

**Besen Partners LLC v 36 W. 128th, LLC**

2023 NY Slip Op 34084(U)

November 16, 2023

Supreme Court, New York County

Docket Number: Index No. 652043/2022

Judge: Arlene P. Bluth

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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. ARLENE P. BLUTH **PART** **14**

*Justice*

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BESEN PARTNERS LLC

Plaintiff,

- v -

36 WEST 128TH, LLC,

Defendant.

-----X

**INDEX NO.** 652043/2022

**MOTION DATE** 11/15/2023

**MOTION SEQ. NO.** 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 53, 54, 55, 56, 57, 58, 64, 65, 66, 67, 68

were read on this motion to/for DISCOVERY.

Plaintiff’s motion to compel defendant to produce documents is denied.

**Background**

This action concerns a dispute about a broker’s commission. Plaintiff is a real estate broker and insists that defendant cheated it out of a commission related to the sale of a building owned by defendant.

In this motion, plaintiff seeks the production of monthly account statements from defendant’s bank account that show defendant’s receipt of the proceeds from the sale of the property and defendant’s transfer of those proceeds to its principal (Sean Tyroler). It also seeks documents about the distribution of the funds from defendant to Mr. Tyroler after the closing for the sale of the property.

Plaintiff insists that these requests are narrowly tailored as it would require the production of only a few account statements and possibly some other documents if defendant

paid Mr. Tyroler by check or wire transfer. Plaintiff emphasizes that defendant testified that it has a single bank account. It explains that this information is relevant because it could lead to the discovery of relevant documents, specifically, the distribution of the funds from the sale and whether plaintiff might need to include additional defendants to recover its broker fee.

In opposition, defendant insists that there are multiple reasons to deny the instant motion. It complains that the requests are overly broad because they demand “all” and “any” documents and one document request is not limited in time. It also argues that these requests are irrelevant to defendant’s claims. Defendant argues that the records plaintiff seeks are not material and necessary.

Defendant insists that plaintiff’s potential damages are clear—the agreement between the parties (which defendant refers to as an “alleged” contract) would entitle plaintiff to five percent commission of the purchase price. Defendant readily points out that the purchase price was \$3.675 million and so the only question remaining is whether plaintiff is entitled to five percent of that amount.

In reply, plaintiff argues that the bank account statements are relevant to show how much defendant actually received in the transaction and when it received it.

## **Discussion**

“Disclosure in civil actions is generally governed by CPLR 3101(a), which directs: ‘[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.’ We have emphasized that the words, ‘material and necessary’, are ... to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and

reducing delay and prolixity. The test is one of usefulness and reason. A party seeking discovery must satisfy the threshold requirement that the request is reasonably calculated to yield information that is ‘material and necessary’—i.e., relevant” (*Forman v Henkin*, 30 NY3d 656, 661, 70 NY3d 157 [2018]).

The Court’s central focus on this motion is relevance, particularly whether the documents requested relate to plaintiff’s causes of action. Plaintiff’s theory in this case is that it was entitled to recover a commission pursuant to an exclusive right to sell agreement. This agreement (NYSCEF Doc. No. 2) entitled plaintiff to recover a five percent commission based on the purchase price of the property if certain conditions were met.

This means that the main issues in this case are the amount of the purchase price and whether the conditions were satisfied to entitle plaintiff to receive the commission. The Court denies the motion because defendant insists that the purchase price was \$3.675 million and attaches documents, such as the real property transfer report, to substantiate this amount (*see* NYSCEF Doc. No. 66). And plaintiff did not raise a sufficient concern in reply to question that amount. Put another way, discovery about where the proceeds may have been transferred has no relevance, in this Court’s view, to any element that plaintiff might need to prove.

The Court observes that questions about how defendant distributed the proceeds might be relevant if plaintiff were to prevail in this case and defendant were unable to satisfy the judgment. But at this stage of the case, before liability has been determined, the Court finds that this request is not material or relevant because defendant concedes the amount of the purchase price and plaintiff claims it is entitled to 5% of the purchase price. The rest of this case will be whether plaintiff met the conditions entitling it to that 5%.

Accordingly, it is hereby

ORDERED that plaintiff's motion to compel is denied.

See NYSCEF Doc. No. 52 concerning the next conference.

11/16/2023

DATE



ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE