

**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

-----x **TRIAL/IAS PART: 25**  
**MWH GROUP, LLC, NASSAU COUNTY**

**Plaintiff,**

**-against-**

**Index No: 18629-08**

**SPARTAN RESTAURANT HOLDINGS CORP.,** **Motion Seq. Nos: 1 & 2**  
**Submission Date: 5/8/09**

**Defendant.**

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**The following papers having been read on these motions:**

**Notice of Motion, Affidavit in Support and Exhibits.....x**  
**Plaintiff’s Memorandum of Law.....x**  
**Affirmation in Opposition and Exhibits.....x**  
**Notice of Cross Motion, Affirmation in Support and Exhibits...x**  
**Reply Affirmation in Further Support/Opposition,**  
**Reply Affidavit in Further Support/Opposition and Exhibit.....x**  
**Reply Memorandum of Law in Further Support/Opposition.....x**  
**Affirmation in Further Support/Opposition and Exhibits.....x**

This matter is before the Court for decision on 1) the motion filed by Plaintiff MWH Group, LLC (“MWH” or “Plaintiff”) on December 8, 2008, and 2) the cross motion filed by Defendant Spartan Restaurant Holdings Corp. (“Spartan” or “Defendant”) on December 10, 2008, both of which were submitted on May 8, 2009.<sup>1</sup> For the reasons set forth below, the Court 1) denies Plaintiff’s motion to disqualify counsel for Defendant; and 2) denies

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<sup>1</sup> This Court assumed responsibility for this motion on May 8, 2009.

Defendant's motion to dismiss the verified complaint ("Complaint").

### BACKGROUND

#### A. Relief Sought

Plaintiff moves for an Order disqualifying Defendant's attorney on the grounds that 1) there is a conflict of interest in light of the business relationship between Marc Horowitz ("Horowitz"), the owner of Defendant company and Richard Gertler ("Gertler"), a member of Thaler Gertler LLP, the law firm representing Defendant ("Law Firm"); and 2) Gertler may be called as a witness in the action. Defendant opposes Plaintiff's application.

Defendant moves for an Order 1) dismissing the Complaint, pursuant to CPLR § 3211(a)(3), on the ground that Plaintiff does not have standing to bring this action; 2) dismissing the Complaint, pursuant to CPLR § 3211(a)(7), on the ground that the Complaint fails to state a cause of action upon which relief can be granted; or, alternatively, 3) granting summary judgment to Defendant, pursuant to CPLR § 3212, and dismissing the Complaint. Plaintiff opposes Defendant's motion.

#### B. The Parties' History

MWH and Spartan executed a Consultant and Non-Compete Agreement dated July 13, 2007 ("Agreement"). The Agreement describes MWH as a company that "provides area development rights and services for finding locations for companies through the Nassau and Suffolk communities." The Agreement describes Spartan as a company "engaged primarily in the franchise and restaurant development business for [the restaurant] Au Bon Pain ["ABP"] for the Nassau and Suffolk County territories."

In this action, MWH alleges that Spartan breached the Agreement by terminating MWH, allegedly "for cause" based on conduct that MWH denies. MWH seeks 1) damages in excess of \$5 million, and 2) a judicial declaration that a) Defendant improperly terminated Plaintiff; b) the Agreement remains in full force and effect; and c) Defendant is required to pay Plaintiff money owed pursuant to the Agreement.

The Agreement provides that Spartan agreed to compensate MWH for, *inter alia*, finding locations in Nassau and Suffolk Counties for ABP franchises and/or restaurants. Pursuant to the Agreement, Spartan agreed to pay MWH 2% of ABP's net sales at sites that Plaintiff located, as well as other fees and compensation through June 30, 2012. MWH alleges that it performed its

obligations by, *inter alia*, finding locations for ABP franchises and/or restaurants in Nassau and Suffolk Counties. MWH alleges, further, that Spartan has not only failed to compensate MWH, but also wrongfully terminated MWH.

Spartan seeks to dismiss the action based on the following grounds, which Spartan asserted as affirmative defenses in its verified answer: 1) MWH lacks standing to pursue this action; 2) the Complaint fails to state a claim upon which relief may be granted; and 3) MWH was not a licensed real estate broker and, accordingly, is barred by Real Property Law § 442-d from recovering from Spartan in this lawsuit. Spartan seeks dismissal of the Complaint, pursuant to CPLR § 3211(a)(3), (7) and/or CPLR 3212 and Real Property Law (“RPL”) § 442-d. Spartan’s application pursuant to RPL § 442-d is based on the allegation that Horowitz does not have a real estate broker’s license.

Paragraph 5(d) of the Agreement provides that Spartan may terminate MWH Group “for cause” based upon:

(i) the filing of any charges or indictment against [MWH] or any of its officers or directors relating to felony or other crime involving moral turpitude; (ii) any act or omission involving dishonestly [sic], disloyalty or fraud with respect to [Spartan] (as determined by [CEO] in good faith); (iii) chronic drug or alcohol abuse or other repeated conduct of any officer or director of [MWH] causing [Spartan] substantial public disgrace or disrepute or economic harm; (iv) gross negligence; (v) gross misconduct unless such misconduct is cured within five (5) days after MWH receives written notice of such misconduct; or (vi) the willful and continued failure by MWH substantially to perform its duties hereunder [except failure due to physical or mental illness] after a five (5) day written demand for substantial performance is delivered to [MWH] by [Spartan], which demand specifically identifies the manner in which [Spartan] believes that MWH has not substantially performed its duties.

On behalf of Spartan, Gertler wrote a letter to Horowitz dated June 10, 2008 (“Letter”) describing conduct in which Horowitz had engaged that Spartan considered a violation of the Agreement. The Letter contained a subject line reading “Five Day Notice to Cure Gross Misconduct; Disciplinary Warning for Repeated Conduct Causing the Company Substantial Public Disgrace or Disrepute or Economic Harm.” In the Letter, Spartan alleged improper conduct by Horowitz (on behalf of MWH), including the following: 1) Horowitz ordered food

from certain ABP locations without paying for it; and 2) Horowitz acted outside the scope of his authority by a) engaging vendors and “providing the false impression to such vendors and others of [his] position and authority;” b) misrepresenting himself as an executive officer of ABP “in an effort to enhance [his] reputation and promote business for [MWH];” and c) improperly holding himself out as an executive of ABP by, *e.g.*, arranging meetings with vendors and bringing vendors to senior management of ABP. Gertler stated in the Letter that Horowitz had been “warned orally on no less than ten (10) occasions” not to approach, recommend or arrange meetings with vendors, or “otherwise hold [himself] out as an executive.”

The Letter also alleged that 1) Horowitz improperly involved himself in ABP’s daily operations when he berated and disciplined an ABP employee, “bringing her to tears;” and 2) Horowitz violated the “non-disparagement” clause in the Agreement by a) making public, disparaging statements about two senior managers of ABP, and about counsel for Defendant; b) publicly expressing his displeasure with the manner in which MWH was compensated; and c) suggesting that certain individuals associated with ABP are unethical.

In the Letter, Spartan outlined the provisions of the Agreement that Horowitz allegedly violated. One of the provisions in the Agreement to which Spartan referred is Paragraph 1, titled “Duties.” Paragraph 1(a), titled “Independent Contractor, reads in pertinent part as follows:

[MWH] has no authority to assume or create any obligation or liability, express or implied, on [Spartan’s] behalf or in its name or to bind [Spartan] in any manner whatsoever.

Spartan also made reference in the Letter to Paragraph 1(d) of the Agreement, titled “Non-disparagement of Team Members,” which reads as follows:

As the Company seeks to work as a unified team with unified goals, [MWH] shall not make any disparaging remarks of any kind in regards to any other consultant, employee or associate of [Spartan] in a public manner. Any problems that may arise between [MWH] and any other consultant, employee or associate of [Spartan] must be dealt with in a private fashion during the weekly meetings held by [Spartan].

The Letter contained numerous directions to Horowitz. Spartan directed Horowitz, *inter alia*, 1) to refrain from loitering in, or going behind the counter at, ABP cafes; 2) to refrain from contacting and/or communicating with employees, or interfering with the cafes’ daily operations;

3) not to enter ABP cafes without express authorization; 4) to communicate with ABP only through counsel; 5) to refrain from contact with potential investors and their employees and consultants; 6) to provide monthly summaries as required by the Agreement; and 7) to cease making public statements that might be perceived as disruptive of ABP and/or tarnish its image or face immediate termination. Spartan advised Horowitz that his duties and responsibilities were limited to the development of new site locations, and warned Horowitz not to negotiate any terms with respect to prospective ABP sites.

