SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JEFFREY K. OING J.S.C. PART 48
Justice

Index Number : 650503/2013
EASTERN CONSOLIDATED
vs.
5 EAST 59 REALTY HOLDING
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Mtn is decided in accordance w/the accompanying memorandum decision/order of this Court

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6/29/15

JEFFREY K. OING, J.S.C.
J.S.C.

1. CHECK ONE: ..... [X] CASE DISPOSED [X] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: [ ] GRANTED [ ] DENIED [ ] GRANTED IN PART [X] OTHER
3. CHECK IF APPROPRIATE: ..... [ ] SETTLE ORDER [ ] SUBMIT ORDER
[ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

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EASTERN CONSOLIDATED PROPERTIES, INC.,

Plaintiff,

-against-

5 East 59 REALTY HOLDING COMPANY, LLC, MIP 5 EAST 59TH STREET, LLC, ALEXANDROS, DEMETRIADES, ATHANASIOS DEMETRIADES AND PAULO AGNELO MALZONI,

Defendants.

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Index No.: 650503/2013

Mtn Seq. No. 003

DECISION AND ORDER

JEFFREY K. OING, J.:

Plaintiff, Eastern Consolidated Properties, Inc., moves, pursuant to CPLR 3212, for an order granting it summary judgment on its first cause of action against defendant 5 East 59 Realty Holding Company, LLC (5 East Realty), and dismissing defendant Alexandros Demetriades' ("Alex") counterclaim for attorney fees based on plaintiff's allegedly frivolous claims. Further, in the event plaintiff prevails, it seeks to discontinue, pursuant to CPLR 3217(b), its remaining claims against defendants 5 East Realty, Alex, and Athanasios Demetriades ("Tommy").

Defendants, 5 East Realty and Alex, cross-move for summary judgment dismissing all claims against them.

Background

Plaintiff commenced this action to recover a commission for the sale of Manhattan real property that was the former home to the Playboy Club. Plaintiff is a real estate brokerage company.

Defendant 5 East Realty was the owner of the nine story real property located at 5-7 East 59th Street (the "property"). Individual defendant Alex was the sole owner/member of 5 East Realty.

The basis for plaintiff's contractual claim is the following one-page commission agreement dated January 11, 2011 with plaintiff (the "commission agreement"), which provides, in relevant part:

> This letter sets forth our Commission Agreement with regard to the Proposed Purchase (defined below) of the Property by any potential buyer or his nominee or an entity in which he is a partner, principal or joint venturer (collectively "Purchaser,") or Purchaser's assignee (also included in the collective "Purchaser,") to whom we as broker have introduced, or shall introduce the Property.
>
> By execution of this letter, you agree to pay us one and three quarter percent (1 3/4%) of the full purchase price for the Property ... at Closing (defined below) as the brokerage commission (the "Commission") in connection with the above-referenced project. The Commission shall be due and payable at the Closing, and shall not[1] be payable only if there is a closing and in no other event.
>
> "Proposed Purchase" includes, without limitation, transfer to Purchaser of fee title, transfer of leasehold title, net lease of the Property, transfer of ownership in the entity holding title to the Property, or any other transfer of ownership or control of the

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[1]The term "not" is clearly a scrivener's error. Indeed, to read the sentence with that term would mean that there would no payment if there were a closing, which is contrary to the first half of the sentence. Defendants do not make an issue of this clear error.

> Property, in each instance in part or in whole. "Closing" shall be deemed to occur upon the full execution and delivery of the instrument(s) of transfer of ownership or control (e.g., without limitation, the deed) to Purchaser.

(Hauspurg Aff., Ex. A). Peter Hauspurg, plaintiff's principal, signed the agreement on plaintiff's behalf; defendant Tommy countersigned this agreement on behalf of "World Properties LLC" (Id.). Defendant Tommy is defendant Alex's son. He testified at his EBT that his father gave him oral authority to, among other things, negotiate the ground floor lease and "review[] offers to sell the property" (Anthanasios Demetriades EBT, Benayoun Aff., Ex. B, pp. 9-10). Defendants do not dispute the validity of the commission agreement.

