

Cushman & Wakefield, Inc. v Kadmon Corp., LLC

2019 NY Slip Op 30045(U)

January 3, 2019

Supreme Court, New York County

Docket Number: 652055/2018

Judge: Barry Ostrager

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION

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CUSHMAN & WAKEFIELD, INC.	INDEX NO.	<u>652055/2018</u>
Plaintiff,	MOTION DATE	<u>1/2/19</u>
- v -	MOTION SEQ. NO.	<u>002</u>
KADMON CORPORATION, LLC,		
Defendant.		

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 61, 62, 63, 64, 65, 67, 68 were read on this motion to/for JUDGMENT - SUMMARY.

HON. BARRY R. OSTRAGER:

Plaintiff Cushman & Wakefield, Inc. (“Cushman”) commenced this action seeking to recover a commission allegedly owed by Defendant Kadmon Corporation, LLC (“Kadmon”) in connection with Kadmon’s surrender of its leasehold interest in office space to a non-party landlord. Plaintiff moves for summary judgment on its claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and account stated. Plaintiff’s motion for summary judgment is denied for the reasons stated herein.

Factual Background

In October 2010, Kadmon, as tenant, entered a written lease with ARE-East River Science Park, LLC, as landlord, for certain office space.

On September 29, 2016, Kadmon granted Cushman certain exclusive listing rights to market the office space pursuant to a Listing Agreement. (Hartman Aff. Ex. A [NYSCEF Doc. 35]). The Listing Agreement granted Cushman the exclusive right to “sublease the premises” or

to “obtain an assignment, buyout, cancellation or termination” of Kadmon’s lease, and further provided that Cushman be paid a commission in connection with its work as the exclusive agent for the premises. *Id.*

In February and March of 2017, Cushman negotiated a termination of the lease with the landlord on behalf of Kadmon. (*See* Hartman Aff. Exs. E-H [NYSCEF Docs. 39-42]).

On April 14, 2017, Kadmon sent Cushman a notice terminating the Listing Agreement, effective June 13, 2017. (Hartman Aff. Ex. I [NYSCEF Doc. 43]).

On June 13, 2017, pursuant to Section 5 of the Listing Agreement, Cushman sent Kadmon a list of prospective tenants the premises had been submitted to during Cushman’s tenure as the exclusive agent. (Hartman Aff. Ex. J [NYSCEF Doc. 44]). Notably, Cushman included the landlord on the list of parties the property had been submitted to, and Cushman further noted the work it had performed in negotiating a lease termination with said landlord. *Id.*

On August 11, 2017, Kadmon and the landlord entered the “Fifth Amendment to Lease” whereby Kadmon surrendered certain portions of the premises to the landlord. (Wolf Aff. Ex. E [NYSCEF Doc. 53]).

On August 17, 2017, Cushman sent Kadmon a \$508,404.80 invoice as commission for Cushman’s work in negotiating the lease surrender. (Hartman Aff. Ex. L [NYSCEF Doc. 46]). After Cushman sent the invoice, Kadmon purportedly offered to pay \$100,000 in recognition of Cushman’s work. No commission was ever paid, and Cushman subsequently commenced this action.

Discussion

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any

material issues of fact from the case.” *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853 (1985). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” *Id.*

Section 5 of the Listing Agreement provides:

If, during the Term, [Kadmon] enters into a Transaction for any portion of the Premises, [Kadmon] will pay to [Cushman] a commission in accordance with the attached Schedule of Commissions. Within 10 days after the end of the Term, [Cushman] will provide to [Kadmon] a list of prospective subtenants and assignees to whom the Premises was submitted by any party during the Term. **Following the expiration of the Term, if a prospective subtenant or assignee appearing on the abovementioned list enters into a Transaction** within 180 days after the end of the Term, and thereafter the Transaction is fully executed and delivered, [Kadmon] will pay a commission to [Cushman] as provided for in this Section 5. (emphasis added)

Further, “Transaction” is defined as a “sublease, assignment, buyout, cancellation or termination.” It is undisputed that the “Term” expired on June 13, 2017, in accordance with a valid notice of termination.

Cushman argues that it is entitled to a commission under the Listing Agreement because Cushman commenced negotiations of a lease termination with the landlord; listed the landlord as a party to whom the premises were submitted during the Term; and Kadmon subsequently entered a lease termination with the landlord within 180 days after the end of the Term. Thus, Cushman argues that Kadmon executed a Transaction—the lease termination—with a party Cushman had submitted the premises to, within 180 days after the Listing Agreement expired, thereby entitling Cushman to a commission.

In opposition, Kadmon argues, *inter alia*, that Cushman is entitled to a commission only if a “subtenant or assignee” on Cushman’s list enters into a Transaction during the applicable 180-day period following the expiration of the Term. Kadmon asserts that the landlord—the party that entered into a Transaction with Kadmon for a lease termination—is not a “subtenant or

assignee” as those terms are commonly understood, and thus Cushman is not entitled to a commission under the terms of the Listing Agreement.

“In reviewing a written contract, the Court’s primary objective is to give effect to the intent of the parties as revealed by the language they chose to use. Where a contract is unambiguous, that is, where its words convey a definite and precise meaning upon which reasonable minds could not differ, its interpretation can be determined as a matter of law.” *Bolt Elec., Inc. v. City of New York*, 223 F.3d 146, 150 (2d Cir. 2000). “Where, however, reasonable minds could differ on the meaning of the language used, the meaning of the words becomes an issue of fact if there is relevant extrinsic evidence of the parties’ actual intent.” *Id.* Thus, “courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing.” *Ashwood Capital, Inc. v. OTG Management, Inc.*, 99 A.D.3d 1, 7 (1st Dep’t 2012).

Here, Section 5 of the Listing Agreement contains an ambiguity precluding any decision as a matter of law. Specifically, the term “Transaction” is defined to include certain transactions—such as a lease termination—that necessarily include the landlord as a transacting party and exclude any third-party assignee or subtenant as a transacting party. However, a narrower reading of the text of Section 5 suggests that Cushman only stands to receive a commission for a “Transaction” involving a subtenant or assignee.

Reading the Listing Agreement as a whole, it appears that Section 5 was clearly intended to apply to any Transaction involving a subtenant, assignee, or landlord, as the Listing Agreement explicitly includes the landlord as a party covered by the Listing Agreement. Unfortunately, Section 5 reads “prospective subtenant or assignee,” which terms do not encompass the landlord. Thus, while the apparent sloppy draftsmanship will undoubtedly be

resolved by testimony concerning industry custom and/or the intent of the parties, the Court cannot impute words into an agreement that do not appear within the four corners of the document. Therefore, Plaintiff's claim for breach of the Listing Agreement cannot be decided as a matter of law.

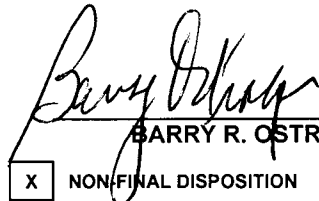
Finally, Plaintiff's claim for account stated also presents triable issues of fact precluding summary judgment. While it is undisputed that Cushman sent Kadmon an invoice for a commission, the affidavit of Steven Gordon, a principal of Kadmon, asserts that Kadmon disputed the commission entirely but nevertheless made a counteroffer shortly after receipt of the invoice. These factual issues can only be resolved with testimonial evidence at trial.

Accordingly, it is hereby

ORDERED that Plaintiff's motion for summary judgment is denied; and it is further

ORDERED that the parties appear for a compliance conference on January 29, 2019 at 9:30 a.m.

1/3/2019
DATE



BARRY R. OSTRAGER, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE