SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42
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FIVE EAST 44th LLC

Plaintiff

Index No. 157300/15
DECISION AND ORDER

DOUGLAS ELLIMAN, LLC

Defendant. MOT SEQ 001

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this breach of contract action, the plaintiff Five East 44th LLC (Five East), a residential condominium developer of a building located at 5 East 44th Street in Manhattan, seeks damages arising from the failure of defendant Douglas Elliman, LLC's (Elliman), a real estate brokerage company, to indemnify Five East for commissions owed to another broker pursuant to the terms of the parties' Exclusive Sales Agreement.

Elliman now moves for summary judgment dismissing the complaint in its entirety pursuant to CPLR 3212 on the ground that, upon the principle of collateral estoppel, Five East's previous breach of the same agreement precludes its instant breach claim against Elliman. Elliman also seeks sanctions pursuant to 22 NYCRR 130-1.1(c)(2). Five East opposes the motion. Both branches of the motion are denied.

II. BACKGROUND

The parties entered into the subject sales agreement on December 3, 2009, wherein Elliman was to provide real estate brokerage services for the sale of condominium units at the building project. The agreement provides, in Paragraph 12, that Five East would pay Elliman a commission upon "a written contract of sale…[having] been executed and unconditionally delivered by the purchaser and [Five East] and title clos[ing]." Paragraph 13 of the agreement provides that Elliman "will indemnify and hold [Five East] harmless from and against any and all claims, costs, expenses, losses and liabilities (including, without limitation, reasonable attorneys' fees and disbursements) arising out of any claims for commissions made by any Cooperating Broker or any brokers or other persons who participated with [Elliman] in bringing about the sale of the Units, or with whom [Elliman] is alleged to have dealt."

Paragraph 4 limits Five East's liability, providing that "In no event shall [Five East] ever be responsible to pay more than one full commission as described in Section 5 on any transaction with [Elliman] alone, or [Elliman] together with a cooperating broker." Paragraph 5 provides the method of calculating commissions due. Paragraph 6 requires Elliman to pay "cooperating brokers" involved in any sale of a unit a 3% commission. The agreement was signed by Patrick Thompson, as

managing member of Five East, and Kenneth Haber, as Executive VP and General Counsel for Elliman. The initial term of the contract was to extend to May 2010 and depended on the effective date of the offering plan.

Prior to its agreement with Elliman, Five East had a similar agreement with Core Group Marketing LLC (Core), the term of which ran from through July 16, 2009. A year after that contract expired, on July 8, 2010, Core commenced an action in the Supreme Court, New York County (Index No. 650862/2010) against Five East seeking to recover sales commissions for the sale of four condominium units - Units 2A, 2B, 4B and 14. Core alleged that, even though Elliman closed the sales, it had procured the purchasers of those units. In accordance with the its agreement with Five East, Elliman retained an attorney to defend Five East against the Core action. However, following the filing of an amended complaint in the Core action on February 18, 2011, which claimed commissions for three additional units, *i.e.* units 3A, 5B and PH, which may have sold prior to the start of Elliman's contract term, Elliman proposed to indemnify Five East for half of the legal costs associated with the three additional units, conditioned upon Five East's payment of outstanding commissions from the unrelated sale of units 6B and 18. Five East responded that it would pay the commissions if Elliman were to confirm the indemnification agreement in the contract in writing. Elliman

subsequently took the position that it had no obligation under the agreement to indemnify Five East for Core's claims because, although Core participated in bringing about the sale by introducing the purchasers, Core did not "cooperate" with Elliman in procuring them as per the agreement. Relying on that interpretation of Paragraph 13 of the agreement, Elliman stopped indemnifying and retaining counsel for Five East in or about April 2011.

In the meantime, on August 15, 2011, Elliman commenced a breach of contract action against Five East entitled *Douglas Elliman, LLC v Five East 44th LLC*, (Index No. 652271/2011) in the Supreme Court, New York County, to recover unpaid commissions for units 6B and 18, earned upon sales that occurred in 2010. By an order dated March 5, 2012, the court (Singh, J.) granted Elliman leave to enter a default judgment against Five East in the full amount of the commissions, $87,871.00 with statutory interest from November 30, 2010, based upon the affidavit of Kenneth Haber. However, by order dated June 11, 2015, the court conditionally vacated half of the default judgment, as "an issue was raised as to whether another broker is entitled to a 50% commission" on those two units, and directed the defendant to commence a third-party action against that broker, Bracha Group. The third-party action was commenced. By order dated September 2, 2015, the court denied Elliman's motion to reargue and renew.

On July 17, 2015, Five East commenced the instant action against Elliman, alleging that Elliman breached the subject agreement by failing to indemnify it with respect to the Core action. Elliman answered the complaint. Five East maintains that it may recover under the indemnification clause of that agreement despite its own failure to pay Elliman commissions due on units that were unrelated to the Core action. Elliman's position is that, notwithstanding the fact that the actions concern sales of different units in the building, the doctrine of collateral estoppel bars Five East from any recovery under the sales agreement by virtue of its own previous breach of that agreement in failing to pay Elliman commissions due, as found by the court in that action. On that ground, Elliman moves for summary judgment dismissing the complaint.

Soon after the instant action was commenced, Five East moved in the Elliman action to consolidate that action with the instant action. By an order dated November 30, 2015, the court (Singh, J.), denied the motion, finding that "plainly, both actions do not arise out of the same transactions and do not involve the same issues of fact and law." The court explained that Five East's action, the instant action, arises from Elliman's failure to indemnify Five East for sales of condominium units 14 and 3A, while Elliman's action, the action before Justice Singh, concerns commissions allegedly due upon the sales of condominium units 18

and 6B.

The Elliman action concluded in its favor. By order dated March 24, 2016, the court (Singh, J.) denied Five East's motion for a default judgment against third-party defendants Ilan Bracha and The Bracha Group, and granted Elliman's cross-motion for summary judgment against Five East in the sum of $43,935.50. In that decision, the court found that, since Bracha worked for Elliman at the time of the sale and thus could not independently seek commissions from Five East, Elliman was entitled to the full value of the default judgment. As to Five East's breach, that court held that "Elliman has established its performance pursuant to the Agreement, but Five East failed to pay the commission owed [Elliman], therefore breaching the terms of the Agreement. Douglas Elliman has set forth a prima facie case for its cause of action of breach of contract."

Since that order, Five East has not made any payments to satisfy the $43,935.50 judgment.

III. DISCUSSION

A. SUMMARY JUDGMENT

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable

issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824, 833 (2014); Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Zuckerman v City of New York, 49 NY2d 557, 562 (1980). If the movant fails to meet this burden and establish its claim or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law (see Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Zuckerman v City of New York, supra; O'Halloran v City of New York, 78 AD3d 536 [1st Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, supra; O'Halloran v City of New York, supra; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013). This is because "'summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue.'" Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d at 480 (1st Dept. 1990) *quoting* Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970).

Initially, it should be noted that Elliman has not submitted an affidavit of anyone with personal knowledge and relies upon deposition testimony of Patrick Thompson, a member of TWP Capital Holdings 1, LLC the sole member of Five East 44th LLC, taken in 2014 and 2017 in the Elliman action. These transcripts are not in admissible form as they are not signed by the witness as required by CPLR 3116. See Reilly v Newireen Associates, 303 AD2d 214 (1st

Dept. 2003); Rue v Stokes, 191 AD2d 245 (1st Dept. 1993). Further, since Elliman's counsel claims no personal knowledge of the underlying facts, the affirmations submitted are without probative value or evidentiary significance on this motion. See Zuckerman v City of New York, supra; Trawally v East Clarke Realty Corp., 92 AD3d 471 (1st Dept. 2012); Thelen LLP v Omni Contracting Co. Inc., 79 AD3d 605 (1st Dept. 2010).

Elliman's core argument on its motion is, essentially, that under the principal of collateral estoppel, the determination in the prior action that Five East breached the agreement bars this breach of contract action against Elliman since Five East would be unable to prove that it performed its obligations under the contract, a necessary element of a breach of contract claim. See Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010)

The doctrine of collateral estoppel, or issue preclusion, "precludes a party from relitigating an issue which has previously been decided against him in a proceeding in which he had a fair opportunity to fully litigate the point." Kaufman v Eli Lilly & Co., 65 NY2d 449 (1985). Collateral estoppel requires two distinct elements: "that an issue in the present proceeding be identical to that necessarily decided in a prior proceeding, and that in the prior proceeding the party against whom preclusion is sought was accorded a full and fair opportunity to contest the issue." Allied Chem. v. Niagara Mohawk Power

Corp., 72 NY2d 271 (1988); In re Hofmann, 287 AD2d 119 (1st Dept. 2001). "The party seeking the benefit of collateral estoppel bears the burden of proving that the identical issue was necessarily decided in the prior proceeding, and is decisive of the present action." Matter of Sherwyn Toppin Marketing Consultants, Inc. v New York State Liquor Auth., 103 AD3d 648, 650 (2nd Dept. 2013) citing City of New York v College Point Sports Assn., Inc., 61 AD3d 33, 421 (2nd Dept. 2009); see Kim v Goldberg, Weprin, Finkel, goldstein, LLP, 120 AD3d 18 (1st Dept. 2014).

Here, Elliman has not demonstrated that, as a matter of law, the doctrine bars the instant breach of contract claim against it. While there is an identity of parties, and it is undisputed that the court in the prior action found that Five East had breached the parties' agreement, that finding and the issues litigated in that action were limited to Five East's obligation to pay commissions due on the sales of two particular units in 2010, pursuant to Paragraph 12 of the agreement. By contrast, at issue here is Five East's right to indemnification from Elliman in regard to the sale of other units in which another broker was involved, pursuant to Paragraph 13 of the agreement. Indeed, in the order denying consolidation in the Elliman action, Justice Singh agreed with Elliman's argument made in opposition to that motion, that the two actions do not involve the same questions of

law and fact. In that regard, Five East argues that the doctrine of judicial estoppel applies.

"Under the doctrine of judicial estoppel, or estoppel against inconsistent positions, a party is precluded from inequitably adopting a position directly contrary to or inconsistent with an earlier assumed position in the same proceeding. Nestor v Britt, 270 AD2d 192, 193 (1st Dept. 2000) *quoting* Maas v Cornell Univ., 253 AD2d 1, 5, *lv granted*, 93 NY2d 806, *affd* 94 NY2d 87. Thus, a party who asserts one position in the pleadings are estopped from taking a contrary position later in the proceedings. See Casper v Cushman & Wakefield, 74 AD3d 669 (1st Dept. 2010). Decisional authority further holds that judicial estoppel shall not apply unless the party had secured a judgment in his or her favor or has or obtained some decisive relief through taking the prior inconsistent position. See D&L Holdings,LLC v RGC Goldman, LLC, 287 AD2d 65 (1st Dept. 2001) or somehow benefitted from taking the prior inconsistent position (see Bianchi v New York City Dept. of Housing and Community Renewal, 5 AD3d 303 (1st Dept. 2004, *lv app denied* 3 NY3d 601 (2004). Here, Elliman secured a decision in its favor by taking the position that the two actions involved differing issues of law and fact. However, that decision was not in this action, but in the Elliman action.

In its reply papers, Elliman references the rule that when one party commits a material breach of a contract, the other party to the contract is relieved, or excused, from further performance under the contract; the non-breaching party is discharged from performing any further obligations under the contract and may elect to terminate the contract and sue for damages or continue the contract. See Rebecca Broadway Ltd. P'ship v. Hotton, 143 AD3d 71 (1st Dept. 2016). A breach is material if it substantially defeated the parties' objective in contracting. See Awards.com, LLC v. Kinko's, Inc., 42 AD3d 178 (1st Dept. 2007). Elliman appears to argue that its agreement with Five East was immediately voided or abrogated by Five East's failure to pay commissions for the 2010 sale of units 6B and 18, and that, once that breach occurred, Elliman was no longer obligated to perform under any provision of the contract, including the indemnification provision, in regard to the sales of other units involving another broker. However, it cannot be concluded, as a matter of law, that Five East's failure to pay commissions on units 6B and 18 "substantially defeat[] the parties' objective in contracting." Awards.com, LLC v. Kinko's, Inc., supra.

Indeed, Elliman does not now expressly claim, much less establish, that it had elected to immediately abandon the contract. Rather, the proof indicates that Elliman attempted to

re-negotiate or amend the agreement to include more favorable terms. In that regard, it should be noted that contracts may be divisible such that one or more provisions remain enforceable after another is breached (see Kosinki v Woodside Constr. Corp., 77 AD2d 674 [3rd Dept. 1980]; Rentways, Inc. V O'Neill Milk & Cream Co., Inc., 282 App Div 924 [1st Dept. 1953]) or a provision is deemed illegal (see Steinlauf v Delano Arms, Inc., 15 AD2d 964 [2nd Dept. 1962], and a contract can be ratified by the injured party after the breach. See Reversible Destiny Found., Inc. v Post, 173 AD3d 647 (1st Dept. 2019); Braddock v Braddock, 60 AD3d 84 (1st Dept. 2009). Moreover, it has been held that a breach of a master lease which concerns a particular unit of a building does not necessarily bar claims of breach concerning other units. See World City Found., Inc. V Sacchetti, 48 AD3d 213 (1st Dept. 2008).

Thus, Elliman did not meet its burden in the first instance of demonstrating a lack of triable issues in regard to its contractual obligation to indemnify Five East.

Even if Elliman had met its burden, Five East's submissions raise triable issues. In opposition, Five East submits, *inter alia*, a sworn affidavit of Patrick Thompson, in which he states that Core procured the purchasers for units 14 and 3A but did not execute the contracts, and that Five East paid Elliman full commissions on those units. Five East settled the Core action by paying Core $29,250, plus $5,000 in legal fees. Five East also

submits the 2018 deposition testimony of Kenneth Haber of Douglas Elliman, taken in this action. Haber testified that he drafted the subject agreement and that the commission due on each unit depends on factors such as whether there is a second broker involved who is a "cooperating" broker and whether the sale was made during the contract terms, as well as the sale price. His testimony also confirmed that when a dispute arose with Five East, Elliman attempted to vary the agreement by placing conditions on its indemnification obligation. Haber was unaware of when Elliman ceased to indemnify Five East, but testified that it did so because Five East withheld commissions on some units. In a letter dated March 24, 2011, from Haber to Thompson, Haber agrees that Elliman will indemnify Five East for certain commissions paid to Core, puts forth a proposal varying the agreement terms, and declares that Elliman would cease paying the legal costs of Five East in the Core action if Five East did not adopt the proposal and pay commissions on units 6B and 18.

The parties' submissions raise a triable issue, *inter alia*, as to whether, under the circumstances of the subject sales, Douglas Elliman was obligated to indemnify Five East for the commissions Five East paid to Core in the Core action. Indeed, the submissions, including the Haber deposition, indicate that each sale presents factual issues as to the amount of the commission owed, the proper party to be paid, and the party

responsible for paying it. Thus, while Five East's success at trial is not certain, Elliman has failed to demonstrate its entitlement to dismissal of the complaint on these papers.

B. SANCTIONS

Elliman's application for sanctions is denied. 22 NYCRR 130-1.1(a) provides, in relevant part, that the court, "in its discretion, may award . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct." Frivolous conduct includes conduct that is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law, or is undertaken primarily to harass or maliciously injure another. See 22 NYCRR 130-1.1(c). Upon applying this standard, the court concludes that Five East has not engaged in frivolous conduct within the meaning of 22 NYCRR 130-1.1.

III. CONCLUSION

For the reasons set forth herein, the motion of defendant Douglas Elliman LLC for summary judgment and for sanctions is denied.

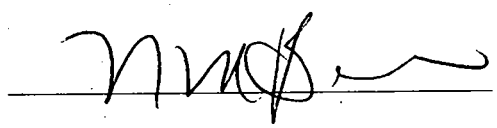
Accordingly, and upon the foregoing papers, it is

ORDERED that the motion of defendant Douglas Elliman, LLC

for summary judgment dismissing the complaint and for sanctions is denied in its entirety.

This constitutes the Decision and Order of the court.

Dated: December 3, 2019

ENTER: 

HON. NANCY M. BANNON