

Signature Partners, LLC v Appnexus Inc.

2015 NY Slip Op 30040(U)

January 15, 2015

Supreme Court, New York County

Docket Number: 158957/12

Judge: Peter H. Moulton

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Supreme Court of the State of New York
New York County: Part 57

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SIGNATURE PARTNERS, LLC

Plaintiff,

-against-

Index No. 158957/12

APPNEXUS INC.

Defendant.

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Peter H. Moulton, J.S.C.

This action concerns the parties' rights and obligations under a real estate brokerage agreement. Defendant moves to dismiss the second amended complaint pursuant to CPLR 3211(a)(1), (7).

BACKGROUND

Plaintiff Signature Partners, LLC ("Signature") is a real estate brokerage firm. Defendant AppNexus, Inc. ("AppNexus") is an on-line advertising and marketing company. In September 2010 AppNexus approached Signature concerning office space in Manhattan. AppNexus had a particular interest in obtaining space at 28 West 23rd Street ("the building"). AppNexus engaged Signature to conduct negotiations for space at the building, and at 675 Avenue of the Americas.

The parties entered into a one-page agreement on Signature's letterhead on September 29, 2010 (the "Agreement"). It states

"DRAFT" above its text. It is addressed to "NAME" AppNexus," and the address line states "Dear ____." Despite these indicia that the Agreement was in formation, the document is signed by both parties and they agree it governs their agreement. However, the parties differ sharply in their interpretation of the agreement's longevity, and, in particular, the length of a purported "tail" provision.

It is necessary to quote from the Agreement at some length. It provides in relevant part:

AppNexus Inc. ... hereby agrees that Signature Partners, LLC shall have the exclusive right to represent AppNexus, Inc. in connection with lease negotiations at 28 West 23rd Street and 675 Avenue of the Americas ... whether directly with the Landlord or with a sublandlord or assignor.

You will refer all inquiries, proposals, and offers to us and any other communications between you and third parties (and any of their brokers, agents, and/or representatives) relative to any transaction to which this agreement relate4s shall be referred to, and handled by, us in accordance with your instructions.

However, any proposed agreement for you to lease or otherwise acquire any space will be subject to your approval in all respects, and no agreement will be binding upon you until it has been reduced to writing, signed and delivered on terms and conditions satisfactory to you and your legal counsel.

This agreement shall become effective upon its execution by you and shall continue for a minimum period of six (6) months and

thereafter until cancelled by us upon thirty (30) days prior written notice. Subsequent to the termination of this agreement you shall agree to recognize us as your exclusive broker in accordance with the terms hereof, with respect to the locations described above during the term of this agreement.

The Agreement further provides that Signature would look solely to the seller or lessor for payment of their "full commission." The percentage of the commission is not specified in the agreement.

Following the execution of the Agreement, Signature negotiated two subleases for AppNexus at 28 West 23rd Street. The first was for a sublease for space on the fifth floor of the building with sub-landlord Mattel Inc. This sublease expired on December 31, 2011. The second lease, which began as a sublease, was for space on the fourth floor with sub-landlord Ecko Unlimited. The second sublease was to expire on June 30, 2014, and provided that immediately thereafter AppNexus would enter into a direct lease with the building's owner. Pursuant to the Agreement, Signature looked to the building's landlord and to the sublessors for its commissions and the commissions for these two initial leases were duly paid.

As the Mattel sublease was set to expire in December 2011, AppNexus approached Signature concerning finding additional space at the Building. Signature duly prepared a proposal dated December 19, 2011, for a longer term lease for the same space AppNexus had

sublet from Mattel on the fifth floor. Soon after the submission of this proposal, AppNexus informed Signature that it did not want to move forward with a new lease.

Subsequently AppNexus sent Signature a letter dated January 24, 2012 terminating the Agreement on thirty days' notice. AppNexus contends that the Agreement thus expired on February 24, 2012. Signature contends that the Agreement lived on pursuant to the tail provision. The parties' contentions on this point are discussed at greater length below.

On July 5, 2012, roughly four months later, AppNexus obtained a lease for the same fifth floor space that was the subject of Signature's proposal. AppNexus used another broker, Cushman and Wakefield. The lease specified a starting annual rent of \$1,225,000. This transaction will be denoted herein as the "July 2012 transaction." In his affidavit, Robert Frost, Signature's president contends that such a large transaction could not happen "overnight" and infers that AppNexus must have been negotiating behind Signature's back during the exclusive period of the Agreement.

On April 2, 2013, fourteen months after the exclusive period had terminated, AppNexus entered into a second, larger lease (actually a lease modification) at the building. Plaintiff contends that the lease modification increased AppNexus' space at the building from 91,000 to 221,000 square feet. This transaction

will be denoted herein as the "April 2013 transaction." Signature again infers that this transaction may have occurred during the exclusive period of the Agreement.

Signature brings this lawsuit seeking what it contends are its lawful commissions for the July 2012 and April 2013 transactions. AppNexus now moves to dismiss for failure to state a cause of action (CPLR 3211(a)(7)) and on the basis of documentary evidence (CPLR 3211(a)(1)).

DISCUSSION

On a motion to dismiss the complaint for legal insufficiency, the court must accept the facts alleged as true and determine simply whether the facts alleged fit within any cognizable legal theory. (Morone v Morone, 50 NY2d 481, 484.) On a motion to dismiss, a court may consider facts alleged in an affidavit as a supplement to the complaint. (Ackerman v 305 East 40th Owners Corp., 189 AD2d 665.)

Here the second amended complaint, supplemented by Frost's affidavit, adequately sets forth causes of action that the July and April 2013 transactions were put together during the Agreement's exclusive period. Even if the transactions were put together after the exclusive period expired, then plaintiff may still be entitled to commissions if it can show that there was "direct and proximate link" between its actions and the eventual deals. (See SPRE

Realty, Ltd v Dienst, 119 AD3d 93.) Whether those contentions will survive information unearthed in disclosure remains to be seen. At this point, the court is only concerned with whether plaintiff has pleaded viable claims in its second and fourth causes of action.

The first and third causes of action, which rely on the purported "tail" provision of the Agreement, are not viable. The supposed "tail" provides:

Subsequent to the termination of this agreement you shall agree to recognize us as your exclusive broker in accordance with the terms hereof, with respect to the locations described above during the term of this agreement.

Plaintiff contends that this provision essentially exhumes an agreement that has been terminated according to its explicit terms, and requires defendant to ensure that plaintiff gets its commissions for any future lease obtained by defendant at the building, in perpetuity. That interpretation would nullify the termination provision of the Agreement. A contract must be interpreted so as not to render any provision a nullity. (E.g. Helmsley-Spear Inc. v New York Blood Center, Inc., 257 AD2d 64.) Additionally, a contract will generally not be deemed to be perpetual unless it says so explicitly. (Haines v City of New York, 41 NY2d 769.) There is also no grounds for engrafting into the Agreement a "reasonable time period" for the tail, as plaintiff suggests in the alternative. Here the Agreement clearly provided procedures for its termination. AppNexus terminated the Agreement

according to those procedures. Accordingly, the first and third causes of action are dismissed.

The fifth cause of action, which alleges that defendant acted in bad faith, is adequately pled. Even if plaintiff is unable to prove either 1) that the July 2012 and April 2013 transactions were formed during the exclusive period, or 2) that if formed after the exclusive period, plaintiff was the procuring cause of one or both of the transactions, it still may be able to recover if it can show that defendant terminated the Agreement "in bad faith and as a mere device to escape the payment of a commission." (SPRE, supra, 119 AD3d at 100.) Whether this cause of action could survive a motion for summary judgment is not before the court. All that is necessary at this juncture is that plaintiff state the claim.

CONCLUSION

Defendant's motion to dismiss is granted to the extent that the first and third causes of action are dismissed. In all other respects the motion is denied. This constitutes the decision and order of the court.

DATE: January 15, 2015



J.S.C.

PETER H. MOULTON
J.S.C.