

**Teger Commercial LLC v Piccininni Props. Corp.**

2020 NY Slip Op 33690(U)

January 8, 2020

Supreme Court, Rockland County

Docket Number: 030582/2016

Judge: Thomas P. Zugibe

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This opinion is uncorrected and not selected for official publication.

To commence the statutory period for appeals as of right under CPLR § 5513(a), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
ROCKLAND COUNTY

-----X  
TEGER COMMERCIAL LLC

Index No. 030582/2016

Plaintiff,

-against-

VERDICT

PICCININNI PROPERTIES CORP.,

Defendants.

-----X  
Zugibe, J.

Plaintiff's complaint alleges three causes of action. (1) breach of contract, (2) account stated and (3) quantum meruit & unjust enrichment. Following a bench trial conducted on September 26, 2019 and September 27, 2019, this court finds in favor of the Plaintiff on the first and second causes of action in the sum of \$71,090.97 plus attorney fees. This determination is based upon a full and complete review of the documentary evidence presented, the credibility of the witnesses that testified at trial and the written proposed findings of fact and conclusions of law submitted by the parties. The court credits the testimony of Lynn Teger as credible, candid and entirely consistent with the documentary evidence admitted at trial.

The relevant and essentially uncontroverted evidence established the following: Plaintiff, a licensed real estate broker, and Defendant, the owner of the subject premises located at 37 Ramland Road, Orangeburg, New York, entered into an Exclusive Right Commission Agreement (Trial Exhibit "A") dated August 12, 2009 for the lease of Defendant's premises. The agreement required Defendant to pay to Plaintiff a 4% commission on the net rent for the initial lease term and any options, extensions and renewals.<sup>1</sup> This listing agreement was for a term of six months expiring February 12, 2010. Plaintiff, thereafter, procured a tenant for the leasehold

<sup>1</sup> Defendant argued in the alternative that if a commission was owed, a 1% commission would apply based upon the terms of a certain co-broker agreement. This argument is without merit inasmuch as Defendant was not a party to that agreement and no evidence was proffered that Defendant was a third-party beneficiary thereof.

premises (hereinafter “leasehold”) who executed a lease dated 12/22/09 for the period January 15, 2010 and terminating on January 14, 2015. The lease further granted tenant the option to renew the lease for three additional five-year terms. A commission pursuant to the exclusive right agreement was paid to the Plaintiff at the time of the lease execution.<sup>2</sup>

As noted, the initial lease term expired on January 14, 2015. The tenant remained in possession of the leasehold as a holdover tenant on the same terms and conditions of the initial written lease and continued to pay the monthly rent. On April 16, 2016 Defendant executed a ten (10) year lease with the holdover tenant for the original leasehold plus an additional 1,800 square feet of leased space. Hiram Karmaker, President of LTS Enterprises, the tenant herein, testified that he has had continuous uninterrupted possession of the leasehold since the execution of the original lease, that he exercised the option to extend the initial lease and considered the new lease a continuation of the old lease. The gravamen of this case is simply whether this lease is a renewal of the initial lease mandating the payment of a broker commission as Plaintiff contends or an entirely new lease not bound by the commission agreement. The credible evidence plainly establishes by a preponderance of the evidence that the second lease was a renewal of the original lease and clearly subject to the payment of commissions. The evidence established that Plaintiff did not partake in the negotiation of the 2016 lease as a result of Defendant’s affirmative efforts to “obstruct the Broker’s performance hereunder” in direct breach of paragraph 3 of the Exclusive Right Commission Agreement. What is equally clear is that whether Defendant intentionally obstructed Plaintiff’s efforts as determined by this court or merely renegotiated the lease in good faith, since the commission agreement was an “exclusive right” and not merely an “exclusive agency agreement, the law is eminently clear that Plaintiff is entitled to her commission. *Morpheus Capital Advisors v. UBS AG*, 23 N.Y. 3d 528 (2014), *Rennert Diana & Co. v Ziskind*, 191 AD 2d 545 (2d Dept 1993). Further, under an exclusive right agreement, such as the Agreement here, the broker is entitled to its commission “regardless of whether or not the broker put any effort at all into procuring the sale”; *Audrey Balog Realty Corp., Inc. v East Coast Real Estate Developers, Inc.*, 202 AD2d 529 (2d Dept 1994).

