

Brunello Realty, Ltd v 560 Seventh Ave. Owner Primary LLC

2023 NY Slip Op 30495(U)

February 16, 2023

Supreme Court, New York County

Docket Number: Index No. 652006/2022

Judge: Arlene P. Bluth

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

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

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BRUNELLO REALTY, LTD,

Plaintiff,

- v -

560 SEVENTH AVENUE OWNER PRIMARY LLC,U.S.
SPECIALITY INSURANCE COMPANY

Defendant.

-----X

INDEX NO. 652006/2022

MOTION DATE 02/14/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57

were read on this motion to/for SUMMARY JUDGMENT.

Plaintiff's motion for summary judgment is denied.

Background

Plaintiff contends that it entered into a commission agreement with defendant 560 Seventh Avenue Owner Primary LLC ("560") in February 2019. Under the agreement, plaintiff (a real estate broker) agreed to procure tenants in a building owned by 560. It claims that it found a tenant and that 560 only made partial payments towards the commission owed to plaintiff. Plaintiff maintains that at least \$350,000 remains outstanding. It now moves for summary judgment on its causes of action for breach of contract, foreclosure of the mechanic's lien it filed, account stated, and discharge of the mechanic's lien bond issued by defendant U.S. Specialty Insurance Company.

In opposition, defendant 560 claims that the tenant for which plaintiff seeks a commission was for a Jimmy Buffet Margaritaville location in Times Square. It explains that it

entered into an exclusive management, leasing, and brokerage agreement with another real estate broker, MHP. 560 acknowledges that MHP was introduced to Margaritaville as a potential tenant by plaintiff. The lease agreement between 560 and Margaritaville states that a commission was to be paid by 560 to both MHP and plaintiff in accordance with a separate agreement among these three parties.

560 claims that no such agreement was ever executed and that it initially paid MHP \$300,000 and plaintiff \$400,000 as commission. 560 argues that plaintiff, in this lawsuit, is seeking the full amount of the commission that should go to both MHP and plaintiff. It emphasizes that plaintiff is certainly entitled to a commission but that it has already been paid more than it was entitled to receive. 560 maintains that plaintiff's motion relies upon an unsigned commission agreement that was never executed by 560.

560 contends that it eventually paid plaintiff \$960,000 through August 2020 in an attempt to dissuade plaintiff from filing a mechanic's lien although plaintiff did it anyway. It admits it paid another \$15,000 to plaintiff the same day the lien was filed.

In reply, plaintiff emphasizes that 560 admits it made 30 partial payments and cannot now argue that it overpaid plaintiff. It observes that it was not a party to any agreement with MHP and so that has no relevance on the instant motion.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers

(id.). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

The Court begins its analysis with the lease agreement—the agreement that required 560 to pay a broker's commission to both plaintiff and MHP. This agreement states that “Tenant represents and warrants that it has not retained or otherwise dealt with any broker or finder with regard to the Demised Premises other than Brunello Realty Ltd. and MHP Real Estate Services (collectively, the "Brokers"). Landlord shall pay any commission which shall be due to Brokers pursuant to a separate agreement to be negotiated by Landlord and Brokers” (NYSCEF Doc. No. 36, ¶ 9.01). Obviously, it was in the lease to clarify that the landlord (560) was responsible for the brokers' fees and the tenant verified who the brokers were. For purposes of the current litigation, the key part of this provision is, clearly, that there should be a separate agreement between 560 and the brokers to determine the amount of the commission.

The Court finds that 560 raised a material issue of fact and denies the motion because plaintiff failed to submit a signed and executed agreement in connection with the lease for Margaritaville. The Court recognizes that 560 admits that plaintiff should get a broker's fee; but 560 claims it paid plaintiff all it was entitled to receive and that it never entered into the agreement specifically contemplated by the lease concerning the commission. And the agreement uploaded by plaintiff (NYSCEF Doc. No. 2) is not signed by 560.

The Court cannot bind 560 to an agreement it did not sign at this stage of the case. Plaintiff's various other arguments, of which there are many, all arise from its assertion that it entered into a binding agreement with 560 and that 560 did not pay the commission required under that agreement. But plaintiff failed to submit whatever constitutes a "binding agreement" on this motion. In other words, without a valid agreement, there is no basis upon which this Court could grant the motion. Plus, discovery has not started (the RJI was filed in connection with the motion). Simply put, there are too many unanswered questions about the relationship and the provisions of any agreement between plaintiff, MHP and 560.

The Court will overlook any procedural miscues by plaintiff (it did not include a statement of material facts). However, the Court declines to dismiss any causes of action (as requested by 560) because defendant failed to make a cross-motion for such relief.

Summary

Although 560 admits that plaintiff was a co-broker for the subject lease and a commission was due, the exact amount owed to plaintiff is an issue of fact. Although plaintiff received payments from 560, plaintiff did not show, as a matter of law, that it is entitled to recover more. As 560 observes, it made certain payments as part of an effort to complete a project at the premises (according to 560, it wanted to avoid a lien on the property). And 560 claims that it

eventually rejected the invoices it was receiving from plaintiff. That raises a material issue of fact for the account stated claim; of course, an account stated claim requires some sort of agreement between the parties and, as stated above, the Court has not yet made a determination.

It is unclear exactly what occurred or why 560 paid two brokers over a million dollars (in total) when, at least on these papers, it failed to memorialize the agreement specifically mentioned in the Margaritaville lease. Presumably, that agreement would have stated how much each broker (plaintiff and MHP) was due. At this stage of the case, discovery is required to explore, among many issues, exactly what happened after (or before) the lease was executed and why 560 started making payments. But from the papers submitted, plaintiff has failed to make a prima facie case how much it was entitled to receive for its role in co-brokering the lease.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is denied.

Conference: June 6, 2023 at 11:00 a.m. By May 30, 2023, the parties are directed to upload 1) a discovery stipulation signed by all parties, 2) a stipulation of partial agreement that identifies the areas in dispute concerning discovery or 3) letters explaining why no agreement could be reached. Based on these submissions, the Court will assess whether an in-person conference is required. The failure to upload anything will result in an adjournment of the conference.

2/16/2023
DATE


ARLENE P. BLUTH, J.S.C.

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