SCAN

TRIAL DECISION
SUPREME COURT OF THE STATE OF NEW YORK

ROSEN ASSOCIATES MANAGEMENT

Plaintiff,

- against -

BRUCKNER PLAZA ASSOCIATES, THE CALDOR CORPORATION, and TOYS "R" US, INC. and TOYS "R" US - NY LIMITED PARTNERSHIP.

Defendants.

By: HON. DANIEL MARTIN

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Index No.: 031773/94

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This matter comes to the Court as a non-jury trial as to five causes of action brought by plaintiffs. The Court finds for the defendants on all the causes of action and the causes of action are dismissed.

At the outset it is noted that the plaintiff withdrew its claim as against The Caldor Corporation and proceeded only as against the other defendants, Bruckner Plaza Associates ("Plaza), Toys "R" Us, Inc. and Toys "R" Us, NY Limited Partnership.

The court makes the following findings of fact. At all times relevant to this action, defendant Bruckner Plaza Associates ("Plaza") was the owner of the Bruckner Plaza Shopping Center (the "Center") located in the Bronx, New York . In 1991, the plaintiff became the managing agent of the Center pursuant to an appointment by Richard Godosky ("Godosky"), a court-appointed receiver in a mortgage foreclosure action in Supreme Court, Bronx County, captioned Chase Manhattan Bank, N.A. v. Bruckner Plaza Assoc., et al. The order appointing the receiver enjoined and restrained Plaza from interfering in any manner with the Center. The plaintiff and Godosky entered into a Management Agreement dated June 25, 1991 which was approved by the court in the mortgage foreclosure action. Pursuant to the Management Agreement, for commercial leases signed and accepted by the receiver, the plaintiff was entitled to a commission not greater than five and one-half (5 ½%) percent on the gross amount of base rentals due on the initial term. Such compensation was to be paid for leases that were signed and accepted by the receiver and required the approval of the court.

Richard Stadtmauer ("Stadtmauer"), Vice President of the management partner of Plaza,

had been affiliated with Plaza since it acquired the Center and during the period involved in this action, oversaw the management of the Center. Mr. Stadtmauer knew that a receiver had been appointed and had read the order appointing him. Mr. Stadtmauer also knew that the receiver had appointed the plaintiff as property manager for the Center.

The basis for some of the claims by plaintiff arose out of Plaza's dealings with defendant, The Caldor Corporation.

With regard thereto, Lionel Leisure, Inc. ("Lionel"), a tenant at the Center, had filed for bankruptcy early in 1991 apparently prior to the appointment of the plaintiff. In the Spring of 1992, a meeting took place at the plaintiff's office, attended by representatives of the plaintiff, including Florence Rosen, its vice president and David Rosen, its director of leasing, and representatives of Caldor, including Alan Kuller ("Kuller"), its Senior Vice President. Subsequent to the meeting, Florence Rosen sent a letter to the receiver, notifying him of the plaintiff's contact with Caldor regarding a possible tenancy at the Center. Pursuant to receiver's instructions, this letter was copied to Marci Plotkin, who worked for Stadtmauer After the meeting, Kuller wrote a letter to David Rosen confirming Caldor's interest in the Lionel space and stating that Caldor was prepared to work with the plaintiff to acquire it. After the meeting, David Rosen sent Caldor information, spoke to representatives of Caldor on the telephone on several occasions concerning the Center and met with them on at least one occasion.

Around September 30, 1992, Plaza and Chase Manhattan Bank, the plaintiff in the underlying action in which the receiver was appointed, agreed to settle the foreclosure action. Thereafter both parties therein filed a joint motion for an order directing the receiver to render a final accounting and for dismissal of the action. By order dated October 21, 1992, the court granted the joint motion and directed the receiver to render a final accounting within 45 days. It further ordered that the action was discontinued on the terms of the parties previously referred to in the stipulation. Thereafter and on or about December 14, 1992 the receiver filed a final accounting and motion to be discharged. Both Plaza and Chase in the underlying suit filed objections. In the opinion of Plaza, the accounting was deficient and Plaza did not trust the plaintiff. In May of 1993 the parties to the underlying suit obtained an order directing the receiver to show cause why he should not be ordered to immediately surrender possession of the property in question to Plaza and render a final accounting. In Plaza's opinion, the plaintiff had been "dragging its feet" in providing financial information for the accounting necessitating the order to show cause.

During the continuing pendency of the receivership, but after the settlement, Stadtmauer met with Kuller in the Fall of 1992. Stadtmauer on November 6, 1992, wrote to Gerard Lucciola ("Lucciola"), an attorney in receiver's office, asking that the plaintiff be prohibited from negotiating with potential tenants at the Center. On November 9, 1992, Lucciola responded to Stadtmauer's letter, reminding him that he had been authorized to negotiate only with Lionel and Key Food/Durso, another tenant of the Center that was in bankruptcy, and that with respect to all other tenants, the order appointing the receiver remained in place and would be enforced until Godosky's release and discharge. Caldor acquired the Alexander's lease on December 1, 1992 Thereafter, Stadumauer negotiated with Caldor. Plaza entered into a Fourth Lease Modification Agreement with Caldor, dated December 17, 1992 (the "First Caldor Agreement"). As part of the

First Caldor Agreement, Caldor also made a $3 million payment into escrow which was eventually released to Plaza and used by Plaza to pay down the debt. The First Caldor Agreement gave Plaza sole discretion to determine whether it was necessary to obtain the consent of the receiver. The First Caldor Agreement was expressly subject to and conditioned upon an order of the foreclosure court permitting its execution and delivery by Plaza.

On March 9, 1993, the Court in the Lionel Bankruptcy issued an order authorizing Lionel to enter into a Lease Termination Agreement for its lease at the Center. Plaza and Caldor entered into a revised version of the Fourth Lease Modification Agreement on March 21, 1993 (the "second Caldor Agreement"). It provided that Plaza was to use "efforts" to cause Lionel's lease to be rejected, terminated or surrendered in the Lionel bankruptcy and to deliver possession of the Lionel space to Caldor by April 15, 1993. If Plaza was successful in doing so, Caldor agreed to accept possession of the Lionel space. In the Second Caldor Agreement, the rent attributable to the Lionel space was reduced from $881,250 to $781,250 per year. This rent reduction was intended to pay back Caldor's $3 million escrow payment over 30 years.

The Second Caldor Agreement again gave Plaza sole discretion to determine whether the receiver's consent was necessary. The Second Agreement was also expressly subject to and conditioned upon an order of the foreclosure court permitting its execution and delivery by Plaza, if the Center was in receivership. The Second Agreement again prohibited Caldor from disclosing it to the receiver without the prior written consent of Plaza.

According to defendant, in order for the Caldor Agreements to become effective, Plaza had to reacquire the Lionel space and Chase Manhattan Bank ("Chase") had to give its approval. Both of these events occurred while the receivership was pending.

On April 30, 1993, Terrence L. Dugan of Simpson Thacher and Bartlett, a law firm representing the receiver, wrote to Plaza's attorneys demanding disclosure of any agreement between Plaza and Caldor, threatening to seek relief from the foreclosure court, reminding Plaza's attorneys that Plaza was still subject to contempt sanctions if it interfered with the receivership, and reserved the receiver's right to collect commissions on any agreement with Caldor. Soon thereafter, the aforementioned order to show cause was obtained by Plaza and Chase.

On April 30, 1993, Plaza and Chase entered into an agreement disbursing the $3 million Caldor escrow deposit. $1,750,000 of this amount, less expenses, was divided equally between Chase and WR Properties Associates, L.P., an entity affiliated with Plaza, of which Stadtmauer was Vice President.

Florence Rosen knowing since the previous fall that the receivership in the foreclosure action might be terminating became concerned that the plaintiff be protected on any leasing commissions to which it was entitled and wrote separate letters to Godosky and Stadtmauer, each dated June 10, 1993. The letter to the receiver asked him to take whatever steps were appropriate and necessary to protect the plaintiff's interests and enclosed a list of prospective tenants with whom the plaintiff had discussed leasing space at the Center. The list included Caldor. The letter to Stadtmauer reserved the plaintiff's right to take appropriate action to

collect commissions to which it was entitled.

On July 20, 1993, the Court, so ordered a stipulation in the foreclosure action terminating the receivership. The Stipulation provided among other things that, subsequent to a turnover date, Plaza would assume and be responsible for "all obligations, liabilities and costs relating to the [Center], whether accruing before of after the Turnover Date." In the Stipulation, the receiver released Plaza with respect to any actions, etc. which the "Receiver or his heirs, executors, or administrators, ever had, now have or hereafter can, shall or may have by reason of any matter, cause or thing whatsoever from the beginning of the world to the Release Date."

