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| <b>Winick Realty Group LLC v 756 Myrtle Ave LLC</b>                                                                                                                                                                            |
| 2023 NY Slip Op 32092(U)                                                                                                                                                                                                       |
| June 21, 2023                                                                                                                                                                                                                  |
| Supreme Court, New York County                                                                                                                                                                                                 |
| Docket Number: Index No. 651621/2020                                                                                                                                                                                           |
| Judge: Debra A. James                                                                                                                                                                                                          |
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| This opinion is uncorrected and not selected for official publication.                                                                                                                                                         |

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

PRESENT: HON. DEBRA A. JAMES

PART 59

*Justice*

-----X

WINICK REALTY GROUP LLC,

Plaintiff,

- v -

756 MYRTLE AVE LLC, TL MYRTLE LLC, and MS MYRTLE  
LLC,

Defendants.

-----X

INDEX NO. 651621/2020MOTION DATE 06/21/2023MOTION SEQ. NO. 002

## DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50

were read on this motion to/for

DISMISSAL

### ORDER

Upon the foregoing documents, it is

ORDERED that to the extent that it seeks dismissal of the complaint against defendants TL Myrtle LLC and MS Myrtle LLC, the motion of defendants for summary judgment pursuant to CPLR 3211(a)(1) and (7) is GRANTED and the complaint is dismissed in its entirety as against such defendants, with costs and disbursements to such defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of such defendants; and it is further

ORDERED that the action is severed and continued against the remaining defendant; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office 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); and it is further

ORDERED that to the extent that it seeks dismissal of the as to the second (unjust enrichment) and third (quantum meruit) causes of action complaint against defendant 765 Myrtle Ave LLC, the motion of defendants is GRANTED; and it is further

ORDERED that as to dismissal of the first cause of action (breach of contract) of the complaint against defendant 765 Myrtle Ave LLC, the motion of defendants is DENIED; and it is further

ORDERED that counsel are directed to post on NYSCEF a proposed preliminary discovery conference order or competing proposed preliminary discovery conference order(s) at least two

days before August 17, 2023, on which date counsel shall appear via Microsoft Teams, unless such appearance be waived by the court.

DECISION

The Commission Agreement dated December 18, 2007 (NYSCEF Document Number 34), which defendants annex to their moving papers, states, in pertinent part:

"6. If Landlord sells the Premises prior to Broker being paid its entire Commission, including, without limitation, any Commission on unexercised Options, then notwithstanding anything contained herein to the contrary, the unpaid amount of the Commission including that which is payable with respect to an Option shall be due and payable immediately upon the closing of such sale, **unless the purchaser of such property assumes, by separate written agreement, the obligations of Landlord hereunder.**"

Emphasis supplied.

As for defendants TL Myrtle LLC and MS Myrtle LLC, this court concurs that such defendants have prima facie established an absence of any written "affirmative assumption" of liability for the brokerage commission owed by non-party Myrtle Avenue LLC to plaintiff under the subject Commission Agreement dated December 18, 2007 (NYSCEF Document Number 34). See Wharton Associates, Inc. v Continental Indus Capital LLC, 137 AD3d 1753, 1754 (4<sup>th</sup> Dept 2016). Nor has plaintiff sufficiently pled causes of action for either unjust enrichment or quantum meruit against such

defendants. See Georgia Malone & Co, Inc v Rieder, 86 AD3d 406, 408 (1<sup>st</sup> Dept 2011):

"'pleadings failed to indicate a relationship between the parties that could have caused reliance or inducement'. . .

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In order to establish a quantum meruit claim, plaintiff must show 'the performance of services in good faith, acceptance of the services by the person to whom they were rendered, an expectation of compensation therefor, and the reasonable value of the services'".

Therefore, as the complaint inadequately pleads unjust enrichment or quantum meruit against defendants TL Myrtle LLC and MS Myrtle LLC, such defendants are entitled to summary dismissal of the complaint, in its entirety, against them.

Article 41 of the Lease dated December 14, 2007 (NYSCEF Document Number 40) (Lease), which defendants append to their moving papers, provides, in pertinent part:

"Broker. Owner and Tenant represent and warrant to each other that they have not had any dealings with any real estate brokers or agents in connection with the negotiation of this Lease, except for Winick Realty Group LLC (the "Broker"). Owner agrees to pay a commission to the Broker in accordance with a separate agreement between Owner and the Broker and further agrees to indemnify Tenant for all claims and demands made by the Broker."

Defendants, for the first time in reply in further support of their motion, submit the Purchase Agreement dated May 6, 2016 between non-party Myrtle Place LLC, as seller, and defendant 765 Myrtle Ave LLC, as purchaser (NYSCEF Document Number 48). This court holds that plaintiff's argument with respect to the terms of

such Purchase Agreement is permitted, and concurs with plaintiff that such Agreement raises an issue of fact whether defendant 765 Myrtle Ave LLC assumed responsibility for the payment of the subject brokerage commission under the Commission Agreement. Appended to such Purchase Agreement is an Assignment and Assumption of Landlord's Interest in Leases (NYSCEF Document Number 48, page 53), which states, in pertinent part:

"Assignee hereby assumes the performance of all of the terms, covenants and conditions of the Leases on, from and after the date hereof, all with the full force and effect as if Assignee had signed the Leases originally as the landlord named therein".

Such document, a signed copy of which plaintiff would be entitled to seek in discovery, constitutes some evidence that defendant 765 Myrtle Ave LLC assumed the obligation to pay the outstanding brokerage agreement, as assignee under the Lease. However, for the same reasons as stated above with respect to the now dismissed co-defendants, neither the cause of action for unjust enrichment nor the cause of action for quantum meruit as against defendant 765 Myrtle Ave LLC are sufficiently pled, and therefore, shall be dismissed.

*Debra A. James*

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6/21/2023

DATE

CHECK ONE:

☐

CASE DISPOSED

☐

GRANTED

☐

DENIED

☒

NON-FINAL DISPOSITION

☒

GRANTED IN PART

☐

OTHER

APPLICATION:

☐

SETTLE ORDER

☐

SUBMIT ORDER

CHECK IF APPROPRIATE:

☐

INCLUDES TRANSFER/REASSIGN

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE