

<b>Estate of Brown v Pullman Group, LLC</b>
2008 NY Slip Op 31043(U)
April 8, 2008
Supreme Court, New York County
Docket Number: 0602593/2006
Judge: Jane S. Solomon
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: JANE S. SOLOMON  
Justice

PART 55

Index Number : 602593/2006  
ESTATE OF JAMES BROWN  
vs.  
PULLMAN GROUP  
SEQUENCE NUMBER : 005  
DISMISS

INDEX NO. \_\_\_\_\_  
MOTION DATE 12/17/07  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED  
1-3  
4-5

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 is decided in accordance with the enclosed memorandum decision and order.

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

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1413).

Dated: 4/8/08

JANE S. SOLOMON  
J.S.C.

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

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

-----X

ESTATE OF JAMES BROWN, JAMES BROWN  
ENTERPRISES, INC., AND JAMES BROWN,  
LLC,

INDEX NO. 602593/06

Plaintiffs,

DECISION AND ORDER

-against-

THE PULLMAN GROUP, LLC

Defendant.

-----X

JANE S. SOLOMON, J.

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk  
and notice of entry cannot be served based hereon. To  
obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
1415).

Plaintiffs move both to dismiss and for summary  
judgment on the counterclaims of defendant Pullman Group, LLC  
(Pullman). The motion is granted for the reasons below.

The facts of this action were discussed in some detail  
in a previous decision issued August 20, 2008, under motion  
sequence 01, and are restated briefly here. James Brown (Brown)  
was a world-famous musical performer and songwriter. He  
commenced this action in November 2006, but passed away a month  
later. His estate appeared as a plaintiff in the action before  
the decision in motion sequence 01 issued. Plaintiff James  
Brown, Inc. is a corporation formed to organize Brown's concert  
tours, and defendant James Brown, LLC was formed to receive  
royalties and otherwise help exploit income generated by Brown's  
songs. Brown and James Brown Enterprises, Inc. (together  
referred to as the Owners) entered into an agreement with Pullman

pursuant to an engagement letter dated February 24, 1999 (Engagement Letter). Under the Engagement Letter, Owners pledged future song revenues as collateral for a loan.

In early 2006, Brown and James Brown, LLC sought another loan from Royal Bank of Scotland (RBS), also secured by revenue from Brown's oeuvre. When the RBS deal was contemplated to close, \$20.1 million of the Pullman financing was outstanding. It was expected that the RBS deal would fund a repurchase of the Pullman debt and extend approximately \$5.1 million in fresh money to Brown and James Brown, LLC. The RBS deal was "scotched" when Pullman sent a letter to Brown, James Brown, LLC and RBS on May 5, 2006, informing them that it viewed the deal as a breach of Owner's obligations under the Engagement Letter, relying on paragraph 7 thereof. Paragraph 7 states that "Pullman is granted the exclusive right, at its sole discretion, to refinance any future transaction(s) or asset sale(s) for owner upon future recoupment of the securities. . . . Such refinancing shall be interpreted to include all future financings during the greater of owner's life or two future financing periods in addition to the initial financing contemplated." Pullman contended that the proposed RBS deal was a transaction of the kind contemplated by paragraph 7.

Pullman's compensation under the Engagement Letter is described in paragraph 5. As relevant here, paragraph 5 grants

Pullman \$100,000 as liquidated damages if a transaction does not close because of Owner's failure or refusal "to perform its obligations under this Engagement Letter" before a firm commitment is received from a purchaser; or, at a later time, Pullman becomes entitled to \$250,000 (Engagement Letter, paragraph 5[c][iii]).

Plaintiffs commenced this action with two causes of action: (1) Declaratory judgment holding that the Pullman RBS deal did not invoke Pullman's rights under paragraph 7, and (2) tortious interference with prospective economic advantage arising from the May 5, 2006 letter. The second cause of action was dismissed, leaving only the declaratory judgment claim. Pullman counterclaimed for a declaratory judgment in its favor, and for breach of contract arising from the proposed RBS deal.

In this motion, plaintiffs move to dismiss the counterclaims. First, it argues that the competing declaratory judgment causes of action are moot because the RBS deal did not take place and never will, so there is no case in controversy. Second, it argues that no transaction took place that could invoke Pullman's rights to be compensated under paragraph 7 of the Engagement Letter, so Pullman's second counterclaim also should be dismissed. In support thereof, it submits the affidavit of one of the personal representatives of the estate, who states that the RBS deal did not take place, it no longer is

viable, and plaintiffs have no intention of reviving it (Aff. of Albert H. Dallas, Notice of Motion, Ex A).

Pullman advances two arguments largely on procedural grounds. They contend that summary judgment is inappropriate because plaintiffs have not joined issue on the counterclaims, and because plaintiffs rely on contested facts regarding the status and description of the RBS deal. Pullman also argues that dismissal is not properly granted under the relevant standard of review on a motion to dismiss for failure to state a cause of action (Leon v Martinez, 84 NY2d 83 [1994]). Pullman views RBS's 2006 offer to finance repurchase of the securities issued pursuant to the Engagement Letter as an event that entitles Pullman to liquidated damages under paragraph 5(c)(iii). That plaintiffs chose not to close the RBS deal, as they freely acknowledge (see plaintiffs' reply memorandum, at 5, stating that plaintiffs chose to abandon the transaction), did not eliminate their obligation to pay liquidated damages.

Plaintiffs and Pullman contend that the text of the Engagement Letter, a copy of which was attached to the complaint, defines the scope of their obligations in this lawsuit. As such, plaintiffs' motion will be considered as one based alternatively on documentary evidence or on failure to state a cause of

action.<sup>1</sup>

Paragraph 39 of the counterclaim alleges that, "in direct violation of the provisions of paragraph 7 of the Engagement Letter," plaintiffs were negotiating to refinance the loan originally negotiated by Pullman. Pullman does not cite any other provision of the Engagement Letter that it alleges was breached. However, paragraph 7 does not prohibit Owners from negotiating to refinance the loans; it describes Pullman's rights in the event the loans were refinanced. While the proposed transaction with RBS may very well have entitled Pullman to a fee once consummated, the parties agree that the deal did not close.

Pullman analogizes its claim to that of a real estate broker who procures a bone fide purchaser for a client seller. If the seller refuses to sell the property, the broker nevertheless has earned its fee under the contract (e.g., Julian J. Studley v Coach, Inc., 3 AD3d 358 [1<sup>st</sup> Dept 2004]). Courts have held that "a cause of action for a brokerage commission is sufficiently pleaded if the efforts of the broker are rendered a failure by the fault of the principal; if capriciously he changes his mind after the purchaser, ready willing and able, and

---

<sup>1</sup> Plaintiffs' notice of motion states that dismissal is sought under CPLR 3211(a)(2), i.e., for lack of subject matter jurisdiction. Pullman correctly points out that this is probably a typographic error, since plaintiffs initiated this lawsuit. However, plaintiffs may have meant the motion is made pursuant to CPLR 3211(a)(1) based on documentary evidence.

consenting to the prescribed terms, is produced" (id., citations omitted). Nothing akin to this scenario occurred in the present case. Pullman did not procure RBS. Also, paragraph 5(c)(iii) of the Engagement Letter entitles Pullman to liquidated damages if a transaction does not close because of Owner's failure or refusal to perform its obligations under the Engagement Letter. It is not triggered where Owners fail to close on a transaction that would itself be a breach of the contract.

Accordingly, it hereby is

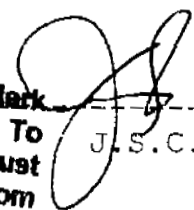
ORDERED that plaintiffs' motion to dismiss the second counterclaim is granted, and the Clerk is directed to enter judgment accordingly; and it further is

ADJUDGED and DECLARED that the question of whether the proposed transaction between plaintiff James Brown, LLC and Royal Bank of Scotland would constitute a breach of the Engagement Letter had it been consummated is moot because the transaction is abandoned.

Dated: April 8, 2008

ENTER:

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1413).

  
J. S. C.

JANE S. SOLOMON