1 of 1 DOCUMENT

[*1] Sutton & Edwards, Inc., Plaintiff, against 68-60 Austin Street Realty Corp. a/k/a 68-60 Austin Street Corp. And Ilya Mikhailov, Defendants.

141-07

SUPREME COURT OF NEW YORK, NASSAU COUNTY

2008 NY Slip Op 51181U; 20 Misc. 3d 1101A; 2008 N.Y. Misc. LEXIS 3389; 239 N.Y.L.J. 123

June 11, 2008, Decided

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

HEADNOTES

[**1101A] Brokers--Real Estate Brokers--Commission.

COUNSEL: [***1] For Plaintiff: Westerman Ball Ederer Miller & Sharfstein, LLP, Mineola, NY.

For Defendant: Baram & Kaiser, Esqs., Garden City, NY.

JUDGES: Hon. Leonard B. Austin, J.S.C.

OPINION BY: Leonard B. Austin

OPINION

Leonard B. Austin, J.

Before the Court are a motion and cross-motion with respect to a claimed real estate brokerage commission for the lease of two floors at 68-60 Austin Street, Forest Hills, New York.

[*2] The complaint alleges three causes of action. The first is a breach of contract by Defendants 68-60 Austin Street Realty Corp. ("Realty") and Ilya Mikhailov ("Mikhailov"). The second claims breach of a personal guaranty of the obligations of Realty by Mikhailov. The third seeks payment on the basis of *quantum meruit*. The answer denies the obligation of the Defendants to pay a brokerage commission, and interposes six affirmative defenses.

Plaintiff seeks summary judgment on its first cause of action against Realty or, in the alternative, summary judgment on its third cause of action against both Defendants.

The Defendants cross-move for summary judgment dismissing the complaint against Mikhailov on the grounds that *General Obligations Law § 5-701(a)(2)* requires that an agreement to answer for the debt, default, [***2] or miscarriage of another requires a writing signed by the party to be charged.

BACKGROUND

Mikhailov is a principal of Realty, the owner of an office building at 68-60 Austin Street, Forest Hills, New York ("Premises"). In mid-2006, a medical tenant vacated approximately 10,800 square feet covering two floors of the Premises.

Plaintiff claims that Darren Leiderman ("Leiderman") of its office was contacted by Walter Check ("Check"), a representative of North Shore-LIJ Health System, Inc./North Shore Community Services, Inc. ("North Shore"), an arm of the North Shore-Long Island Jewish Health System. The purpose of the contact was to obtain assistance in locating medical office space in the Forest Hills area.

Leiderman canvassed the available space in Forest Hills and advised Check of a number of potential locations, including the Premises owned by Realty. Leiderman had numerous contacts with Mikhailov and showed the space to representatives of North Shore. His efforts eventually resulted in the signing of a lease agreement on December 7, 2006 ("Lease"). The Rider to the Lease provided in part, "(O)wner [Realty] represents that it has dealt with no broker in connection with this lease other [***3] than Sutton & Edwards, Inc. and Owner agrees to pay any fees or commissions due to Sutton & Edwards, Inc. or any other broker with whom owner has dealt in connection with this lease" (P44-A) (Emphasis added).

Mikhailov signed the Lease as a representative of Realty, the owner of the Premises.

The Defendants contend that the Lease with North Shore was not procured as a result of the efforts of the Plaintiff. Rather, they claim it was through the intervention of another tenant in the building, Mridula Noori, M.D., who knew personnel at North Shore who might be interested in the Premises. In an affidavit in support of the cross-motion, Mikhailov states that, in December 2005, at a holiday party in Dr. Noori's office, he met Robert Hattenbach, the president of Forest Hills Hospital, an affiliate of North Shore-LIJ Health Care System, who advised him that North Shore required space for its MRI machines. He claims to have been contacted by North Shore in the summer of 2006, before any involvement by Leiderman, and that, on a number of occasions, representatives of North Shore came to inspect the Premises.

