

**Nemeroff v The Coby Group, LLC**

2008 NY Slip Op 30660(U)

March 5, 2008

Supreme Court, New York County

Docket Number: 0600778/2005

Judge: Michael D. Stallman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
PRESENT: Hon. MICHAEL D. STALLMAN PART 7  
*Justice*

ANDREW NEMEROFF,  
Plaintiff,

INDEX NO. 600778/05

MOTION DATE 10/19/07

MOTION SEQ. NO. 004

THE COBY GROUP, LLC, LESLIE WESTREICH,  
and MORTY J. YASHAR,  
Defendants.

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 5 were read on this motion to reargue

	PAPERS NUMBERED
Notice of Motion— Affidavits — Exhibits 1-10	1-2
Answering Affidavits — Exhibit A	3
Replying Affidavit — Exhibit V	4
Supplemental Affirmation — Exhibits 1-10	5

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that the motion is decided in accordance with the annexed memorandum decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO  
JUSTICE  
DATED: \_\_\_\_\_ J.S.C.

**FILED**  
MAR 10 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 3/5/08  
New York, New York

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

**MICHAEL D. STALLMAN**  
J.S.C.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 7**

-----X  
ANDREW NEMEROFF,

Plaintiff,

Index No. 600778/2005

- against -

THE COBY GROUP, LLC, LESLIE WESTREICH, and  
MORTY J. YASHAR,

**Decision and Order**

Defendants.

-----X

**HON. MICHAEL D. STALLMAN, J.:**

**FILED**  
MAR 10 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

Defendants move to reargue the Court's decision dated March 29, 2007, which partially granted defendants' motion for summary judgment dismissing the complaint.

**BACKGROUND**

Plaintiff is a real estate broker licensed in New York working as a mortgage broker. In this action, plaintiff alleges that he had an agreement with defendants to act as their broker to find partners and financing for defendant The Coby Group LLC (Coby), for the purchase of real estate in Florida for \$145 million. It is undisputed that plaintiff introduced Alex Adjmi and Robert Cayre to Coby. Adjmi and Cayre were supposed to provide Coby with, among other things, a \$4.5 million additional deposit for the real estate deal. Plaintiff claims that defendants Westreich and Yashar orally agreed to pay him a brokerage fee and to provide an equity position for introducing defendants to Adjmi and Cayre. Plaintiff seeks a minimum fee of \$500,000, plus a "customary" commission of 2% to 3%, which amounts to \$900,000.

Defendants deny any oral agreement with plaintiff. According to defendants, Adjmi and Cayre neither provided the \$4.5 million additional deposit nor delivered nor cooperated in attempts

to secure financing, forcing defendants to secure financing themselves and to restructure the real estate deal as a “flip,” i.e., a purchase and resale of the property. It is undisputed that the property was flipped for a profit of \$15 million. Adjmi and Cayre brought suit over the restructured deal, alleging that defendants had entered into a surreptitious deal, Cayre and Adjmi v Westreich, Yashara, the Coby Group, LLC et al, Index No. 111983/2004. Cayre v Westreich settled pursuant to a stipulation dated August 26, 2004.

The complaint alleges seven causes of action. By decision dated August 9, 2005, Justice Soto granted defendants' motion to dismiss as to the second, third, sixth and seventh causes of action, including the part of the first cause of action that alleges breach of a written agreement.

By decision dated March 29, 2007, this Court partially granted defendants' motion for summary judgment, dismissing the remaining part of the first cause of action alleging breach of an oral agreement to pay plaintiff's commission. This Court found that the alleged oral agreement to pay plaintiff's commission was unenforceable for lack of essential terms. The Court denied defendants' motion as to the fourth and fifth causes of action, sounding in quantum meruit and unjust enrichment. In opposition to defendants' motion, plaintiff also raised the unpleaded theory that he was entitled to a finder's fee, instead of a broker's commission. However, this Court ruled that the Statute of Frauds would bar this claim.

