Rosenhaus Real Estate, LLC v S.A.C. Capital Mgt., Inc.
2013 NY Slip Op 33062(U)
November 15, 2013
Sup Ct, New York County
Docket Number: 601012/09
Judge: Andrea Masley

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____ PART 43
Justice

Index Number : 601012/2009
ROSENHAUS REAL ESTATE, LLC
vs
S.A.C. CAPITAL MANAGEMENT
Sequence Number : 004
SUMMARY JUDGMENT

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 consistent with
annexed decision.

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

Dated: 11/8/13

HON. ANDREA MASLEY, J.S.C.

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

Index No.: 601012/09

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

ROSENHAUS REAL ESTATE, LLC,
Plaintiff,

-against-

S.A.C. CAPITAL MANAGEMENT, INC., S.A.C CAPITAL MANAGEMENT, LLC, S.A.C. CAPITAL ADVISORS, LLC, MACKLOWE PROPERTIES, LLC, MACKLOWE MANAGEMENT CO., INC., MACKLOWE MANAGEMENT LLC, 540 MADISON AVENUE LEASE, LLC, 540 ACQUISITION CO. LLC, 540 INVESTMENT LAND COMPANY, LLC, and 540 INVESTMENT LAND COMPANY, INC.,
Defendants.

DECISION/ORDER

HON. ANDREA MASLEY
Judge, Supreme Court

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Defendant's Motion for Summary Judgment	1
Exhibits	2
Memo of Law	3
Affirmation in Opposition	4
Memo of Law	5
Exhibits	6
Reply	7

In this breach of contract action for a brokerage commission on rental of commercial property at 540 Madison Avenue in Manhattan, defendants move pursuant to CPLR 3212 to dismiss the first, second, and fifth causes of action in the complaint. Plaintiff opposes defendants' motion for summary judgment and asks the court to search the record and grant plaintiff reverse summary judgment.

Discovery is complete and plaintiff has filed a Note of Issue.

Defendants S.A.C Capital Management, Inc., S.A.C Capital Management, LLC, and S.A.C Capital Advisors, LLC (collectively, "SAC") were a group of hedge fund managers based in Stamford, Ct. and tenants at 540 Madison Avenue. Defendants

Macklowe Properties, LLC, Macklowe Properties, Inc., Macklowe Management Co., Inc., and Macklowe Management LLC (collectively, "Macklowe") were the broker and managing agent for 540 Madison Avenue. Defendants 540 Madison Avenue Lease, LLC, 540 Acquisition Co. LLC, 540 Acquisition Co., Inc., 540 Investment Land Company, LLC, and 540 Investment Land Company, Inc. (collectively, "540 Madison") were owners of the building. Plaintiff Rosenhaus Real Estate, LLC ("Rosenhaus") is a real estate broker of which Mr. Rosenhaus is the sole principal, retained by defendants SAC in connection with a lease renewal on office space at 540 Madison.

The undisputed facts are as follows. In 1997, SAC entered a 10-year lease at 540 Madison and expanded its tenancy through several lease amendments over the years through 2004. Plaintiff negotiated the initial lease and the first three of four amendments to the lease, for which he was paid an agreed-upon commission. In November of 2004, plaintiff and SAC entered an agreement in which plaintiff would represent SAC in negotiating a renewal of the lease and expansion of SAC's offices at 540 Madison. Macklowe and plaintiff were to be paid a one-half commission respectively. The terms of the agreement are stated in an email to plaintiff from Paul Iwanowski, SAC's Head of Facilities, on November 19, 2004. . The email to plaintiff from SAC's Mr. Iwanowski, states that:

> • You are our representative to negotiate a renewal/expansion deal with Macklowe and 540 Madison. You have agreed to charge 50% of a normal commission and have the landlord rebate 50% of a normal commission to SAC in the form of landlord concessions (additional TI or additional free rent).
> • We have retained the services of another broker to analyze potential office space outside of 540 Madison.
> • Deal points to include in the expansion onto the second floor are: below market rent taking into consideration Wachovia leases this space until 2014; TI is to completely fit out this "shelf" space and bring toilets and anything else up to code; free rent period.
> • Deal points for the renewal are: market deal for ten years with TI and/or free rent period: rights for SAC to add a 500KW generator and associated fuel tank at

the building; Landlord to place condensate pumps that feed SAC floors on landlord emergency generator, electrical sub metering to be addressed after SAC power usage survey; 500 sf of free storage space within the building; renewal option at 90% of FMV.

