

**Midtown Equities Brokerage LLC v Ninety-Five  
Madison Co., L.P.**

2017 NY Slip Op 31220(U)

May 18, 2017

Supreme Court, New York County

Docket Number: 654321/2016

Judge: David B. Cohen

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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. DAVID BENJAMIN COHEN  
*Justice*

PART 58

-----X  
MIDTOWN EQUITIES BROKERAGE LLC  
Plaintiff,

INDEX NO. 654321/2016

MOTION DATE 11/22/2016

- v -

MOTION SEQ. NO. 001

NINETY-FIVE MADISON COMPANY, L.P.,  
Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 12, 13, 14, 15, 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32

were read on this application to/for SUMMARY JUDGMENT(AFTER JOINDER)

Upon the foregoing documents, it is

Decided that the motion is granted in part. Defendant is the owner of the premises located at 95 Madison Avenue. On March 7, 2014, defendant and Winick Realty Group LLC entered into an exclusive brokerage agreement (the "Winick Agreement") whereupon Winick would attempt to locate a suitable tenant for the ground floor, second floor and third floor of the premises. The parties negotiated a schedule for the commission due to Winick procuring a tenant. Paragraph 6 of the Winick agreement states "if negotiations proceed with a prospective tenant represented by a licensed real estate broker other than [Winick], Broker shall procure from such Outside Broker an agreement in form and substance satisfactory to the Owner which shall provide that all commissions shall be due only when, as and if the lease is fully executed and unconditionally

delivered by the parties thereto, and that commissions shall be calculated and payable in accordance with this Agreement. If a lease is fully executed and unconditionally delivered for which an Outside Broker is entitled to a commission, then the Owner shall pay Broker a commission equal to one half (1/2) of one (1) full commission payable under Schedule A and Owner shall pay such Outside Broker one-half (1/2) of one (1) full commission.”

The Complaint alleges that plaintiff was the broker for Vitra, that plaintiff introduced Vitra to defendant, that Vitra and defendant entered into a lease, that defendant paid Winick the commission due to Winick equal to half of a full commission and that defendant failed to pay plaintiff its commission. The Complaint alleges five causes of action (1) breach of contract of an intended third-party beneficiary; (2) breach of oral contract; (3) *quantum meruit*; (4) unjust enrichment; and (5) estoppel. Plaintiff seeks \$146,659.50 in damages based upon the commission paid to Winick.

In the instant motion, plaintiff seeks summary judgment on its (1) breach of contract claims; (2) quasi contract claims; and (3) its estoppel claim. In support of the motion, plaintiff submitted the affidavit of David Beare, the director of leasing for plaintiff and the agent directly involved with this transaction. Plaintiff also submitted several other documents including the Winick Agreement and Winick's computation of its commission. In opposition, defendant submitted the affidavit of Rita Sklar - the manager of the general partner of defendant, a copy of the letter of intent signed by the parties, a copy of the draft lease prepared by plaintiff's attorney based upon the letter of intent and a copy of the final lease with substantial changes from the letter of intent.

Plaintiff argues that (1) under the terms of the Winick Agreement, it is an intended third-party beneficiary as evidenced by its inclusion in a letter of intent signed by the parties, the draft

lease sent by defendant to Vitra and the final lease signed by defendant and Vitra; (2) that it is entitled to summary judgment under an implied contract as the procuring cause of the sale; (3) that its performance and defendant's acceptance of such performance have conferred a benefit on defendant require summary judgment on the quasi contractual claims; and (4) the undisputed facts support plaintiff's equitable claims.

Defendant argues that plaintiff was not a third party beneficiary as there was no separate written agreement between them as required by the Winick Agreement; that it was not the procuring cause of the lease because the letter of intent signed by the parties was entered into with plaintiff and Citra's intention of material changes; the final negotiated lease had many changes from the letter of intent that were made without the help of plaintiff; and that not only was defendant not enriched by plaintiff the final terms of the lease were worse than they would have gotten from another potential tenant.

Summary judgment is a drastic remedy that should not be granted where there exists a triable issue of fact (*Intergrated Logistics Consultants v. Fidata Corp.*, 131 AD2d 338 [1st Dept 1987]; *Ratner v. Elovitz*, 198 AD2d 184 [1st Dept 1993]). On a summary judgment motion, the court must view all evidence in a light most favorable to the non-moving party (*Rodriguez v. Parkchester South Condominium Inc.*, 178 AD2d 231 [1st Dept 1991]). The moving party must show that as a matter of law it is entitled to judgment [*Alvarez v. Prospect Hosp.*, 68 NY2d 320 324 [1986]]. The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). After the moving party has demonstrated its *prima facie* entitlement to summary

judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

One who seeks to recover as a third-party beneficiary of a contract must establish (1) that a valid and binding contract exists between two parties; (2) that the contract was intended for his or her benefit; and (3) that the benefit was direct rather than incidental (*Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 368 [1st Dept 2006]) “One is an intended beneficiary if one’s right to performance is ‘appropriate to effectuate the intention of the parties’ to the contract *and* either the performance will satisfy a money debt obligation of the promisee to the beneficiary or ‘the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance’ ”(*Roosevelt Islanders for Responsible Southtown Dev. v Roosevelt Is. Operating Corp.*, 291 AD2d 40, 58 [1st Dept 2001]). An incidental beneficiary is a third party that may derive a benefit from the performance of a contract though that party is neither the promisee nor the one to whom performance is to be rendered (*Artwear, Inc. v Hughes*, 202 AD2d 76 [1st Dept 1994]).

The Winick Agreement clearly states that “if negotiations proceed with a prospective tenant represented by a licensed real estate broker other than [Winick].....and if the lease is fully executed and unconditionally delivered by the parties thereto... Owner shall pay such Outside Broker one-half (1/2) of one (1) full commission.” Plaintiff’s right to performance is ‘appropriate to effectuate the intention of the parties’ to the contract and the performance will satisfy a money debt obligation of the promisee to the beneficiary. Further, the fact that letter of intent and initial draft lease prepared by defendant’s representatives all state that Vitra utilized the service of plaintiff as broker and that defendant would pay plaintiff’s commission clearly show an intention “that the promisee intends to give the beneficiary the benefit of the promised

performance” (*id.*). Indeed, the final lease also acknowledges that plaintiff served as Vitra’s broker and may be owed a commission. Defendant’s argument that the since the Winick Agreement stated that “Broker shall procure from such Outside Broker an agreement in form and substance satisfactory to the Owner,” a separate written agreement was necessary, is without merit. First, the Winick Agreement does not require anything written. Second, in any event, the letter of intent, a writing from defendant’s representative, addressed to plaintiff on behalf of its client, states “Winick Realty Group LLC and Midtown Equities Brokerage, LLC to split one (1) full commission equally per Winick’s Exclusive Agreement with Landlord. Since the Court finds plaintiff to be a third-party beneficiary of the Winick Agreement, summary judgment is granted on the breach of contract action.

However, summary judgment is denied on plaintiff’s second cause of action, its theory of implied or express contract as the procuring broker. Plaintiff was plainly aware that it did not have any contract with defendant, as defendant was wholly represented by Winick. To the extent that the lease or other documents requires a payment by defendant to plaintiff, those documents were not a direct contract between these parties but based upon the obligations discussed above.<sup>1</sup> Further, for a real estate broker to procure a deal and earn its commission, there must be a direct and proximate link from the broker to the deal, as distinguished from one that is indirect and remote” (*SPRE Realty, Ltd. v Dienst*, 119 AD3d 93 [1st Dept 2014]; *citing and explaining Greene v Hellman*, 51 NY2d 197 [1980]). This standard requires something beyond a broker’s mere calling the property to the attention of a party or the creation of an “amicable atmosphere” or an “amicable frame of mind” that might have led to the ultimate transaction. At the same time, a broker need not negotiate the transaction’s final terms or be present at the closing (*id.*).

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<sup>1</sup> The Court notes that plaintiff has not sued its own client and therefore this decision does not discuss whether plaintiff procured a deal for its client.

Although there is no question whether plaintiff introduced the parties or participated in certain earlier negotiations there remains a material dispute whether plaintiff's participation was an obstacle to the deal and where on the spectrum from introduction to direct and proximate link plaintiff falls. As these questions are inherently factual summary judgment on the second cause of action is denied.

Similarly, the motions for summary judgment on quasi contractual claims are denied. To succeed on a claim for *quantum meruit* plaintiff must establish (1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services (*Fulbright & Jaworski, LLP v Carucci*, 63 AD3d 487 [1st Dept 2009]). Here, defendant has raised an issue of material fact whether plaintiff performed its brokerage services in good faith. In addition, although defendant may have benefited from the services, the services were performed on behalf of its own client.

For unjust enrichment, the plaintiff must prove "that (1) the defendant was enriched, (2) at plaintiff's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]). Based upon the affidavit of Ms. Sklar, it is not clear that defendant was enriched in this matter as plaintiff claims that the terms of the lease were less favorable than it would have gotten with another tenant. For the same reasons, it is not clear that it is against equity and good conscience to permit defendant to retain the fee.

Similarly, plaintiff's motion for summary judgment on the fifth cause of action of equitable estoppel is denied based upon the questions of fairness and equity raised above. In addition, the Court notes that it has only found equitable estoppel used as a defense and not as a

proper cause of action, unlike promissory estoppel which is a proper cause of action. Plaintiff's motion for sanctions based upon frivolous conduct is denied. It is therefore

ORDERED, that plaintiff's motion for summary judgment on the first cause of action is granted in the amount of \$146,659.50 plus costs, disbursements and interest from June 18, 2016; and it is further

ORDERED, that plaintiff's motion is otherwise denied; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

5/18/2017

DATE

DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: