

SCBN

SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK
Present:
HON. JOSEPH COVELLO

Justice

RE/MAX OF NEW YORK, INC.,

TRIAL/IAS, PART 22
NASSAU COUNTY

Plaintiff,

Index No.: 008006/03

- against-

Motion Seq. No.: 001

UZI MAROM, d/b/a RE/MAX CITY REALTY,

Motion Date: 12/12/04

Defendant,

The following papers read on this motion:

Notice of Motion.....	x
Affidavit in Opposition.....	x
Reply.....	x

Upon the foregoing papers the motion by plaintiff, for an Order pursuant to CPLR §3212, granting plaintiff summary judgment to plaintiff against defendant, Uzi Marom d/b/a RE/Max City Realty, is determined as set forth herein.

Plaintiff, RE/MAX of New York, Inc. (RE/MAX), commenced this action against defendant, Uzi Marom (Marom), for breach of contract and unjust enrichment, regarding a Franchise Agreement (Agreement) the parties entered into on or about May 8, 1998. Plaintiff asserts that pursuant to the Agreement defendant, Marom was a RE/MAX franchisee for a portion of New York County from May 8, 1998 to on or about February 11, 2003. That pursuant to the Agreement defendant was obligated to pay certain franchise, management and other fees. That pursuant to the Agreement, if defendant franchisee fails to pay any monies owed when due, the plaintiff has the right to terminate upon 30 days written notice. These defaults could be cured within 30 days and if not, the Agreement is automatically terminated

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without further notice. Plaintiff asserts that it performed all of its obligations under the Agreement. Plaintiff sent defendant / franchisee, Marom, a letter dated January 10, 2003 advising him of various defaults and further advising him that if the defaults were not cured within 30 days the Agreement would automatically terminate. That due to defendant's failure to cure the defaults within the 30 days the Agreement automatically terminated on February 11, 2003. In addition, the termination of defendant's franchise and license to use the RE/MAX name, marks and system would terminate as well. That after termination, the defendant did not discontinue all use, imitations and or duplication of all distinguishing characteristics of the RE/MAX name and system, as required as per the Agreement. That by letter dated February 12, 2003, plaintiff reminded defendant of his post termination obligations and demanded compliance. That defendant failed and refused to honor the post termination obligations and continued to use for its benefit the RE/MAX system and name.

It is well established that a party moving for summary judgement must make a *prima facie* showing of entitlement as a matter of law. The moving party must offer sufficient evidence to demonstrate absence of any material issue of fact. **Winegrad v New York Univ. Med. Center**, 64 NY2D 851, 853. Once a *prima facie* showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact, which requires a trial of the action. **Alvarez v Prospect Hosp.**, 68 NY2d 320. Pure speculation, unsupported by any other evidence, is insufficient to raise an issue of fact (see Gibbs v Rochdale Village, Inc., 282 AD2d 706, *citing Simmons v Metropolitan Life Ins. Co.*, 84 NY2d 972). A court may

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grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to judgment as a matter of law. **Alvarez v Prospect Hosp.**, 68 NY2d 320. Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (**Miller v Journal-News**, 211 AD2d 626).

Based upon the submitted documentary evidence which includes the subject Franchise Agreement, letter dated January 10, 2003 with annexed bills and invoices, letter dated February 12, 2003 and the affidavit of Henry Weber, President of RE/MAX of New York, Inc., the plaintiff has made a *prima facie* case showing of entitlement to partial summary judgement on the issue of liability.

Defendant, Marom's answer to the complaint contains general denials and no affirmative defenses or counterclaims. Defendant, Marom opposes the instant motion asserting that the motion must be denied in that there are triable issues of fact. He acknowledges that he entered into the Agreement, but denies that he breached the Agreement in any way. He asserts that he performed all obligations and paid all fees due under the Agreement and that plaintiff has failed to come forth with any proof that defendant breached the Agreement other than plaintiff's self serving letters of January 10, 2003 and February 12, 2003.

Defendant, Uzi Marom's unsupported assertions do not raise a triable issue of fact as he has not submitted any evidence in support of his assertions that he has not breached the

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agreement and paid all required fees.

Therefore, it is hereby

ORDERED, that the plaintiff is granted partial summary judgment on the issue of liability. However, a hearing is necessary as to the issue of damages and the amount of reasonable counsel fees plaintiff incurred and is entitled. It is further

ORDERED, that this matter is respectfully referred to the Calendar Control Part for a trial on the issue of damages and counsel fees, subject to the approval of the Justice therein presiding. Plaintiff shall serve a copy of this Order with Notice of Entry and the Note of Issue upon defendant, Uzi Marom, d/b/a RE/MAX City Realty, and plaintiff shall file copies of same together with receipt of payment upon the Clerk of this Court, within ninety (90) days of Entry of this Order. The directive, with respect to the Trial on damages and counsel fees, is subject to the right of the Justice presiding in the Calendar Control Part, to refer the matter to a Justice, Judicial Hearing Officer, or a Court Attorney / Referee, as he or she deems appropriate.

This constitutes the decision and Order of the Court.

Dated: February 17, 2005

ENTERED
MAR 01 2005 Joseph Covello, J.S.C.
NASSAU COUNTY
COUNTY CLERK'S OFFICE