

**New York Commercial Real Estate Servs., LLC v
M&E 23rd St. Realty LLC**

2014 NY Slip Op 33024(U)

November 21, 2014

Sup Ct, NY County

Docket Number: 650480/2013

Judge: Peter H. Moulton

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. Peter H. Moulton PART 57
Justice

New York Commercial Real Estate Services, LLC

INDEX NO. 650480/2013

MOTION DATE _____

v.

MOTION SEQ. NO. 001 002

M&E 23rd Street Realty LLC, et al.

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Papers Numbered

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion for summary judgment by plaintiff is granted in part and denied in part, to the following extent.

Plaintiff, a licensed real estate broker, brings this action pursuant to three agreements, one with each of the three defendants. The agreements settled the parties' dispute concerning fees plaintiff claimed for obtaining tenants for three spaces owned by defendants. Steven Croman, who is the principal of each of the defendants, signed the three agreements.

Each agreement set forth a schedule, reciting the exact commissions due to plaintiff by certain stated dates, as long as the tenants stay current with the rent through certain specified dates. If any of the tenants were to fall behind in rent, defendant was to serve a notice to cure on the tenant within 60 days of this execution of the relevant agreement or within 35 days of the end of the month in which the unpaid rent and additional rent came due, whatever date was later.

The first agreement, with defendant M & E 23rd Street Realty, is dated August 25, 2012. It provides in relevant part:

1. Owner agrees to pay and NYCRS agrees to accept a total of \$31,323.00 as full payment of any and all broker's fees and commissions NYCRS claims Owner owes NYCRS for leasing the Premises to Tenant and/or its predecessor. Said \$31,323.00 shall

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

be paid to NYCERS as follows:

a. \$10,441.00 within ten (10) days of Tenant making full payment of all rent and additional rent owed Owner so that it has a "zero" balance on its account. Tenant current [sic] has a balance in the amount of \$10,463.65 due through August 2012; and

b. \$10,441.00 on or before September 15, 2012 provided that as of said date Tenant is current in its payment of all rent and additional rent owed to Owner through September 15, 2012.

C. \$10441.00 on or before October 15, 2012, provided that as of said date Tenant is current in its payment of all rent and additional rent owed to Owner through October 15, 2012.

2. If Tenant is not current in its payment of all rent and additional rent owed to Owner by September 15, 2012, as set forth in paragraphs 1(b) and 1(c) respectively, Owner shall not be required to pay NYCERS the monies due pursuant to paragraphs 1(b) and 1(c) respectively until such time as Tenant is current in its payment of all rent and additional rent owed to Owner so that Tenant has a "zero" balance on its account.

3. In the event that Tenant is not current in its rental payments to Owner, Owner agrees to commence legal action against the Tenant to collect the outstanding rent and additional rent owed to it within 60 days of this Agreement being executed by the parties, or within 35 days of the end of the month in which the unpaid rent and additional rent comes due, whichever date is later. Service of a rent demand notice within this time frame shall satisfy the requirements of this paragraph if followed by service of a non-payment petition within a reasonable time thereafter.

Plaintiff invokes the language quoted above, and defendants' own ledger books and interrogatory responses, to show that the Tenant maintained a zero balance and that the commissions are thus due and owing. While defendant argues that its ledger has not been authenticated or shown to qualify as a business record or other hearsay exception, those arguments ignore the fact that the ledger was specifically used by defendant to answer an

interrogatory (Interrogatory 6) posed by plaintiff. That interrogatory sought information concerning the tenant's rent status. Defendant answered by referring to the ledger. The ledger shows a credit balance for the Tenant at the end of October. Accordingly, all the conditions set forth in the agreement have been satisfied and defendant owes plaintiff its commission of \$31,323.

The tenant in the second space, covered by plaintiff's agreement with 179-181 Essex Street, apparently did not stay current in its rental payments at the relevant dates. Plaintiff argues that defendant breached this agreement by not bringing summary proceedings within the deadlines set forth in those agreements. Defendant did serve a notice to cure on the tenant, but not within sixty days as required by paragraph 3 of the agreement. According to plaintiff, the remedy for failing to bring the complaint is payment of the commission specified in the second agreement (\$12,776). However, paragraph 3 does not explicitly state what the penalty would be for defendants' failing to adhere to the time limits specified in paragraph 3. Paragraph 4 states that if the tenant vacates the premises or is evicted, defendant is released from having to pay any commissions. This implies that the payment of rent by the tenant for the relevant period is a prerequisite to payment of commissions. Where a contract is ambiguous, summary judgment is improper because the interpretation of the contract becomes a fact issue. (Yanuck v Simon Paston & Sons Agency Inc., 209 AD2d 207.) Accordingly, plaintiff's motion for summary judgment on the second contract is denied.

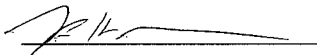
With respect to the third agreement, defendant 424 East 9th LLC paid the first two installments of \$8102.25. The remaining two installments, totalling \$16,204.50, were not paid. The tenant in the third space is listed in the Agreement as "Sons of Brooklyn, LLC." In its answers to interrogatories defendant admit that any rents due were paid. Accordingly, there is no issue of fact that the balance of the commission is due on the third agreement.

CONCLUSION

For the reasons stated, the motion for summary judgment is granted with respect to the

first and third causes of action. The motion is denied with respect to the second cause of action. The entry of judgment, with interest, shall abide the final disposition of this case. The parties are encouraged to settle the remaining claim. This constitutes the decision and order of the court.

Dated: 11/21/14



New York, New York

J.S.C.
PETER H. MOULTON
HON. PETER H. MOULTON
SUPREME COURT JUSTICE

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