

Optimal Spaces, Inc. v Derderian

2012 NY Slip Op 33870(U)

February 3, 2012

Supreme Court, New York County

Docket Number: 109783/09

Judge: Jeffrey K. Oing

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

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OPTIMAL SPACES, INC.,

Plaintiff,

-against-

HAROUTIUN DERDERIAN,

Defendant.

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Mtn Seq. No. 003

DECISION AND ORDER

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JEFFREY K. OING, J.:

Background

Non-party Haroust LLC was the landlord and owner of property (the "landlord") located at 116-122 East 124th Street (the "property"). Non-party Cushman & Wakefield ("C&W") and plaintiff, Optimal Spaces, Inc. ("Optimal"), executed separate brokerage agreements with the landlord and its principal, defendant Haroutiun Derderian, to lease the space located at the property (Moving Papers, Ex. B). Optimal's brokerage agreement is dated November 3, 2008 (Id.). In consideration for the brokerage services, the landlord agreed to pay C&W and Optimal a commission for procuring a ready, willing, and able tenant for the property. Con Edison ("Con Ed") was procured as a potential tenant to lease a portion of the ground floor and a portion of the 2nd floor for a ten year term.

The lease (the "first lease") was dated January 15, 2009, and was for a 10-year period with a base annual rent for the

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first five years of \$330,000 (Moving Papers, Ex. C). On or about the date of execution of the first lease, Con Ed paid the landlord \$27,500 representing the first month of rent.

Subsequent to executing the first lease, Con Ed discovered that the underlying property was encumbered by two mortgages, with Intervest National Bank and ER Holdings. Con Ed also learned that the landlord was in default and the property was in foreclosure. On or about July 13, 2009, Con Ed filed a lawsuit against the landlord and defendant Derderian seeking a rescission of the first lease (Moving Papers, Ex. E). In the interim, the landlord and defendant Derderian restructured the ownership and refinanced the property, and proposed new terms to Con Ed in an attempt to settle Con Ed's lawsuit.

On October 27, 2009, non-parties SJ 11 East 124, LLC and Sackman Enterprises, Inc., and defendant Derderian, on behalf of the landlord, executed an operating agreement to form a new LLC known as 116 East 124 Associates LLC (the "116 East 124 LLC"). The members of the 116 East 124 LLC included SJ 11 East 124 LLC, which holds 51% interest, and defendant Derderian, who holds 49% interest. Defendant Derderian claims that the 116 East 124 LLC was formed to renegotiate and transfer the landlord's lease obligations, and to operate, maintain, and sell the property.

On October 27, 2009, the 116 East 124 LLC and Con Ed executed a second lease agreement (the "second lease") (Moving

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Papers, Ex. G). Defendant Derderian claims that upon negotiating the second lease, C&W, as well as Optimal, billed the 116 East 124 LLC for the commissions allegedly due and owing for that transaction. C&W originally billed the landlord for the first lease, but discontinued its billing once Con Ed rescinded. When the second lease was effectuated, C&W then billed the 116 East 124 LLC for the commission. Defendant Derderian contends that C&W has always treated both Con Ed leases as the same transaction. Defendant claims that the first and second leases are in fact the same lease for one tenancy, and that the second lease was merely an amended version of the first lease. Thus, defendant argues, C&W and Optimal were only entitled to one brokerage fee.

On July 10, 2009, Optimal commenced an action against Derderian, individually, to recover sales commissions due and payable under the brokers agreement for procuring Con Ed pursuant to the rescinded first lease of January 15, 2009 (Moving Papers, Ex. J).

On April 8, 2010, Optimal also commenced an action against the 116 East 124 LLC for brokerage commissions (Moving Papers, K). Optimal was seeking the sum of \$54,735 pursuant to paragraph 54 of the second lease (Moving Papers, Ex. G).

On October 27, 2010, JHO Gammerman conducted a bench trial in the instant action (Moving Papers, Ex. M). At the conclusion

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of the trial, JHO Gammerman indicated what his current thoughts were, but gave defendant Derderian, who was pro se at the time, an opportunity to submit a copy of the transcript and proposed findings of fact and conclusions of law (Moving Papers, Ex. M, Tr., pp. 70-74). JHO Gammerman reserved decision until November 17, 2010 in order to have an opportunity to review whatever was submitted and then determine whether or not the thoughts or conclusions he expressed on the record at the end of the trial should be changed (Id.). Defendant Derderian never produced anything, nor did he appear on November 17, 2010 (Tr., November 17, 2010). As such, JHO Gammerman awarded plaintiff judgment against defendant in the amount of \$64,375, with interest from January 15, 2009 (Id.).

Defendant now moves to vacate the judgment, dated November 17, 2010, and entered on December 8, 2010, pursuant to CPLR 5015(a)[3], based on fraud, misrepresentation, or misconduct allegedly perpetrated by Stephen Sunderland, Optimal's Senior Managing Director. In that regard, Derderian argues that the 116 East 124 LLC and Optimal executed a settlement agreement on December 14, 2010 in which Optimal would accept \$34,300 as payment to settle all claims in that action (Moving Papers, Ex. L). The parties also stipulated to discontinue the action (Id.). Derderian claims that pursuant to terms of that settlement agreement Optimal released the members of the 116 East 124 LLC

from further liability and litigation (Moving Papers, Ex. L, ¶ 4).