The terms are also memorialized in a letter of November 22, 2004 from Mr. Iwanowski to plaintiff, stating that plaintiff had been "engaged exclusively as SAC Capital's representative to expand and extend our lease at 540 Madison Avenue."[1] There followed two proposals to extend and expand the lease by Macklowe, the second, of December 14, 2004, in writing to Mr. Rosenhaus. On December 20, 2004, SAC's Brian Cohn responded by email that "under no circumstances" would SAC renew its lease. On December 29, 2004, Mr. Rosenhaus attempted to contact Steven A. Cohen, SAC's principal, directly. Mr. Rosenhaus was reprimanded by Mr. Conheeny for contacting Mr. Cohen and directed never to do so again. SAC's David Kelly also called Mr. Rosenhaus and said to cease negotiation efforts until "I'll call you when we need you." Negotiations reached a standstill during most of 2005 and 2006. In August 2006, Mr. Rosenhaus learned of renewed negotiations. On August 15, 2006, Mr. Rosenhaus emailed Macklowe and requested his commission. On August 15, 2006, SAC's Brian Cohn emailed plaintiff and declared that plaintiff was no longer SAC's representative. In November, 2006, defendants signed a new lease with 540 Madison. SAC refused to pay plaintiff a commission on the transaction, and plaintiff filed this action.

Plaintiff alleges in the complaint, filed in 2009: (1) against Macklowe and the owner of the building, failure to pay a brokerage commission in connection with the lease; (2) against Macklowe and the owner of the building, failure to pay a commission

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[1]SAC states in the letter that plaintiff has been engaged at one full commission, contrary to the agreement by email that plaintiff would work for one half commission. The parties do not dispute that this was in error, and that plaintiff was engaged at "50% of a normal commission," as stated in the email.

in connection with the sublease; (3) against Macklowe to impose a constructive trust on the commission; (4) against SAC for interference with plaintiff's contract with Macklowe; (5) against SAC for breach of contract; (6) against SAC for unjust enrichment; (7) against SAC and Macklowe for unjust enrichment; and (8) against SAC for punitive damages. The third, fourth, sixth, seventh and eighth causes of action were dismissed by Justice Stallman.

In dispute is whether plaintiff is owed a brokerage commission under the terms of the agreement. In an action for breach of contract, plaintiff has the burden of proof. The court requires proof of "(1) a contract; (2) performance of the contract by one party; (3) breach by the other party; and (4) damages." *WorldCom, Inc. v Sandoval*, 182 Misc 2d 1021, 1023 (Sup Ct, NY County, 1999).

Initially, the movant has the burden on a motion for summary judgment to come forward with sufficient proof in admissible form to enable a court to determine that it is entitled to judgment as a matter of law. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). "When reviewing a motion for summary judgment the focus of the court's concern is issue finding, not issue determination, and the affidavits should be scrutinized carefully in the light most favorable to the party opposing the motion." *Goldstein v County of Monroe*, 77 AD2d 232, 236 (4th Dept 1980). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Winegrad*, 64 NY2d at 853. However, once a moving party has made a prima facie showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1976). Summary judgment is a drastic

remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial. *Andre v Pomeroy*, 35 NY2d 361, 364 (1974).

A broker does not work gratuitously. *Gronich & Co. v 649 Broadway Equities Co.*, 169 AD 2d 600, 609 (1ST Dept 1991). At the same time, a contract "will not be construed to create an exclusive right to sell unless it expressly and unambiguously provides for a commission upon sale by the owner or excludes the owner from independently negotiating a sale." *Far Realty Assoc. Inc. v RKO Del. Corp.*, 34 AD 3d 261, 262 (1st Dept 2006). An exclusive agency, on the other hand, merely precludes the owner from retaining another broker. *Harvard Assoc. v Hayt, Hayt & Landau*, 262 AD 2d 814, 815 (2d Dept 1999)(where landlord refused to deal with tenant's broker engaged after negotiations began between landlord and tenant, tenant did not owe broker commission when the lease was executed). An exclusive agency arrangement may allow the owner to enter its own direct negotiations. *Salomon v. Angsten*, 19 AD3d 143 (1st Dept 2005). Where a broker is not the procuring cause of a renegotiated lease, it is not entitled to a commission when it has only an exclusive right to agency. *Harvard Assoc., supra.*

Plaintiff argues that its brokerage business was engaged on an exclusive basis without any time limit to the relationship, that it performed and produced two written lease proposals and only refrained from continued performance at the request of defendants. Moreover, plaintiff insists that he procured the material terms of the November, 2006 lease between SAC and Macklowe. At his deposition, Mr. Rosenhaus testified that he was "pushed aside" while SAC pursued a "ruse" that it was looking for office space elsewhere, and that while the deal was concluded "behind his back," he was essential to a rapprochement between the parties:

> When I came into the picture, they thought each other – they were throwing very bad names at each other, not proper in front of two ladies. I brought them together. I'm the one who got the director of their construction to meet with the SAC guys. I'm the guy who got Billy Macklowe – and let me tell you something, Billy Macklowe in those days was a real big shot. . . That was a big deal, and by me getting them there, that bridged the gap to make it possible for conversations to continue. . . Macklowe thought that the SAC brokers were animals, filthy animals, that they make a mess in the bathrooms and in the halls and they clogup the toilets. I made all of that go away, Todd, everything, and I made it possible to talk. And that's what I do.

(Transcript p 210-211).

Defendants argue that plaintiff played no role in negotiating the lease renewal after January, 2005. Rather, SAC negotiated the renewal on its own which does not constitute a breach of the agreement. Thus, SAC insists that plaintiff was not the "procuring cause" of the final transaction. The court rejects SAC's reliance on all of the cases regarding "procuring cause" because this is a lease renewal case where the landlord and tenant are known.[2] All of the cases cited by SAC regarding new leases and unknown buyers or sellers are not applicable to this unique situation where plaintiff's job was limited to renewal of the lease of the premises at 540 Madison. A broker is entitled to compensation where evidence is sufficient to establish a "continuing connection between plaintiff's initial efforts and the eventual sale of the premises, and the limited interruption in the sequence of events did not diminish plaintiff's participation in the procurement of the deal." *Quantum Realty Services, Inc. v ISE America, Inc.*, 214 AD 2d 420, 421 (1st Dept 1995). Defendants have not established the absence of triable issues as to whether plaintiff was the procuring cause of the substantial terms of

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[2]Indeed, defendants' citation on cases is unreliable because defendants do not rely on holdings in the cases cited, but cherry-pick dicta. See e.g. *Interactive Properties, Inc. v Doyle Dane Bernbach, Inc.*, 125 AD2d 265 (1st Dept 1986) where broker was awarded ½ commission because she had an exclusive agency as the parties agree plaintiff has here.

the renegotiated lease. Rather, defendants' own documentary evidence suggests that the pause in negotiations between SAC and Macklowe may have been a dilatory tactic on SAC's part to gain advantage over Macklowe. Defendants cannot frustrate a broker's representation. *Curtis Props. Corp. v. Greif Cos.*, 212 A.D.2d 259 (1st Dept 1995)(defendants' summary judgment motion to dismiss denied. Representing itself in a renewal lease negotiations frustrates the broker's right to represent the client, a condition precedent of the contract). Rather, plaintiff invested significant time and effort to bring the parties to the table following bad blood. Whether the final lease was better or worse than the deal plaintiff last negotiated is an issue of fact to the extent that it is some evidence of whether plaintiff's efforts resulted the ultimate agreement. *Douglas Real Estate Management Corp. v Montgomery Ward & Co.*, 4 NY2d 33 (1958) (where broker was engaged to negotiate a renewal lease, but was terminated when no authorized negotiations were pending and the final lease was substantially different than the lease proposed by the broker and defendant acted in good faith in terminating the lease, all issues of fact at trial, broker was not entitled to a commission). Whether plaintiff failed to perform its ultimate objective a signed renewal lease is an issue of fact.

Alternatively, SAC insists it does not owe plaintiff a commission because plaintiff was terminated. At his deposition, plaintiff testified that in 2005 and 2006 he was not in communication with SAC because "they didn't want me involved." (Transcript p. 193). At his deposition, SAC's Thomas Conheeney testified that in January 2005 he instructed plaintiff to "stand down, don't do anything, if we need you, we'll call you." (Transcript p. 29). Mr. Conheeney did not, by his own sworn account, terminate the services of plaintiff.

Over the hiatus in negotiations between SAC and Macklowe, SAC explored

office space outside 540 Madison. In fact, documentary evidence suggests that SAC may have been motivated to explore space elsewhere in an effort to reach more favorable terms with Macklowe. In an email of February 28, 2006 to SAC colleagues, Mr. Iwanowski comments on a proposed lease renewal at 540 Madison:

> • A Broker will show us competing spaces, and when word gets back to Macklowe, his renewal proposal will get more competitive.
> • A Broker will be able to add fresh market data on comparable deals in and around 540 Madison and force Macklowe to sharpen his pencil. (Defendants' Exhibit 52).

In the same email, Mr. Iwanowski states that Macklowe would "pocket about $800,000 in unspent commissions" if a broker were not retained. Mr. Iwanowski also comments that a savings in commission would accrue in part to SAC.

Contracts of exclusive agency are terminable at will in the absence of an express provision of duration. *Liberty Import, Inc. v Bourguet*, 146 AD 2d 535 (1st Dept 1989). Here, an issue of fact exists as to whether the contract was first terminated in January 2005 or August 15, 2006. Regardless of when plaintiff was terminated, an issue of fact exists as to whether the termination was in bad faith. In *Quantum Realty*, *supra*, the court concluded that the termination of plaintiff's services had been in bad faith, thus entitling plaintiff to its commission.

The motion to dismiss Macklowe is granted. Plaintiff had no agreement with Macklowe. In the second proposal of December 17, 2004, Macklowe explicitly promised to pay one-half of plaintiff's commission. However, that proposal was never signed.

Plaintiff's request pursuant to CPLR 3212(b) for summary judgment is denied because issues of fact abound.

Accordingly, it is

ORDERED that SAC's motion to dismiss is denied; and it is further

ORDERED, that Macklowe's motion to dismiss is granted and the Macklowe defendants are dismissed from the action; and it is further

ORDERED that the matter is set down for a pre-trial conference on January 23, 2014 at 2:15 in Part 43.

Dated: 11/15/13

Andrea Masley, JSC