

Lionsgate Fin., Inc. v Simmons
2022 NY Slip Op 34044(U)
November 28, 2022
Supreme Court, New York County
Docket Number: Index No. 652995/2018
Judge: Sabrina Kraus
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. SABRINA KRAUS PART 57TR

Justice

-----X

LIONSGATE FINANCE, INC.

Plaintiff,

- v -

BRADLEY SIMMONS,

Defendant.

-----X

INDEX NO. 652995/2018

MOTION DATE 11/21/2022

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 87, 88, 89, 90, 91, 92, 93, 94

were read on this motion to/for DISCOVERY.

BACKGROUND

Plaintiff is a commercial mortgage broker that earns commissions from borrowers for procuring financing for real estate transactions. Defendant is a Manhattan real estate developer. The parties entered into a Commercial Mortgage Advisory Agreement (the “Agreement”) pursuant to which defendant agreed to pay plaintiff a commission if defendant obtained financing from a lender introduced by plaintiff. Plaintiff brings this action for breach of the Agreement because defendant obtained several financings from Ontario Wealth Management Corporation (the “Lender”) introduced by plaintiff, without advising plaintiff and without paying the required commissions.

Plaintiff alleges that Midtown West 47 St LLC (Midtown) is one of defendant’s real estate companies, and that Midtown took out two loans with Lender on April 25, 2018, in the amounts of \$2.4 million and \$3.6 million (collectively the “Midtown Loans”). Plaintiff alleges it is entitled to commissions for the Midtown Loans.

At his deposition, defendant admitted Midtown took out the Midtown Loans but refused to authenticate the Midtown Loans documents claiming plaintiff needed to get information about from Fang “Kelvin” Zou (Zou), the alleged Managing Member of Midtown. Plaintiff issued a Subpoena to Midtown for documents concerning the Midtown Loans and any other financing for the subject real estate project at 343 West 47th Street from Lender and also for the testimony of Zou. Zou and Midtown failed to respond.

THE PENDING MOTION

On November 21, 2022, plaintiff moved by order to show cause for an order pursuant to CPLR §2308(b), CPLR §3124 and Uniform Civil Rule § 202.7 compelling Midtown to produce documents and testimony responsive to plaintiff’s subpoena *ad testificandum* and *duces tecum* dated April 12, 2022, and related relief.

Defendant filed opposition and Midtown failed to appear. The court heard limited oral argument and reserved decision, allowing movant to submit a reply to the opposition papers, which were filed only minutes before oral argument was held.

For the reasons stated below, the motion is granted.

DISCUSSION

Upon a motion to compel compliance with a non-judicial subpoena, the Court “shall order compliance” if it determines that the subpoena was authorized. CPLR §2308(b); *see also 4720 15th Ave. LLC v. Jacobson*, 2017 ny Slip Op 30318(U). The Subpoena seeks relevant documents and testimony. CPLR §3101(a) requires “full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.” The courts have interpreted this language to “require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial ... [and thus not limited to] evidence directly related to issues in the pleadings.” *Allen v. Crowell-Collier Publishing Co.*, 21 N.Y.2d

403, 406-408 (1968). This is consistent with New York's policy of permitting "open and far-reaching discovery." *Kavanagh v. Ogden Allied Maint. Corp.*, 92 N.Y.2d 952, 954 (1998).

In opposition, defendant seems to argue that discovery from Midtown is not relevant because it is not a defendant, not a party to the subject brokerage Agreement and the Agreement expired. The Agreement provides for a customary tail so that a commission is due for a financing from "Any lenders" introduced by plaintiff "even if a closing takes place after the expiration of this Agreement." Further, defendant agreed not to circumvent the brokerage relationship, which duty is also imposed by common law.

Defendant admits that Midtown entered into two loans with Lender totaling \$6 million -- nine days after formation -- on April 25, 2018. Defendant testified that other than the fact that Zou is the manager of Midtown, defendant did not remember anything else about Midtown or whether it took out the loans. At a subsequent deposition, defendant admitted that he introduced Zou to Mr. Joseph Meerbaum, the principal of plaintiff, plaintiff financed his membership in Midtown with a loan from Lender and Zou is familiar with the documentation of Midtown's loans with Lender.

As defendant refuses to stipulate to the authenticity of the two mortgage loans that Midtown took with Lender, plaintiff is entitled to discovery from Midtown to discover any further loans from Lender and to establish an evidentiary basis for the loan documents.

WHEREFORE it is hereby:

ORDERED that plaintiff's motion to compel is granted; and it is further

ORDERED that Midtown and Fang Kelvin Zou shall produce to plaintiff on or before December 21, 2022, documents responsive to plaintiff's subpoena; and it is further

ORDERED that Fang Kelvin Zou shall, within 30 days from production of the aforesaid documents, appear for deposition, at the office of counsel for plaintiff, on a date and at a time convenient for the parties; and it is further

ORDERED that counsel are directed to appear for a virtual status conference on February 1, 2023, at 12:30 PM;

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied.

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11/28/2022

DATE _____

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

☐ DENIED

X

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

☐ OTHER

REFERENCE