Defendant also argues under Limited Liability Company Law § 609(a) he cannot be held individually liable because he is a member of the 116 East 124 LLC. Further, the brokers agreement dated November 3, 2008 was between the landlord and Optimal. Derderian claims he was merely a signatory on behalf of the landlord.

Discussion

As for defendant's argument pursuant Limited Liability Company Law § 609(a), that he cannot be held individually liable, the argument is unavailing. This same argument was raised before, and determined by, JHO Gammerman. In that regard, JHO Gammerman found that "[t]he agreement was signed by the defendant individually, not on behalf of any corporation or entity. And he is therefore personally liable for the commission" (Moving Papers, Ex. M, Tr., p. 72). Further, defendant had the opportunity to appear in Court before JHO Gammerman on November 17, 2010 to submit any additional evidence. Having failed to do so, defendant's remedy was to appeal JHO Gammerman's decision or move to set aside the verdict. Accordingly, that branch of defendant's motion to vacate the judgment based on Limited Liability Company Law § 609(a) is denied.

As for defendant's claim pursuant to CPLR 5015(a) [3], on October 27, 2010, Sunderland, Optimal's managing director, was called as a witness during the trial. Defendant Derderian had full opportunity to cross-examine Sunderland. At one point during the questioning, JHO Gammerman inquired as to whether Optimal had filed a separate lawsuit seeking a judgment for the same broker's commissions they were seeking against defendant Derderian individually in this action:

Q. Are you suing the entity Haroust (phonetics), LLC?

The Court: He is not. He is suing you individually.

Mr. Derderian: In a separate action?

The Court: Do you have another lawsuit?

The Witness: I'm not suing Haroust (phonetics), LLC.

The Court: Do you have another lawsuit claiming the same commissions, that is the question?

The Witness: I have no other lawsuit.

The Court: That is the answer.

Mr. Derderian: Did you have another lawsuit?

The Court: Did you ever start another lawsuit that you are aware of?

Mr. Blant: Relating -

The Court: Please.

Did you ever, I'm asking the witness. Did you ever start another lawsuit that you are aware of concerning these commissions?

* * *

The Court: That is not a hard question. Did Optimal ever start another lawsuit for these commissions? That is a yes or no question.

The Witness: No lawsuit was filed.

The Court: That is the answer.

Mr. Derderian: What did he say?

The Court: No lawsuit was filed.

Mr. Derderian: There was no index number, you're telling me, for another lawsuit against another entity to deal with the same matter?

The Witness: I don't believe so

The Court: I don't believe so. That is the answer.

Mr. Derderian: I don't believe this.

The Court: I don't' believe so, he says.

The Witness: I had spoken to -

The Court: Stop talking.

(Moving Papers, Ex. M, pp. 44-45).

Defendant argues that Sunderland committed fraud on the Court since on April 8, 2010, six months prior to the October 27, 2010 trial, Optimal sued the 116 East 124 LLC in a separate lawsuit seeking the same broker's commission. Defendant contends

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that JHO Gammerman's decision following the trial assumed the truthfulness of Sunderland's testimony since JHO Gammerman would not have granted an award based on the same broker's commission that was also being litigated in a different lawsuit. Thus, defendant argues, Optimal was allowed to "double-dip" as a result of the fraud committed upon the Court by Sunderland.

For the following reasons, that branch of defendant's motion to vacate the judgment pursuant to CPLR 5015(a)[3] is denied. In the instant action, Optimal sought the broker's commissions based on the **first** lease, dated January 15, 2009 (Moving Papers, Ex. J). The action that Optimal settled against the 116 East 124 LLC was to recover the broker's commission on the **second** lease dated October 27, 2009 (Moving Papers, Ex. K). In addition, paragraph 4 of the settlement agreement between Optimal and the 116 East 124 LLC, provides the following:

Nothing in the aforesaid release shall be construed as precluding plaintiff from pursuing any claims it may have against Haroust, LLC, Haroutiun Derderian and/or ER Holdings, LLC, on account of a separate prior lease between Haroust LLC, and Consolidated Edison Company, which lease was terminated by Consolidated Edison Company of New York, Inc., provided that plaintiff indemnifies and holds harmless 116 East 124 Associates, LLC, Sackman Enterprises, Inc, James Hefelfinger, Carter Sackman and Barry Judelson, and their respective members, shareholders, and attorneys, from any claims by Haroust, LLC and/or Haroutiun Derderian, including claims for indemnity and contribution, as a result [of] plaintiff pursuing claims based upon the aforesaid prior lease.

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(Moving Papers, Ex. L). Thus, Optimal reserved its claims against defendant based on the first lease.

Based on the foregoing, defendant Derderian fails to adduce any evidence of fraud on the court.

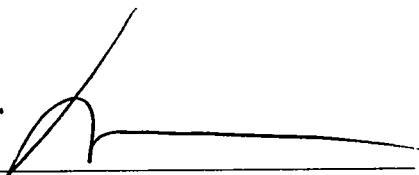
Accordingly, defendant's motion to vacate the judgment is denied.

This memorandum opinion constitutes the decision and order of the Court.

Dated:

2/3/12

JEFFREY K. OING
J.S.C.



HON. JEFFREY K. OING, J.S.C.