

Hunter Realty Org., LLC v A.O. Textiles

2013 NY Slip Op 30087(U)

January 16, 2013

Sup Ct, New York County

Docket Number: 107794/2009

Judge: Shlomo S. Hagler

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Shlomo S. Hagler
Justice

PART: 17

THE HUNTER REALTY ORGANIZATION, LLC,
Plaintiff,

INDEX NO.: 107794/2009
MOTION SEQ. NO.: 001

- against -

A.O. TEXTILES,
Defendant.

DECISION and ORDER

Motion by plaintiff for summary judgment.


	<u>Papers Numbered</u>
Notice of Motion with Affirmation of Plaintiff's Counsel Andrew T. Miltenberg, Esq., Affidavit of Wayne Siegel, and Exhibits "A" through "F"	<u>1, 2, 3, 4</u>
Affirmation of Defendant's Counsel Joseph A. Deliso in Opposition to Plaintiff's Motion and Exhibits "A" through "C"	<u>5, 6</u>
Reply Affirmation of Plaintiff's Counsel Megan S. Goddard, Esq. in Further Support of Motion ...	<u>7</u>
Transcript of Oral Argument of April 30, 2012	<u>8</u>

Cross-Motion: No Yes Number of Cross-Motions: 0

Upon the foregoing papers, it is hereby ordered that this Motion is granted as set forth in the attached separate written Decision and Order.

FILED
JAN 22 2013
COUNTY CLERK'S OFFICE
NEW YORK

Dated: January 16, 2013
New York, New York



Hon. Shlomo S. Hagler, J.S.C.

Check one: Final Disposition Non-Final Disposition

Motion is: Granted Denied Granted in Part Other

Check if Appropriate: SETTLE ORDER SUBMIT ORDER

DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 17

-----X
THE HUNTER REALTY ORGANIZATION, LLC,

Index No.: 107794/2009

Plaintiff,

- against -

Motion Sequence No. 001

A.O. TEXTILES,

Defendant.

FILED

DECISION & ORDER

-----X
HON. SHLOMO S. HAGLER, J.S.C.

JAN 22 2013

COUNTY CLERKS OFFICE
NEW YORK

Plaintiff The Hunter Realty Organization, LLC ("Hunter" or "plaintiff") moves, pursuant to CPLR § 3212, for summary judgment on its complaint against defendant A.O. Textiles ("A.O. Textiles" or "defendant"). Defendant opposes the motion arguing that questions of fact exist which precludes the granting of summary judgment.

FACTUAL BACKGROUND

In or about May 2008, Wayne Siegel ("Siegel"), an employee of Hunter, met with Joonsoo Kim ("Kim"), president of A.O. Textiles, regarding the expiration of defendant's lease at its then premises at 135 West 36th Street, New York, New York ("old premises"), which was due to expire on April 30, 2009. Defendant was interested in moving to different premises by the time its old lease expired and Hunter offered to find defendant such new premises.

Plaintiff and defendant entered into a letter agreement dated June 12, 2008, which was signed by Kim on behalf of defendant ("the Agreement"). (See Exhibit "A" to the Motion.) The first two paragraphs of the Agreement state:

You hereby grant to The Hunter Realty Organization, LLC (Hunter) the exclusive right to find, negotiate for, and secure space for you and you agree to the leasing or purchasing of such space solely and exclusively through "Hunter".

This agreement shall be effective upon the execution of this agreement, by the parties hereto, and shall continue through May 31, 2009 and extend thereafter until cancelled by either party upon sixty days prior written notice.

The third paragraph of the Agreement states that the defendant agrees “to refer all inquiries, proposals and offers to Hunter including those from brokers, lessees, lessors and owners and also authorizes Hunter to work with other brokers on a cooperating basis with its exclusive brokerage right. The fourth paragraph of the Agreement states that “[w]ithout limiting the foregoing, ‘Hunter’ shall receive its compensation from the owner lessor or sublessor of the space, which is leased or purchased.”

The Agreement also states that the defendant “will recognize Hunter and act through ‘Hunter’ as broker on all submissions” made to the defendant during the term of the Agreement. Finally the Agreement provides that it “may not be changed, rescinded or modified except by an agreement in writing.”

Defendant had very specific requirements about the space (between 4,000 and 5,000 square footage and very bright), total rent (less than \$10,000 per month), and geographic area (between Fifth or Sixth Avenues to Eighth or Ninth Avenues and 35th and 41st Streets). (See Transcript of Examination Before Trial of Joonsoo Kim taken on November 11, 2010 [“Kim EBT”] at pp. 32 and 54, attached as Exhibit “C” to Defendant’s Affirmation in Opposition to the Motion.) Although Hunter informed defendant that they should start looking at locations in September of 2008 and again in November, 2008, defendant thought that was too early. (Kim EBT at pp. 50, 54, 56-57.)

Beginning in early December, 2008, and continuing through the end of February, 2009, Hunter again contacted defendant about several potential locations and showed defendant three possible premises but defendant informed Hunter that those locations did not meet its space, price

or location requirements. (Kim EBT at pp. 37-38, 54, 61-87.) However, Hunter and defendant continued to negotiate prices with a landlord or its broker regarding a possible location at 252 West 37th Street, New York, New York, but a deal was never consummated. (Kim EBT at pp. 72-87.)

Beginning in March 2009, defendant began working with Adams & Company (“Adams”), another broker whom it had used for its previous lease at its old premises, to find it a new location. (Kim EBT at pp. 29, 31.) Adams found defendant a space at 149 West 36th Street, New York, New York, for which defendant signed a seven year lease in the latter part of March, 2009. (Kim EBT at pp. 16, 17, 35-36.) On March 31, 2009, defendant notified Hunter by e-mail that it had entered into a contract for another premises. (Exhibit “B” to Motion.) Defendant neither informed Hunter that it was working with Adams to find it a new location (Kim EBT at p. 33) nor did it inform Adams of its Agreement with Hunter (Kim EBT at p. 31).¹ By letter to Kim dated April 1, 2009, Hunter’s senior Managing Director, Richard Gottlieb (“Gottlieb”), acknowledged defendant’s March 31st notification, reminded him of the “exclusive agreement” that they had, requested the terms of the transaction with the landlord and/or landlord’s agent, and informed Kim that Hunter would be looking to either the landlord or the defendant for its compensation. (See Exhibit “C” to Plaintiff’s Motion.)

Plaintiff thereafter served and filed the Summons and Complaint in this action seeking damages from defendant for breach of contract as a first cause of action, for *quantum meruit* as a second cause of action, and unjust enrichment for a third cause of action. Defendant answered the

1. Interestingly, in October, 2008, defendant had e-mailed Hunter when defendant had received an advertisement from Adams about an available space at 463 Seventh Avenue. (Kim EBT at pp. 58-59.) Defendant, who was familiar with that space, was not interested in considering that space at that time because the cost was too high and Kim felt it was too early to start looking. (Kim EBT at pp. 59-60.) However, as noted, defendant did not inform Hunter later of its contacts or dealings with Adams. (Kim EBT at p. 33.)

complaint and raised four affirmative defenses, including claims that the contract is unconscionable, that plaintiff failed to perform any enforceable contract, and that the defendant had no obligation to pay the plaintiff under the terms of the alleged contract.

DISCUSSION

Summary Judgment

The movant has the initial burden of proving entitlement to summary judgment. (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851 [1985].) Once the movant has provided such proof, in order to defend the summary judgment motion the opposing party must “show facts sufficient to require a trial of any issue of fact.” (CPLR § 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]; *Freedman v Chemical Construction Corp.*, 43 NY2d 260 [1977]; *Spearmon v Times Square Stores Corp.*, 96 AD2d 552 [2d Dept 1983].) “It is incumbent upon a [litigant] who opposes a motion for summary judgment to assemble, lay bare and reveal [his, her, or its] proof, in order to show that the matters set up in [the complaint] are real and are capable of being established upon a trial.” (*Spearmon*, 96 AD2d at 553 [quoting *Di Sabato v Soffes*, 9 AD2d 297, 301 (1st Dept 1959)].) If the opposing party fails to submit evidentiary facts to controvert the facts set forth in the movant’s papers, the movant’s facts may be deemed admitted and summary judgment granted since no triable issue of fact exists. (*Kuehne & Nagel, Inc. v F.W. Baiden*, 36 NY2d 539, 543-544 [1975].)

The “Exclusive” Agreement

Hunter argues that the Agreement between it and the defendant gave the plaintiff the exclusive right to find, negotiate and secure space for the defendant and the defendant agreed that Hunter would exclusively handle the leasing and purchasing effective through May 31, 2009.

Neither party changed, rescinded or modified the Agreement. However, before the Agreement terminated, defendant engaged Adams, another broker, to look for a new space and eventually signed a new lease for that space without notifying or involving Hunter.

Kim stated that, despite the Agreement, he did not believe that he had to work exclusively with Hunter and that with time running short before his lease expired, he felt he had to pursue other leads. He also claimed that he was not satisfied with the work Hunter had done to find A.O. Textiles a new location. Defendant also claims that there are questions of fact regarding the wording of the Agreement which precludes summary judgment.

First, on a motion for summary judgment, the mere assertion by the party opposing the motion that the agreement language means something different to him, where the contract or agreement is otherwise clear, unequivocal, and understandable when read in connection with the entire agreement, is not in and of itself sufficient to raise a triable issue of fact. (*Bethlehem Steel Co. v Turner Construction Co.*, 2 NY2d 456 [1957]. Furthermore, the interpretation of such a contract or agreement, including whether the contract is ambiguous, is an issue of law to be determined by the Court. (*Id.*; *Nappy v Nappy*, 40 AD3d 825 [2d Dept 2007].)