In support of this position, the Defendants have submitted Dr. Noori's affidavit sworn [***4] to on March 27, 2007. In it she states, in language which appears to be that of Mikhailov, that she was approached by her landlord (Mikhailov) in mid-June with respect to vacant space which he sought to lease. She further averred that she contacted [*3] former associates at North Shore and was involved in all negotiations between the parties, as opposed to real estate brokers, who were not. In a subsequent affidavit of December 5, 2007, Dr. Noori retracted and disavowed her earlier statements, and denies any involvement in contacting North Shore, or introducing Mikhailov to Hattenbach or anyone else.

The Lease and Rider were drafted by Michael Mikhailov, Esq., the son of Mikhailov. The Rider, containing P 44-A (Brokerage), was e-mailed to counsel for North Shore on November 21, 2006. This document does not contain the language to the effect that the owner agreed to pay a brokerage commission to Sutton & Edwards pursuant to a separate agreement. In his deposition, Mikhailov's son confirmed that he did not draft that portion of the paragraph which contained an agreement to pay Sutton & Edwards.

Plaintiff mailed two brokerage agreements to the Defendants, one dated on October 13, 2006 and the [***5] other on November 30, 2006. The first was for $ 132,503.39 and the second for $ 48,000. Counsel for Plaintiff argues that the latter was an effort to resolve the matter by settlement. Neither was executed. Plaintiff seeks to recover on the basis of an oral agreement and Rider P 44-A.

LEGAL PRINCIPLES

A. Summary Judgment

When presented with a motion for summary judgment, the function of a court is "not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of material issues of fact." *Quinn v. Krumland, 179 AD2d 448, 449-450, 577 N.Y.S.2d 868, (1st Dept. 1992)*. See also, *S.J. Capelin Assoc., Inc. v. Globe Mfg. Corp., 34 NY2d 338, 343, 313 N.E.2d 776, 357 N.Y.S.2d 478 (1974)*.

To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. *Matter of Suffolk County Dept. of Social Services v. James M., 83 NY2d 178, 630 N.E.2d 636, 608 N.Y.S.2d 940 (1994)*; *Stillman v. Twentieth Century-Fox Corp., 3 NY2d 395, 404, 144 N.E.2d 387, 165 N.Y.S.2d 498 (1957)*. It is a drastic remedy -- the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue. *Freese v. Schwartz, 203 AD2d 513, 611 N.Y.S.2d 37 (2nd Dept. 1994)*; and *Miceli v. Purex Corp., 84 AD2d 562, 443 N.Y.S.2d 269 (2nd Dept. 1984)*.

The [***6] evidence will be considered in a light most favorable to the opposing party, and the proof submitted in opposition will be accepted as true and all reasonable inferences drawn in favor of the opposing party. *Negri v. Stop and Shop, Inc., 65 NY2d 625, 480 N.E.2d 740, 491 N.Y.S.2d 151 (1985)*; and *Louniakov v. M.R.O.D. Realty Corp., 282 AD2d 657, 724 N.Y.S.2d 70 (2nd Dept. 2001)*. But this rule will not be applied where the opposition is evasive or indirect. The opposing party is obligated to come forward and bare his proof, by affidavit of an individual with personal knowledge, or with an attorney's affirmation to which appended material in admissible form, and the failure to do so may lead the court to believe that there is no triable issue of fact. *Zuckerman v. City of New York, 49 NY2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980)*.

The failure of the opposing party to respond to a motion for summary judgment does not mandate the granting summary judgment. The movant is still required to make the necessary showing that there is no issue of fact and that the movant is entitled to judgment as a matter of law. *Liberty Taxi Mgt., Inc. v. Gincherman, 32 AD3d 276, 820 N.Y.S.2d 49 (1st Dept. 2006)*.

[*4] B. Statute of Frauds

The Statute of Frauds is codified in *General Obligations Law § 5-701*. [***7] To the extent it is relevant in this matter, it provides:

§ 5-701. Agreements required to be in writing

a. Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged

therewith, or by his lawful agent, if such agreement, promise or undertaking:

*** 2. Is a special promise to answer for the debt, default or miscarriage of another person;

Generally, the statute applies to circumstances in which the promisor has acted as surety of another; but there are surety situations in which no writing is required. If, for example, the promisee had no reason to believe that the promisor was acting as a surety, or where the obligations of the principal and surety are joint, or where the promise is made to the principal, no writing is required. But, if between the original debtor and the surety, the original debtor ought to pay, the debt is not the promisor's own and he is undertaking to answer for the debt of another. Under such circumstances, a writing is generally required. *Martin Roofing Inc. v. Goldstein, 60 NY2d 262, 457 N.E.2d 700, 469 N.Y.S.2d 595 (1983).*

An oral promise to pay an antecedent debt of another may be enforceable, but only if [***8] there is new consideration flowing to the promisor which is beneficial to him, and the promise subsists irrespective of the liability of the original debtor. *Id. at 267.*

C. Entitlement to Real Estate Brokerage Commission

An oral agreement with a licensed real estate broker to pay a commission for services in connection with a sale or lease of real estate is enforceable. *General Obligations Law § 5-701(a)(10).* "(I)n order to state a direct claim for a commission, the broker must prove (1) that he or she is duly licensed, (2) that he or she had a contract, express or implied, with the party to be charged with paying the commission, and (3) that he or she was the procuring cause' of the sale." *Strategic Alliance Partners, LLC v. Dress Barn, Inc., 386 F.Supp.2d 312, 316 (S.D.NY 2005), citing Buck v. Cimino, 243 AD2d 681, 684, 663 N.Y.S.2d 635 (2nd Dept. 1997).*

In the absence of a special agreement to the contrary, a broker does not make out a case for commissions simply because he or she initially called the property to the attention of the ultimate purchaser. *Greene v. Hellman, 51 NY2d 197, 205-206, 412 N.E.2d 1301, 433 N.Y.S.2d 75 (1980).* "(T)here must be a direct and proximate link, as distinguished from one that is indirect and remote, [***9] between the bare introduction and the consummation." *Id. at 206.* But, once a proximate link is established, and the broker procures a purchaser who is ready, willing and able to purchase, he is entitled to a commission. It does not matter, absent a contrary agreement, that the transaction is never consummated. *Lane Real Estate Dept. Store v. Lawlet Corp., 28 NY2d 36, 42-43, 268 N.E.2d 635, 319 N.Y.S.2d 836 (1971); Hecht v. Miller, 23 NY2d 301* [*5] *305, 244 N.E.2d 77, 296 N.Y.S.2d 561 (1968);* and *Smith v. Peyrot, 201 NY 210 214, 94 N.E. 662 (1911).*

DISCUSSION

In motion sequence No. 1, the Plaintiff seeks summary judgment against Realty in the amount of $ 132,503.69 on the first cause of action. Alternatively, the Plaintiff seeks the same relief against both Defendants on the third cause of action based on the theory of *quantum meruit.*

Breach of contract relief is not sought against Mikhailov in recognition that he did not personally retain the broker. *Hentze-Dor Real Estate, Inc. v. D'Allessio, 40 AD3d 813, 836 N.Y.S.2d 265 (2nd Dept. 2007).* There is no writing by which Mikhailov agreed to answer for the debt, default or miscarriage of Realty. Nor is there any evidence that there was new and additional consideration flowing to the individual so as to possibly remove the transaction from [***10] the Statute of Frauds. *General Obligations Law § 5-701(a)(2);* and *Martin Roofing, Inc. v. Goldstein, supra.*

For the plaintiff to succeed, there must be no material issue of fact. *Stillman v. Twentieth Century-Fox Film Corp., supra.* Not every factual issue is material. In a rather convoluted, and eventually contradicted scenario, the Defendants claim that a tenant at the building was the driving force behind the long-term lease agreement in December 2006. But the role of this tenant has been recanted both by her subsequent affidavit and the deposition testimony of Mikhailov. Even if the conduct of the tenant were as represented by the Defendants, it would not preclude the Plaintiff from entitlement to a commission for its services in procuring a tenant and effectuating a lease agreement. Thus, Dr. Noori's participation, or lack thereof, is not a material fact.

Plaintiff certainly qualifies as a licensed real estate broker, thus satisfying the first of the three-pronged test set forth in *Greene v. Hellman, supra.* It is true that Defendants never signed an agreement to pay the claimed commission. Indeed, Mikhailov denies receiving even a single document mailed to the Defendants at their [***11] office address. He specifically denies receiving the correspondence from Leiderman dated October 13, 2006, attached to which was Schedule "A" -- the commission rates.

The documentation submitted by the Plaintiff overwhelmingly demonstrates that there were multiple contacts and communications among the parties and their representatives between late September and December 7, 2006, when the Lease was signed. Among them was the term sheet sent via e-mail on November 20, 2006 by Leiderman to Check, the representative of North Shore, Lerner, the attorney for North Shore, and

mix917@aol.com, the e-mail address for Michael Mikhailov, who was representing his father in the transaction.

Lastly, Mikhailov testified that he read the Lease before signing it, which includes an acknowledgment of the Plaintiff's role in the transaction and the obligation of the Defendants to pay a commission pursuant to a separate agreement (Rider P 44-A). It is inconceivable that the Defendants did not recognize, at the very least, an implied obligation to pay for the brokerage services rendered by the Plaintiff. Denying facts which virtually all other participants in the transaction recognize to be true, does not [***12] create a question of fact. Plaintiff has met its burden of establishing the existence of an agreement, actual or implied, which requires the Defendants to pay a commission for their efforts.

It is also obvious that the Plaintiff was the procuring cause of the Lease [*6] agreement. Among the most salient documents in this respect is the affidavit of Walter J. Check, the Director of Leasing and Housing, Real Estate Services, for North Shore-LIJ Health System, Inc. Without any direct interest in the outcome of the proceeding, he describes in detail his solicitation of Leiderman of Sutton & Edwards to locate medical office space in Forest Hills, and the multiple visits to the site with Leiderman and their joint interaction with Mikhailov. The mere fact that the Defendants deny that any of this occurred defies credulity, and does not rise to the level of a material factual issue.

Well before the execution of the lease, Mikhailov's son, Michael, was aware of the claim of the Plaintiff. Although he left for vacation on December 2, 2006, before the Lease was signed, he was in contact with counsel for North Shore about the final terms of the Rider. As of 7:40 p.m. on December 1, 2006, he e-mailed [***13] Lerner that the terms, other than those mentioned in the e-mail, were acceptable and that the lease would be executed by his father in his absence. The commission to be paid to the Plaintiff was not one of the disputed items, but he thought his father would resolve this issue before signing the Lease.

In fact, Mikhailov who testified that he read the document before signing it, denied it in his affidavit in support of the cross-motion. Nevertheless, he executed the Lease which acknowledged the role of Plaintiff in P 44-A. Such an acknowledgment in a contract of sale entitles Plaintiff to summary judgment. The language of the signed document was clear and unambiguous. Therefore, summary judgment is appropriate. *Helmsley-Spear, Inc. v. New York Blood Center, Inc., 257 AD2d 64, 67, 687 N.Y.S.2d 353 (1st Dept. 1999).*

Whether Mikhailov read the language in the brokerage paragraph of the Rider or he did not is not relevant. In the absence of fraud, duress or other misconduct by a party, the signer of an agreement is bound by its terms. Claims of not having read the document, or difficulty with the English language do not obviate this fact. *Pimpinello v. Swift & Co., 253 N.Y.159, 170 N.E. 530 (1930)*; and *Ahmed v. Getty Petroleum Marketing, Inc., 12 AD3d 385, 786 N.Y.S.2d 188 (2d Dept. 2004).*

The [***14] motion for summary judgment by the Plaintiff to recover the sum of $ 132,503.69, from Realty must be granted.

The cross-motion by the Defendants to dismiss the complaint against Mikhailov individually must also be granted, since there is no evidence that he personally retained the services of the Plaintiff, nor is there a writing in which he agreed to answer for the debt of Realty in the event of its default. There is no evidence of beneficial consideration flowing to him so as to remove any such promise from the Statute of Frauds.

Accordingly, it is,

ORDERED that Plaintiff's motion for summary judgment is granted to the extent of granting leave to enter a Clerk's judgment on the first cause of action in favor of the Plaintiff and against 68-60 Austin Street Realty Corp. a/k/a 68-60 Austin Street Corp. in the sum of $ 132,503.69 together with interest from December 1, 2006 and costs and disbursements; and it is further,

ORDERED that Defendants' cross-motion for summary judgment dismissing the complaint as to Defendant Ilya Mikhailov is granted.

[*7] This constitutes the decision and order of the Court.

Dated: Mineola, NY

June 11, 2008

Hon. Leonard B. Austin, J.S.C.