Plaintiff claims that it "earned the commission owed under the Agreement," but that 5 East Realty "has refused to pay what it indisputably owes" (Benayoun Aff., ¶ 2). Specifically, Jerome Simon Benayoun, plaintiff's former real estate broker, states in his affidavit that in July 2010, on a business trip to Brazil to seek Brazilian purchasers of New York real estate, he met with Marco Charoo, a director of the Malzoni Group and Maragogipe Investimentos e Participacoes LTDA ("MIP"), who is the "right hand man" of former defendant Paulo Angelo Malzoni ("Malzoni"), principal owner of the Malzoni Group and MIP (Id., ¶ 5).

Benayoun states that one of the opportunities discussed during that meeting concerned the East 59th street property (Id.).

Benayoun further states that on December 3, 2010 he met with Malzoni personally, at which point MIP's U.S. subsidiary MIP US Holdings, LLC ("MIP US") signed a Confidentiality Agreement with plaintiff, dated December 6, 2010, to obtain confidential information from 5 East Realty about the property (Id., ¶ 6; Ex. C).

Benayoun claims that after negotiations in December of 2010, 5 East Realty "accepted MIP's offer for the Premises, based upon the Premises being delivered free and clear of the 99 year ground lease," and that "Alex signed MIP's non-binding offer letter dated December 21, 2010"(Id., ¶ 7; id., Ex. D). 5 East Realty, however, disputes that the offer was ever actually "accepted" because all the offers made were contingent on the ground lease tenant being bought out.

Plaintiff then claims that although 5 East Realty accepted MIP US's offer the original transaction failed to close because the demands with respect to the 99 year leasehold could not be met, and in August 2011 the deal appeared to collapse (Benayoun Aff., ¶¶ 11-12). Benayoun, however, "continued to keep tabs" on the deal and on August 15, 2012 he read in The Real Deal that a "billionaire South America playboy is in contract to purchase 5

East 59th Street..." (Benayoun Aff., ¶¶ 13-15, Ex. K). Benayoun emailed defendant Tommy about it, but Tommy replied that the buyer was an entity called "Lincoln Financial" (Id., Ex. L).

The Contract of Sale dated August 1, 2012 lists the buyer as MIP 5 East 59th Street, LLC, an undisputed affiliate of Malzoni and MIP US (Id., Ex. M). The purchase price is listed as $37,250,000 (Id.). Closing took place on November 19, 2012 for the price listed (copy of recorded deed, 12/18/12, Id., Ex. N). Another broker, Kevin Leahey, president of KRL Real Estate Consulting Corporation, who had a prior working relationship with both 5 East Realty and the ground lease tenant negotiated the deal whereby both the ground lease tenant and 5 East Realty simultaneously transferred their interests to MIP 5 East 59th Street, LLC. Emails produced in discovery reveal that at some point defendants contemplated having this entity "Lincoln Financial" listed on the purchase documents, with the immediate right to assign to MIP US, but ultimately opted against doing that because "[i]t might not make a difference per the broker risk standpoint" (July 20, 2012 email, id., Ex. R; Exs. P - T).

Plaintiff claims that because it introduced 5 East Realty, the seller, to MIP US, the buyer, it is entitled to the 1 3/4% commission per the parties agreement. This action ensued.

Complaint and Procedural History

Plaintiff alleges four causes of action against 5 East Realty: 1) breach of contract; 2) breach of implied contract; 3) contract implied in law; and 4) unjust enrichment.

As against MIP, the Demetriadeses, and Malzoni, plaintiff asserted two causes of action for: 5) tortious interference with contract and 6) unjust enrichment.

Defendant Alexandros Demetriades asserts a single counterclaim against Eastern for attorneys' fees based on the "frivolous" nature of the claims against him (Answer, ¶¶ 19-22, NYSCEF Doc. No. 15).

In a decision and order issued on the record on October 30, 2013 (mtn seq. No. 001), this Court held that the tortious interference and the unjust enrichment claims against MIP and Malzoni were "insufficiently pleaded" and dismissed both without prejudice (NYSCEF Doc. No. 32).

