

**Macklowe Inv. Props. LLC v MIP 57th Dev.
Acquisition LLC**

2024 NY Slip Op 33350(U)

September 23, 2024

Supreme Court, New York County

Docket Number: Index No. 656919/2021

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

-----X

MACKLOWE INVESTMENT PROPERTIES LLC,

Plaintiff,

- v -

MIP 57TH DEVELOPMENT ACQUISITION LLC, NEW YORK
MEDICAL INVESTORS LLC, 432 PARK PROPERTIES, INC.

Defendant.

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INDEX NO. 656919/2021

MOTION DATE 05/15/2024,
05/15/2024

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 98, 99

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 85

were read on this motion to/for JUDGMENT - SUMMARY.

This action arises out of allegations of breach of contract. Plaintiff now moves for summary judgment, motion sequence 001, on its breach of contract, breach of the covenant of good faith and fair dealing, and unjust enrichment causes of action. Defendants oppose the motion and move separately, motion sequence 002, for summary judgment dismissing the complaint in its entirety. For the reasons set forth below, plaintiff’s motion for summary judgment is denied and defendant’s motion for summary judgment is granted.

Background

Plaintiff, a licensed real estate brokerage office, and defendants entered into a development management agreement and a property management agreement. Defendant, MIP 57th Development Acquisition, LLC (“MIP Acquisition”) is the owner of the retail and garage portions of certain real property located at 432 Park Avenue, New York, NY. Defendant, MIP Acquisition

is also the owner of the adjoining real property located at 36 East 57th Street, New York, NY, as successor by merger to defendant NY Medical Investors, LLC. Defendant, 432 Park Properties Inc., together with defendants MIP Acquisition and NY Medical, hold an ownership interest in MIP 57th Development Holding, LLC, which owns MIP Acquisition.

On April 7, 2017, the parties entered into a letter agreement that specified rights and obligations of each party and is a valid and enforceable contract. On December 7, 2018, Phillips entered into a lease agreement (“Lease”) with MIP Acquisition to lease certain retail space located at the Property. Pursuant to the lease, Phillips agreed to pay MIP Acquisition \$121,642,500 in rent over the course of a 15-year term.

On January 16, 2019, plaintiff sent defendants an invoice for the leasing commission that it calculated at \$3,282,622.00. Defendants disagree with plaintiff’s calculation; thus no commission has been paid.

Summary Judgment Standard

It is a well-established principle that the “function of summary judgment is issue finding, not issue determination.” *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 [1st Dept 1989]. As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320, 501 [1986]; *Winegrad v New York University Medical Center*, 64 NY 2d 851 [1985]. Courts have also recognized that summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted.

Discussion

In support of its motion for summary judgment, plaintiff contends that defendants have refused to pay the standard New York City commission rate for the tenant it procured for the property. Plaintiff contends that it is undisputed that it performed pursuant to the contract, nevertheless defendants have failed to pay the commission due.

In opposition and in support of its own motion for summary judgment, defendants contend that plaintiff has failed to satisfy a condition precedent pursuant to the agreement, thus plaintiff's claims are not yet ripe.

Preliminarily plaintiff does not oppose the portion of defendants' motion seeking dismissal of the third cause of action, unjust enrichment and dismissal of the complaint as against defendants NY Medical and 432 Park Properties, those portions of the defendants motion are granted without opposition.

Both parties rely on section 5 of the agreement, NYSCEF Doc. 22, entitled "leasing commissions", and provides in relevant part

Macklowe Broker shall be entitled to receive a standard New York City commission rate with respect to any final lease agreement executed by Phillips de Pury / Mercury Group ("Phillips") subject to the terms of this Section 5. Macklowe Broker's right to receive any Leasing Commission pursuant to this Section 5 with respect to any final lease agreement executed by Phillips shall terminate upon the date that is three (3) years following the date hereof Notwithstanding anything to the contrary herein, in no event shall Macklowe Broker or any Affiliate of Macklowe Broker . . . (ii) be paid any leasing commission pursuant to this Section 5 unless, (a) Macklowe Broker has executed an industry-standard leasing commission agreement in form and substance reasonably satisfactory to Owner pursuant to which Macklowe Broker shall provide customary representations and warranties and, solely with respect to Phillips and any Recommended Tenant, shall indemnify Owner from any and all claims from any other brokers (except any brokers engaged by Owner) for leasing commissions arising from such broker's negotiations with tenant and/or Macklowe Broker in connection with the applicable lease

During oral argument, plaintiff averred that providing defendants with the requisite industry-standard leasing commission agreement would be futile as it was already made evident that defendants position was that plaintiff was not entitled to the amount it sought. The Court is not persuaded by plaintiff’s argument that requiring plaintiff to comply with the terms of the agreement would be futile, nor is the Court convinced that defendants waived its right to the executed leasing commission agreement identified in the underlying agreement.

Defendants have established, and plaintiff has not refuted, that it has failed to satisfy a condition precedent, thus defendants have established a prima facie entitlement to judgment as a matter of law.

The Court has reviewed plaintiff’s remaining contentions and finds the unavailing. Accordingly, it is hereby

ORDERED that the complaint is dismissed in its entirety.

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9/23/2024
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED		
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED

<input type="checkbox"/>	NON-FINAL DISPOSITION		
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN

<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	FIDUCIARY APPOINTMENT
<input type="checkbox"/>	REFERENCE

CHECK IF APPROPRIATE: