

**Lansco Corp. v 83 Wooster LLC**

2013 NY Slip Op 33065(U)

December 5, 2013

Sup Ct, New York County

Docket Number: 650608/13

Judge: Manuel J. Mendez

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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. MANUEL J. MENDEZ  
*Justice*

PART 13

THE LANSKO CORPORATION,

INDEX NO. 650608/13

Plaintiff(s),

MOTION DATE 11-6-2013

- v -

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

83 WOOSTER LLC,

Defendant(s).

The following papers, numbered 1 to 9 were read on this motion and cross-motion to/ for Summary Judgment:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 3</u>
Answering Affidavits — Exhibits _____ cross motion _____	<u>4 - 7</u>
Replying Affidavits _____	<u>8 - 9</u>

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is Ordered that Plaintiff's Motion for Summary Judgment and to Dismiss is denied. Defendant's Cross-Motion to Dismiss is denied.

This is an action seeking payment of a real estate broker's fee pursuant to a brokerage agreement.

On or about March 26, 2012, Defendant 83 Wooster LLC ("Wooster") entered into a lease (the "Lease") with Matlinkatz LLC ("Matlinkatz") whereby Matlinkatz leased a retail space located at 83 Wooster Street, New York, New York (the "Premises") from Wooster. The Lease was for a term commencing June 1, 2012 and expiring June 30, 2022.

On or about March 23, 2012, Wooster and Plaintiff The Lansco Corporation

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

("Lansco") entered into a brokerage agreement (the "Commission Agreement") whereby Wooster was to pay Lansco for real estate broker services Lansco provided in connection with the Lease.

The Commission Agreement provided, in pertinent part, that Wooster would pay Lansco: "(i) \$47,500 on mutual execution and delivery of the [Lease], and [Matlinkatz's] possession, (ii) \$47,500 on January 1, 2013 provided [Matlinkatz] or its successor-in-interest or assignee is in possession of the Space, and is not in default in payment of fixed monthly rent under the [Lease] or when such default is cured...". The Commission Agreement also provided for an acceleration of payments in the event that any of the installments was not paid.

On or about July 1, 2012, Wooster paid Lansco the \$47,500 due upon possession (the "First Commission Payment").

Wooster did not pay Lansco the \$47,500 due on January 1, 2013 (the "Second Commission Payment").

When Wooster failed to pay Lansco the Second Commission Payment, Lansco sent Wooster a letter (the "Acceleration Letter"), dated January 2, 2013, wherein Lansco demanded payment and triggered the acceleration clause as to a third commission installment payment, originally due on January 1, 2014.

Wooster responded to the Acceleration Letter on or about January 4, 2013, (the "Advisement Letter") wherein Wooster informed Lansco that Matlinkatz had vacated and surrendered possession of the Premises on December 31, 2012, and no rent payment for January 2013 had been made. Wooster explained that for this reason Lansco was not entitled to the Second Commission Payment.

Lansco responded to the Advisement Letter by requesting from Wooster a copy of the written agreement pursuant to which Matlinkatz vacated and surrendered the Premises (the "Surrender Agreement"), which Wooster then provided.

The Surrender Agreement, as executed between Wooster and Matlinkatz, states that, "[Matlinkatz] has advised [Wooster] that [Matlinkatz] does not intend to pay the Fixed Rent (as defined in the Lease) due on January 1, 2013, or make any subsequent payments of Fixed Rent due under the Lease and that [Matlinkatz] will be in default under the Lease as of January 1, 2013".

Pursuant to the Surrender Agreement, Matlinkatz surrendered its security deposit to Wooster which totaled \$234,000, which was equivalent to six months

worth of rent.

There remain questions of fact as to the sequence of events that caused Matlinkatz to vacate and surrender the Premises on December 31, 2012.

Lansco alleges that Wooster negotiated with Matlinkatz to have Matlinkatz vacate the Premises earlier than Matlinkatz had originally intended so that Wooster would not have to pay the Second Commission Payment.

Wooster alleges that Lansco advised Matlinkatz to vacate the Premises and that Lansco was working to secure a new lease for Matlinkatz in another location.

In order to prevail on a motion for Summary Judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence demonstrating the absence of any material issue of fact. See *Klein v. City of New York*, 89 N.Y.2d 883, 652 N.Y.S.2d 723 (1996); *Ayotte v. Gervasio*, 81 N.Y.2d 1062, 601 N.Y.S.2d 463 (1993); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986).

On a motion to dismiss, non-moving parties are accorded the benefit of every possible favorable inference, and the court determines only whether the facts as alleged fit within any cognizable legal theory. See *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 389 N.Y.S.2d 314, 357 N.E.2d 970 (1976).

The unresolved questions of fact as to the conflicting versions of events that resulted in Matlinkatz vacating the Premises necessitate the denial of both Lansco's Motion for Summary Judgment and Wooster's Cross-Motion for Dismissal.

Lansco's Motion also requests dismissal of Wooster's Counterclaims and Affirmative Defenses.

Wooster's Affirmative Defenses and first Counterclaim relate to the sequence of events which resulted in the execution of the Surrender Agreement and cannot be dismissed because of the outstanding questions of fact.

Wooster's second Counterclaim is for attorney's fees to be paid to a prevailing party according to the terms of the Commission Agreement. As neither Party has yet prevailed, dismissal of this Counterclaim would be premature.

Accordingly, Lansco's Motion for Summary Judgment is denied. Lansco's Motion to Dismiss Wooster's Counterclaims and Affirmative Defenses is denied.

Wooster's Cross-Motion to Dismiss is denied.

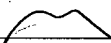
Accordingly, it is ORDERED that Lansco's Motion for Summary Judgment is denied, and it is further,

ORDERED that Lansco's Motion to Dismiss Wooster's Counterclaims and Affirmative Defenses is denied, and it is further

ORDERED that Wooster's Cross-Motion to Dismiss is denied.

ENTER :

Dated: December 5, 2013

  
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 MANUEL J. MENDEZ  
 J.S.C. MANUEL J. MENDEZ  
 J.S.C.  
 X NON-FINAL DISPOSITION  
 REFERENCE

Check one:  FINAL DISPOSITION

Check if appropriate:  DO NOT POST