendment to the lease and that Hub did not specifically assume the Commission Agreement entered into by Periton and Dysal. As support for its position, defendant cites *Longley-Jones Assoc. v Ircon Realty Co.*, 67 N.Y.2d 346 wherein the Court of Appeals held that "absent an affirmative assumption, a grantee is only liable for those covenants that run with land."

Plaintiff, in its cross-motion for summary judgment argues that the entirety of the documents signed by Periton and Hub specifically includes the Commission Agreement and that, as such, Hub is now responsible to pay the commission due thereunder.

Hub claims that it did not *affirmatively* assume Periton's obligations under the Commission Agreement since that document did not specifically refer to it. The Assignment and Assumption of Leases, however, shows that Hub's reliance on *Longley-Jones Assoc. V. Ircon Realty Co.*, supra, is misplaced. The Assignment and Assumption of Leases is a two page document that covers the myriad of generalized obligations that Hub was to assume in this large, complicated commercial real estate transaction. Despite the fact that the Assignment and Assumption of Leases includes many generalized obligations, a close reading of that document shows that it specifically includes "... *any obligation for the payment of any deferred leasing commissions payable after the date of this Assignment with respect to any of the Leases.*" Hub cannot now claim that it did not know about the Commission Agreement since it was made clear in the Assignment and Assumption of Leases that commissions might be due in the future. Furthermore, the First Amendment to Building 167 Lease and Building 175 Lease (which was the subject of the Assignment and Assumption of Leases) also specifically refers to the Commission Agreement between Periton and Dysal and provides for the opportunity for the renewal of the lease. Therefore, Hub was aware that the first amended lease could be renewed and the as well as the existence of the Commission Agreement and, therefore, the potential for commissions to come due pursuant to it. As such, Hub affirmatively assumed responsibility for the payment of lease commissions when it executed the Assignment and

Assumption of Leases. Any other reading of the collection of relevant documents here defies logic.

Accordingly, defendant's motion for summary judgment is denied and plaintiff's cross-motion for summary judgment granted.

The only issue that remains to be resolved is the calculation of the commission due since the renewed lease agreement provides for an area smaller than that included in the lease assumed by Hub on its purchase from Periton. As such, the Court will hold a hearing at the date and time specified herein at which arguments regarding adjustments to the commission due and payable may be heard.

Dated: 9/22/11
RIVERHEAD, NY



Ralph T. Gazzillo
A.J.S.C.

NON-FINAL DISPOSITION XX