

<b>Hunter Realty Org., LLC v Select NY, LP</b>
2017 NY Slip Op 32317(U)
October 27, 2017
Supreme Court, New York County
Docket Number: 652239/2013
Judge: Shlomo S. Hagler
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 17

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THE HUNTER REALTY ORGANIZATION, LLC,

Plaintiff,

Index No.: 652239/2013

-against-

Motion Seq. No.: 002

SELECT NY, LP,

DECISION/ORDER

Defendant.

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HON. SHLOMO S. HAGLER, J.S.C.:

Defendant Select NY, LP ("Select" or "defendant") moves pursuant to CPLR 3212 for summary judgment dismissing the Verified Amended Complaint (the "Amended Complaint") of plaintiff The Hunter Realty Organization, LLC ("Hunter" or "plaintiff").<sup>1</sup> Plaintiff's Amended Complaint alleges defendant breached its contract by failing to pay plaintiff a real estate brokerage commission for the lease of office space (the "Space") in a building located at 401 Broadway, New York, New York ("401 Broadway") (Affirmation of Mark Tamoshunas ("Tamoshunas Affirmation"), Exhibit "B" [Amended Complaint]).

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<sup>1</sup>On or about June 24, 2013, Coldwell Banker Commercial Hunter Realty ("Coldwell") commenced this action asserting causes of action for breach of contract and quantum meruit. On or about November 21, 2013, Coldwell filed a Verified Amended Complaint amending the caption to identify The Hunter Realty Organization, LLC as the proper plaintiff (Tamoshunas Affirmation, Exhibits "A", "B"). By Order, dated April 10, 2014, this Court denied defendant's motion to dismiss plaintiff's breach of contract claim pursuant to CPLR 3211, and dismissed plaintiff's claim for quantum meruit, as duplicative of the breach of contract claim (*Id.*, Exhibit "C").

FACTUAL BACKGROUND

Plaintiff is a commercial real estate brokerage firm (*Id.*, ¶ 2). On May 15, 2009, plaintiff entered into a letter agreement with defendant for "the exclusive right to find, negotiate for, and secure space for Select" (the "Brokerage Agreement") (*Id.*, Exhibit "F" [Brokerage Agreement]; *Id.*, Exhibit "B" [Amended Complaint], ¶ 4).

By its terms, the Brokerage Agreement continued through December 31, 2009 and was to be "extend[ed] thereafter on a month-to-month basis until terminated by either party upon thirty-days (30) prior written notices to the non-terminating party" (*Id.*, Exhibit "F" [Brokerage Agreement]). The Brokerage Agreement provided further that plaintiff:

"shall receive any commission, fee or other compensation earned hereunder from the owner, lessor, or sublessor of the space which is leased by Select; provided, however, in no event shall Hunter seek any commission, fee or other compensation whatsoever from Select."

The Brokerage Agreement also included a provision regarding termination as follows:

"[u]pon and after termination of this agreement, Select shall recognize Hunter and act through Hunter as broker in any negotiations then pending, or dealings then being carried on, for a leasing of space by Select; provided, however, that within ten-days (10) following such termination, Hunter shall have provided to Select a detailed list of any such negotiations then pending, or dealings then being carried on, which list must be confirmed by Select, in Select's

good faith" (*Id.*) (the "Tail Provision").

Moreover, the Brokerage Agreement provided that "[i]n the event of any dispute under this agreement, or any litigation or arbitration in connection therewith, the prevailing party shall be entitled to receive from the non-prevailing party its reasonable legal fees and disbursements" (*Id.*).<sup>2</sup>

According to Select, in the spring and summer of 2012, it asked Hunter to find new office space for Select's New York office.<sup>3</sup> Plaintiff claims it investigated a number of locations in Manhattan (Tamoshunas Affirmation, Exhibit "G" [Siegel deposition] at 27-28, 32).<sup>4</sup> It is undisputed that on June 29, 2012, Nathalie Piquionne, Chief Financial Officer of Select ("Piquionne") emailed both Peter Sabesan, Principal of Hunter ("Sabesan"), and Siegel forwarding them information about a space on the 12<sup>th</sup> floor at 401 Broadway that Jonathan Braaten ("Braaten"), defendant's general manager, had sent to her.<sup>5</sup> In

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<sup>2</sup>Although the Brokerage Agreement also provided that "in no event shall Hunter seek any commission, fee or other compensation whatsoever from Select" (Tamoshunas Affirmation, Exhibit "F"), defendant merely cites this provision as a fact and fails to make any legal argument as a ground to support its motion for summary judgment.

<sup>3</sup>Select maintains that the renewal lease with its landlord at the time (at 131 Varick Street) was nearing the end of its term.

<sup>4</sup>Wayne Douglas Siegel ("Siegel") is the Senior Managing Director of Hunter (Tamoshunas Affirmation, Exhibit "G" at 7).

<sup>5</sup>On June 29, 2012, that employee, Jonathan Braaten, emailed Piquionne stating that he and Herwig Preis ("Preis"), CEO of Select, "saw a great space at 401 Broadway which is just south of Canal. [Preis] and I saw it the other week and felt it had great potential" (*Id.*, Exhibit

her email to Sabesan and Siegel of Hunter, Piquionne states that the Space "is too small and the pricing with the ad ons [sic] is at first sight not the best deal-I have not seen the building - maybe you can have a look at it and see if there is anything [sic] to cut the price-it is 401 Broadway" (Tamoshunas Affirmation, Exhibit "I").<sup>6</sup> That same day, Sabesan replied to Piquionne and stated, in part, "I will check out this building and will look around to see if any good deals etc[.]. So none of us waste anytime [sic], can u ask and then provide us with parameters and we will see what spaces are available" (*Id.*, Exhibit "J").

Defendant claims that the only proof plaintiff produced which demonstrates that plaintiff did any work to pursue 401 Broadway was in the form of two emails sent by plaintiff to 401 Broadway. In the first email, dated August 6, 2012 (five weeks after Piquionne's email to Sebasen and Siegel), from Siegel to James ("Jay") Caseley ("Caseley"), the agent at 401 Broadway, Siegel sought to arrange a tour of the Space (the "August 6

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"I"). According to defendant, Braaten learned about spaces available at 401 Broadway from employees of other companies located there.

<sup>6</sup>Piquionne also stated in the email that she had notified Preis about the current status with the defendant's landlord and with the Woolworth building, which was one of the spaces being pursued by Hunter for Select.

Email") (Tamoshunas Affirmation, Exhibit "M").<sup>7</sup> The second email, dated August 27, 2012, from Siegel to a representative of 401 Broadway, states "doug, what r u asking for this unit?" (the "August 27 Email") (*Id.*, Exhibit "N"). Piquionne testified that defendant never received detailed information, including pricing and square footage regarding the Space at 401 Broadway (*Id.*, Exhibit "K" [Piquionne Deposition] at 98-99).

Defendant claims that plaintiff showed it spaces at several other buildings. However, "after months of searching, none of the options [plaintiff] had to present were suitable for [defendant's] business or made sense to [defendant's] CEO to pursue" (Notice of Motion, Piquionne Affidavit, at ¶ 34). By letter, dated August 30, 2012, from Piquionne to Sabesan, defendant terminated the Brokerage Agreement, effective as of September 30, 2012 (the "Termination Letter") (Tamoshunas Affirmation, Exhibit "P"). The Termination Letter provided in pertinent part:

Please accept this letter as termination of [sic] agreement dated May 15, 2009 between SelectNY LP and your company Coldwell Banker Commercial Hunter Realty/The Hunter Realty Organization, LLC, effective as per September 30<sup>th</sup> 2012.

Herwig, our CEO, Jonathan and Julie felt that none of the offices shown were the right fit for SelectNY which lead [sic] to the decision to terminate the agreement.

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<sup>7</sup>Caseley responded that day "[m]eet in lobby at 2:45" (Tamoshunas Affirmation, Exhibit "M").

There are currently no pending negotiations, dealings for a leasing of space by SelectNY LP.

Defendant asserts that after it terminated the Brokerage Agreement, it considered staying at its then current location, and at the same time decided to determine whether 401 Broadway was still a viable option (Notice of Motion, Piquionne Affidavit, ¶ 43; Affirmation of Diana Zborovsky in Opposition ("Zborovsky Affirmation"), Exhibit "G" [Piquionne Deposition] at 76-78).

Piquionne stated that she contacted the brokers at 401 Broadway and learned that the entire 12<sup>th</sup> floor was available. Piquionne arranged for a tour in September of 2012 (Notice of Motion, Piquionne Affidavit, ¶¶ 44, 46; Zborovsky Affirmation, Exhibit "G" [Piquionne Deposition] at 77-78). At her deposition, Piquionne was asked whether the approximate time that negotiations for a lease at 401 Broadway was "started" by defendant with 401 Broadway took place in "October, September". Piquionne responded "Yes, we are talking about the lease, yes, that -- the last quarter of the year 2012" (*Id.* at 84).

Defendant submits a copy of a Letter of Intent, dated October 8, 2012, from the managing agent of 401 Broadway to Piquionne covering the lease of the entire 12<sup>th</sup> floor space. Piquionne signed the letter on October 25, 2012 (Notice of Motion, Tamoshunas Affirmation, Exhibit "Q"). After subsequent negotiations during November and December of 2012, a lease for

the Space was signed at the end of December 2012 (the "Lease") (Zborovsky Affirmation, Exhibit "G" [Piquionne Deposition] at 77-81; Piquionne affidavit, ¶¶ 46-47; Tamoshunas Affirmation, Exhibits "Q", "R", "S"; Tamoshunas Reply Affirmation, Exhibit "F").<sup>8</sup>

Defendant further maintains that plaintiff never provided it with a "detailed list of any [n]egotiations then pending or dealings with" 401 Broadway (or any other landlord) within ten days following the termination of the Brokerage Agreement pursuant to the terms of said agreement. It is undisputed that plaintiff never provided defendant with such a list. Defendant contends that it did not prevent plaintiff from sending a list identifying 401 Broadway as a landlord with whom plaintiff was negotiating (Tamoshunas Affirmation, Exhibit "G" [Siegel Deposition] at 89-90; *Id.*, Exhibit "L" [Sabesan Deposition] at 47). Consequently, defendant seeks dismissal of the Amended Complaint and in accordance with the Brokerage Agreement's terms, "reasonable legal fees and disbursements."

In opposition, plaintiff refers to the August 6 Email and the August 27 Email as evidence that plaintiff "did in fact do the work necessary [sic] in the process of leasing a space at 401

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<sup>8</sup>According to defendant, the Lease was dated "as of" October 26, 2012, and numerous drafts of the Lease and rider were exchanged until executed at the end of December 2012 (Reply Affidavit of Piquionne at ¶ 14). An email from the managing agent of 401 Broadway to Piquionne, dated December 21, 2012, acknowledges receipt of the Lease and checks (Notice of Motion, Tamoshunas Affirmation, Exhibit "R").

Broadway" (Zborovsky Affirmation, Exhibit "H" [Affidavit of Sabesan in Support of Opposition] at ¶ 12).

Plaintiff maintains that in September 2012, while the Agreement was still in effect, defendant "took steps" to lease 401 Broadway because defendant visited the Space at that time without informing plaintiff (Zborovsky Affirmation, Exhibit "H" [Sabesan Affidavit] at ¶¶ 26, 31). Plaintiff refers to the deposition of Piquionne wherein she indicated that negotiations by defendant with 401 Broadway for the Space began in "October, September". Plaintiff argues therefore that defendant contacted 401 Broadway in September 2012 in order to "cut plaintiff out of the deal." Plaintiff claims further that (i) defendant refused to allow plaintiff to show defendant the Space prior to the Termination Letter; (ii) the Termination Letter "purposefully and fraudulently" represented that "there are currently no pending negotiations, dealings for a leasing of space by [Select]" when such negotiations were taking place; and (iii) the condition in the Brokerage Agreement requiring plaintiff to provide defendant with a list of pending negotiations within ten days of termination was rendered impossible for plaintiff to fulfill as a result of defendant's bad faith misrepresentation that there were no pending negotiations or dealings for a lease at 401 Broadway (Zborovsky Affirmation, Exhibit "H" [Sabesan Affidavit] at ¶¶ 17, 20, 23-29, 32; Plaintiff's Memorandum of Law at 5).

## DISCUSSION

### **Summary Judgment**

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1<sup>st</sup> Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact'" (*People v Grasso*, 50 AD3d 535, 545 [1<sup>st</sup> Dept 2008], quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In considering a summary judgment motion, evidence should be "viewed in the light most favorable to the opponent of the motion" (*People v Grasso* 50 AD3d at 544 [internal citation omitted]).

