NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2218-09T1

THE GALBREATH COMPANY
ALEXANDER SUMMER DIVISION,
L.L.C.,

Plaintiff-Respondent,

v.

NOISE UNLIMITED, INC.,

Defendant-Appellant.

Argued October 12, 2010 - Decided April 29, 2011

Before Judges Carchman and Graves.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-1495-09.

Walter N. Wilson argued the cause for appellant (Mr. Wilson and Ashley M. Tice, attorneys; Mr. Wilson and Ms. Tice, on the brief).

Scott D. Jacobson argued the cause for respondent (Herten, Burstein, Sheridan, Cevasco, Bottinelli, Litt & Harz, LLC, attorneys; Mr. Jacobson, on the brief).

PER CURIAM

Defendant Noise Unlimited, Inc., appeals from an order granting summary judgment in the amount of $109,126.88, together

with prejudgment interest and costs of suit, to plaintiff The Galbreath Company Alexander Summer Division. We affirm.

Plaintiff is a realtor, and defendant is the owner of commercial space located at 683 Route 10 in Randolph, New Jersey (the Property). On October 11, 1996, the parties entered into a commission agreement regarding the Property in which defendant expressly recognized that plaintiff had "introduced" defendant to TKR Cable Company (TKR), a cable television provider. The agreement also provided as follows:

> 2. In consideration of the mutual covenants herein contained and for the efforts of [plaintiff] to effect an interest in the Property by [TKR], [defendant] agrees to pay a commission equal to Five (5%) percent of the net aggregate rental when a rental transaction has been consummated. The commission shall be considered earned and shall be due upon lease commencement.
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> 3. In the event of any exercise of renewal options, any extension, or execution of a new lease, all of the foregoing hereinafter referred to as a "Further Leasing[,"] provided that [TKR] is not represented by a third-party broker, who is authorized by [TKR], in writing, then [defendant] shall pay to [plaintiff] five (5%) percent of the aggregate net rental for said further leasing. The commission shall be due upon lease commencement. It is understood, however, that [defendant] shall not be liable for commissions for any period extending beyond five (5) years after the initial term expiration date.

Five weeks later, on November 15, 1996, defendant executed a lease renting the Property to TKR for a term of twelve years and four months, with two five-year renewal options. The lease authorized TKR to use the Property for "office/administrative/ warehouse purposes and [the] sale of services relating to TKR's cable television business." It also allowed TKR to assign the lease without defendant's consent under specified circumstances:

> [TKR] shall have the right to sublet all or a portion of the premises or assign this Lease without the consent of [defendant] and without the right of [defendant] to recapture the effected parties of the premises, if, and only if, [defendant] shall have received prompt notice and appropriate documentation that prior to the effective date of such assignment and (a) the sublessee or assignee is a business entity which is an affiliate or wholly-owned subsidiary of [TKR], or which may, as a result of a reorganization, merger, or consolidation, succeed to the entire business carried on by [TKR] at such time; . . . and (c) in the case of an assignment, the assignee agrees to assume all of [TKR's] obligations under the Lease . . . .

In addition, defendant agreed to pay "all brokerage commissions in connection with this Lease."[1] Finally, the lease provided that all "covenants and agreements" therein would "be binding and inure to the benefit of the parties hereto, and their respective representatives, successors, and assigns."

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[1] Defendant ultimately paid plaintiff $202,222.50 in connection with the initial lease.

On September 17, 1997, roughly ten months after the execution of the original lease, TKR filed a verified petition with the New Jersey Board of Public Utilities seeking approval of an "[i]nternal [r]estructuring" that would dissolve TKR. According to the petition, some of TKR's responsibilities would be assumed by CSC TKR (Cablevision[2]), a new cable television company. The Board approved the proposed restructuring on December 17, 1997, noting that it would "serve to change the ownership, control, operation and management" of several "New Jersey cable television systems."

Cablevision advised defendant in a letter dated March 11, 1998, that it had "acquired the operating assets and liabilities" of TKR, including the November 15, 1996 lease for the Property. The letter further stated that Cablevision "look[ed] forward to [a] continued relationship" with defendant.[3]

Cablevision continued to occupy the Property under the terms of lease for the next ten years. In early 2008, it initiated negotiations for an extension. On October 24, 2008, Cablevision and defendant executed a "First Amendment of Lease" extending Cablevision's leasehold for a term of approximately

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[2] CSC TKR ultimately did business as "Cablevision of Morris."

[3] In a deposition taken before trial, G. Dean McAdoo, defendant's president, confirmed his understanding that Cablevision used the Property for "the very same" purposes as TKR.

five years, commencing on March 15, 2009.[4] The amendment indicated that apart from the extension and rent amount, "all other terms and conditions of the Lease [would] remain in full force and effect."

Plaintiff wrote to defendant on November 10, 2008, requesting information about the lease extension and indicating that it planned to "issue an invoice for this commission" pursuant to the commission agreement. Plaintiff sent a follow-up letter on January 13, 2009, after defendant failed to respond.

On February 17, 2009, plaintiff filed a complaint asserting that defendant had "wrongfully refused to remit" the commission. The complaint sought "compensatory damages, [prejudgment] interest, attorney's fees and costs of suit." In an answer filed April 8, 2009, defendant denied the allegations and claimed "that the lease agreement will speak for itself as to the terms thereof."

Plaintiff moved for summary judgment on October 20, 2009, and defendant cross-moved for summary judgment on November 5, 2009. The court heard arguments on November 20, 2009, and, in an oral decision, granted summary judgment to plaintiff. The

[4] The document explicitly referred to this period as the "Extended Term."

court's decision emphasized the covenant of good faith and fair dealing and included the following:

> Number one, there was an agreement between the plaintiff and the defendant . . . that the commissions would be paid as defined by further leasing set forth in the commission agreement. There was a takeover of the tenant by a company that continued in the lease that did not need consent pursuant to section 17.02 of the lease. That was approved by the [Board of Public Utilities] and that lease was extended as set forth in . . . the first amendment to the lease.
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> . . . .
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> The commission agreement contemplated an extension of not more than five years. [TKR] was purchased by [Cablevision, and] pursuant to the terms of the lease between [TKR] and [defendant] consent could not be withheld. That being said the extension of the lease was entered into and . . . the Court will grant summary judgment in favor of the plaintiff and against the defendant. The Court will deny the defendant's motion for summary judgment and will enter the appropriate amount.

That same day, the court memorialized its decision in an order. Defendant appealed on January 14, 2010,[5] and raises the following arguments:

> <u>POINT ONE</u>
>
> THE TRIAL COURT ERRED IN GRANTING THE PLAINTIFF SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS

[5] On February 2, 2010, we entered an order permitting the notice of appeal as within time.

THE CONTRACT BETWEEN THE PARTIES IS CLEAR IN THAT DEFENDANT WAS ONLY OBLIGATED TO PAY A COMMISSION AS A RESULT OF THE NEW LEASE CHARACTERIZED AS AN EXTENSION IN THE EVENT OF FURTHER LEASING BY TKR.

POINT TWO

THE TRIAL COURT ERRED IN GRANTING THE PLAINTIFF SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS THE PLAINTIFF CANNOT ALTER THE TERMS OF ITS OWN AGREEMENT WITH THE DEFENDANT BY INCORPORATION OF THE DEFENDANT'S LEASE AGREEMENT WITH TKR AS PLAINTIFF WAS NOT A PARTY TO THIS CONTRACT.

POINT THREE

THE COURT ERRED IN FINDING THAT FRY V. DOYLE WAS CONTROLLING IN THIS MATTER.

Based on our examination of the record, we find insufficient merit in these arguments to warrant extended discussion. R. 2:11-3(e)(1)(E). We add only the following comments.

While Cablevision is not the specific tenant named in the commission agreement, it is undisputed that Cablevision is TKR's successor-in-interest, properly assumed TKR's obligations under the lease, and used the Property for substantially the same business as TKR. Given the close relationship between Cablevision and TKR, we are satisfied that Cablevision's tenancy would not have occurred but for plaintiff's services under the commission agreement. Furthermore, the commission agreement

encompassed "any exercise of renewal options, any extension, or execution of a new lease." Under these circumstances, we find that TKR's restructuring did not limit plaintiff's right to recover a commission. See Fry v. Doyle, 167 N.J. Super. 486, 494 (App. Div.) (finding that the assignment of an option "did not alter [a broker's] status as the procuring or efficient cause of . . . the option agreement"), certif. denied, 81 N.J. 287 (1979); cf. Louis Ross Assocs., Inc. v. Interstate Holding Corp., 249 N.J. Super. 436, 438-39 (App. Div.) ("The broker is entitled to a commission upon procuring a customer willing and able to enter into a contract to purchase or lease the property on terms agreeable to the landowner.") (citing Ellsworth Dobbs, Inc. v. Johnson, 50 N.J. 528, 543 (1967)), certif. denied, 127 N.J. 551 (1991).

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION