

<b>Mid-Hudson Props. Inc. v Anker</b>
2023 NY Slip Op 30205(U)
January 17, 2023
Supreme Court, New York County
Docket Number: Index No. 654376/2019
Judge: Verna L. Saunders
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. VERNA L. SAUNDERS, JSC

PART 36

*Justice*

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INDEX NO. 654376/2019

MID-HUDSON PROPERTIES INC., 901 PROPERTIES LLC,  
NORTH WHITE PROPERTIES LLC, BRONXVILLE  
PROPERTIES INC. and PROFESSIONAL PROPERTIES LLC,  
Plaintiffs,

MOTION SEQ. NO. 004

- v -

**DECISION + ORDER ON  
MOTION**

MARK ANKER and ANKER MANAGEMENT CORP.,  
Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 51, 52, 53, 54, 55, 56, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69

were read on this motion to/for

SUMMARY JUDGMENT

On August 1, 2019, plaintiffs commenced this action by summons and complaint against defendants, seeking to recover statutory damages under New York State Real Property Law (“RPL”) § 440 and 442 (first cause of action), as well as damages under theories of fraudulent inducement (second cause of action), negligent misrepresentation (third cause of action), breach of fiduciary duty (fourth cause of action), money had and received (fifth cause of action), breach of the implied covenant of good faith and fair dealing (sixth cause of action), conversion (seventh cause of action) and unjust enrichment (eighth cause of action). (NYSCEF Doc. Nos. 1, *summons and complaint*; 45, *amended complaint*).<sup>1</sup>

As alleged in the amended complaint, the parties entered into a contractual agreement for property management services, whereby defendants agreed to undertake the overall management of each of plaintiffs’ properties to provide certain services, including but not limited to, invoicing tenants, collecting rents, paying bills, handling tenant complaints, engaging vendors, entering into agreements for the care and operation of plaintiffs’ properties, inspecting and repairing the properties, in addition to maintaining the properties from 2012 through 2018. Plaintiffs further allege that defendants wrongfully held themselves out as duly accredited and qualified real estate managers when, in fact, they were not licensed as real estate brokers in the State of New York. (NYSCEF Doc. 45 ¶¶ 20-24). Plaintiffs also aver that, insofar as defendants collected rents and engaged in the business of real estate management of plaintiffs’ properties without a license, they violated RPL § 440(a) and 442-e (3). (NYSCEF Doc. No. 45 ¶¶ 18-35).

Defendants filed an answer to the amended complaint on January 31, 2021 (NYSCEF Doc. No. 46, *answer to amended complaint*).

<sup>1</sup> The complaint was amended to correctly name the corporate defendant as ANKER MANAGEMENT CORP. (NYSCEF Doc. No. 41, *decision and order dated December 10, 2020*).

Now, after joinder of issue, plaintiffs move the court, pursuant to CPLR 3212, for partial summary judgment on the issue of liability against defendants, as well as to amend the *ad damnum clause* in the amended complaint to reflect an amount of \$243,077.40. (NYSCEF Doc. Nos. 51, *notice of motion*; 53, *exhibits 1-3 to affidavit in support of motion*).

Defendants oppose the motion and cross-move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. (NYCEF Doc. Nos. 58, *notice of cross-motion*; 59, *affidavit in support of cross-motion and in opposition*). Defendants argue, in sum, that RPL §§ 440 and 442-d, which require that a real estate broker be licensed, are inapplicable where the collection of rent is an incidental responsibility among other duties that do not include brokerage services. (NYSCEF Doc. No. 64, *memorandum of law*).

In reply, plaintiffs reassert that defendants were not licensed as New York real estate brokers under RPL 440 and RPL 442-d and that, based on the prevailing case law, this constitutes a statutory violation warranting summary judgment in this case. (NYCEF Doc. No. 65, *Dweck affidavit*).

In a motion for summary judgment, the movant bears the initial burden of presenting affirmative evidence of its *prima facie* entitlement to summary judgment, producing sufficient evidence to demonstrate the absence of any material issue of fact. (see *Sandoval v Leake & Watts Servs., Inc.*, 192 AD3d 91, 101 [1st Dept 2020]; *Reif v Nagy*, 175 AD3d 107, 124-125 [1st Dept 2019]; *Cole v Homes for the Homeless Inst., Inc.*, 93 AD3d 593, 594 [1st Dept 2012].) “Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution.” (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003].)

Pursuant to CPLR 3212, “a motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit” (CPLR 3212 [b].)

RPL § 440(1) provides:

“Whenever used in this article ‘real estate broker’ means any person, firm, limited liability company or corporation, who, for another and for a fee, commission or other valuable consideration, lists for sale, sells, at auction or otherwise, exchanges, buys or rents, or offers or attempts to negotiate a sale, at auction or otherwise, exchange, purchase or rental of an estate or interest in real estate, *or collects or offers or attempts to collect rent for the use of real estate . . .*” (emphasis added).

RPL 440-a provides, in relevant part:

“No person, co-partnership, limited liability company or corporation shall engage in or follow the business or occupation of, or hold himself or itself out or act temporarily or

otherwise as a real estate broker or real estate salesman in this state without first procuring a license therefore as provided in this article.”

RPL § 442-d provides that “[n]o person . . . shall bring or maintain an action in any court of this state for the recovery of compensation for services rendered . . . in the buying, selling, exchanging, leasing, renting or negotiating a loan upon any real estate without alleging and proving that such person was a duly licensed real estate broker or real estate salesman on the date when the alleged cause of action arose.”

RPL § 442-e (3) provides that

“In case the offender shall have received any sum of money as commission, compensation or profit by or in consequence of his violation of any provision of this article, he shall also be liable to a penalty of not less than the amount of the sum of money received by him as such commission, compensation or profit and not more than four times the sum so received by him, as may be determined by the court, which penalty may be sued for and recovered by any person aggrieved and for his use and benefit, in any court of competent jurisdiction.”

Here, plaintiffs’ motion for summary judgment is denied. Defendants submit deposition testimony from a separate matter wherein Anker described defendants’ involvement with plaintiffs’ properties as that of a property manager with duties to act as a superintendent, inspect properties, pay utility bills, handle complaints, maintain monthly reports, pay invoices, and collect rents, while never holding himself out to be a licensed broker, never collecting security deposits or performing services of real estate brokers (NYSCEF Doc. Nos. 60, *examination before trial Anker May 31, 2018*; 61, *examination before trial Anker June 5, 2019*; 62 *Nov 15 monthly report for 901 Properties*; 63 *email sampling*). Furthermore, defendants maintain that plaintiffs’ representative, Mr. Dweck, separately handled and hired broker services. Insofar as defendants have raised an issue of fact that its services included a myriad of duties, which were incidental to the collection of rent, plaintiffs’ motion for partial summary judgment on the issue of liability is denied. (*Zedeck v Derfner Mgmt. Inc.*, 106 AD3d 465, 465 [1st Dept 2013] [“The statute is inapplicable where the collection of rent is incidental to responsibilities which fall outside the scope [of] brokerage services”]; see *Herson v Troon Mgt., Inc.*, 58 AD3d 403, 403 [1st Dept. 2009]; *Garber v Stevens*, 94 AD3d 426, 427 [1st Dept. 2012].)

Plaintiffs’ motion is granted solely to the extent it seeks to amend the *ad damnum* of the amended complaint to reflect \$243,077.40.

Defendants’ cross-motion is also denied since, as discussed above, issues of fact remain with respect to defendants’ duties and responsibilities. Moreover, defendants failed to file a statement of facts, as required by CPLR 3212. All other arguments have been reviewed by this court and are either without merit or need not be addressed given the findings above. Accordingly, it is hereby

**ORDERED** that plaintiff's motion, to the extent it seeks partial summary judgment, pursuant to CPLR 3212, against defendants on liability, is denied; and it is further

**ORDERED** that plaintiffs' motion is granted solely to the extent it seeks to amend the complaint; and it is further

**ORDERED** that defendants' cross-motion is denied; and it is further

**ORDERED** that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiffs shall serve a copy of this decision and order, with notice of entry, upon all parties in this proceeding, in addition to the Clerk of the Court; and it is further

**ORDERED** that service upon the Clerk of the Court shall be made in accordance with 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/suptctmanh](http://www.nycourts.gov/suptctmanh).

This constitutes the decision and order of this court.

January 17, 2023

  
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HON. VERNA L. SAUNDERS, JSC

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