Discussion

Defendants 5 East Realty and Alex argue that plaintiff is not entitled to a commission because it abandoned the sale in August 2011 when the initial deal fell apart. In that regard, defendants point to an August 3, 2011 email in which Benayoun, plaintiff's broker, told Morris Missry, a principal of the ground

lease tenant, "I wish you good luck to find a buyer at that level" (Biaggi Affirm., Ex. A). This argument is unavailing.

To begin, this statement is part of an email chain concerning larger negotiations. Benayoun states that in writing that email he was "obviously seeking to have the leaseholder lower its demands so a sale could be made" (Benayoun Reply Aff., ¶ 2). Subsequent emails proffered by plaintiff demonstrate that Benayoun was still very much trying to do a deal either with MIP or another buyer after it initially fell apart with MIP in August 2011. For example, on September 7, 2011, Benayoun emailed defendant Tommy, "where are you standing on this?", to which he replied, "I thought you guys decided to move on [to] something else" (Benayoun Reply Aff., Ex. A). That prompted Benayoun to respond, "I am a broker and I make money if this deal happen [sic]. Buyer is working on other deals but I will get his attention here if there is a deal to be made" (Id.).

Benayoun also emailed defendant Tommy on November 8, 2011, asking, "what's the status" and "is there a deal to be made?" (Id., Ex. B). On December 1, 2011, Benayoun emailed defendant Tommy to say, "I have a rich European client interested in the deal, his office is on Madison around the corner, we'd like to see some space in the building, are you around today?" (Id.). Further, email exchanges between Benayoun and defendant Tommy as

late as June 2012 demonstrate that plaintiff was still making inquiries about the property (Benayoun Aff., Ex. J). Indeed, Benayoun states that he never abandoned his "attempt to sell the Premises" and "5 East was well aware of my continuing efforts" (Benayoun Reply Aff., ¶ 10).

More importantly, nothing in the record suggests that 5 East Realty ever terminated its commission agreement with plaintiff. Defendants' reliance on the August 17, 2011 email to the contrary is misplaced. In that email to Benayoun after the first MIP deal fell apart, defendant Tommy said:

> I am sorry that in the end it did not work out. Please let Marco and Mr. Malzoni [sic] that I wish you all the best and hope you do well in the future.

(Benayoun Aff., Ex. H). This statement does not amount to a clear and unequivocal termination of the commission agreement. At most, defendant Tommy is expressing regret that the deal fell apart. Indeed, the subsequent emails referenced, supra, demonstrate that plaintiff was still seeking purchasers for the property and that 5 East Realty was well aware of this fact -- at no point did Tommy indicate to plaintiff that the commission agreement was no longer in effect or terminated.

Next, defendants 5 East Realty and Alex argue that plaintiff is not entitled to a commission because too many material terms remained outstanding during the period between MIP's first offer

in December 2010 and August 2011 when the deal initially fell apart, i.e., there was no agreement to vacate by the ground lease tenant. This argument is equally unavailing.

The commission agreement, supra, does not require that plaintiff negotiate the deal to closing, but merely provides for a commission if a closing takes place with any purchaser that it "introduce[d]" for the property. Thus, under the plain terms of the commission agreement, to be entitled to a commission, plaintiff had to fulfill two conditions: 1) introduce the buyer for the property, and 2) have the same buyer close on the purchase. The agreement does not speak of abandonment, termination, or any other requirement, and imposes no time limit on its validity.

Here, although the listed purchaser for the property is MIP 5 East 59th Street, LLC, there is no dispute that it is related to Malzoni and MIP US within the meaning of the commission agreement. Given that Malzoni and MIP US were buyers that plaintiff introduced to defendants, and a closing took place with these purchasers, plaintiff should be awarded summary judgment on its first cause of action for breach of contract.

The cases cited by defendant in opposition are all inapplicable, distinguishable, or simply do not say what defendants claim they say. Heelan Realty and Dev. Corp. v

Ocskasy, 27 AD3d 620 (2d Dept 2006), which defendants quote for the proposition that to be entitled to a commission, "a broker must demonstrate that he or she produced a ready, willing and able purchaser who came to a meeting of the minds with the seller as to all of the material terms of the sale," involved a dispute over a prospective purchaser (see also, Reza Namazi Real Estate Corp. v Johnson, 243 AD2d 396 [1st Dept 1997] [summary judgment denied because broker never produced an able buyer]; Freiling v Restivo, 69 AD2d 978 [4th Dept 1979] [summary judgment denied where sale never took place because purchaser poor credit risk]). Norma Reynolds Realty Inc v Miral, another case cited by defendants, wherein a broker's action for a commission was dismissed following a nonjury trial because there was "no meeting of the minds" between the seller and prospective buyer, likewise did not involve a consummated sale (301 AD2d 364 [1st Dept 2003]).

The following cases cited by defendants are equally inapplicable. In Thoens v J.A. Kennedy Realty Corp., 279 App Div 216 [1st Dept 1951]), the owner "arbitrarily refused to continue negotiations and prevented broker from earning commissions" so the sale never took place. In Sibbald v Bethlehem Iron Company, the seller unquestionably terminated the brokerage agreement (83 NY 378 [1881]). Similarly, in Kaelin v Werner, (27 NY2d 352

[1971]), although the broker claimed he produced a buyer on the seller's terms, the seller sold the property to another buyer, not procured by the suing broker. Finally, in Granger v Schachenmayr, (49 Ad3d 1079 [3d Dept 2008]), there was not only no sale to the prospective purchaser produced by the broker, but no record at all that defendants sold the property to a third party.

In short, none of the cases cited by defendants for the general principle concerning "material terms" and "meeting of the minds" address the situation at bar where the seller sells the property to the same person introduced to it by the broker without paying the broker's commission.

To the extent that defendants rely on the fact that the commission agreement was non-exclusive, this distinction is of no consequence. In Smith v McGovern, an 1875 Court of Appeals case cited by defendants, there was a dispute over commission between two brokers without any sort of written agreement for commission (20 Sickels 574 [1875]). The Court of Appeals held that there was no error in a jury's conclusion that, "if defendant employed two brokers, that one effected the sale who brought the minds of the parties to meet." This case is distinguishable from the one at bar for several reasons. First and foremost, in Smith the Court of Appeals was reviewing a jury's verdict for clear error,

not deciding a motion for summary judgment. Second, in Smith the seller, unlike here, did not promise the broker a commission in the event that a closing took place based on an introduction procured by the broker. Rather, Smith involved an exchange of properties, wherein two brokers tried to accomplish the deal and one was successful whereas the other was not.

Likewise, Priestley v Buildmaster Housing Corp., 28 AD2d 707 (2d Dept 1967), is readily distinguishable. In Priestley, the Second Department disagreed with a trial court's jury instruction and granted a new trial because the trial court "misrepresented a basic element of the law of broker-employer, namely, that where a broker is employed to sell property at a specific price and is unsuccessful, and the owner later begins or resumes negotiations with the broker's prospect in good faith and a sale results, then the broker is not entitled to a commission" (Id. at 708). The Second Department found that, "there was sufficient evidence of intervening factors or circumstances between the initial unsuccessful negotiations (assuming there were negotiations) and that sale upon which the jury could find that [seller] acted in good faith in resuming negotiations with someone who may, in fact, have been brought to its attention by plaintiff" (Id.). Putting aside the fact that this decision concerned a jury instruction and not a motion for summary judgment, the case is

distinguishable because it focuses on the common law rules applicable to broker-seller relationships and not, as in this case, a contractual obligation voluntarily undertaken by a sophisticated seller of a multi-million dollar property.

Defendants' counterclaim for attorneys' fees cannot be sustained given that plaintiff's claim is plainly not frivolous, and, in any event, no such claim is cognizable under New York law.

Accordingly, plaintiff's motion for summary judgment on its first cause of action is granted. Further, in light of this determination, that branch of plaintiff's motion seeking to discontinue its remaining causes of action is granted. That branch of the motion seeking dismissal of the counterclaim is granted and it is hereby dismissed. Defendants' cross-motion for summary judgment is denied as moot.

Submit order with damage award and interest on notice to Part 48 (Room 242), 60 Centre Street, within 15 days after service of a copy of this order with notice of entry. Defendants may submit a proposed counter-order.

Dated: 6/29/15

HON. JEFFREY K. OING, J.S.C.