Defendants move to reargue this Court's prior decision denying summary judgment dismissing the causes of action for quantum meruit and unjust enrichment. By stipulation dated July 19, 2007, the parties agreed to submit further supplemental briefs addressing two questions of the Court: (i) what is the benefit that plaintiff conferred on defendants on the theory of unjust enrichment, and (ii) what is the reasonable expectation to be paid for services if the deal was

[\* 4 ]  
structured differently than as originally agreed?

### DISCUSSION

Although plaintiffs' theories of quantum meruit and unjust enrichment are based on the same set of facts, the Court's prior decision analyzed the two theories separately, according to the respective elements of those theories. "A cause of action for unjust enrichment is stated where 'plaintiffs have properly asserted that a benefit was bestowed ... by plaintiffs and that defendants will obtain such benefit without adequately compensating plaintiffs. Moreover, [w]here defendants have reaped such benefit, equity and good conscience require that they make restitution.'" Korff v Corbett, 18 AD3d 248, 251 (1st Dept 2005) (internal citations and quotation marks omitted). Under unjust enrichment, this Court found an issue of fact as to whether plaintiff had conferred a benefit upon defendants.

As to the elements of quantum meruit,<sup>1</sup> plaintiff must prove "(1) the performance of the services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services." Curtis Properties Corp. v Greif Cos., 212 AD2d 259, 266-267 (1<sup>st</sup> Dept 1995). This Court found that an issue of fact as to whether plaintiff had a reasonable expectation of compensation for his services, based on deposition excerpts of defendant Westreich submitted on the prior motion.

Reargument is granted. Defendants have demonstrated that the Court misapprehended the excerpts of Westreich's deposition in considering plaintiff's theory of quantum meruit. Based on

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<sup>1</sup> "It has been pointed out that the term 'quantum meruit' is ambiguous in customary use: 'it may mean (1) that there is a contract 'implied in fact' to pay the reasonable value of the services, or (2) that, to prevent unjust enrichment, the claimant may recover on a quasi-contract (an 'as if' contract) for that reasonable value'" Heller v Kurz, 228 AD2d 263, 263 (1<sup>st</sup> Dept 1996) (citations omitted).

deposition excerpts, the Court previously found that defendant Westreich allegedly told plaintiff that he would be paid for his services if Westreich “flipped” the property. However, the full deposition transcript submitted on reargument indicates that this conversation pertained not to the deal at issue, but to a real estate transaction in the Bronx. See Monachino Opp. Aff., Ex A [Nemeroff EBT], at 60-80.

As in the prior motion, defendants focus on the contentions that plaintiff had nothing to do with either finding the real estate or securing real estate financing, which was being handled by another mortgage broker, and that plaintiff played no role in the flip sale. Defendants also maintain that Adjmi and Cayre did not provide the \$4.5 million deposit that they agreed to provide, and attempts to secure financing to purchase the property for \$145 million “blew up.” Cayre EBT, at 106. Under these circumstances, defendants contend that there was no reasonable expectation that plaintiff would receive a commission. Defendants assert that Nemeroff did nothing that enriched defendants.

In opposition, plaintiff argues that simply having Adjmi and Cayre’s names associated with the real estate deal added credibility, and would have aided defendants with finding investors and financing. Plaintiff maintains that he was responsible for bringing the parties together, and that Adjmi and Cayre infused money into the project at a critical time when cash was needed. Plaintiff asserts that defendants promised him that he would be compensated if he introduced them to Adjmi and Cayre, and if that introduction led to a sale of the property. Opp. Mem. at 8.

“[I]t cannot be assumed that a broker works gratuitously and [the parties to the transaction] are held to such knowledge when they accept the result of the broker's services.” Gronich & Co., v 649 Broadway Equities Co., 169 AD2d 600, 602 (1st Dept 1991). “In the absence of a contract,

express or implied, a broker is entitled to receive a commission in a reasonable amount for bringing together the parties to a transaction.” Curtis Props. Corp., 212 AD2d at 266. “A showing that a broker simply introduced the parties or called the property to the tenant's attention, without more, does not entitle the broker to a commission; there must be a proximate link between the broker's efforts and the consummation of the transaction.” Helmsley-Spear, Inc. v 150 Broadway N.Y. Assoc., 251 AD2d 185, 186 (1st Dept 1998).

Here, plaintiff submits evidence that he attended at least two or three meetings and participated in telephone calls with defendants and Adjmi and Cayre. Kook Suppl. Affirm., Ex 10 [Yashar EBT], at 68-69 (submitted on prior motion as Monachino Opp. Aff., Ex U at 29); *Id.*, Ex 7 [Cayre EBT], at 39-40 (submitted on prior motion as Monachino Opp. Affirm., Ex R). Although defendants dispute whether plaintiff contributed anything worthwhile at the meetings, they have not demonstrated, as a matter of law on this motion, that there was no proximate link between plaintiff's alleged actions and the flip deal that was ultimately consummated. The timeline of the meetings and telephone conversations in relationship to when defendants considered a flip sale is not clear from the record. Thus, defendants do not show the applicability of Ryan v Bettiol (211 AD2d 844 [3d Dept 1995])[broker not entitled to commission on a lease because lease negotiations did not begin until almost a year after broker introduced the parties for a sale of the property, and broker admitted took a “wait and see” approach]).

Finally, the Court's prior ruling that the Statute of Frauds barred plaintiff's claim to a finder's fee, for simply introducing defendants to Adjmi and Cayre, was in error. The Court was not aware that plaintiff is a licensed real estate broker, who is exempt from General Obligations Law § 5-701 (a) (10). A licensed real estate broker may not recover a finder's fee in the absence of an express,

special agreement solely to act as a finder. PKG Assoc. v Dubb, 306 AD2d 333, 333-334 (2d Dept 2003); Futterman Org. v Bridgemarket Assocs., 278 AD2d 105, (1<sup>st</sup> Dept 2000); Indus. & Commercial Realty Assoc. Co. v Great Atl. & Pac. Tea Co., 60 AD2d 527 (1<sup>st</sup> Dept 1977).

In the prior motion, plaintiff asserted that he had a special contract with defendants for a straight commission for an introduction (Nemeroff Aff. ¶ 4). Plaintiff also submitted a letter agreement that plaintiff prepared himself, which defendants did not sign. Defendants contend that plaintiff's affidavit should be rejected as a tailored affidavit insufficient to raise a triable issue of fact. Defendants point out that plaintiff testified at his deposition that his fee would have been a commission and equity interest in the property if defendants' partners either provided equity or credibility and financial wherewithal to borrow a large sum of money, and that a flip "was not something that was really at the forefront of anybody's mind at the time." Nemeroff EBT, at 106-107, 116, 136. Defendants assert that plaintiff raised the alleged special contract for the first time on their summary judgment motion.

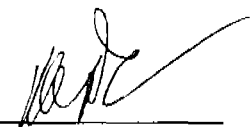
The unsigned letter agreement does not raise a triable issue of fact as to the existence of a special contract. The Court does not reject plaintiff's affidavit as tailored solely to evade summary judgment. The fact that plaintiff did not specifically allege the existence of a special contract in the pleadings does not entitle defendants to summary judgment. "It has only been the dead hand of a criticized case that influenced courts to grant summary judgment for defendant when a plaintiff's submissions, but not its pleadings, made out a cause of action." Alvord and Swift v Stewart M. Muller Const. Co., 46 NY2d 276, 281 (1978). Therefore, based on the totality of the submissions before the Court, defendants have not proven their entitlement to judgment as a matter of law barring

[\* 8 ]  
plaintiff's recovery to a finder's fee.<sup>2</sup>

Accordingly, it is hereby

**ORDERED** that defendants' motion to reargue is granted, and upon reargument, the Court adheres to its prior order and vacates the portion of the decision which held that the Statute of Frauds bars plaintiff's claim to a finder's fee.

**Dated:** *March 5, 2008*  
New York, New York

**ENTER:**  
  
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J.S.C.

**MICHAEL D. STALLMAN**  
J.S.C.

**FILED**  
MAR 10 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

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<sup>2</sup> The Court does not address the issue of whether plaintiff may amend his pleadings at this stage of the action to include a finder's fee claim.