Core Group Mktg. LLC v 550 W. 29th St. LLC
2024 NY Slip Op 34418(U)
December 16, 2024
Supreme Court, New York County
Docket Number: Index No. 654308/2020
Judge: Jennifer G. Schecter
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: COMMERCIAL DIVISION

PRESENT: **HON. JENNIFER G. SCHECTER** **PART** 54

Justice

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CORE GROUP MARKETING LLC,

Plaintiff,

- v -

550 WEST 29TH STREET LLC,

Defendant.

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INDEX NO. 654308/2020

DECISION AFTER TRIAL

In this breach-of-contract action, based on the credible evidence, the court finds that defendant 550 West 29th Street LLC (Owner) did not terminate plaintiff Core Group Marketing LLC (Broker) for cause as required by the parties' 2015 Exclusive Sales and Marketing Agreement (Agreement) (Dkt. 90), nor did the three subsequent agreements between the parties supersede the Agreement.

In 2015, Owner and Broker entered into the Agreement, which provided that Broker would be the exclusive agent to market and sell 19 residential units at 550 West 29th Street (Building). In September 2018, Owner purportedly terminated the Agreement in writing (Dkt. 433 at 5). It urges that Broker was terminated for cause because it failed to sell any units (Dkt. 433 at 8-9; Dkts. 175, 197, 335). Broker insists that it was not properly terminated for cause in accordance with the bargained-for requirements of the Agreement and that it remains entitled to its commissions.

Nearly two years after the purported termination, in January 2020, the parties discussed a mutual general release of the Agreement (Release) and Owner giving Broker an exclusive to sell three units in the Building (Dkt. 433 at 5). In February 2020, without Broker executing the Release, the parties entered into six-month exclusive sales agreements for three units (New Agreements) (Dkt. 211). The parties dispute whether the New Agreements supersede the Agreement.

Breach of Contract/Wrongful Termination

In no uncertain terms, the Agreement provides that Owner could "not terminate the Agreement without Cause" before expiration of its Term (Dkt. 90 § 7[i]). Cause is defined as "(a) acts of gross negligence, willful misconduct or fraud by Broker; or (b) material breach of this Agreement by Broker, in each case which is not cured within thirty (30) days after written notice from Owner" (*id.* [emphasis added]).

The evidence established that although Owner was dissatisfied with Broker's lack of sales, there was no Cause for termination as defined by § 7 of the Agreement. While Owner set

forth written reasons it believed Broker was in material breach, it purported to terminate the Agreement on that basis without providing Broker the required opportunity to cure (Dkts. 175, 176, 177, 197, 205, 335; *see Alloy Advisory, LLC v 503 West 33rd St. Assoc., Inc.*, 195 AD3d 436 [1st Dept 2021]).[1]

Despite Owner's numerous expressions of its desire to terminate, at no point did Broker accept any termination or abandon its rights under the Agreement. For example, after Owner notified Broker by email that it was "looking to terminate the marketing agreement . . .," Broker replied that "the agreement does not allow for a termination . . .we will continue to work on the project with the full effort of selling the units and being compensated for all sales according to the [Agreement]" (Dkts. 176, 210). After receiving a formal letter purporting to terminate the Agreement, Broker responded that the letter "failed to identify any 'cause' which would justify premature termination of the Agreement" and that the termination "clearly violates the Agreement's mandatory cure provisions" (Dkts. 177, 186). Significantly, the majority of the complaints that Owner recounted at trial were never addressed in writing.

Additionally, although the parties dispute how often they were in contact after the purported termination, the credible testimony established that Broker never abandoned the Agreement (Dkt. 432 at 45-47 [Osher testified that Broker continued to work for Owner and was in contact 3-4 times a month], 119 [Owner testified that Broker "was not in touch on a weekly or bi-weekly basis" but that there was contact when "closings started or close to it"]).

Ultimately, Broker convincingly proved that Owner did not properly terminate the Agreement.[2]

Subsequent Agreements

"A subsequent contract regarding the same subject matter will supersede a prior contract, **but only with regard to that same subject matter**" (*Pope Contracting, Inc. v New York City Hous. Auth.*, 214 AD3d 519, 520 [1st Dept 2023] [emphasis added]; *see Tiffany & Co. v Lloyd's of London Syndicates 33, 510, 609, 780, 1084,1225,1414, 1686, 1861, 1969, 2001, 2012, 2232, 2488, 2987, 3000, 3623, 4444, 4472, & 4711,* 83 Misc 3d 1211[A] at *7 [Sup Ct, NY County 2024] ["a subsequent contract that does not pertain to 'precisely the same subject matter' will not supersede an earlier contract unless the subsequent contract has definitive language indicating it revokes, cancels or supersedes that specific prior

[1] To the extent Owner had other complaints about Broker--for example, that it was selling units in a nearby building, or that it was not working with specific international brokers--those grievances were not reduced to writing nor was a cure period provided (*see, e.g.,* Dkt. 432 at 101, 103, 107-108).

[2] That a different broker sold multiple units shortly after it began working with Owner does not have any bearing on Broker's performance. Owner only first agreed to substantial price reductions (up to 40%) when the new broker began work (Dkt. 432 at 82-84, 41 ["another broker who sold a number of units . . .They had drastically reduced prices, discounted them and kind of did a fire sale."]; *see also* Dkt. 426).

contract"], *citing Globe Food Servs. Corp. v Consolidated Edison Co. of NY, Inc.*, 184 AD2d 278, 279 [1st Dept 1992]). "The determination whether a subsequent agreement is superseding is fact-driven" (*Hyunchol Hwang v Mirae Asset Securities (USA) Inc.*, 165 AD3d 413, 414 [1st Dept 2018]).

Although the New Agreements included some of the original units,[3] they did not cover all of the units in the Agreement. Nor did they contain any language indicating that the Agreement was revoked, canceled or superseded.

The court credits Broker's testimony that the parties never mutually agreed to enter into a superseding agreement and that Owner merely hoped that the parties' long termination dispute would be resolved by the New Agreements. <u>After all, Broker rejected the Release.</u>

Broker testified that the New Agreements were an accommodation to Owner to space out the marketing of unsold units and would reaffirm the Agreement (Dkt. 394 at 178-79; Dkt. 432 at 43 ["So this was reaffirming the three units that were going to be the first units of us selling the remainder of the project"]). Owner testified that the New Agreements represented a fresh start between the parties, effectively releasing it from the obligations under the Agreement (Dkt. 432 at 112 [" . . . starting fresh and starting new with these three specific units"]). It believed that the New Agreements would resolve the parties' business dispute (Dkt. 394 at 174). The evidence established, however, that Owner knew that by entering into the New Agreements Broker was not waiving any rights because when Owner stated that it would only extend Broker's rights past the date in the New Agreements, Broker made clear that it still believed the Agreement was in full force and effect (Dkt. 394 at 179). The evidence also established that Owner understood that Broker was unwilling to sign the Release because it continued to maintain entitlement to commissions under the Agreement, which it at all times asserted was in effect (*see* Dkt. 394 at 164 ["I believe Plaintiff's side chose not to sign (the Release)], 168 ["I think it was CORE that didn't want to sign the general release, because they thought it countered their opinion on our disagreement (litigation position)"], 173 [asked whether a general release was entered into Owner answered "No. I believe we were leaning towards it and CORE wasn't"]). Owner's unsupported hope or subjective--and objectively unreasonable--belief that if Broker sold these three units it would not pursue claims under the Agreement because "everything is nice and dandy" and everything would be resolved from a business perspective, is insufficient to affect a release of the obligations set forth in the Agreement (*id.* at 174). The failure to reach an agreement on the Release positively proves that the parties did not mutually agree to supersede the Agreement. They decided to proceed together as to the three units because, for both of them, some sales were better than no sales.

The parties' remaining arguments are unavailing, including Defendant's argument that damages are limited based on § 7(iii), which contemplated an "effective termination" of the Agreement and that never happened.

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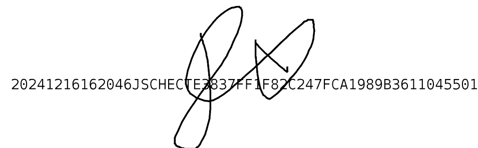
[3] CORE does not seek commissions for the three units covered in the New Agreements as they fell outside of the term of the Agreement (Dkt. 436 at 27 n 16).

In the end, for the reasons stated, Broker proved that Owner breached the Agreement and that it is entitled to commissions for the sale of all units that closed during the Term and to attorneys' fees under § 16(v) of the Agreement.[4]

After addressing plaintiff's forthcoming fee application, the court will direct the entry of judgment in the amount of $1,549,773.16, with 1% monthly interest from July 1, 2024 through the date judgment is entered (*see* Dkt. 426).

Accordingly, it is ORDERED that the parties shall promptly confer on the amount of remaining attorneys' fees owed to plaintiff and e-file and email a letter with the agreed-upon amount, and if they cannot agree, by January 7, 2025, plaintiff shall e-file a fee application (including billing records), and by January 23, 2025, defendant may e-file objections to the fee application. Plaintiff shall email ktouaf@nycourts.gov when these filings are fully submitted.



DATE: 12/16/2024 **JENNIFER G. SCHECTER, JSC**

Check One: [X] **Case Disposed** [ ] **Non-Final Disposition**

[4] By order dated April 11, 2024, plaintiff was awarded $9,920.43 in attorneys' fees associated with cross-motions (Dkt. 424). In its fee application, plaintiff should specify whether the amount was paid or remains outstanding and should not include documentation with respect to those fees.