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<sup>2</sup> Although Plaintiff contended during trial that additional commissions were due and owing as a result of a lease amendment to the initial lease, this claim was not part of the complaint or bill of particulars and will not be considered.

Defendant's additional contention that the agreement expired prior to the exercise of the option is similarly without merit. The express provisions and clear intent of the agreement was the payment of a commission on the exercise of the options that extended for three five-year option periods, well beyond the stated effective date of the agreement. The Exclusive Right Commission agreement was in effect when the original lease was signed, therefore, Plaintiff is entitled to the commission. Because the listing agreement was in effect when the option was given, and because the option subsequently was exercised, plaintiff is entitled to a commission just as if the new lease was executed during the life of the listing agreement. *Century 21 v. Gibson*, 152 A.D.2d 446 (4<sup>th</sup> Dept 1989).

Defendant further contends that since the tenant failed to provide the requisite notice and exercise the option within 90 days of the end of lease, that this somehow absolved the Defendant of his contractual duty to the Plaintiff. While the failure to exercise the renewal clause in accordance with the lease could have imperiled tenant's right to exercise the option, this clause certainly did not constitute an impediment to Plaintiff's right to a commission if tenant remained as a tenant and exercised the option. In order for the option mechanism set forth in the initial lease to constitute a bar to Plaintiff's claim, this same language would perforce be required in the commission agreement specifying that strict compliance with such language constituted a condition precedent to any entitlement to commissions notwithstanding a renewal of the lease. It does not.

As noted hereinabove, Plaintiff is awarded commissions in the sum of \$71,090.97. This award constitutes a 4% commission on all base rents received between the expiration of the original lease and execution of the second lease (4/1/16 through 3/31/16) totaling \$132,708.38 and base rent set forth in the renewal lease as follows: \$130,750.44 (year 1), \$137,288.04 (year 2), \$144,152.40 (year 3), \$151,359.96 (year 4), \$158,928.00 (year 5), \$166,874.40 (year 6), \$175,218.12 (year 7), \$183,979.20 (year 8), \$193,178.16 (year 9) and \$202,837.20 totaling \$1,644,565.92.

Plaintiff is further awarded attorney fees in accordance with paragraph 3 of the Exclusive Right Commission Agreement in the sum of \$52,420.94 as follows: Plaintiff was initially represented by the law firm of Condon & Mara, Attorneys at Law, from February 2016 to January 2019. Detailed time sheets are presented establishing that this firm handled all pleadings

and court appearances at an hourly rate of \$300/hour plus expenses for a total of \$19,904.72. Based upon a review of the monthly invoices specifying the nature, quantity and complexity of the legal work performed, time assigned to the tasks and expenses incurred, the court finds that the fees are reasonable and not excessive and consonant with customary billing practices and hourly rates in this area. In January 2019, Barry Haberman, Esq. was substituted as attorney for Plaintiff. The written retainer agreement between counsel and Plaintiff provided for the payment of a flat fee of \$2,500 for preparation of opposition papers to the motion for summary judgment, a flat rate fee of \$5,000 for trial, an additional fee equal to one third of any recovery if Plaintiff prevails plus expenses. Detailed time sheets and attorney affirmation are likewise provided for the Haberman firm establishing 87.80 hours of legal services in the preparation and trial of this matter. In assessing the reasonableness of the contingent fee portion of the claim, dividing the total attorney fees requested by the billable hours expended results in an hourly rate of \$355.31/hour. Based upon the complexity of this matter, this court finds that the resultant hourly rate, billable hours and the specific work performed are not unreasonable and likewise comport with industry standards in this area.

This constitutes the verdict of this court.

Dated: New City, New York  
January 8, 2020

  
Thomas P. Zugibe  
Justice of the Supreme Court

To: All parties via e-file