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

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GRONICH & COMPANY, INC., Index No. 650846/2012

Plaintiff,

-against-

LONGSTREET ASSOCIATES L.P.,

Defendant.

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JOAN A. MADDEN, J.

Plaintiff Gronich & Company, Inc. ("Gronich") moves for summary judgment on its claim for a brokerage commission in the amount of $1,890,000, in connection with the renewal and extension of a retail lease for the property at 767 Fifth Avenue in Manhattan ("Building"). Defendant, Longstreet Associates L.P. ("Longstreet") opposes the motion and cross moves for summary judgment dismissing the complaint. For the reasons set forth below, Gronich's motion is granted.

Background

Gronich, which is a licensed real estate broker, acted as the broker for lease entered into in 1985 between FAO Schwarz ("FAO") and the Building's then owner for Building's ground floor, second floor, and subcellar space ("the Lease). In 1996, a third amendment of the Lease was entered into between Longstreet, as landlord, and FAO, as tenant, for a fifteen-year term ("Third Amendment"). At the time of the Third Amendment, Gronich entered into a December 10, 1996, a commission agreement with Longstreet ("the Commission Agreement"), which is at issue in this action. The Commission Agreement provides for a commission for the fifteen-year term of the Third Amendment (i.e. until January 2012), and contains a provision for Gronich to

receive an additional commission in the event an extension option is exercised by the tenant for five-year period beyond January 31, 2012.

Specifically, the Third Amendment states in Article 44 entitled "Tenant's Extension Option" section 44.01 that:

> Tenant shall have the right, at its option, to extend the Term with respect to the entire (and not less than the entire) Demised Premises for a single five (5) year period (the "Extension Term"). The Extension Term shall commence on February 1, 2012, and shall expire on January 31, 2017, unless the Extension Term shall sooner end pursuant to any of the terms, covenants or conditions of this lease or pursuant to law. Tenant shall give Landlord written notice of Tenant's intention to exercise such option on or before January 31, 2011... and upon giving of such notice this Lease and the Term shall be extended without execution or delivery of any other or further documents. (Third Amendment at 5-6)

The Commission Agreement provides for the payment schedule for the Third Amendment in accordance with Schedule "A". (Commission Agreement, ¶ 5). Schedule "A" sets forth the payment schedule and specifies "in the event that Tenant exercises the extension option (for the period beyond January 31, 2012) contained in Article 44 of the rental lease as amended by the Third Amendment, an additional commission equal to 2% of the Base Rent payable during such extended term shall be due and payable." (Schedule "A" at 2).

Paragraph 8 of the Commission Agreement states that "broker (i.e. Gronich) agrees that in the event Landlord sells, transfers or otherwise disposes of its interest in the Building, or its interest in the Third Amendment, and if Landlord shall deliver to Broker an agreement by the purchaser or grantee assuming payment of the amounts due and unpaid hereunder, then Landlord shall be relieved of all liability under this agreement."

In May of 1998, Longstreet entered into a contract to sell the Building to Trump 767 Fifth Avenue, LLC ("Trump") ("The Contract of Sale"). Section 1.1 (e), of the Contract of Sale provides that the Seller shall sell, assign, transfer and convey to the Purchaser, and the purchaser

shall purchase, assume, accept, and acquire from Seller: "to the extent permitted to be assigned or conveyed, all Service Contracts ... and other agreements relating to the ownership, leasing or occupancy of the Real Property." Article 4 titled "Representations and Warranties" provides under Section 4.1(f) that: "Seller has delivered to Purchaser true and complete copies of all of the brokerage agreements relating to the Space Leases, which includes the FAO leases.[1] The brokerage agreements noted on Exhibit H (subject to amendments and supplements permitted pursuant to Section 5.1 (c)) are the only brokerage agreements related to the Space Leases with respect to which amounts will remain unpaid as of August 1, 1998." (Id. at 8). Notably, Exhibit H to the Contract of Sale lists three brokerage agreements that do not relate to the FAO lease. (Id. at H-1).

Article 9, Section 9.1 (a), entitled "Apportionments and Payments" states that the following shall be apportioned at the Closing as of the close of business on the day immediately preceding the Closing Date: Section 9.1 (f) "the costs incurred in securing Space Leases consented to by Purchaser in accordance with Section 5.1 (c) hereof, after the date hereof, including, without being limited to, brokerage commissions, work letters or tenant installation costs or allowances, reasonable attorneys' fees and disbursements, advertising expenses and any tenant inducement costs, shall be pro-rated based upon the term of the Space Lease and the

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[1]The term "Space Leases" is defined in Section 4.1 (e) as the Leases listed in Exhibit G to the Contract of Sale which constitutes "all of the leases, licenses, concession agreements and other forms of agreements wherein Seller (as a party named therein or the successor thereto) grants any party or parties right of use or occupancy of any portion of the Building other than use or occupancy of parking spaces (the "Space Leases"). (Id. at 7-8). Exhibit G-6 lists and includes the FAO leases. (Id. at G-6).

number of days there of after rent commencement under the Space Lease occurring prior to the Closing Date." (Id. at 22) (emphasis supplied). Section 9.1 (g) provides:

> Each of Seller and Purchaser shall pay fifty percent (50%) of all amounts paid or payable in respect of (I) the brokerage commissions listed on Exhibit H and (ii) the tenant improvement allowances listed on Exhibit M. All brokerage commissions for any renewals or extensions of the terms of Space Leases made in accordance with Section 5.1 (c) hereof (including any brokerage commissions due in respect of a Tenant waiving or failing to exercise a cancellation right) or any expansion of the premises covered thereby shall be paid by Purchaser." (Id. at 22)(emphasis supplied).

Section 5.1 (c) entitled "Covenants of Seller" states: "From and after the date of this Agreement and until the Closing Date... (iv) no Service Contract shall be canceled, terminated, amended, extended, or otherwise modified which shall have a material adverse effect on the Building nor shall any new service, maintenance, operating or brokerage agreement be entered into by Seller unless the same is consented to by Purchaser and reasonable necessary for normal operation of the Building prior to the Closing date and may be terminated by Seller (and, after the Closing Date, by Purchaser) upon not more than thirty (30) days' written notice without the payment of any premium or penalty." (Id. at 13) (emphasis supplied).

Also in the record is the closing binder for the sale of the Building ("Closing Binder"). The Closing Binder contains assignments and assumptions from the Seller to the Purchaser of (ii) the Spaces Leases, (iii) Service Contracts, and (iv) Licenses and Permits and none of which specifically references any brokerage agreements. (Closing Binder at 3-5).

Gronich moves for summary judgment to recover a brokerage commission of $1,890,000.00, plus interest, arguing that it entitled to this amount as matter of law under the Commission Agreement to the Third Amendment as the uncontroverted evidence demonstrates that the Lease was extended pursuant to the option in the Third Amendment, thus triggering its

right to commission in accordance with Schedule "A" of the Commission Agreement. Gronich further argues that under New York law, the obligation to pay a brokerage commission does not run with the land and must be affirmatively assumed, and that the documentary evidence, including the Contract of Sale and the Closing Binder, show that when Trump purchased the Building in 1998, it did not assume such an obligation. In particular, Gronich asserts that the specific references in the Contract of Sale as to assumption of brokerage commissions do not cover the Commission Agreement, which is not listed in Exhibit H, and does not constitute a brokerage commission within the meaning of Section 5.1(c) which applies only to those agreements entered into between the date of the contract and the closing.

In addition, Gronich argues that even if there were an assumption by Trump of the obligation to pay the commission, since Longstreet failed to deliver to Gronich a copy of such agreement as required under paragraph 8 of the Commission Agreement, Longstreet remains obligated to pay the commission.

In support of the motion, Gronich submits various documentary evidence described above, including (1) The Lease (2) The Third Amendment (3) The Contract of Sale (4) The Commission Agreement (5) An offering memorandum and (6) the Closing Binder. Gronich also relies on the affidavit of its President, Neal J. Gronich, who states that FAO exercised its option to extend the term of the Third Amendment of the Lease for an additional five-year term commencing on February 1, 2012 expiring January 31, 2017, on January 25, 2011, which resulted in additional brokerage commissions being owed to Gronich from Longstreet. Gronich Affidavit, ¶ 6. According to Mr. Gronich, when the Building was sold by Longstreet to Trump in 1998, Gronich never received an agreement or other notice that the Commission Agreement

was assigned to Trump as required under the Commission Agreement, and that he "opens all of Gronich's mail and if such a document were sent, I would have seen it." Id. ¶'s 8, 9.