A review of the Agreement between the parties shows that the Agreement is clearly and unambiguously an agreement which required the defendant to work exclusively through Hunter to find any new space until the expiration of the Agreement on May 31, 2009. However, under paragraph three of the Agreement, Hunter was able to work cooperatively with other brokers and defendant was required to refer all proposals and offers to Hunter. Just as the defendant had notified Hunter of the listing by Adams in October, 2008, it was required to notify Hunter of the offer by Adams in March, 2009 and allow Hunter to work with Adams on a cooperative basis on that listing.

Defendant argues that it was entitled to use another broker because Hunter had not found it a suitable new space by March, 2009, and time was running out before its old lease expired. While Kim may not have been satisfied with Hunter's efforts on its behalf, a position that was never conveyed to Hunter, it was still required under the Agreement to work with Hunter and refer any other leads it received to Hunter. While the defendant may feel it had entered into an Agreement which was a bad business deal, that is not a cognizable legal defense. For example, in *Century 21 A.L.P. Realty v Doller*, 170 AD2d 941 (3d Dept 1991), the court rejected defendant's argument that it needed to accept an offer provided by another broker because the broker with which it had an exclusive brokerage agreement never produced a buyer ready, willing and able to purchase the premises. The court found that the only factor to be considered was whether the defendant used another broker before the agreement with its exclusive broker had expired. (170 AD2d at 941.)

The result of defendant's actions is that it breached the Agreement, and the plaintiff is entitled to summary judgment for such breach of contract. (See *Kaplan-Belo Associates, Inc. v Cheng*, 258 AD2d 622 [2d Dept 1999] [defendants breached agreement giving first broker "sole and exclusive" right to represent defendants when they enlisted the services of another broker to purchase premises before the expiration of the agreement with the first broker].)

Effect of Breach of the Agreement

The primary thrust of defendant's defense to plaintiff's motion is that the defendant had no obligation to pay the plaintiff under the terms of the Agreement. Defendant's counsel argues that since defendant had no obligation to pay plaintiff under the terms of the Agreement if there were no breach, it should not be obligated to pay anything upon a breach of the Agreement.

Defendant's argument is unpersuasive. Had defendant not breached the Agreement and had referred the Adams listing to Hunter, plaintiff would have had to seek its compensation from the lessor, and perhaps would have shared the commission. However, by breaching the Agreement and not referring the Adams listing to Hunter, it deprived and prevented the plaintiff from receiving such compensation from the lessor. (See *Kaplon-Belo*, 258 AD2d at 622 [upon breach of the exclusive agreement, "plaintiff was entitled to the commission it would have received had the appellants not breached the agreement"]; See also *Interactive Properties, Inc. v Doyle Dane Bernbach, Inc.*, 125 AD2d 265 [1st Dept 1986] *appeal denied* 70 NY2d 613 [1987]; cf. *Columbia Asset Management Corp. v Emerson Equities*, 75 NY2d 759, 760-761 [1989] [Court rejected defendant's motion for summary judgment allowing plaintiff's claim for breach to go forward noting that "[p]laintiff was suing not because defendants had declined to pay earned commissions on units actually placed, but rather because, according to its allegations, defendants had prematurely, and in bad faith, terminated the syndication plan thereby depriving plaintiff of the opportunity to earn commissions."].)

This Court having determined that defendant breached the Agreement, it must now decide how to determine the measure of plaintiff's damages. In *Casandra Properties, Inc. v M.S.B. Development Co., Inc.*, 79 AD3d 1088, 1090 (2d Dept 2010), the Appellate Division held that "the measure of damages for breach of an exclusive agency agreement 'are measured "not necessarily" by the amount of commissions but rather by the expenses actually incurred and the profits of commissions lost on a sale the exclusive broker would have made' (citations omitted)." In a similar situation presented in *Interactive Properties, Inc. v Doyle Dane Bernbach, Inc.*, *supra*, the First Department held that, when a broker with an exclusive agreement with its client was prevented from collecting a commission when its client used another broker to lease premises, the exclusive broker was entitled to an award of half of the total commission which it could have received had it been

brought into the negotiations. (125 AD2d at 272-273.) As the Appellate Division noted in *Interactive Properties*, the first broker was not entitled to the total commission amount, despite its exclusive contract, since it could not prove it could have independently procured the lease into which its client entered. (*Id.* at 268, 272-273.)

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion for summary judgment by plaintiff The Hunter Realty Organization and against defendant A.O. Textiles, is hereby granted on the issue of liability; and it is further

ORDERED that the assessment of damages due to plaintiff The Hunter Realty Organization from defendant A.O. Textiles is referred to a referee to hear and determine; and it is further

ORDERED that the Clerk is directed to enter Judgment accordingly.

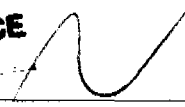
The foregoing constitutes the decision and order of this Court.

FILED

ENTER:
JAN 22 2013

COUNTY CLERKS OFFICE
NEW YORK

Dated: January 16, 2013
New York, New York


Hon. Shlomo S. Hagler, J.S.C.