Cushman & Wakefield of Connecticut, Inc. v Access Private Duty Servs. at Hjdoi, Inc.
2016 NY Slip Op 31629(U)
August 18, 2016
Supreme Court, New York County
Docket Number: 652308/2014
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55

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CUSHMAN & WAKEFIELD OF CONNECTICUT, INC.,

Plaintiff,

DECISION/ORDER
Index No. 652308/2014

-against-

ACCESS PRIVATE DUTY SERVICES AT HJDOI, INC. D/B/A ACCESS HEALTHCARE SERVICES, ACCESS PRIVATE DUTY SERVICES, INC.

Defendants.

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HON. CYNTHIA KERN, J.:

Plaintiff Cushman & Wakefield of Connecticut, Inc. has brought the present motion for summary judgment. Defendants have brought a cross-motion for summary judgment. As will be explained more fully below, the motion for summary judgment is granted and the cross-motion is denied.

The relevant facts are as follows. Plaintiff is a licensed real estate broker. Defendants entered into a written Exclusive Broker's Agreement dated February 16, 2011 (the "Agreement") pursuant to which defendants engaged plaintiff as their exclusive broker to find, negotiate for, and secure commercial premises for defendants. In the Agreement, the defendants agreed to refer to plaintiff all inquiries and offers received by defendants with respect to the lease or purchase of premises, "regardless of the source of such inquiries or offerings..." The Agreement provides that it will commence on the date of the Agreement and continue in effect until December 31, 2011. During the period when the Agreement was still in effect, defendants became aware of a property that they were interested in leasing which was owned by SG Chappaqua B, LLC ("SG Chappaqua") but they did not refer the property to the plaintiff. Instead, defendants began negotiating to lease the property directly without involving plaintiff. In September 2011, SG Chappaqua generated a proposed memorandum of understanding regarding the leasing of the premises. Defendants then entered into a written lease agreement with SG Chappaqua dated January 9, 2012 without informing

plaintiff of their actions. The Lease contained as Exhibit E a rent schedule of the base rent, which was approximately $6,192,934 for the entire term, excluding cost escalations and taxes. As a result of these actions, plaintiff lost the opportunity to obtain a commission from SG Chappaqua based on the lease of the premises by defendants. David Walsh, the portfolio manager for SG Chappaqua, the owner of the premises leased by defendants, testified that if the defendants had notified him that they had an exclusive agreement with plaintiff, SG Chappaqua would have paid plaintiff the full commission that it seeks in this action. Testimony of David Walsh, Lehman Aff., Exh. F, at 20-21. Based on the standard formula for brokerage commissions in Westchester County, SG Chappaqua would have paid plaintiff a commission in the amount of $190,023.65. Testimony of David Walsh, Lehman Aff., Exh. F, at 20-21.

This court finds that plaintiff is entitled to summary judgment on its claim for breach of the Agreement. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

To sufficiently state a cause of action for breach of contract, a complaint must allege (1) the existence of a contract; (2) the plaintiff's performance under the contract; (3) the defendant's breach of the contract; and (4) damages as a result of the breach. *See JP Morgan Chase v. J.H. Electric of NY. Inc.*, 69 A.D.3d 802 (2d Dept 2010).

In the present case, plaintiff has made a prima facie showing that it is entitled to judgment as a matter of law on its claim for breach of the Agreement. The Agreement between the parties unambiguously provides that:

> "You [plaintiff] are hereby appointed our sole broker and granted the exclusive right to find, negotiate for and secure premises (including our current premises), on our behalf, a lease or purchase of premises."

The Agreement continues,

> "We [defendants] will refer to you all inquiries and offerings received by us with respect to the lease or purchase of premises, regardless of the source of such inquiries or offerings, and all negotiations shall be conducted solely by you or under your direction, subject to our review and final approval."
>
> "If and when we decide on a location, you will negotiate the terms of the purchase of lease on our behalf and in our interest…."

Based on the undisputed facts, it is clear that defendants located the premises which they eventually leased from SG Chappaqua during the term of the Agreement between the parties, that they negotiated the terms of the lease with SG Chappaqua during the term of the Agreement and that they ultimately entered into a lease with SG Chappaqua for the premises. It is also undisputed that they failed to refer to plaintiff any information about their negotiation of and entering into a lease with SG Chappaqua. Finally, David Walsh, the portfolio manager for SG Chappaqua, the owner of the premises leased by defendants, testified that if the defendants had notified him that they had an exclusive agreement with plaintiff, SG Chappaqua would have paid plaintiff the full commission that it seeks in this action. Testimony of David Walsh, Lehman Aff., Exh. F, at 20-21. Based on these undisputed facts, plaintiff has established that defendants breached the Agreement by independently negotiating a lease with SG Chappaqua and not referring to plaintiff the opportunity to negotiate and secure a lease for defendants at the leased premises, as a result of which plaintiff lost the opportunity to negotiate a commission agreement with the landlord SG Chappaqua. Moreover, plaintiff has established that it suffered damages as a result of defendants' breach consisting of its lost commission on the lease of the property. As a result of defendants' breach, plaintiff is entitled to damages in the amount of $190,023.65, which is the amount of the commission that it would have earned if defendants had not breached the Agreement.

Defendants have failed to raise an issue of fact in opposition to plaintiff's motion for summary judgment. Their argument that plaintiff cannot recover from defendants because the Agreement provides that the plaintiff would look to the landlord rather than defendants for their commission is without merit. Plaintiff is not suing defendants for recovery of a commission under the Agreement. Rather plaintiff is suing defendants based on the breach of their contractual obligation under the Agreement to give it the

exclusive opportunity to negotiate the lease on behalf of defendants so that plaintiff would have had the opportunity to be paid a commission by the landlord. Under these circumstances, plaintiff is entitled to recover contractual damages equal to the amount of the commission it would have earned if defendants had not breached their contractual obligation to give plaintiff the exclusive right to lease the premises on their behalf. *See Far Realty Assoc. v. RKO Del Corp.*, 34 A.D.3d 261 (1st Dept 2006) ("A broker is entitled to a commission upon the sale of the property by the owner only where the broker has been given the exclusive right to sell"); *Sylvan Lawrence Co. v. Pennie & Edmonds*, 235 A.D.2d 215 (1st Dept 1997) (broker can bring action based on breach of brokerage agreement where defendant's actions prevented broker from earning commission from a third party landlord). In *D'Angelo, Forrest & Co. v. Franklin United Life Ins. Co.*, 65 A.D.2d 766, 767, 409 N.Y.S.2d 784, 785 (2d Dept. 1978), the court specifically held that:

> "The fact that, under the terms of the contract between plaintiff and Franklin, the plaintiff was to look only to the prospective lessor for a commission is irrelevant. Since Franklin, the prospective lessee, may have breached the contract, it may be liable for the commission lost by the plaintiff as a result of the breach."

The argument by defendants that plaintiff cannot recover under the Agreement because the defendants had terminated the Agreement for cause before any claim arose is without any factual basis. The only evidence defendants present to support their claim that they terminated the Agreement is the affidavit of their attorney, which is not based on his personal knowledge. The only factual testimony supporting defendants' claim that they terminated the Agreement is the deposition testimony of defendants' principal, Ms. Weadock. However, Ms. Weadock did not testify during her deposition that she ever terminated the Agreement. Ms. Weadock did testify that she cursed at one of plaintiff's employees. However, the fact that she cursed at one of plaintiff's employees does not constitute evidence that she actually terminated the Agreement for cause. Moreover, the defendants' claim that it had cause to terminate the plaintiff under the Agreement is merely speculative and conclusory as it does not set forth any factual basis for why they had grounds to terminate the Agreement other the conclusory statement of defendants' attorney that plaintiff breached the Agreement by failing to show suitable properties.

Finally, the argument by defendants that any damages incurred by plaintiff are speculative is without basis. As previously discussed, the witness for SG Chappaqua specifically testified during his deposition that the landlord would have paid plaintiff its commission if it had known that plaintiff was the exclusive broker for defendants. Moreover, the amount of the commission is definite enough. Plaintiff and the witness for the landlord SG Chappaqua both agreed that plaintiff's commission would have been calculated pursuant to the standard rate structure used for such transactions in Westchester County.

Based on the foregoing, plaintiff's motion for summary judgment is granted and defendant's cross motion is denied. The clerk is directed to enter judgment in favor of plaintiff and against defendants in the amount of $190,023.65, together with interest thereon at the statutory rate from January 9, 2012, plus costs and disbursements. The foregoing constitutes the decision and order of the court.

DATE : 8/18/2016

KERN, CYNTHIA S., JSC