Denham, Wolf Real Estate Servs, Inc. v 60-74 Gansevoort St. LLC
2019 NY Slip Op 32097(U)
July 8, 2019
Supreme Court, New York County
Docket Number: 656278/2016
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 39EFM

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DENHAM, WOLF REAL ESTATE SERVICES, INC.,

Plaintiff,

- v -

60-74 GANSEVOORT STREET LLC,MAIYET INC.

Defendant.

INDEX NO. 656278/2016

MOTION DATE 03/15/2019

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

----------X

HON. SALIANN SCARPULLA:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 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, 73, 74, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 107, 108, 109

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

This is an action for payment of a real estate brokerage commission. Plaintiff, Denham, Wolf Real Estate Services, Inc. (Denham Wolf) moves for summary judgment on the complaint, as well for an amendment of the caption to remove Maiyet, Inc as a defendant.

Background

Denham Wolf is a licensed real estate broker in New York. In July 2014, it entered into a brokerage agreement with Maiyet, a luxury fashion company, to "locate and negotiate for property in New York City for either lease or purchase." Maiyet sought commercial space on behalf of its affiliated special purpose entity, Lava Capital Opco, LLC ("Lava").

Defendant 60-74 Gansevoort Street LLC ("Gansevoort") is a Delaware limited liability company and fee owner of real property located at 60-74 Gansevoort Street, New York, New York. In the fall of 2014, Denham Wolf learned that Gansevoort was planning to develop a new building on the property and was looking for an appropriate tenant; it began negotiations on behalf of Maiyet to lease part of the property. On October 19, 2015, Lava as tenant, and Gansevoort as landlord, executed a fifteen-year lease (the Lease).

The Lease

Under the Lease, Gansevoort would erect a new building in addition to other structures on its property and Lease to Lava a large part of the building, including the entire second through eighth floors, as well as a part of the basement and ground level retail space, but only to the extent that the "Final Plan" for any or all of the floors was approved by the New York City Landmarks Preservation Commission (Landmarks Commission) (*see* Lease §§ 1. A, 1. B).

> Landlord shall use commercially reasonable efforts to endeavor to obtain, on or before April 30, 2016 (the 'Outside Date'), a written status update letter from the 'Landmark[s] Commission' approving the Building floor plans ..., which status update letter shall be subject to any Minor Changes (as hereinafter defined) by reason of ... any Landmark[s] Commission ... comment, decision or suggestion (the 'Status Update Letter').

(Lease at § 1. F [i]). "Minor Changes" is defined as

> (i) a change in the gross square footage … by reason of a Legal Requirement (as hereinafter defined) and/or any Landmark[s] Commission approval, provided, that, the gross square footage of the Above-Ground Portion shall not be less than 59,000 gross square feet in the aggregate on a cumulative basis and (ii) any reduction in the slab to slab height of the ceiling for floors two (2) through eight

> (8) in the Building shall not be less than that shown on **Exhibit D-1**… for each respective floor.

id. at § 1. F [i]).[1]

Gansevoort "agree[d] to promptly deliver the Status Update Letter to Tenant upon Landlord's receipt of same," and the parties agreed that if the Landmarks Commission's approval "require[d] a Minor Change," then the "Tenant shall be obligated to pay the full amount of Fixed Rent due and owing hereunder" (*id.*).

Lava had the right to terminate the Lease under section 1. F (ii) if Gansevoort failed to obtain the Status Update Letter by April 30, 2016 and Lava delivered written notice no later than May 30, 2016; the Lease would then terminate as of July 15, 2016 (*see id.* at § 1. F [ii]). However, if Gansevoort received and provided written notice to Lava of the Status Update Letter prior to July 15, 2016, Lava's "termination notice" would be "deemed null and void," and the Lease would "remain in full force and effect" (*id.* at § 1. F [ii]).

Gansevoort could also terminate the Lease between July 15, 2016 and October 15, 2016 upon written notice (*id.* at § 1. F [ii]). If neither party chose timely to terminate the Lease during that time period, the Lease would continue in full force and effect and Lava would have no right to object to any changes in the plans required by the Landmarks Commission's Status Update Letter (*id.*).

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[1] Exhibit D to the Lease sets forth the minimum slab to slab heights for the eight floors, "as measured from the top of slab to the top of slab"; the plan was that the tallest floor was the first floor, at 14 feet 10 inches; the shortest floor was the third floor, at 11 feet 6 inches (*see* Lease, exhibit D-1).

Additionally, upon notice to Lava by Gansevoort of any comment or decision by the Landmarks Commission that would necessitate a change to the plans "in excess of any Minor Changes," the parties had a right to terminate the Lease within 30 days; otherwise the Lease would continue in full force and Lava would have no right to object to plans reflecting those changes (*id.* at § 1.F [iii]).[2]

The Commission Agreement

On the same date as the Lease was signed, Denham Wolf and Gansevoort signed a commission agreement (the Commission Agreement), which provides that Gansevoort would pay a brokerage commission to Denham Wolf totaling $3.22 million, in two equal installments of $1.61 million, after the occurrence of three events:

> (i) the Lease is fully executed and actually delivered, received and accepted in accordance with the terms of the Lease by [Lava] and Landlord, (ii) any guaranty required under the Lease has been duly executed and delivered by the guarantor to Landlord, and (iii) the Lease has not been terminated due to a default [sic] by [Lava] beyond applicable notice, grace and cure periods.

(Commission Agreement § 1, ¶ 1).

The first installment would be due within five business days after Gansevoort had received the Status Update Letter from the Landmarks Commission, and the second installment would be due within five business days following the "Commencement Date" (*id.*), which is defined in the Lease as the date on which Gansevoort delivered "exclusive possession" of the premises to Lava (*see* Lease at § 1. D). The Commission Agreement at § 1, ¶ 2 provides

[2] The Lease also gave Lava other termination rights, not at issue here.

> Notwithstanding anything contained … in Section 1 to the contrary, the First Installment shall not be due or payable until the time for the exercise of Landlord's and [Lava]'s option to cancel or terminate the Lease pursuant to Sections l.F(ii) and l.F(iii) thereof shall have expired or been waived in writing by the respective party, and, if the Lease shall be cancelled or terminated pursuant to such Sections 1.F(ii) and 1.F(iii), no Commission whatsoever shall be due or payable in connection with the Lease.

Subsequent Events

The first set of plans for the space negotiated by Maiyet and Lava was submitted by Gansevoort's architect, nonparty BKSK Architects LLP (BKSK), to the Landmarks Commission on October 27, 2015 . The project consisted of two buildings, one at 60-68 Gansevoort Street ("60-68 Bldg.") and the other at 70-74 Gansevoort ("70-74 Bldg."). The plans envisioned that 60-68 Bldg. would be six floors, including a sixth-floor penthouse, while 70-74 Bldg. would be eight stories and include a two-story penthouse The total gross square footage, excluding the basement, was 84,583 feet, and the total gross square footage of floors two and above was 68,207 square feet.

The Landmarks Commission held its first public meeting and hearing about the project on November 10, 2015, which continued with a public meeting held on February 9, 2016. The Landmarks Commission then commented that the original plans needed modification, as one building was taller than the "historic height" of the building previously at the site, and that the other should "conform to a typological appropriateness standard for other warehouse buildings in the area" (*see* Poisson aff, ¶¶ 8-9).

BKSK reworked the plans, reducing the height of both buildings and modifying the size of the two penthouses. The "interim re-design" was then presented informally to the Landmarks Commission, which issued further comments.

A further modified design was presented at the public meeting of the Landmarks Commission on June 7, 2016. Among other changes, this revised design eliminated both penthouses and reduced 70-74 Bldg. to six floors. The "slab to slab heights" of the second through fifth floors of 60-68 Bldg. were reduced to 11 feet, 1 inch. According to BKSK, the total gross square footage for the buildings, excluding the basement, was 74,496, and the total gross square footage of floors two and above was 58,287.

The Landmarks Commission approved this plan. The June 7, 2016 Status Update Letter issued to Gansevoort summarized the scope of the approved work overall, including demolition of "the western building" and construction of a new building, "as put forward in your application completed on October 15, 2015."

Lava's Attempts To Terminate The Lease

Meanwhile, by letter dated May 25, 2016, Lava stated it was terminating the Lease pursuant to section 1. F (ii), effective July 15, 2016, based on Gansevoort's failure to receive the Status Update Letter from the Landmarks Commission by the agreed-upon April 30, 2016 "Outside Date." Lava reserved its right to terminate the Lease based on its belief that the Landmarks Commission made comments requiring changes to the floor plans "in excess of any Minor Changes," and that Gansevoort had not promptly provided notice to Lava of those comments.

In its May 31, 2016 reply letter, Gansevoort indicated that it intended to obtain the Status Update Letter by July 15, 2016, as allowed under section 1. F (ii) of the Lease, and would "vitiate" Lava's termination, leaving the Lease in full force and effect. Gansevoort noted its disagreement with Lava's assertion that the Landmarks Commission made comments that necessitated changes to the plans "in excess of any Minor Changes," which would have required notice to Lava under section 1. F (iii) of the Lease.

On June 9, 2016, Lava notified Gansevoort by a second letter that it was terminating the Lease pursuant to section 1. F (iii) of the Lease, disputing Gansevoort's claims that the Landmarks Commission had not made comments or suggestions that necessitated more than Minor Changes to the plans. Lava referenced the proposed plans and elevations dated May 31, 2016, obtained from the Landmarks Commission's website, showing changes in the slab to slab heights of the second through eighth floors, changes in the floor configurations, removal of the penthouses and – what Lava concluded based on consultation with two architects – the reduction in the above-ground square footage to less than 59,000 gross square feet. Lava also asserted it had not received written notice of the Landmarks Commission's comments following the February 9, 2016 public meeting, which were addressed on May 31, 2016.

Gansevoort's June 21, 2016 reply letter included a copy of the Landmarks Commission's Status Update Letter, and stated that, as provided in section 1. F (ii) of the Lease, Gansevoort was vitiating Lava's exercise of its termination right and declaring Lava's May 25, 2016 letter to be "null and void." Gansevoort "denie[d] that such

termination [of the Lease] was ever effected," and declared that Lava's June 9, 2016 letter "shall be and is deemed null and void," and "confirm[ed], through this letter, that tenant has no right, and/or any further rights, to terminate the Lease or object to the Plans pursuant to Sections 1.F(i), (ii), (iii) and/or (iv) of the Lease."[3]

Lava responded by letter dated June 28, 2016, indicating that its termination notices remained "in full force and effect." Lava contended that: the Status Update Letter approved revised plans, not the original plans as submitted; Gansevoort had no authority to make changes to the original plans; and Gansevoort had "failed to deliver the Status Update Letter required by the Lease," such that Lava's termination of the Lease under section 1. F (iii) "remains binding and effective." Lava also challenged, "as a factual matter," Gansevoort's claim that the revised plans showed the above-ground portion as more than 59,000 square feet.

Lava And Gansevoort Terminate The Lease

On July 14, 2016, Lava, Maiyet and Gansevoort signed a "Lease Termination and Release Agreement," effective on that date (Termination Agreement). The Termination Agreement referenced Lava's letters of May 25, 2016, June 9, 2016, and June 28, 2016 that "purported to cancel and terminate the Lease," and Gansevoort's letter of June 21, 2016, that "purported to vitiate the May Termination Notice and reject the June Termination Notice [and] declared the Lease to be in full force and effect." The

[3] Gansevoort also advised Lava that under article 45 of the Lease, Lava was required to deliver the sum of $15 million to Gansevoort within 10 days of its delivery of the Status Update Latter.

Termination Agreement also stated that "to avoid the expense, inconvenience, and uncertainty associated with litigation, and to resolve any and all disputes between them … the parties … without acknowledging or admitting fault or liability, have agreed to cancel and terminate the Lease" and guaranties.

Denham Wolf's Attempt To Obtain Its Commission

On June 24, 2016, Denham Wolf wrote to advise Gansevoort that the first installment of the broker's commission was due and payable within five business days of its receipt of the Status Update Letter from the Landmarks Commission. Denham Wolf wrote again on September 6, 2016, reiterating that pursuant to the Commission Agreement, Gansevoort owed $1,610,000. Gansevoort's counsel rejected Denham Wolf's demand by letter dated September 15, 2016, asserting that Denham Wolf was not entitled to any commission because the Lease was "ultimately canceled or terminated pursuant to [sections 1. F (ii) and 1. F (iii)] of the Lease."

Perhaps crossing in the mail, Denham Wolf provided its second notice to Gansevoort, dated September 15, 2016, noting that under the Commission Agreement, if Gansevoort did not pay the first installment within five business days, in addition to charging an agreed-upon interest, Denham Wolf had the option to immediately demand payment of the second installment. After Gansevoort's counsel rejected Denham Wolf's demand by letter dated September 23, 2016, Denham Wolf exercised its right to demand immediate payment of the second installment of the commission in addition to the first, totaling $3.22 million plus interest.

Denham Wolf's counsel wrote to Gansevoort's counsel on September 29, 2016, disputing that the Lease could have been legitimately terminated. The letter pointed out that Gansevoort had expressly rejected Lava's attempt at termination under section 1. F (ii) of the Lease and had denied the existence of a Landmarks Commission comment necessitating a change to the Plans in excess of a "minor change." Denham Wolf's counsel reasoned that neither party to the Lease had the right to terminate under section 1. F (iii). In response, Gansevoort's counsel wrote that although Gansevoort had "initially rejected" both of Lava's termination letters, "subsequent analysis of the issues identified in the letters exchanged by the parties directly culminated in the termination of the Lease in July 2016." Gansevoort's counsel asserted that the Landmarks Commission's approval "went far beyond the criteria of a 'Minor Change,' both because the square footage was less than the square footage required under the Lease, and also because the floor-to-floor heights did not meet the requirements of the Lease," and that the Lease had been validly terminated under sections 1. F (ii) and (iii).

In response, Denham Wolf commenced this action. Gansevoort answered, denying the pertinent allegations and asserting sixteen affirmative defenses.

Denham Wolf now moves for summary judgment on its complaint, arguing that it is "uncontroverted that the conditions that would allow Denham Wolf to earn its Commission have been satisfied." Gansevoort's Director of Acquisitions, Matthew Abreu, did not, Denham Wolf argues, dispute that the conditions set forth in the Commission Agreement for payment of the commission were satisfied: the Lease and

guarantees were fully executed and delivered; and the Lease was never terminated due to a default by Lava under the Lease. Thus, Denham Wolf concludes, based on the terms of the Commission Agreement, the first installment of the brokerage commission came due no later than June 14, 2016 – the date of the Termination Agreement – and the second installment came due after Gansevoort's "unjustified refusal" to pay the first installment following notice.

Denham Wolf argues that the evidence shows that while Lava had attempted to terminate the Lease under both sections 1.F (ii) and (iii), Gansevoort nullified the termination under 1.F (ii) by timely obtaining the Status Update Letter on June 7, 2016, and advised Lava in its June 21, 2016 letter, that Lava "has no right, and/or any further rights, to terminate the Lease or object to the Plans pursuant to sections 1.F(i), (ii), (iii) and/or (iv) of the Lease." It points out that "at no time did Gansevoort ever withdraw its rejection of Lava's attempts to terminate the Lease under Sections 1.F(ii) and 1.F(iii)." Denham Wolf argues that the signing of the Termination Agreement "constituted the expiration and/or waiver of any right to terminate the Lease under Sections 1.F(ii) or 1.F(iii) of the Lease."

In opposition, Gansevoort argues that the Lease was terminated pursuant to section 1. F (iii) because the comments, decisions and/or suggestions by the Landmarks Commission "necessitate[d] a change to the [Buildings' Original Plans] in excess of any Minor Changes." Accordingly, it claims that under the Commission Agreement, Gansevoort was exempt from paying a commission.

Gansevoort acknowledges that it initially contested Maiyet/Lava's right to terminate, as it was "reluctant to accept that its efforts to satisfy the Lease requirements—and thereby save the $245 million Lease—had been unsuccessful. But it ultimately "conceded" that "the Approved Plans incorporated changes to the Original Plans that exceeded Minor Changes, indisputably triggering Lava's right to terminate and cancel the Lease pursuant to Section 1.F(iii)," and it did not challenge Maiyet/Lava's termination of the Lease pursuant to Lava's letter of June 28, 2016. Gansevoort asserts that, because the Lease was terminated pursuant to section 1. F (iii), no commission was due under the Commission Agreement, and Denham Wolf's motion for summary judgment on the first two causes of action must be denied.

Gansevoort contends that Denham Wolf ignores both Lava's letter of June 28, 2016 reasserting its intention to terminate the Lease pursuant to section 1. F (iii), and that Gansevoort subsequently "conceded and did not challenge" Lava's claims. Gansevoort also challenges Denham Wolf's reading of the Commission Agreement as providing that the termination of the Lease must occur under both section 1. F (ii) and (iii), in order to nullify Gansevoort's obligation to pay the brokerage commission. According to Gansevoort, the Commission Agreement's cancellation provision contains two clauses, the first being a "tolling provision" providing that no payment is due until after the time either party could exercise its option to cancel pursuant to sections 1. F (ii) or (iii) of the Lease. The second clause provides that no payment is due when the Lease is terminated pursuant to sections 1. F (ii) or (iii). While Gansevoort's argument is not entirely clear, it

appears to argue that under Denham Wolf's interpretation, the Lease could be terminated under section 1. F (iii) because the Landmarks Commission required changes to the plans "in excess of any Minor Changes," but the brokerage commission would still be payable because the tolling provision requires that the Lease be terminated under section 1. F (ii) as well as section 1. F (iii), even when the time period for terminating under section 1. F (ii) has expired. Such a result, Gansevoort asserts, would be "nonsensical."

Discussion

"'[T]he 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 demonstrate the absence of any material issues of fact'" (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The issue is not whether the plaintiff can ultimately establish liability, but "whether there exists a substantial issue of fact in the case on the issue of liability which requires a plenary trial" (*Barr v County of Albany*, 50 NY2d 247, 254 [1980]).

Here, there are material questions of fact concerning the terms of the Commission Agreement and the Termination Agreement that cannot be resolved in a motion for summary judgment. Denham Wolf argues that the terms of the Commission Agreement with Gansevoort have been fully complied with and that it is entitled to a brokerage commission. Gansevoort argues that the Lease was timely terminated by Lava pursuant to section 1. F (iii) because the comments of the Landmarks Commission required major

changes in the building plans that would essentially destroy Lava's initial plans; therefore, Denham Wolf is not entitled to a commission.

Gansevoort has not provided copies of the building plans to establish that the changes required were "in excess of Minor Changes," although it has submitted its architect's affidavit describing the nature of the modifications made to comply with the Landmarks Commission's requirements. Nonetheless, there remains a question of fact as to whether the changes were of the nature that fell under section 1. F (iii) of the Lease, and whether Lava was entitled to Lease cancellation on that ground.

The problem is that Gansevoort's June 21, 2016 letter to Lava rejects the latter's claim to terminate the Lease on *any* basis. It unequivocally declared that Lava could not terminate or cancel the Lease based on section 1. F (iii), and specifically denied that the Landmarks Commission had made comments requiring changes to the building plans "in excess of Minor Changes" under the Lease. Notably, this letter was written two weeks after the Status Update Letter was issued and gave no hint, as now claimed, that its architect had not yet completed a review of the Status Update Letter to determine what modifications were needed to comply with the Landmarks Commission's comments.

Turning to the Termination Agreement, although both parties argue it supports their positions, I disagree. First, while the Termination Agreement: refers to "disputes" that arose out of the Lease; declares that the parties do not acknowledge or admit fault or liability; and, states that Gansevoort, Maiyet and Lava agreed to cancel and terminate all claims between them, "known and unknown," it does not directly state that the Lease was

terminated pursuant to section 1. F (iii) or that any party waived any rights under the Lease. There is no statement in the Termination Agreement – or elsewhere – that Gansevoort withdrew or disavowed its contentions set forth on June 21, 2016 that it was "impermissible" for Lava to terminate the Lease under section 1. F (iii) because the Landmarks Commission had not made any comment necessitating changes "in excess of Minor Changes," or that Gansevoort "conceded" Lava's entitlement to terminate the Lease on that basis.

Nor does the Termination Agreement by itself support Denham Wolf's claim that the parties did not and could not terminate the Lease under section 1. F (iii) of the Lease. Denham Wolf argues that by entering into the Termination Agreement without specifically indicating that termination of the Lease was based on section 1. F (iii) of the Lease, Lava waived its right to cancel the Lease under section 1. F (iii) because the Commission Agreement provides that the first installment of the commission was not payable "until the time for the exercise of [Gansevoort]'s and [Lava]'s option to cancel or terminate the Lease pursuant to Sections 1.F(ii) and 1.F(iii) thereof *shall have expired or been waived in writing by the respective party*" (Commission Agreement, § 1, ¶ 2 [emphasis added]). Denham Wolf argues that the second paragraph of section 1 of the Commission Agreement, providing that no commission is due or payable when the Lease is terminated under sections 1. F (ii) and 1. F (iii) of the Lease, means that if the Lease was terminated for "any other reason, or for no reason," then Denham Wolf is entitled to its commission.

Because the Termination Agreement is ambiguous, I cannot conclude as a matter of law that the Lease was terminated on a basis other than that addressed by section 1.F (iii) or that Lava had waived its option to cancel, and for that reason, Denham Wolf's motion for summary judgment is denied. However, that part of the motion in which Denham Wolf seeks to amend the caption of the action is granted.

In accordance with the foregoing, it is

ORDERED that the part of plaintiff Denham, Wolf Real Estate Services, Inc.'s motion for summary judgment on the complaint is denied; and it is further

ORDERED that the part of the motion seeking amendment of the caption is granted, and the caption is amended to read as follows:

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Denham, Wolf Real Estate Services, Inc.,

Plaintiff, Index No. 656278/2016

- against

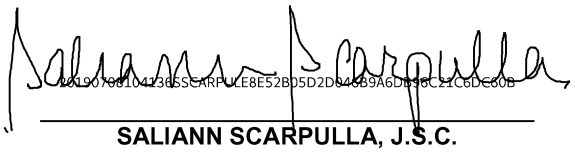
60-74 Gansevoort Street LLC,

Defendant.
----------x;

and it is further

ORDERED that counsel for Denham, Wolf Real Estate Services, Inc.is directed serve a copy of this order on the Clerk of the Supreme Court, New York County so that it may change the caption accordingly.

This constitutes the decision and order of the Court.



7/8/2019
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE