

<b>Highcap Group LLC v Salih</b>
2021 NY Slip Op 32387(U)
November 15, 2021
Supreme Court, New York County
Docket Number: 655857/2018
Judge: Debra A. James
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. DEBRA JAMES**

**PART 59**

*Justice*

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HIGHCAP GROUP LLC,

Plaintiff,

- v -

MARC SALIH and ISMAEL FERNANDEZ

Defendants.

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INDEX NO. 655857/2018

MOTION DATE 05/04/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 51

were read on this motion to/for

JUDGMENT - SUMMARY

ORDER

Upon the foregoing documents, it is

ORDERED that plaintiff's motion for summary judgment is DENIED; and it is further

ORDERED and ADJUDGED that defendants' motion for summary judgment dismissing the complaint is GRANTED and the complaint is DISMISSED, with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment, accordingly.

DECISION

Plaintiff moves and defendants cross-move for summary judgment respectively in this dispute concerning plaintiff's right to a real estate commission pursuant to the parties' June 28, 2016, Commission Agreement. The court shall deny the plaintiff's motion and grant the defendants' cross-motion, finding that a condition precedent to defendants' payment obligation under the Agreement was not satisfied.

The relevant portion of the Agreement reads:

"In connection with the proposed joint venture, you agree to pay us, and we agree to accept, as compensation for our services as brokers or otherwise, . . . , if a joint venture agreement, transfer of property to Joint Ownership and closing of construction loan for development upon terms and conditions acceptable to both parties, has been executed by Marc Salih . . . and Ismael Fernandez."

The Agreement further provides that "If, after execution and delivery of a joint venture agreement the transfer of ownership and/or construction loan shall fail to close for any reason whatsoever, except by your willful default, no compensation shall be due or payable to us."

The parties do not dispute that the joint venture condition precedent to payment has been fulfilled. The parties dispute centers around the "construction loan" and the "transfer of property to Joint Ownership" requirements of the Agreement.

Plaintiff argues that defendants have breached the Agreement by failing to make payments thereunder and that the defendants have willfully failed to obtain a construction loan, and also intentionally delayed transferring the property to the joint venture with the intent of avoiding the payments owed plaintiff under the Agreement. Defendants counter that the construction loan and property transfer condition precedents have not been fulfilled and thus they are not in breach of their obligations under the Agreement. Defendants further argue that the Agreement does not obligate them to transfer property to the joint venture prior to the completion of construction nor does it obligate them to obtain a construction loan. Defendants further argue that the failure to obtain the construction loan was not willful, but was the result of financial hurdles and issues with the property that have delayed substantial construction.

The court's

'function is to apply the meaning intended by the parties, as derived from the language of the contract in question'. In interpreting a contract, words should be accorded their 'fair and reasonable meaning', and 'the aim is a practical interpretation of the expressions of the parties to the end that there be a realization of [their] reasonable expectations'. Moreover, 'a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms'. Although the parties offer conflicting interpretations of a contract, that does not render it ambiguous. Moreover, 'where the intention of the parties may be gathered from the four corners of the instrument, interpretation of the

contract is a question of law and no trial is necessary to determine the legal effect of the contract'."

Dreisinger v Teglassi, 130 AD3d 524, 527 (1<sup>st</sup> Dept 2015) (citations and internal quotations omitted).

The threshold question is whether there is any ambiguity in the Agreement as it relates to the terms of defendants' performance concerning the transfer of ownership to the joint venture and the obtaining of a construction loan. It is undisputed that, under the plain meaning of the Agreement terms, the property has not been transferred to the joint venture and no named construction loan has been signed. As there is no ambiguity as to same, such defeats plaintiff's claims at the threshold. Although plaintiff argues that defendants have willfully delayed the transfer of the property to the joint venture, there is nothing in the Agreement providing that the transfer has to occur prior to the commencement of construction. Plaintiff's argues that the inclusion of a payment schedule implies a time element. Such inclusion is insufficient to overcome the fact that the Agreement unambiguously sets no time of the essence deadline for such a transfer.

Furthermore, plaintiff is unable to establish that the defendants have willfully defaulted under the Agreement, given that there is no time of the essence clause governing defendants' performance, and construction upon the property has

not proceeded. Therefore, plaintiff's motion for summary judgment must be denied as the condition precedent of property transfer to the joint venture has not been satisfied.

With respect to the condition that defendants' close upon a construction loan, there is ambiguity as to the type of financing that comes within that definition. Defendants themselves argue that they had doubts about the ability to obtain a "conventional" construction loan and nothing in the papers indicates that defendants actually ever applied for such a loan. However, the defendant used other financing arrangements including a "bridge loan" to begin preliminary work and construction. Whether the parties intended such financing that led to the commencement of work on the premises to qualify as a "construction loan" is ambiguous in light of the parties' contentions of what they intended at the time of the execution of the Agreement.

Nonetheless, as the property transfer condition precedent is conjunctive with the construction loan condition precedent, and the record at bar establishes, as a matter of law, that the property transfer condition precedent has not been fulfilled and that the failure of such fulfillment was not the result of a willful default by defendants, the court shall grant defendants' cross-motion for summary judgment dismissing the complaint.

*Debra A. James*  
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11/15/2021  
 DATE

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 DEBRA JAMES, J.S.C.

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