Spartan ended the Letter by advising Horowitz that his conduct, in light of prior warnings, constituted “gross misconduct, insubordination and disloyalty.” Spartan advised Horowitz that his failure to cease this conduct would constitute a “basis for discipline,” including termination of the Agreement for cause. Gertler also sent Horowitz an e-mail dated June 11, 2008 in which he provided Horowitz with a copy of the Letter and advised Horowitz that he was not to communicate with anyone at Spartan, and should direct any communications only to Gertler.

Horowitz replied to the Letter via an e-mail to Gertler, dated June 13, 2008. Plaintiff provides a copy of that e-mail,<sup>2</sup> which read as follows “Your letter has been given to my attorney and will be considered and responded to upon his review and consultation with counsel.”

By letter dated June 17, 2008 (“Termination Notice”), Spartan advised Horowitz that Spartan has terminated the Agreement for cause. In the Termination Notice, Spartan characterized Horowitz’s June 13<sup>th</sup> e-mail “as a thinly veiled threat made solely for the purpose of intimidation,” and advised Horowitz that Spartan has concluded that Horowitz does not intend to comply with the Agreement.

Plaintiff denies engaging in the conduct that Spartan alleges, either before or after it received the Letter. Plaintiff submits that Spartan was not justified in terminating the Agreement for cause.

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<sup>2</sup> The e-mail contains the word “Redacted” on the top half of the page. The Court assumes that the redacted portion is not pertinent to the issues in these motions.

C. The Motion to Disqualify Counsel

In support of Plaintiff's motion to disqualify counsel, Horowitz provides an affidavit ("Horowitz Affidavit") detailing his personal and business relationship with Gertler. Horowitz affirms, *inter alia*, that 1) he has known Gertler since 2003, during which time Gertler has referred business to Horowitz; 2) they have both served as board members of the Crossways Business Association since 2005; 3) in 2005, Horowitz and Gertler became partners in a limited liability company called Fuel Cell Dynamics, LLC ("Fuel Cell"); 4) Gertler drafted documents, including the Articles of Organization and Operating Agreement, pertaining to the formation of Fuel Cell; 5) the New York Secretary of State website reflects that Fuel Cell's address, for service of process, is Fuel Cell, "c/o Thaler Gertler;" 6) pursuant to Fuel Cell's Operating Agreement, Horowitz and Gertler are managing members with a fiduciary relationship to each other; and 7) after Horowitz executed the Agreement, he learned that Gertler withdrew part of his Fuel Cell capital contribution without Horowitz's consent, in violation of the Operating Agreement, and Horowitz is "evaluating [his] legal options against Gertler" with respect to this alleged withdrawal of funds. Horowitz also alleges that Gertler introduced him to Spartan, that the parties negotiated the Agreement in the Law Firm's office and that Gertler played an active role in those negotiations.

Paragraph 21 of the Agreement, titled "Legal Counsel," contains explicit language regarding MWH's legal representation. In Paragraph 21, MWH "acknowledge[d] and agree[d]" that:

(a) it has not relied on any representations, promises, or agreements of any kind made to it in connection with its decision to execute this Agreement except for those set forth herein; **(b) it has been advised to consult an attorney before signing this Agreement, and that it has had the opportunity to consult with an attorney;** (c) it does not feel that it is being coerced to sign this Agreement or that its signing would for any reason not be voluntary, nor does it believe [sic] the process by which it has been offered this Agreement is discriminatory; and (d) it has thoroughly reviewed and understands the effects of this Agreement before signing it. (emphasis added)

Defendant opposes Plaintiff's motion, submitting that disqualification of the Law Firm is not appropriate in light of the facts that 1) Fuel Cell is now defunct; 2) neither Fuel Cell nor

Horowitz is a party to the action, nor the movant as to the motion to disqualify; 3) the Horowitz Affidavit fails to allege an attorney-client relationship between Plaintiff and Law Firm, or Gertler; 4) the Horowitz Affidavit fails to establish that the Law Firm, or Gertler, owed a fiduciary duty to Plaintiff with regard to the negotiation and execution of the Agreement; 5) the Agreement contains a provision (set forth above) reflecting that MWH was advised, and given an opportunity, to consult with an attorney before signing the Agreement; 6) upon information and belief, Horowitz consulted with an attorney regarding the Agreement; and 7) prior to negotiations between Spartan and Horowitz regarding the Agreement, Horowitz, Gertler and two Spartan managers discussed the potential conflict in light of Gertler's involvement with Fuel Cell, and Horowitz voiced no objection at that time to Gertler's representation of Spartan.

Plaintiff also seeks to disqualify Gertler on the ground that he is a necessary witness. Specifically, Plaintiff alleges that Gertler drafted the Agreement and will be called upon to clarify and/or articulate the basis(es) for Spartan's termination of the Agreement. Plaintiff argues that "it is necessary to discover from Gertler the circumstances under which Plaintiff would be entitled to be paid since Gertler drafted the terms therein." Defendant opposes that application, submitting that Plaintiff has failed to specify the testimony that Gertler would provide, or even to establish that such testimony is necessary. Moreover, Defendant argues, the Agreement speaks for itself and, therefore, the parol evidence rule would bar Gertler's testimony regarding the meaning of that Agreement.

#### D. The Parties' Positions

MWH seeks to disqualify the Law Firm from representing Spartan, submitting that Gertler's personal and business relationship with Horowitz creates a conflict of interest with respect to that representation. MWH also argues that the Law Firm should be disqualified because Gertler is a necessary witness in this case. Spartan opposes that application.

Spartan moves to dismiss the Complaint on the grounds that Plaintiff does not have standing to bring the action, and that the Complaint fails to state a cause of action upon which relief may be granted. Spartan argues that, because MWH has failed to establish that it is a licensed real estate broker, MWH may not recover for unpaid commissions that Spartan may owe to MWH pursuant to the Agreement. Spartan argues, further, that MWH's failure to

possess a real estate license forecloses MWH, generally, from seeking to enforce the Agreement.

### RULING OF THE COURT

#### A. Motion to Disqualify Counsel

A party's valued right to be represented in ongoing litigation by counsel of its own choosing should not be abridged, absent a clear showing that disqualification is warranted. *Horn v. Municipal Information Services, Inc.*, 282 A.D.2d 712 (2d Dept. 2001), citing *Olmoz v. Town of Fishkill*, 258 A.D.2d 447 (2d Dept. 1999); *Feeley v. Midas Props.*, 199 A.D.2d 238 (2d Dept. 1993). A party seeking disqualification of opposing counsel must establish that (1) there is a prior attorney-client relationship between the moving party and opposing counsel; (2) the matters involved in both representations are substantially related; and (3) the interests of the current client and former client are materially adverse. *M.A.C. Duff, Inc. v. ASMAC, LLC*, 61 A.D.3d 828 (2d Dept. 2009) citing *Tekni-Plex, Inc. v. Meyner and Landis, supra*, at 131; *Calandriello v. Calandriello*, 32 A.D.3d 450, 451 (2d Dept. 2006); *Columbus Constr. Co., Inc. v. Petrillo Bldrs. Supply Corp.*, 20 A.D.3d 383 (2d Dept. 2005). Plaintiff, as the movant, has the burden of establishing grounds for the disqualification of Defendant's counsel. *Tekni-Plex, Inc. v. Meyner and Landis*, 89 N.Y.2d 123, 131 (1996), *rearg. den.*, 89 N.Y.2d 917 (1996); *Solow v. W.R. Grace Co.*, 83 N.Y.2d 303, 308 (1994); *see also, S & S Hotel Ventures, Ltd. Partnership v. 777 S. H. Corp.*, 69 N.Y.2d 437, 445 (1987).

When the moving party can demonstrate each of these factors, an irrebuttable presumption of disqualification follows. *Pellegrino v. Oppenheimer & Co., Inc.*, 49 A.D.3d 94, 98 (1st Dept. 2008), citing *Tekni-Plex, Inc. v. Meyner and Landis, supra*, at 131. The Court should not, however, apply these rules in a mechanical way that may interfere with a party's right to counsel of his own choosing, or enable a movant's bad faith litigation tactic. *Pellegrino* at 98. Thus, the irrebuttable presumption will not arise unless the movant makes the requisite showing as to each of these criteria. *Id.*

To determine whether an attorney-client relationship exists, a court must consider the parties' actions. *Pellegrino v. Oppenheimer & Co., Inc., supra*, at 99, citing *Wei Cheng Chang v. Pi*, 288 A.D.2d 378, 380 (2d Dept. 2001), *lv. den.*, 99 N.Y.2d 501 (2002). An attorney-client

relationship is established when there is an explicit undertaking to perform a specific task. *Wei Cheng Chang v. Pi*, *supra*, at 380. While the existence of the relationship is not dependent upon the payment of a fee or an explicit agreement, a party cannot create the relationship based on his or her own beliefs or actions. *Pellegrino v. Oppenheimer & Co., Inc.*, *supra*, at 99, citing *Jane St. Co. v. Rosenberg & Estis*, 192 A.D.2d 451 (1st Dept. 1993), *lv. app. den.*, 82 N.Y.2d 654 (1993). Disqualification is inappropriate either 1) when there is no substantial relationship between the issues in the current and former representation; or 2) where the party seeking disqualification fails to identify any specific confidential information imparted to the attorney. *Pellegrino v. Oppenheimer & Co., Inc.*, *supra*, at 98, quoting *Saftler v. Government Empls. Ins. Co.*, 95 AD2d 54, 57 (1st Dept. 1983); *Muriel Siebert & Co., Inc. v. Intuit Inc.*, 32 A.D.3d 284, 286 (1st Dept. 2006), *aff'd.*, 8 N.Y.3d 506 (2007).

The Court concludes that Horowitz and Gertler's relationship as managing members of Fuel Cell does not provide grounds for Gertler's disqualification. It is true that, as a managing member of Fuel Cell, Gertler was obliged to perform his duties in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances. Limited Liability Company Law § 409(a); *Nathanson v. Nathanson*, 20 A.D.3d 403, 404 (2d Dept. 2005). The fiduciary relationship between Gertler and Horowitz regarding Fuel Cell, however, is not dispositive of the issue before the Court because that representation has little – if any – relationship to the issues in the present case.

Indeed, MWH has failed to demonstrate how the Law Firm, or Gertler's, representation of Fuel Cell will adversely affect it in the instant litigation. Specifically, MWH has not explained how 1) Horowitz's allegations about Gertler with respect to the alleged withdrawal of money from Fuel Cell, 2) Gertler's potential responsibility for Horowitz's alleged failure to obtain a real estate license, or 3) Gertler's financial interest in Fuel Cell, a defunct company, establish a conflict of interest necessitating Gertler's disqualification here.<sup>3</sup>

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<sup>3</sup>The Court is aware that one who has served as an attorney for a corporation may not represent an individual shareholder in a case in which his interests are adverse to other shareholders. *Morris v. Morris*, 306 A.D.2d 449 (2d Dept. 2003). In *Morris*, defendant-father founded a corporation called MREC. He gave plaintiff-son a 3.96% interest in MREC, retained an 85.14% ownership in that company and divided the remaining ownership in the company between two non-parties. MREC was then sold to another corporation, and son sued father

Even assuming, *arguendo*, that Horowitz “believed” that Gertler was acting as his attorney when Horowitz executed the Agreement with Spartan, the evidence suggests that, at best, Horowitz believed that Gertler was acting as counsel to both parties. In Paragraph 15 of his Reply Affidavit, Horowitz avers that it was “my belief that Gertler was representing **both** Plaintiff and Defendant in connection with the transaction at issue.” (emphasis added) This affirmation, in conjunction with the fact that MWH has not identified any confidential information that Gertler may have divulged, leads this Court to conclude that disqualification is not mandated. In so concluding, the Court is guided by *Volo Logistics, LLC v. Varig Logistica S.A.*, 51 A.D.3d 554 (1st Dept. 2008), in which the First Department held:

In this action for breach of a loan agreement representing \$ 29.7 million worth of Brazilian airline financing, even if plaintiff lenders' attorneys did represent both sides in the loan transactions at issue, defendants knew at all times that they represented plaintiffs, did not have a reasonable expectation of confidentiality in their dealings with them, and thus cannot seek their disqualification in litigation over the loan obligations [citations omitted]. We note that Varig failed to identify any confidential information that might have been divulged to the attorneys [citations omitted].

*Id.* at 555.

In sum, in light of MWH’s failure to demonstrate that it entered into a fee arrangement, or retainer agreement, with the Law Firm, or that Horowitz reasonably believed that Gertler or the Law Firm represented only MWH, coupled with the failure to identify confidential information allegedly divulged by Gertler, the Court denies MWH’s motion to disqualify Gertler or the Law Firm on the basis of an alleged conflict of interest.

The Court also rejects MWH’s assertion that Gertler is a potential witness in this litigation and thus should be disqualified. An attorney-witness must be disqualified only when it is likely that the testimony to be given by the witness is necessary. *S & S Hotel Ventures Ltd.*

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alleging, *inter alia*, dissipation of MREC’s assets. *Id.* at 450. The Second Department held that the trial court had erred in denying son’s motion to disqualify father’s counsel, with respect to the derivative causes of action, in light of proof that the firm representing father had 1) served for many years as counsel to MREC; and 2) provided services in connection with the transactions underlying the derivative claims. *Id.* at 624-625. Unlike the corporation in *Morris*, which was central to the litigation at issue, Fuel Cell plays no part in the matter *sub judice*.

*Partnership*, 69 N.Y.2d at 445-446; *see also*, *Davin v. JMAM, LLC*, 27 A.D.3d 371 (1st Dept. 2006). The burden of demonstrating necessity is on the challenging party. *Bentvena v. Edelman*, 47 A.D.3d 651 (2d Dept. 2008). The fact that an attorney has relevant knowledge or was involved in the transaction at issue does not render his testimony necessary. *S & S Hotel Ventures Ltd. Partnership, supra*, at 445.

In determining the necessity of an attorney's testimony, the Court should consider factors including the 1) significance of the matters, 2) weight of the testimony, and 3) availability of other evidence. *S & S Hotel Ventures Ltd. Partnership*, 69 N.Y.2d at 446, citing *Comden v Superior Ct.*, 20 Cal.3d 906 (1978), *cert. den.*, 439 U.S. 931 (1978); *Foster Wheeler Corp. v. Babcock & Wilcox Co.*, 440 F.Supp. 897, 903 (S.D.N.Y. 1977).

MWH has not established that Gertler's testimony is necessary to interpret the relevant provisions of the Agreement, or explain the grounds for Spartan's termination of MWH. To the contrary, when, as here, the parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. *W.W.W. Associates, Inc. V. Giancontieri*, 77 N.Y.2d 157 (1990). As the Agreement contains definite terms, several of which are outlined in this decision, that demonstrate the parties' intention to be bound, the Court would be guided by the terms of the Agreement, and would not require Gertler's assistance in interpreting the Agreement.

Finally, with respect to the reasons for Spartan's decision to terminate MWH, the evidence before the Court suggests that there are witnesses affiliated with Spartan, other than Gertler, who could provide that testimony. The availability of those witnesses undermines MWH's contention that Gertler's testimony is necessary. *See, e.g., Kaplan v. Mills*, 187 A.D.2d 565 (2d Dept. 1992) (disqualification not warranted where three other parties were privy to the negotiations and execution of the contract, and there is no indication that unfavorable inference could be drawn from counsel's failure to testify).

For all these reasons, the Court denies MWH's motion to disqualify Gertler, or the Law Firm, from representing Spartan.

#### B. Sufficiency of the Complaint

The Court denies Spartan's motion to dismiss the Complaint under CPLR § 3211(a)(7) for failure to state a cause of action. It is well-settled that the Court must deny such a motion if

the factual allegations contained in the Complaint constitute a cause of action cognizable at law. *Guggenheimer v Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232<sup>nd</sup> Owners Corp. v Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally accept the pleading, and accept the facts alleged as true and accord to the Plaintiff every favorable inference which may be drawn therefrom. *Leon v Martinez*, 84 N.Y.2d 83 (1994). The Court concludes that the Complaint, which outlines the terms of the Agreement and the manner in which Spartan allegedly breached it, states a cause of action.

Nor is Spartan entitled to judgment under CPLR § 3211(a)(3), which permits a party to move for judgment dismissing one or more causes of action asserted against it on the ground that the party asserting the cause of action does not have legal capacity to sue, or to judgment under CPLR § 3212. In reaching this decision, the Court rejects Spartan's claim that, as a matter of law, Real Property Law § 442-d prevents MWH from having standing to pursue this action due to Horowitz's alleged failure to obtain a real estate license.

Section 440 of the RPL defines "real estate broker" to include:

any person, firm, limited liability company or corporation, who, for another and for a fee, commission or other valuable consideration, lists for sale, sells, at auction or otherwise, exchanges, buys or rents, or offers or attempts to negotiate a sale, at auction or otherwise, exchange, purchase or rental of an estate or interest in real estate, or collects or offers or attempts to collect rent for the use of real estate, or negotiates or offers or attempts to negotiate, a loan secured or to be secured by mortgage, other than a residential mortgage loan.

In turn, RPL § 442-d provides:

No person, copartnership, limited liability company or corporation shall bring or maintain an action in any court of this state for the recovery of compensation for services rendered, in any place in which this article is applicable, in the buying, selling, exchanging, leasing, renting or negotiating a loan upon any real estate without alleging and proving that such person was a duly licensed real estate broker or real estate salesman on the date when the alleged cause of action arose.

RPL § 442-d is designed to protect the public, and a court should not permit that statute to be used as a device to enable the unscrupulous to avoid payment of legitimate obligations.

*Matter of Wertlieb (Greystone Partnerships Group, Inc.)*, 165 A.D.2d 644, 647-648 (1st Dept. 1991), citing *Galbreath-Ruffin Corp. v. 40<sup>th</sup> and 3<sup>rd</sup> Corp.*, 19 N.Y.2d 354, 364 (1967), *rearg. den.*, 19 N.Y.2d 973 (1967). The RPL licensing provisions are penal in nature and should be strictly construed. *Reiter v. Greenberg*, 21 N.Y.2d 388, 391-92 (1968).

RPL § 442-a was not intended to cover every transaction in which an interest in real estate may be part of the subject transfer. Where real estate is the principal element involved in the transaction, a broker must have a license and cannot evade its necessity by characterizing its services as that of a finder, intermediary or middleman. *CTM Consulting Services, Inc. v. Wateredge East Inc.*, *supra*, citing *Sorice v. DuBois*, 25 A.D.2d 521 (1st Dept. 1996); *Berg v. Wilpon*, 180 Misc.2d 956, 957 (Sup. Ct. Richmond Co. 1999), *aff'd.*, 271 A.D.2d 629 (2d Dept. 2000). *Weingast v. Rialto Pastry Shop*, 243 N.Y. 113 (1926). If, however, an item of real estate is an incidental feature of the transaction at issue, § 442-d does not apply. *CTM Consulting Services, Inc. v. Wateredge East Inc.*, 21 Misc.3d 1117(A) (Supreme Court Nassau County 2008); *Weingast v. Rialto Pastry Shop*, *supra*; *Mayer v Jova Brock Works, Inc.*, 38 AD2d 615 (3d Dept. 1971).

In *Weingast*, *supra*, plaintiff sought to recover a commission for procuring the sale of a pastry shop. Concluding that plaintiff was not in the business of procuring leases or in buying and selling leases or interests in real estate, but rather was engaged in negotiating as a broker the sale of pastry shops or restaurants as going concerns, the Court concluded that plaintiff was not obligated to obtain a license, and was not barred from maintaining an action to recover his compensation if he had earned it. 243 N.Y. at 117.

At this state of the litigation, the Court cannot determine whether MWH's performance under the Agreement was of such a nature that Horowitz was required to obtain a broker's license. Accordingly, there is an issue of fact whether the lease was an incidental or principal feature of the entire transaction and, therefore, whether MWH is barred by RPL § 442-d from recovering monies Spartan allegedly owes MWH pursuant to the Agreement. Therefore, the Court denies Spartan's motion for summary judgment and for dismissal of the Complaint, without prejudice to renewal of that application.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel to appear before the Court for a Preliminary Conference on August on August 13, 2009 at 9:30 a.m.

ENTER

DATED: Mineola, NY  
July 1, 2009

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HON. TIMOTHY S. DRISCOLL  
J.S.C.