Gronich also submits the affidavit of Michael L. Tumolo, Esq. ("Tumolo"), who is Vice President – Real Estate Counsel of Toys "R" Us Inc. Tumolo's affidavit is submitted in connection with the production of documents by FAO and Toys Acquisition, Inc.[2] pursuant to a subpoena served by Gronich, which resulted in the production of five documents, three of which, including the Lease Extension Agreement, were designated as confidential pursuant to the parties' confidentiality agreement. The other two documents, which are submitted with Tumolo's affidavit are: (1) an assumption and assignment of the lease dated May 22, 2009, between FAO, as assignor, and Toy Acquisition, LLC, as assignee, and (2) a notice dated January 25, 2011 in which Toys Acquisition exercised its option to extend the Lease for the period from February 1, 2012 through January 31, 2017.

Tumolo states that "[i]n accordance with the Confidentiality Agreement, I am disclosing on a non-confidential basis that the dates and the parties to the Lease Extension Agreement are set forth above in [the Lease Extension Agreement], the term of the Lease Extension is five (5) years and the aggregate fixed rent for the Lease Extension is $94,500,000 [and that it] was for the space leased by [FAO and Toys Acquisition LLC at the Building] as of January 31, 2012," Tumolo Aff., ¶ 6

Gronich also submits an offering memorandum generated by Morgan Stanley Realty for Longstreet in 1998. The memorandum lists Gronich as broker but inaccurately states that the commissions on extensions or expansions are none and that the extension option is "1 @ 5 years,

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[2] Toys Acquisition, Inc was the vehicle used by Toys R' Us to acquire FAO.

same bases, no LL work 95% FMV, no add'l commission no work." (Morgan Stanley Offering Memo at 79). Gronich argues this memorandum shows that there was no assumption or assignment of the Commission Agreement to Trump.

Longstreet opposes the motion and cross moves for summary judgment dismissing the complaint, asserting that it expressly assigned to Trump the Commission Agreement based on Section 1.1 (e) of the Contract of Sale which, as indicated above, provides that "Seller [i.e. Longstreet] shall...assign ... agreements relating to the .... leasing or occupancy of the Real Property [i.e. "the Building"]," and therefore this action was brought against the wrong party as Trump had assumed the obligation to pay under the Commission Agreement. Longstreet also argues that the "comprehensive" nature of the transaction including that Longstreet "sold the entire building and all the myriad of contracts that came along with it," demonstrates that the Commission Agreement was intended to be assigned to Trump. Likewise, it argues that the delivery of the brokerage commission agreements for the Building to Trump evidences its affirmative assumption of the obligation to pay under those agreements.

Longstreet also contends that it fulfilled its obligations with respect to the notice of the assignment by providing Gronich with information that the Commission Agreement had been assigned and assumed with delivery of the assignment and assumption materials in this litigation, since that there is no specific contractual requirement as to the timing of the delivery of the agreement.

Longstreet alternatively contends that even if Trump did not assume the obligation to pay the commission, it is not liable to Gronich since FAO did not exercise the renewal option as FAO had assigned the Third Agreement to its successor-in-interest, Toys Acquisition, LLC, which exercised the renewal option.

Discussion

On a motion for summary judgment, the proponent "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. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 324 (1986).

It is well settled that the interpretation of a lease provision is governed by the same rules of construction applicable to other agreements. Missionary Sisters of the Sacred Heart, Ill. v. New York State Division of Housing & Community Renewal, 283 A.D.2d 284, 288 (1st Dept 2001). When interpreting a contract, "the document must be read as a whole to determine the parties' purpose and intent, giving a practical interpretation to the language employed so that the parties' reasonable expectations are realized." Snug Harbor Square Venture v. Never Home Laundry, Inc., 252 A.D.2d 520, 521 (2nd Dept 1998);see also, Zodiac Enterprises, Inc. v. American Broadcasting Companies, Inc., 81 A.D.2d 337, 339 (1st Dept 1981), aff'd, 56 N.Y.2d 738 (1982).

At the same time, however, "a court may not, under the guise of interpretation, fashion a new contract for the parties by adding or excising terms and conditions which would contradict the clearly expressed language of the contract" Republic National Bank of New York v. Olshin Woolen Co., Inc., 304 A.D.2d 401, 402 (1st Dept 2003) (citation omitted). Thus, when the terms of a contract are "clear, unequivocal and unambiguous, the contract is to be interpreted by its own language (citations omitted)." R/S Associates v. New York Job Development Authority, 98

N.Y.2d 29, 32 (2002). And, in the absence of ambiguity, "'[e]vidence outside the four corners of the document ... is generally inadmissible to add to or vary the writing.'" Id. at 33, quoting W.W.W. Assoc. v Giancontieri, 77 N.Y.2d 157, 162 (1990).

Here, the Commission Agreement unambiguously requires Longstreet to pay a commission to Gronich in the event the tenant exercises the extension option. Thus, the only issues on this motion are whether (1) Trump assumed the obligation to pay the commission; and (2) whether the extension was exercised under the terms of the Commission Agreement. The court finds that Gronich has met its burden on both of these issues and Longstreet has not controverted this showing.

With respect to the first issue, it is well settled that under New York law, '[a]bsent an affirmative assumption, a grantee is only liable for those covenants that run with land." See Longley-Jones Associates, Inc. v. Ircon Realty Co., 67 N.Y.2d 346, 348 (1986). Furthermore, of relevance here, the courts have held that "[a] covenant in a lease to pay a broker's commission upon renewal of the lease does not run with the land."Id.; see also Cushman & Wakefield, Inc. v. Progress Corp., N.V., 172 A.D.2d 191, 193 (1st Dept 1991); Gurney, Becker & Bourne, Inc. v. Bradley, 101 A.D.2d 1012, 1013 (4th Dept 1984).

Here, Gronich has submitted documentary evidence demonstrating that Trump did not assume an affirmatively obligation to pay Gronich the commission based on the lease extension so as to relieve Longstreet of liability here. See Longley-Jones Associates, Inc. v. Ircon Realty Co., 67 N.Y.2d at 348 (holding that grantee is not liable "for the performance of each and every covenant in a lease entered into by its grantor merely by taking the conveyance "subject to", and with notice of, the terms of the lease"); Hudson Eng'g Assoc v. Ames Dev. Corp., 228 A.D.2d 477 (2d Dept 1996)(noting that "[t]he mere assignment of a contract may not be interpreted as a

promise by the assignee to the assignor to assume the performance of the assignor's duties so as to create new liability on the part of the assignee to the assignor for the performance of those duties") compare Dysal, Inc. v. Hub Properties Trust, 92 AD3d 826 (2d Dept 2012)(finding that successor lessor affirmatively assumed obligation to pay real estate broker based on express agreement to assume predecessor's obligation to pay commission on the happening of a certain event which occurred).

Moreover, Longstreet has not controverted this showing. While section 1(e) provides for Trump's assumption of "agreements relating to the...leasing of the [the Building]," such general language is insufficient to create an affirmative obligation by Trump to pay the commission under the Commission Agreement. Indeed, the provisions of the Contract of Sale specifically address Trump's obligation to assume certain brokerage agreements and do not include the Commission Agreement. Rather, Exhibit H refers to three other commission agreements, and while Trump agreed to assume an obligation with respect to certain other brokerage agreements and extension or renewals of such agreements within the meaning of Section 5.1(c), this obligation was limited to those agreements entered into between the date of the Contract of Sale and the closing. Nor is the delivery of the brokerage agreements to Trump sufficient to create specific affirmative assumption of the obligation to pay the commission. See Gurney, Becker & Bourne v. Bradley, 101 A.D.2d at 1013 (finding that grantee's knowledge of obligation to pay brokerage commission was insufficient to impose liability for payment in the absence of an a specific assumption of the obligation)

Furthermore, that the Third Amendment to the Lease contained a reference to Gronich being paid commission pursuant to a separate agreement is insufficient to create an affirmative assumption of the brokerage agreement based on the assignment of the Lease. See Longley-

Jones Associates, Inc. v. Ircon Realty Co., 67 N.Y.2d at 348 (grantee not liable for brokerage commission upon renewal of a lease in the absence of an affirmative assumption of the obligation to pay); Hudson Eng'g Assoc v. Ames Dev. Corp., 228 A.D.2d at 478 (assignment is insufficient to create liability for fees that do not run with land in the absence of any affirmative assumption by assignee). Moreover, to the extent case law relied on by Longstreet applying New Jersey law is to the contrary (see e.g. Pagano Co. v. 48 South Franklin Turnpike, LLC, 965 A.2d 1172 [N.J. 2009], it is not controlling here since New York law applies.

Next, even assuming *arguendo* that documentary evidence could be interpreted as constituting an agreement by Trump to affirmatively assume an obligation to pay the commission, Longstreet would not be relieved of liability here since the record establishes that Longstreet failed to deliver any such agreement to Gronich as required under paragraph 8 of the Commission Agreement. Furthermore, Longstreet's argument that it complied with paragraph 8 by providing documents in connection with this litigation is unavailing. While paragraph 8 does not specify a time for the delivery of an agreement assuming the obligation to pay commission, under such circumstances a reasonable time is implied and awaiting delivery of such purported agreement until approximately 14 years after such alleged assumption is unreasonable as a matter of law. See Savasta v. 470 Newport Associates, 82 N.Y.2d 763, 765 (1993)(noting that "[w]hen a contract does not specify time of performance, the law implies a reasonable time").

Therefore, the remaining issue is whether the fact that FAO's successor-in-interest, Toys Acquisition LLC, rather than FAO exercised the extension of the Lease precludes Gronich's recovery of the commission. The Commission Agreement states "in the event that Tenant exercises the extension option (for the period beyond January 31, 2012) contained in Article 44 of the rental lease as amended by the Third Amendment, an additional commission equal to 2%

of the Base Rent payable during such extended term shall be due and payable." The Commission Agreement defines the Tenant as "FAO Schwartz as tenant ("Tenant") covering portions of the Ground, Concourse and Subcellar space (collectively, the "Premises") in the building located at and known as 767 Fifth Avenue, New York, New York (the "Building")." Here, the record shows that Toys Acquisition was assigned the Lease in 2009 and exercised the five year extension option by the return date January 25, 2011. Significantly, however, it is undisputed that the store continued to be occupied by the same toy store although owned by a new entity.

Under these circumstances, Gronich is entitled to its commission since to find otherwise would to be to ignore the purpose of the renewal provision and the expectations of the parties that Gronich be compensated in the event that the same tenant continued to occupy the leased space. See e.g Sbarra v. Totolis, 191 A.D.2d 867 (3rd Dept 1991)(holding that a broker is entitled to a commission from a prior owner for the exercise of option by tenant's successor owner of five year option on lease reasoning that "the name of the tenant who actually exercised the lease option is unimportant as the point of the commission agreement was to recompense plaintiff for arranging what turned out to be a valuable 10 year lease); see generally, Lipper Holdings v. Tident Holdings, 1 AD3d 170, 171 (1st Dept 2003)(holding that "[a] contract should not be interpreted to produce a result that is absurd ... commercially unreasonable... or contrary to the reasonable expectations of the parties").[3]

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[3]The cases which Longstreet cites with respect to this issue do not provide a basis for reaching a contrary conclusion. See e.g. Newmark & Co Real Estate, Inc. v. GCJ Holdings, LLC, 87 A.D.3d 454 (1st Dept 2011)(affirming dismissal of claim by plaintiff broker against disclosed corporate principal who was not party to the agreement providing for payment of plaintiff's commission); Goldstein v. AccuScan, Inc., 2 N.Y.3d 811 (2004) (finding that plaintiff, a consultant, was promised 10% of "all amounts received" by defendant could not be interpreted to mean "all amounts net of attorneys' fees").

In view of the above it is

ORDERED that the motion for summary judgment by plaintiff Gronich & Company, Inc. is granted, and the Clerk is directed to enter judgment in favor of plaintiff Gronich & Company, Inc. and against defendant Longstreet Associates, L.P. in the amount of $1.890,000,[4] plus interest from July 5, 2011[5], at the statutory rate as calculated by the Clerk together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that Longstreet's cross motion for summary judgment is denied.

DATED: April 7, 2015

HON. JOAN A. MADDEN
J.S.C.

[4]The amount at issue is undisputed as it is based on 2% of the aggregate rent of $94,500,000 for the Lease Extension period.

[5]Interest is properly calculated from July 5, 2011, which is the date of the agreement confirming the Lease Extension Agreement and setting forth the amount of aggregate rent on which the commission was based.