

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN

PART 57

Justice

Index Number : 600714/2008

JDF REALTY

INDEX NO. 600714/08

vs

300 WEST 11TH STREET, LLC

MOTION DATE _____

Sequence Number : 002

MOTION SEQ. NO. 002

SUMMARY JUDGMENT

MOTION CAL. NO. _____

is motion ~~is~~ for summary judgment

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1

Answering Affidavits — Exhibits _____

2

Replying Affidavits _____

Memos of Law M1, M2

Cross-Motion: Yes No

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

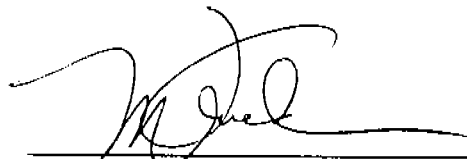
DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

FILED

MAR 19 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/16/09



MARCY S. FRIEDMAN

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x
JDF REALTY, INC.,

- against -

300 WEST 11TH STREET, LLC and JAMES
BARALL,

Pld. ff(s)

Index No.: 600714/2008

FILED

DECISION/ORDER

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NEW YORK

In this action, plaintiff JDF Realty, Inc. (“JDF”) sues for a brokerage fee allegedly due for its services in procuring a lessee, non-party Red River Delta, LLC (“Red River”), for a premises owned by defendant 300 West 11th Street, LLC (“West 11th”). Plaintiff moves for summary judgment for the relief sought in the complaint.

The following facts are undisputed: By lease dated December 12, 2007, West 11th leased space at 570 Hudson Street in Manhattan to Red River. The lease was executed by Michael Callahan, as managing member of Red River. Article 31 of the lease contains the following provision:

“Each party covenants, warrants and represents to the other that it dealt with no broker or finder in connection with this lease other than JDF Realty, Inc. . . . Each party agrees to indemnify and hold the other, non-breaching party harmless from and against any actions, suits, or claims . . . for a brokerage, finder or other commission or fee which either may incur in the event the respective representation is untrue. In reliance on the foregoing, Landlord agrees to pay JDF Realty, Inc. pursuant to separate agreement.”

JDF’s president, Robert Frischman, attests that West 11th’s principal, James Barall, asked

him to find a new tenant for the space, and agreed to pay a commission if JDF found a new tenant. (Frischman Aff., ¶ 6.) He further attests that he faxed a copy of JDF's rate sheet to Barall on two occasions. (Id., ¶¶ 6, 8.) Frischman states that he introduced Wayne Brachman and Michael Callahan to Barall as prospective tenants for a restaurant at the premises, that he arranged and conducted several walk-throughs of the space with them, and that he arranged a meeting with them and Barall. (Id., ¶ 10.)

West 11th's principal acknowledges that Frischman introduced him to Callahan (see Barall Aff., ¶¶ 12), but claims that Brachman was JDF's client (id., ¶ 11), that the partnership between Brachman and Callahan fell through, and that Callahan subsequently approached him to negotiate a lease for a different restaurant. (Id., ¶¶ 22-23.) West 11th asserts that there was no express or implied contract with JDF. (Id., ¶ 7.)

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman, 49 NY2d at 562.)

It is further settled that "[w]here a contract of sale or lease agreement admits the broker's performance of services and includes an express promise by the seller to pay the broker's commission, the broker is entitled to summary judgment on its claim for a commission as a third-

party beneficiary of the contract or lease.” (Joseph P. Day Realty Corp. v Chera, 308 AD2d 148, 152 [1st Dept 2003]; Helmsley-Spear, Inc. v New York Blood Ctr., Inc., 257 AD2d 64 [1st Dept 1999]; William B. May Co. v Monaco, 80 AD2d 798 [1st Dept 1981].)

In support of its motion, plaintiff relies on the provision in West 11th's lease with Red River in which West 11th “agrees to pay [JDF] pursuant to separate agreement.” The court finds that this provision is substantially similar to provisions that have been held to admit the broker’s performance of services and therefore to entitle the broker to summary judgment on its claim for commissions. (See e.g. Helmsley-Spear, Inc., 257 AD2d at 67; Ambrose Mar-Elia Co. v Dinstein, 151 AD2d 416 [1st Dept 1989], lv denied 74 NY2d 615; William B. May Co., 80 AD2d at 799 .) Based on the lease, plaintiff thus makes a prima facie showing of its entitlement to summary judgment.

In opposition, West 11th fails to raise a triable issue of fact as to the existence of a contract for a broker’s fee between West 11th and JDF. Contrary to West 11th's contention, its lease with Red River does not contain a “mere reference” to JDF. (Stern Aff. in Opp., ¶ 19.) This is not a case in which the lease merely provides indemnification between the landlord and tenant against possible claims brought against them by a broker. (Compare Joseph P. Day Realty Corp., 308 AD2d at 152-153.) Rather, as held above, the lease contains an explicit, unambiguous promise by West 11th to pay JDF.

Nor is there a triable issue of fact as to the identity of the lessee introduced by JDF to West 11th. West 11th correctly points out that JDF’s May 9, 2006 proposal for the lease (Ex. E to P.’s Motion) was by its terms addressed to Brachman. However, given the unambiguous lease provision requiring West 11th to pay JDF a broker’s fee for the lease for Callahan’s restaurant, it is immaterial whether Brachman or Callahan was JDF’s client or whether JDF initially introduced Brachman or Callahan to West 11th. (See Helmsley-Spear, Inc., 257 AD2d at 67-68.)

West 11th also may not avoid summary judgment based on its claimed need for discovery, as it fails to show that discovery will lead to relevant evidence in light of the lease provision. (See Bailey v New York City Tr. Auth., 270 AD2d 156 [1st Dept 2000].) The court has considered West 11th's remaining contentions as to liability and finds them without merit.

The court accordingly holds that plaintiff is entitled to partial summary judgment as to liability. As to damages, the court finds a triable issue of fact. JDF seeks damages based on its rate sheets. While JDF submits evidence that it faxed these sheets to Barall on August 3, 2008 and March 22, 2006 (Frischman Aff., ¶¶ 6, 8), the second sheet was sent in connection with different proposed lessees (Kierans and Delaney) (see Ex. D to P.'s Motion), and the first sheet was faxed without a cover letter indicating whether it would apply to a specific transaction or to all transactions between JDF and West 11th. (See Ex. C to P.'s Motion). Under these circumstances, the court finds that although JDF rendered services for which it is entitled to payment, an issue of fact exists as to the reasonable value thereof. Summary judgment will accordingly be limited to liability. (See e.g. William B. May Co., 80 AD2d at 799. Compare Ambrose Mar-Elia Co. v Dinstein, 151 AD2d 416, supra.)

Defendant Barall also opposes plaintiff's motion to the extent that it seeks judgment against him in his individual capacity. JDF fails to address Mr. Barall's arguments, and there is no evidence in the record to support a finding of personal liability against him. (Cf. Hentze-Dor Real Estate, Inc. v D'Allesio, 40 AD3d 813 [2d Dept 2007].)

Plaintiff's motion for summary judgment is accordingly granted to the extent that it is

ORDERED that plaintiff JDF Realty, Inc. is awarded partial summary judgment against defendant 300 West 11th Street, LLC as to liability, and an assessment of damages is directed; and it is further

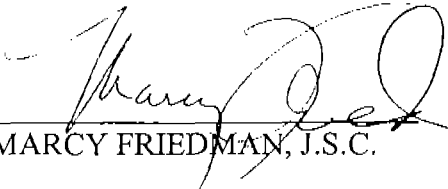
ORDERED that a copy of this order with notice of entry be served upon the Clerk of the Trial Support Office (Room 158), who is directed, upon the filing of a note of issue and a statement of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment herein above directed. Provided that: Nothing herein shall authorize the filing of a note of issue prior to the completion of discovery on damages; and it is further

ORDERED that the complaint is dismissed as to defendant Barall, and the remaining claims are severed and shall continue; and it is further

ORDERED that the remaining parties shall appear for a preliminary conference on discovery as to damages in Part 57 of this Court on April 16, 2009 at 11:00 a.m.

This constitutes the decision and order of the court.

Dated: New York, New York
March 16, 2009


MARCY FRIEDMAN, J.S.C.

FILED
MAR 19 2009
COUNTY CLERK'S OFFICE
NEW YORK