On or about July 30, 1993, the receiver surrendered possession of the premises to Plaza, and on July 30, 1993 Plaza advised the plaintiff that it would not assume the management agreement between plaintiff and the receiver.

Prior to the termination of the receivership, the plaintiff was not aware that Plaza and Caldor had entered into any written agreement regarding the Lionel space. Prior to the time the receivership terminated, the plaintiff did not make a formal claim for commission in connection with Caldor and the Lionel space because Florence Rosen had been told, and believed, that Caldor had purchased the Lionel lease in bankruptcy.

The court now turns its attention to the Toys "R"Us situation.

After the plaintiff became the managing agent of Center, David Rosen attempted to market the Center to Toys "R" Us ("Toys"). Mr. Rosen had contacts with various representatives of Toys. David Rosen called Stephanie Harris ("Harris"), a Toys representative, to find out if Toys would be interested in the Lionel space and, in October 1991, wrote her a follow-up letter. David Rosen telephoned Harris subsequently and was told that Toys was not interested in the Lionel space. Harris went on leave and David Rosen continued his conversations with Mark Keschl ("Keschl"), her supervisor, and wrote Keschl a letter, dated January 6, 1992, enclosing leasing information and demographics.

In January 1993, David Picot ("Picot") became real estate manager for the New York metropolitan area, succeeding Harris. David Rosen called Picot in January or early February 1993. He told Picot of his prior conversations with Harris and Keschl.

After his initial conversation with Picot, David Rosen wrote a letter to Lucciola informing him of the contact. He copied the letter to Macri Plotkin. Thereafter, David Rosen tried calling Picot on numerous occasions but was unsuccessful in reaching him. David Rosen never received a return telephone call.

Shortly after David Rosen had called him, Picot received a letter from Debbie Davis ("Davis") of the Cooperman Company ("Cooperman"). Ms. Davis called Picot shortly thereafter and represented herself as the exclusive broker for the prospective purchase of the Center, The Kushner Companies ("Kushner"). Ms. Davis told Picot that the owner of the Center would be Kushner, that Kushner was planning an outlot which could support a building of the size needed by Toys, that Picot would have to deal with Kushner if he was interested in

proceeding, and that the person to speak to at Kushner about the Center was Stadtmauer, the principal of Kushner.

Mr Stadmauer called Picot on February 19, 1993, two days after David Rosen's letter to Lucciola which was copied to Marci Plotkin. Mr. Stadtmauer told Picot that the Center would be coming out of receivership shortly and confirmed Davis' advice that Cooperman was the exclusive broker and that Cooperman was working for Kushner. Picot told Stadtmauer that he had spoken to David Rosen, and that they had talked about an outlot. Stadtmauer told Picot to deal directly with him (Stadtmauer).

On February 25, 1993, six days after his conversation with Picot, in which he was told that Picot had spoken to David Rosen, Stadtmauer wrote to Lucciola, again asking him to prohibit the plaintiff from speaking to prospective tenants. There was apparently no response to this letter.

Picot authored a non-binding Letter of Intent, dated July 1, 1993, which was executed by Plaza approved by Toys and executed by Picot. The length of the initial term, the number and length of options, the initial rent and the frequency and percentage of rent increases set forth in the Letter of Intent were identical to the terms contained in the lease which was subsequently signed.

On July 12, 1993, Rosen wrote a memo to Stadtmauer listing what was outstanding with respect to the deal between Plaza and Toys. The memo indicated that all of the essential business terms of the lease had been agreed to by that date, which was prior to the discharge of the receiver. Picot continued to deal exclusively with Stadtmauer, Kushner, Cooperman and their attorneys, with regard to the Center. On June 7, 1994, Plaza and Toys entered into a lease for space at the Center. The Toys lease provided that Plaza was to pay any and all brokerage commissions and indemnify Toys against any claims for brokerage commissions. Contrary to the provision of the Toys lease, this letter contained a representation that Toys had dealt with the plaintiff with respect to the Center. Plaza agreed to pay all brokerage commissions and expressly agreed to indemnify Toys with respect to any claim for brokerage commission by the plaintiff. Prior to the termination of the receivership in July 1993, the plaintiff did not know that Toys had engaged in negotiations for space at the Center, either with Plaza or a leasing agent retained by Plaza.

The plaintiff's first cause of action is dismissed. The cause of action sounds in contract and the plaintiff fails to establish the formation of a contract between the plaintiff and the defendant Plaza. Further, plaintiff's rights pursuant to any contract it has with the receiver appointed in the underlying action mandates that any compensation be approved by the Court before there would be any entitlement to same on behalf of the plaintiff.

> "In order to state a claim for leasing commissions against BPA, plaintiff must establish "(1) that he or she is duly licensed, (2) that he or she had a contract, express or implied, with the party to be charged with paying the commission, and (3) that he or she was the 'procuring clause' of the sale." Buck v. Cimino, 663 N.Y.S.2d 635, 637 (2nd Dept. 1997).

Any contractual right plaintiff had with respect to commissions in this matter flowed from its contract with the receiver appointed. As the plaintiff had no privity with defendants there can be no breach of contract claim. Further, the contract in question was special in nature and placed plaintiff in a special relationship with the Court through the receiver.

> "A receivership is a creature of the court "subject to the control of the court at all times," and functions in the place of and as the instrumentality of the court itself. As an "officer of the court" with "fiduciary responsibilities" the receiver acts solely on the court's behalf and is otherwise a stranger to the parties and their dispute. In re Kane, 75 N.Y.2d 511, 533 N.E.2d 1005, 554 N.Y.S.2d 457 (1990) (citations omitted).

As managing agent of property subject to a receivership, plaintiff served "as an officer of the court [and is therefore] limited to compensation to be awarded by the court." Litho Fund Equities v. Alley Spring Apartments, 462 N.Y.S.2d 907, 909 (2nd Dept. 1983). Like the receiver himself, the managing agent of real property in receivership cannot lawfully contract for compensation in addition to sums approved by the receivership court. Id., citing Salmon v. Schenectady Mason Supply Corp., 278 A.D. 609, 610, 102 N.Y.S.2d 91, 92 (3rd Dept. 1951). In short, both the receiver and the receiver's managing agent serve as officers of the court, rather than as agents of the debtor or its creditors. Such an agent "cannot punctuate the completion of his receivership duties with a private compensation arrangement beyond the statute and the glimpse and grasp of the indispensable ultimate principal - - the appointing court." In re Kane, 75 N.Y.2d at 515, 553 N.E.2d at 1007, 554 N.Y.S.2d at 459.

The plaintiff's second cause of action, sounding in tortious interference in the contractual relationship between the plaintiff and the receiver although giving the court a little more pause, also is dismissed. To sustain a cause of action for tortious interference with contract, plaintiff must establish "(1) the existence of a valid contract between plaintiff and a third party, (2) defendant's knowledge of the contract, (3) defendant's intentional procurement of a breach of the contract without justification, (4) actual breach of the contract, and (5) resulting damages." Snyder, 684 N.Y.S.2d at 238; Pyramid Brokerage Co. v. Citibank N.A., 145 A.D.2d 912, 913, 536 N.Y.S.2d 294, 295 (4th Dept. 1988).

Here the plaintiff fails to prove an intentional procurement of the breach. Under the circumstances herein, it can be said and the court concludes that the defendants, knowing that the underlying matter had been settled and Plaza believing that the only impediment to a discharge of the receiver was the receiver's failure to file an appropriate accounting and further believing that such failure may have been the result of plaintiff's actions or inaction, acted under the belief that their actions did not in any way secure a result that was not just under those circumstances. Plaintiff offered no evidence that the receiver and ultimately the Court would have awarded plaintiff compensation. In fact, it is more appropriate to draw from the testimony that the receiver had no intention of securing further compensation for himself and the plaintiff after the fall of 1993. Thus, the court finds for the defendant, Plaza, on this cause of action.

The plaintiff's third cause of action, like the first cause of action, is dismissed for the reasons set forth above. Those arguments are in fact solidified by the fact that Toy "R" Us lease

was finally executed long after the receivership was ended. The fourth cause of action, sounding in tort as does the second, is also dismissed for the reasons set forth above regarding that cause of action.

Settle judgment.

A.J.S.C.