

**Avison Young-N.Y., LLC v 459 W 50 St LLC**

2023 NY Slip Op 32368(U)

July 11, 2023

Supreme Court, New York County

Docket Number: Index No. 653521/2022

Judge: Lyle E. Frank

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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. LYLE E. FRANK PART 11M

Justice

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INDEX NO. 653521/2022

AVISON YOUNG - NEW YORK, LLC,

MOTION DATE 04/12/2023

Plaintiff,

MOTION SEQ. NO. 001

- v -

459 W 50 ST LLC, 182 STANTON LLC, CROMAN REAL ESTATE, INC.

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 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

This action arises out of an alleged breach of contract<sup>1</sup>. Plaintiff Avison Young LLC (hereinafter "Avison Young" or "plaintiff") moves pursuant to CPLR § 3212 for summary judgment on its breach of contract claim against defendants 459 W 50 ST LLC and 182 Stanton LLC (hereinafter "owners" or "defendants")<sup>2</sup>, alleging that defendants failed to pay plaintiff the requisite commissions due under the contract. Defendants oppose the instant motion. For the reasons set forth below, plaintiff's motion for summary judgment is granted.

Factual Background

Plaintiff Avison Young contracted with defendants that plaintiff would be the exclusive agent for the sale of four properties: 336 East 18th Street, 459 West 50th Street, 766 Tenth Avenue, and 145 Attorney Street. See NYSCEF Doc. 18. Pursuant to the contract, plaintiff was owed a commission for each sale based on a tiered rate structure; being owed 3% on the first

1 The Court would like to thank Bani Bedi for her assistance in this matter.

2 The matter has been discontinued, by stipulation, as against defendant Croman Real Estate, Inc, see NYSCEF Doc. 5.

\$10,000,000, 2% on the amount between \$10,000,000 and \$20,000,000, and 1% on excess amounts above \$20,000,000. *Id.*

The Attorney Street property was sold on behalf of 182 Stanton LLC for \$21,250,000, for which plaintiff contends that it was owed \$512,500.00, of which defendants paid only \$212,500.00. Then 459 W 50th LLC sold the West 50th Street property for \$7,700,000, for which plaintiff contends that it was owed \$231,000.00. Plaintiff was paid \$77,000. For both sales defendants paid only 1% of the sale price. Avison Young thus alleges a balance of \$454,000.00 is due.

#### Summary Judgment Standard

The proponent of a summary judgment motion must make 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. CPLR § 3212. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 322 [1986].

#### Discussion

To state a claim for breach of contract, a plaintiff must allege: (1) the parties entered into a valid agreement, (2) plaintiff performed, (3) defendant failed to perform, and (4) damages. *VisionChina Media Inc. v Shareholder Representative Servs., LLC*, 109 AD3d 49, 58 [1st Dept 2013].

As to the first cause of action, the court finds that plaintiff has established its entitlement to judgment as a matter of law and defendant has failed to raise a triable issue of fact. Neither side contests the validity of the contract. The plain terms of the contract exhibit a prima facie breach of contract case. First, section 8 of the contract says: "If during the Term, Owner sells all or any interest in the Property through any means, Owner will pay to [Avison Young] a commission computed in accordance with this Agreement." Exclusive Right to Sell Agreement NYSCEF Doc. 18. Defendants have breached the contract by failing to pay plaintiff in accordance with the determined commission structure.

This Court is further satisfied that the language of the contract repeatedly supports the plaintiff's interpretation of the tiered commission structure applying to the sale of any of the four properties. According to the defendants, the inclusion of the word "gross" in establishing the basis for plaintiff's commission necessarily shows that the tiered commission structure was only applicable to the sale of collective properties. Hence, they argue that plaintiff did not sell all four properties and thus is only entitled to a 1% commission. However, under Section 2 of the Commissions Schedule in the contract, "Gross Sale Price" included "any mortgages, loans or other obligations of Owner which may be assumed by Purchaser or which Purchaser takes title 'subject to,' and any purchase money loans, or mortgages taken back by Owner." NYSCEF Doc. 18. The word 'gross' is clearly in reference to the inclusion of loans and mortgages, not to multiple properties.


Plaintiff also points out that the contract defines each of the four properties covered by the agreement individually as a "Property" and collectively as the "Properties." Section 8 of the agreement also provides that defendants would pay commissions "at closing upon delivery of a deed or other instrument of conveyance." NYSCEF Doc. 18. Thus, the commissions were due at

the end of each sale, not all the sales. The Commissions Schedule additionally provides that plaintiff "will be paid commissions on sale transactions", plural, implying multiple individual transactions, not one transaction of all four properties. *Id.* Significantly, section 21 has a merger clause barring any alleged oral agreements outside of the parties' written agreement. *Id.* The Court finds that the plain meaning of the contract clearly exhibits that the parties contracted for a tiered payment structure in case of the sale of any of the four properties.

Next, the Court agrees with plaintiff that defendants' affirmative defenses are inadequate. Moreover, the Court finds that defendants have failed to raise a triable issue of a fact. The defendants' second, fourth, and fifth defenses involve acceptance of payment by plaintiff, doctrine of accord and satisfaction, and waiver of contract due to acceptance. Defendants claim that the plaintiff is not entitled to tiered commission because plaintiff accepted and approved payment of the 1% commission. However, the Court rejects those arguments and as stated above the Court is satisfied that the above-mentioned language of the contract is unambiguous, and the defendants thus breached the contract to pay the plaintiff a tiered commission upon sale of any of the four properties. Furthermore, defendants have failed to exhibit evidentiary proof for the existence of triable material issues of fact. Based on the foregoing, it is hereby

ORDERED that the plaintiff's motion for summary judgment is granted; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff and as against defendants in the amount of \$454,000.00.

**HON. LYLE E. FRANK**  
J.S.C.  
  
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LYLE E. FRANK, J.S.C.

7/11/2023  
DATE

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