

P.S. Burnham Inc. v Irvine Realty Group, Inc.

2010 NY Slip Op 31642(U)

July 8, 2010

Supreme Court, New York County

Docket Number: 105618/09

Judge: Jane S. Solomon

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON

PART 55

Index Number : 105618/2009

P.S. BURNHAM, INC.

vs

IRVINE REALTY GROUP

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

PAPERS NUMBERED

FILED

JUN 28 2010

NEW YORK COUNTY CLERK'S OFFICE

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

*See attached Memorandum
Discussion + Order.*

*Note of Issue due date extended
to 8/11/10. If remaining parties
need a conference to schedule matters
so as to meet that deadline, call
646-386-3289 to schedule a compliance
conf. J.S. 6/25/10*

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

JANE S. SOLOMON

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X
P.S. BURNHAM INC.,

Plaintiff,

-against-

Index No. 105618/09

IRVINE REALTY GROUP, INC. PAUL IRVINE,
JOANNE CUTLER d/b/a JOANNA CUTLER REAL
ESTATE, CORT JAVARONE, SILVIO GALTERIO,
FORESITE MANAGEMENT, LLC, CHARLES YASSKY,
122 EAST 78, LLC, 122 EAST 78th STREET
OWNER, LLC, and CY 122 EAST 78th
STREET, LLC,

Defendants.

FILED
JUN 28 2010
NEW YORK
COUNTY CLERK'S OFFICE

-----X
JANE SOLOMON, J.S.C.:

Defendant Joanne Cutler moves, pursuant to CPLR 3212 (a) for summary judgment dismissing the complaint as to her. Defendants Irvine Realty Group, Inc. (IRG) and Paul Irvine, and defendants Charles Yassky and CY 122 East 78th Street, LLC (CY) cross-move for the same relief as to them.

Patricia Burnham, a real estate broker who is the principal of plaintiff, represented defendants Cort Javarone, Silvio Galterio, and Foresite Management, LLC (Foresite), of which Javarone and Galterio are the principals, in connection with their attempt to purchase the building located at 122 East 78th Street in Manhattan (the "Building"). The Building, a mixed-use property, was to be reconverted to a one-family home. Although plaintiff had negotiated a sales contract for Foresite, Foresite failed to purchase the Building, having failed to meet a noon, May 22, 2008 deadline for signing the contract and posting the required down

payment. See Cutler Reply Aff., Exh. B. Later, on the afternoon of May 22d, Paula DelNunzio, a broker with non-party Brown Harris Stevens (BHS), sent an e-mail to Yassky and Cutler stating that Irvine, the broker representing former defendant 122 East 78, LLC, the seller of the Building (Seller), had accepted Yassky's offer to purchase the Building for \$13,200,000.

At some time prior to May 22d, Galterio had suggested to Javarone that he contact Cutler, as a potential investor, and on May 19, 2008, Cutler and Javarone contacted IRG and arranged to visit the Building with non-party Joey Betesh, a possible investor. Mr. Betesh, however, decided not to participate in the purchase of the Building. Subsequently, Cutler arranged a meeting on May 28, 2008, at which Javarone met with Yassky to discuss a possible joint investment in a company that would purchase the Building. Although Foresite and Yassky negotiated a possible deal between them, the Building was subsequently purchased by defendant CY, of which defendants Yassky and Cutler, as well as two non-party individuals, were the initial members.

The six causes of action in the complaint are all based on the theory that Yassky and Cutler benefitted from the due diligence that plaintiff performed on behalf of Foresite, and then froze Foresite out of the ultimate purchase of the Building, thereby depriving plaintiff of its anticipated broker's commission. Specifically, plaintiff contends that Cutler informed Yassky of the opportunity to purchase the Building at the meeting held on May 28th, and that both Cutler and Yassky relied upon the information

that plaintiff had provided to Foresite. The evidence is to the contrary. Both Yassky and Cutler state in their affidavits that the availability of the Building was widely known among brokers. Indeed, it was listed on IRG's website. Cutler was fully familiar with the Building, having represented a potential purchaser in October 2006, when the Building had last been on the market. See Cutler Aff., Exh. 3. Cutler states in her affidavit that Yassky, with whom she had earlier partnered in purchasing a building located at 60 East 66th Street, contacted her after he was shown the Building and asked whether she wished to join with him in purchasing it. Yassky states in his affidavit that he and Cutler have known each other for 25 years, and that, once it appeared that Seller would accept his offer, he reached out to Cutler as a potential investor.

As for plaintiff's claim that Yassky relied upon the information that plaintiff had provided to Foresite, it is indisputable that Ms. DelNunzio acted as Yassky's broker with regard to the Building. On May 21, 2008, one week prior to the May 28th meeting at which plaintiff contends that Cutler informed Yassky of the opportunity to purchase the Building, Ms. DelNunzio showed Yassky the Building, e-mailed a summary of the apartments and floor plans of the Building to him (Javarone subsequently sent Yassky the same information on May 30th), and told him that Irvine thought that the remaining tenants could be bought out for \$500,000. Yassky Aff., at 2 and 6, and Exh. Q. The following day, she sent him the Building's Certificate of Occupancy (Yassky Aff.,

Exh. Q) and the e-mail, mentioned above, advising him that Irvine had accepted his offer. It is undisputed that, upon the closing with CY, Seller paid IRG the commission that was due to it, and paid BHS the commission that was due to it.

The complaint alleges six causes of action, two for a brokerage commission, one in quantum meruit, one for unjust enrichment, and one for tortious interference with contract. The claims for a brokerage commission are not viable against any of the moving defendants, because plaintiff had no contractual relationship with any of them. The contract with which the moving plaintiffs are alleged to have interfered is plaintiff's contract with Foresite. However that contract was not breached; Foresite was not obligated to buy the Building, but only to pay plaintiff a commission if it did effect that purchase. Absent the breach of a contract, a claim for tortious interference with it does not lie. *Lama Holding Co. v Smith Barney*, 88 NY2d 413 (1996); *Murataj v Dream Dragon Prods., Inc.*, 72 AD3d 527 (1st Dept 2010). Nor does plaintiff have a claim for tortious interference with prospective economic relations. Such a claim requires a showing of criminal, or independently tortious activity, neither of which the complaint alleges against any of the moving defendants. See *Carvel Corp. v Noonan*, 3 NY3d 182 (2004). Plaintiff's quasi-contractual claims rest on plaintiff's contention that Cutler and Yassky "freely availed themselves of Plaintiff's introduction of [Foresite] to [Seller], as well as information compiled by Plaintiff including the Contract of Sale negotiated by Plaintiff with [Seller]."

Plaintiff's Mem. of Law in Opp., at 17. However, even assuming that contention to be true, the receipt of a benefit, alone, is not a sufficient basis for either a claim of unjust enrichment, or a claim in quantum meruit. The former requires that services have been performed for the defendant, resulting in its unjust enrichment. *Joan Hansen & Co. v Everlast Boxing Headquarters Corp.*, 296 AD2d 103 (1st Dept 2002). The latter requires that the services, the value of which the plaintiff seeks to recover, have been performed at the behest of the defendant. *AJ Contr. Co. v Farmore Realty Inc.*, 47 AD3d 501 (1st Dept 2008); *Kagan v K-Tel Entertainment*, 172 AD2d 375 (1st Dept 1991). Plaintiff does not argue either that it performed services directly for any of the moving defendants, or that any of the moving defendants requested it to perform any services.

Plaintiff's claim against Irvine and IRG appears to be that, although Irvine knew that plaintiff had negotiated a sales contract with Foresite, IRG, acting on behalf of Seller, brokered a sales contract between Seller and CY that did not include Foresite as a party. Plaintiff fails to show either any duty on IRG's part not to do so, once Foresite failed to execute its contract, or any benefit that IRG derived from brokering the contract with CY as the purchaser that it would not have derived from brokering a contract with an entity that included Foresite.

Accordingly, it is hereby

ORDERED that the motion for summary judgement of defendant Joanne Cutler d/b/a Joanna Cutler Real Estate is granted and the

complaint is severed and dismissed as against said defendant with costs and disbursements to said defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the cross motion for summary judgment of defendants Charles Yassky and CY 122 East 78th Street LLC is granted and the complaint is severed and dismissed as against said defendants with costs and disbursements to said defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

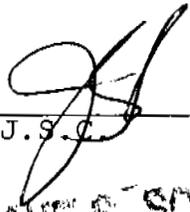
ORDERED that the cross motion for summary judgment of defendants Irvine Realty Group and Paul Irvine is granted and the complaint is severed and dismissed as against said defendants with costs and disbursements to said defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDREDED that the remainder of the action shall continue.

Dated: 6/28/10

ENTER:



J.S.S.

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JAMES S. SOLOMON

FILED
JUN 28 2010
NEW YORK
COUNTY CLERK'S OFFICE