

J. W. Burke Realty LLC v A.L.A. Plastics Corp.

2022 NY Slip Op 31095(U)

April 5, 2022

Supreme Court, New York County

Docket Number: Index No. 155076/2021

Judge: Suzanne Adams

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SUZANNE ADAMS PART 39TR

Justice

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J. W. BURKE REALTY LLC,

Plaintiff,

- v -

A.L.A. PLASTICS CORP.,

Defendant.

-----X

INDEX NO. 155076/2021

MOTION DATE 1/18/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents and after oral argument held January 18, 2022, plaintiff's motion is decided as follows:

Plaintiff, J.W. Burke Realty, LLC ("JWB") commenced the instant action by filing a summons and complaint on May 25, 2021, seeking to recover real estate broker's commissions arising out of the rental of a commercial property in Kings County, NY, asserting causes of action for breach of contract and quantum meruit. Defendant, A.L.A. Plastics Corp. ("ALA") interposed an Answer on June 23, 2021. Plaintiff now moves for summary judgment.

Summary Judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595 (1980). The function of the court when presented with a motion for Summary Judgment is one of issue finding, not issue determination. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Weiner v. Ga-Ro Die Cutting, Inc.*, 104 A.D.2d331, 479 N.Y.S.2d 35 (1st Dept., 1984) *aff'd* 65 N.Y.2d 732, 429 N.Y.S.2d 29 (1985). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of

fact and the right to entitlement to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party. *Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 (1st Dep't 1989). Summary judgment will only be granted if there are no material, triable issues of fact *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957).

In support of its motion, plaintiff submits the affidavit of Jonathan W. Burke, the managing member of JWB, together with a copy of JWB's real estate broker license, a calculation of damages, the published commission rates for commercial leases in New York City, outside of Manhattan of Newmark Knight Frank, CBRE, Cushman & Wakefield, Savills Studley, Greiner Maltz, and Shalom & Zuckerbrot Realty LLC, all of whom are real estate brokerage firms competing with plaintiff. Said submission establish as follows: JWB is a licensed real estate broker in New York City. ALA is the owner of a premises located at 1700 Atlantic Avenue, Brooklyn, NY. On April 23, 2021, Urban Soccer Crown Heights, LLC (the "Tenant"), entered into the Lease for the Premises. Said lease specifically states that JWB was the procuring cause of same. After the closing of the lease, JWB demanded payment of its commission, which remains outstanding. A real estate broker earns its commission upon bringing a seller together with a third party leading to a meeting of the minds on the essential terms of an agreement, or the broker produces a buyer who is ready, willing and able to accept the seller's terms. *Williamson, Picket, Gross v. Hirschfeld*, 460 N.Y.S.2d 37 (1st Dept. 1983). As such, plaintiff was due its commission on April 23, 2021. Where a contract does not specify the specific amount of the commission, "the plaintiff is entitled

to a commission that is fair and reasonable ... [u]sually, this is the customary rate in the community at the time when the services are rendered.” *Kaplon-Belo Assocs. Inc. v. Cheng*, 258 A.D.2d 622 (1st Dept. 1999); *see Georgia Malone & Co., Inc. v. Extell Development Co.*, 118 A.D.3d 591 (1st Dept. 2014) (plaintiff is entitled to “the customary rate in the community at the time when the services are rendered”). The lease for the Premises lists the following rents: Year 1: \$385,500. Year 2: \$397,065, Year 3: \$408,976.95, Year 4 \$421,246.26, Year 5: \$433,883.65, Year 6: \$446,900.16, Year 7: \$460,307.16, Year 8: \$474,116.37, Year 9: \$488,339.86, Year 10: \$502,990.06, Year 11: \$646,579.76, Year 12: \$665,977.15, Year 13: 685,956.46, Year 14: \$706,535.15 and Year 15: \$727,731.20. The standard commission rates for commercial leases in Kings County in New York, is 7% for each of the first 3 years of the Lease and 3% for each year thereafter. As such, the full standard commission is \$278,348.18. As such, plaintiff has established a *prima facie* entitlement to judgment in that amount.

In opposition, defendant submits the affidavit of Peter Samet, the CEO of ALA, together with a series of e-mails between the parties, which establish that the parties failed to agree upon a commission amount, instead establishing as follows: On March 22, 2021, plaintiff e-mailed their initial lease proposal to defendant. As described in plaintiff’s complaint and defendant’s affidavit, JWB agreed to accept a reduced commission based on 4% of the rent for each of the first 5 years of the Lease, 3% for each of the next 5 years of the Lease and 2% of the remaining years on the Lease (which would result in a commission in the amount of \$217,852.08). On April 26, 2021, Patrick J. Gardner, Executive Vice President of JWB emailed Mr. Samet advising that he was working on a payout schedule for the commission. Thereafter, Gardner e-mailed suggesting the commission be paid in 4 installments over the course of a year. Defendant counter-proposed a payout over ten years, which was rejected, and defendant was advised that the industry standard

rates are 7% for each of the first 3 years of the Lease and 3% for each year thereafter. Defendant further argues that there is no industry standard commission and attaches a printout from “Redwood NYC” (who only do business in Manhattan, which reflects standard Manhattan commission rates, and is irrelevant to this action). As such, defendant fails to raise any issues of fact. As the parties failed to reach an agreement as to the amount of brokerage fees, plaintiff is entitled to the customary rate discussed *supra*.

ORDERED that the plaintiff’s motion for summary judgment on the complaint herein is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$278,348.18, together with interest at the rate of 9% per annum from the date of April 23, 2021, until the date of the decision and order on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

<u>4/5/2022</u>			<u>SUZANNE ADAMS, J.S.C.</u>
DATE			
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>
		<input type="checkbox"/> DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>
			<input type="checkbox"/>
			NON-FINAL DISPOSITION
			GRANTED IN PART
			<input type="checkbox"/> OTHER
			SUBMIT ORDER
			FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE