

Square Foot Realty, LLC v Mordred Realty Corp.

2012 NY Slip Op 30428(U)

February 22, 2012

Supreme Court, New York County

Docket Number: 601736/2008

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 15

Index Number : 601736/2008
SQUARE FOOT REALTY LLC
vs.
MORDRED REALTY CORP.
SEQUENCE NUMBER : 005
AMEND SUPPLEMENT PLEADINGS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1
Answering Affidavits — Exhibits _____ | No(s). 3
Replying Affidavits _____ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**


FILED

FEB 27 2012

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 2/22/12



HON. EILEEN A. RAKOWER, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X

SQUARE FOOT REALTY, LLC,

Index No. 601736/08

Plaintiff,

-against-

DECISION and ORDER
Mot. Seq.005

MORDRED REALTY CORP., and MICHAEL
SOHAYEGH, SADRI GARAKANI A/K/A SADRI
REZA GARAKANI A/K/A REZA GARAKANI and
GALAHAD REALTY, CORP.,

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Defendants.

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HON. EILEEN A. RAKOWER:

NEW YORK
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Square Foot Realty, LLC ("Plaintiff") states in its complaint that on June 28, 2006, it entered into a contract with defendant Mordred Realty Corp. ("Mordred") whereby Plaintiff was given the exclusive right to sell and/or lease the ground floor retail portion of the building known as 715 9th Avenue in New York County, which is owned by Mordred ("the premises"). Plaintiff states that, pursuant to the contract, Plaintiff was to have exclusive representation for a period of 4 months, and thereafter such representation would continue until such time as either party opted to terminate the agreement upon 20 days written notice by registered or certified mail. Plaintiff would receive a commission based on the gross rent receipts for the leased premises in the amount of 6% for the first year, 5% for the second year, 4% for the third through fifth years, 3% for the sixth through tenth years, and 2% for the eleventh through twentieth years.

Plaintiff states that, during the term of the representation, Plaintiff received a solicitation from Time Equities, Inc. ("Time") on behalf of Real Birth, a childbirth preparation and newborn care center, for rental of the premises. Plaintiff states that it negotiated on behalf of Mordred and showed the premises to Real Birth. Mordred ultimately entered into a lease with Real Birth; however, Mordred failed to disclose the lease agreement to Plaintiff, and failed to pay Plaintiff the

commission owed under the contract. Plaintiff further states that it made due demand for payment, and that such demand went unanswered.

Plaintiff also sues Michael Sohayegh, an owner of Mordred, alleging that Sohayegh, "through words and deed, held himself out as guarantor of the liabilities" of Mordred. Plaintiff further alleges that Sohayegh "intentionally denuded the assets of [Mordred] to pay the debts of GALAHAD REALTY, CORP. [hereinafter "Galahad"] while aware that debts were owed to [Plaintiff], which remain unpaid."

Also named as a defendant is Sadri Garakani, Sohayegh's wife and co-owner of Mordred. Garakani is similarly alleged to have "intentionally denuded the assets" of Mordred to pay off the debts and prior mortgage against the assets of Galahad.

In addition, Plaintiff sues Galahad, which Plaintiff claims "shared officers and directors" with Mordred, and "was unjustly enriched by the denuding of assets from [Mordred]."

Presently before the court is a motion by Plaintiff to amend its complaint pursuant to CPLR §3025(b). Plaintiff seeks to add an additional cause of action which alleges that, on or around January 22, 2007, Mordred entered into a lease agreement with another proposed tenant for lease of the premises, and that defendants failed to disclose this agreement, notwithstanding the continuing effect of the agreement between Plaintiff and Mordred.

Defendants oppose the motion and cross-move for summary judgment. Defendants argue that the complaint should be dismissed as against Sohayegh and Garakani because there is no evidence in the record that they ever made an agreement of any kind with Plaintiff, as distinct from Mordred. Defendants further argue that Plaintiff's claim that Sohayegh and Garakani verbally held themselves out as guarantors fails as a matter of law, as General Obligations Law §5-701(2) requires that any such guarantee to be in writing. Defendants further argue that Galahad must be dismissed from the action because there is no evidence in the record that Sohayegh and Garakani "denuded" the assets of Mordred and diverted them to Galahad. Lastly, Defendants assert that Mordred is entitled to dismissal of the action because it provided Plaintiff with a September 12, 2006 letter via certified mail, return receipt requested, signed by Garakani, stating that Mordred

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was terminating the contract based upon (1) factual misrepresentations concerning the experience of Aaron Gavios, Plaintiff's principal; and (2) the "many mistakes" that Gavios made during the representation. These "mistakes" are not specified in the letter, with Garakani stating that it is not "appropriate to get into any details."

With respect to defendants' motion for summary judgment, the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]). "[I]f it is reasonable to disagree about the material facts or about what may be inferred from undisputed facts, summary judgment may not be granted. Moreover, in deciding whether there is a material triable issue of fact, 'the facts must be viewed in the light most favorable to the nonmoving party'" (*Ferluckaj v. Goldman Sachs & Co.*, 2009 NY Slip Op 2483 [2009]).

Paragraph 1 of the subject contract provided that the agreement "may be terminated for cause with a seven (7) day notice." Paragraph 1 further provided that "Cause" shall mean any of the following: (i) a material breach by [Plaintiff] in the performance or compliance with any of its obligations under this Agreement; ... or (iii) the fraud, willful misconduct, gross negligence, dishonest or criminal acts of [Plaintiff]." Paragraph 7 provides that

Notwithstanding either party's option to terminate under the terms hereof, the terms of this Agreement shall survive the Termination Date with respect to any transaction consummated, within three (3) months of the Termination Date ("Pending Period"), as a result of the involvement of [Plaintiff] and/or written information furnished by [Plaintiff] to [Mordred] ... provided that [Plaintiff] submit to [Mordred] within ten (10) days of

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the Termination Date, a list ("Pending List") of-(a) persons or entities with whom [Plaintiff] has dealt, negotiated with, and shown the premises with respect to the Premises [sic], (b) any Outside Brokers involved, and (c) the specific terms of the transaction(s) proposed by or discussed with such persons or entities

The court finds that Mordred is not entitled to summary judgment because it has failed to make a prima facie showing that it had cause to terminate the agreement. Sohayegh's affidavit states that Gavios falsely represented to his wife that, *inter alia*, he had 15 years' experience in the real estate business when in fact he only had two. Sohayegh's hearsay affidavit does not constitute proof in admissible form (*see United States Trust Co. v. Bamco 18*, 183 A.D.2d 549, 553 [1st Dept. 1993]). Moreover, Gavios testified that he had no recollection of any conversation with Garakani.

With respect to Plaintiff's allegations concerning Garakani, Sohayegh, and Galahad acting as alter egos of Mordred, the court finds that defendants' motion for summary judgment is premature. The record indicates that defendants have not yet appeared for their depositions. Plaintiff should have the opportunity to depose defendants on this issue (*see CPLR §3212(f)*).

However, Plaintiff's claim that Sohayegh is personally liable based upon alleged verbal guarantees fails as a matter of law. General Obligations Law § 5-701(a)(2) provides that

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 ... is a special promise to answer for the debt, default or miscarriage of another person...

Turning to Plaintiff's motion to amend CPLR §3025(b) provides that "[a] party may amend his pleading... at any time by leave of court... Leave shall be freely given upon such terms as may be just..." "CPLR §3025 allows liberal amendment of pleadings absent demonstrable prejudice" (*Atlantic Mut. Ins. Co. v. Greater New York Mut. Ins. Co.*, 271 A.D.2d 278, 280 [1st Dept. 2000]). In the

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absence of prejudice, leave to amend a pleading should be denied only when the proposed amendment is plainly lacking in merit (*see Bd. of Managers of Gramercy Park Habitat Condo. v. Zucker*, 190 A.D.2d 636 [1st Dept. 1993]) (*see also Pier 59 Studios, L.P. v. Chelsea Piers, L.P.*, 2007 NY Slip Op 4179, *2 [1st Dept. 2007]) (“[I]n considering the proposed amendment, ‘the court should examine, but need not decide, the merits of the proposed new pleading unless it is patently insufficient on its face. Once a prima facie basis for the amendment has been established, that should end the inquiry, even in the face of a rebuttal that might provide the ground for a subsequent motion for summary judgment’”).

Applying this standard, the court finds that Plaintiff is entitled to amend its complaint. The additional cause of action is not plainly lacking in merit. Assuming *arguendo* that Mordred did not have cause to terminate the contract, the purported termination letter would be a nullity and, pursuant to Paragraph 1, the contract would remain in effect after passage of the four-month period until either party provided 20 days’ written notice. Moreover, defendants have not shown that they will be prejudiced by the proposed amendment.

Wherefore, it is hereby

ORDERED that Plaintiff’s motion for leave to amend its complaint is granted, and the amended complaint in the proposed form annexed to the moving papers shall be deemed served on defendants upon service of a copy of this Order with notice of entry thereof; and it is further;

ORDERED that defendants shall file and serve an answer to the amended complaint within twenty days of service of a copy of this Order with notice of entry; and it is further

ORDERED that defendant’s cross-motion for summary judgment is granted solely as to that portion of Plaintiff’s second cause of action which alleges that Sohayegh is liable to Plaintiff as guarantor of Mordred; and it is further

ORDERED that defendants’ cross-motion is denied in all other respects.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: February 17, 2012



EILEEN A. RAKOWER, J.S.C

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