### **Brokerage Commission**

Generally, to be entitled to a commission, a broker must have "brought about the sale [or lease] . . . [or, in other words], the broker must be the procuring cause" (*Greene v Hellman*, 51 NY2d 197, 205-206 [1980]; see *SPRE Realty, Ltd. v Dienst*, 119 AD3d 93, 97-98 [1<sup>st</sup> Dept 2014]). However, a "broker with an exclusive right to sell need not show that it was the

procuring cause of the sale" (*Sioni & Partners, LLC v Vaak Props., LLC*, 93 AD3d 414, 417 [1<sup>st</sup> Dept 2012]; see *Rachmani Corp. v 9 E. 96<sup>th</sup> St. Apt. Corp.*, 211 AD2d 262, 268 [1<sup>st</sup> Dept 1995] ["an exclusive right to sell agreement entitles the broker to receive a commission on a sale to any purchaser, whether or not the broker played a part in the negotiations"]).

#### **Determination**

In the instant matter, defendant has failed to establish its *prima facie* entitlement to judgment as a matter of law. Plaintiff alleges that "defendant had in fact been dealing directly with the building management/agent at 401 Broadway in the hopes of cutting [p]laintiff out of the deal, despite the...Brokerage Agreement" (Zborovsky Affirmation, Exhibit "H" [Sabesan Affidavit] at ¶ 23).<sup>9</sup> There is undisputed evidence in the record that defendant viewed the Space in September 2012, during the period in which the exclusive Brokerage Agreement was still in effect in accordance with the terms of the Termination Letter (Zborovsky Affirmation, Exhibit "G" [Piquionne Deposition] at 83-84).<sup>10</sup> Plaintiff maintains therefore that defendant purposely and fraudulently failed to disclose the pending

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<sup>9</sup>Plaintiff alleges that Select's representation in the Termination Letter that "there were currently no pending negotiations, [*sic*] dealings for a leasing space by [defendant]" was false and misleading.

<sup>10</sup>The Termination Letter provided that the termination of the Agreement was effective as of September 30, 2012.

dealings for leasing of 401 Broadway, which was a property defendant was required to refer to plaintiff during the term of the Agreement (*Id.*, Exhibit "H" [Affidavit of Sabesan in Support of Opposition] at ¶ 29). Plaintiff also argues that defendant's unwillingness to rent the Space during the term of the Brokerage Agreement was an act of bad faith and that defendant interfered with plaintiff's ability to adhere to the Brokerage Agreement's conditions. Plaintiff alleges that as a result of defendant's misrepresentations, plaintiff had no reason to believe that negotiations for 401 Broadway were ongoing and thus could not have disclosed such negotiations at the time the Termination Letter was sent.

By viewing the Space directly without plaintiff's participation during the term of the Agreement (in September 2012), plaintiff has at the very least raised an issue of fact as to whether defendant breached the exclusivity provision of the Agreement prior to its termination (see *Julien J. Studley, Inc. v Coach, Inc.*, 3 AD3d 358, 360 [1<sup>st</sup> Dept 2004]; *Kaplon-Belo Assoc. v Cheng*, 258 AD2d 622, 622 [2d Dept 1999]).

Moreover, the language in the Tail Provision is very broad and requires Select to recognize Hunter as the broker "in any negotiations then pending, or dealings then being carried on, for a leasing of a space by Select." The purpose of such a provision is to protect a broker from the loss of a commission in the event

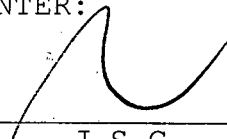
a property is sold or leased by the owner after termination of a listing contract (see *Saunders Ventures, Inc. v Catcove Group, Inc.*, 151 AD3d 991, 992-993 [2d Dept 2017]; *Picotte Real Estate v. Gaughan*, 107 AD2d 996, 997 [3d Dept 1985]). In this case, there is at least an issue of fact as to whether defendant's failure to inform plaintiff of negotiations with 401 Broadway gives rise to liability under the Tail Provision.

**CONCLUSION**

Based on the foregoing, it is ORDERED, that defendant's motion for summary judgment is denied.

Dated: October 27, 2017

ENTER:

  
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J.S.C.  
**SHLOMO HAGLER**  
J.S.C.