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

PRESENT: HON. EILEEN BRANSTEN PART 3

Index Number : 600445/2007

CORCORAN GROUP

VS

538 EMMUT PROPERTIES, LLC

Sequence Number : 001

DISMISS

INDEX NO. 600445/07

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

The following papers, numbered 1 to 7 were read on this motion and cross-motion to/for for summary judgment and a dismissal

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2,3,4
Replying Affidavits	5,6,7

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION

FILED
JUL - 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 6-27-08

Eileen Branston

HON. EILEEN BRANSTEN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☒ DO NOT POST ☐ REFERENCE

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

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THE CORCORAN GROUP,

Plaintiff,

-against-

Index No. 600445/07
Motion Date: 8-2-07
Motion Seq. No.: 01

538 EMMUT PROPERTIES LLC, and JOHN YOUNG, individually and doing business as EMMUT PROPERTIES,

Defendants.

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PRESENT: EILEEN BRANSTEN, J.:

Pursuant to CPLR 3212, plaintiff The Corcoran Group ("Corcoran") moves for partial summary judgment on its first cause of action and for dismissal of defendants' affirmative defenses pursuant to CPLR 3211(b).[1] Defendants oppose Corcoran's motion and themselves cross-move for partial summary judgment dismissing the first, fifth and sixth causes of action.

Background

Corcoran is a licensed real estate broker. *See*, Chiang Aff'd in Support ("Supp"), Exh. A, (Verified Complaint) ("Compl.") ¶ 2). Defendant 538 Emmut Properties LLC ("LLC") is a New York limited liability company. Defendant John Young ("Young") is a managing member of LLC who is engaged in the business of developing real property under the name

[1] Plaintiff has withdrawn that part of its motion seeking summary judgment on the seventh cause of action for reimbursement of out-of-pocket expenses pursuant to the brokerage agreement. *See*, Chiang Reply Aff'd ("Reply"), at 3, ¶ 7.

"Emmut Properties" ("Properties"). *See*, Compl. ¶¶ 4-5; Supp., Exh. C (Verified Answer) ("Ans.") ¶¶ 4-5.

In the Spring of 2004, LLC and Young began negotiations with Hergen Realty, Inc. ("Hergen") to purchase a building under construction at 526 East 80th Street in Manhattan (the "Building"). LLC acquired title to the Building on August 2, 2004. *See*, Young Aff'd at 2, ¶ 3, 9; Compl. ¶¶ 9-10. However, prior to that date, on June 1, 2004, Corcoran entered into a letter brokerage agreement (the "Agreement" or "Brokerage Agreement") with Properties. *See*, Supp., Exh. B (Brokerage Agreement). Pursuant to the Agreement, Corcoran agreed to act as the exclusive selling agent for a seven unit condominium project (the "Project") at the Building sponsored by Properties, covenanting that it would "diligently and in good faith canvass and solicit and otherwise use it best efforts to secure satisfactory purchasers for the Units and bring about contracts of sale on terms and conditions satisfactory to Sponsor." *See*, Agreement at 2, ¶ 6. The units ranged in asking price from $3,400,000 to $6,100,000, with a combined price of approximately $30,000,000. *See*, Stiefel Aff., Exh.A (Condominium Offering Plan), at p. 19. LLC ultimately assumed the obligations of Properties and Young under the Agreement, and as sponsor of the Project.[2] *See*, Compl. ¶ 29; Ans. ¶ 29.

[2] The complaint seeks to hold all three defendants liable under the Agreement. Although defendants have raised a variety of objections relating to the interpretation and effect of the contract, none of them have argued a lack of party status under the Agreement.

Paragraph 10 of the Agreement governs Corcoran's entitlement to commissions. Paragraph 10(a) provides that the sponsor (LLC) must "[p]ay the Selling Agent [Corcoran] . . . at closing, a commission of five percent (5%) of the sale price of each Unit . . . if sold directly by the Selling Agent's designated agents . . ." (emphasis added). Furthermore, paragraph 10(e) provides:

> "Notwithstanding anything in this Agreement to the contrary, if Sponsor willfully defaults under a Purchase Agreement or voluntarily releases a Purchaser from its obligations under any Purchase Agreement, then Selling Agent shall be entitled to payment of the full amount of the Commission which would have been paid had the sale been completed."

Paragraph 11 of the Agreement states that "any offer submitted for the purchase of the Units and all terms and conditions of any proposed sale shall be subject to the approval of Sponsor, which approval may be given or withheld in Sponsor's sole and absolute discretion." Paragraph 12 provides that:

> "Within thirty (30) days from the expiration of this Agreement . . . Selling Agent shall deliver to Sponsor a list of all prospective purchasers who inspected the Units during the term of this Agreement. If within six (6) months of termination date a contract is signed to sell a Unit to a purchaser on said list, Selling Agent shall be entitled to a commission as designated . . . but such commission shall not be deemed earned unless or until title closes, in accordance with the Contract of Sale and the sales price is paid unless due to the fault of the Sponsor" (emphasis added).

Finally, paragraph 22 states that the "Agreement contains the entire understanding of the parties and may not be changed or modified orally, but only by written instruments signed by the parties."

Defendants filed a condominium offering plan (the "Plan") with the New York State Department of Law on May 27, 2005, which was effective for a period of one year. *See*, Compl. ¶ 31; Ans. ¶ 31; Stiefel Aff., Exh.A (Condominium Offering Plan). Under its terms, defendants were required to declare the Plan effective once purchase agreements for 80% of the units had been executed. Defendants had the option to do so if fewer units were sold, but could not do so if less than 15% of the units had been sold. Furthermore, defendants had the right, in their "sole discretion," to declare the Plan abandoned before 80% of the units were sold. *See*, Plan, at p. 46, ¶ N.

On December 21, 2005, defendants filed an amendment to the Plan (the "First Amendment"), which reflected changes in the size of the units and the estimated monthly common charges. *See*, Stiefel Aff., at ¶ 13; Stiefel Aff., Exh.B (First Amendment). The First Amendment was approved by the Attorney General's office on January 13, 2006. *See*, Stiefel Aff. At ¶ 15; Stiefel Aff., Exh. C (Attorney General's acceptance letter). A second amendment (the "Second Amendment"), offering storage bins and again updating unit size, was submitted on March 22, 2006 and accepted on May 1, 2006. *See*, Stiefel Aff., at ¶ 21; Stiefel Aff., Exh. D, (Second Amendent); Exh. E (Attorney General's acceptance letter).

On January 4, 2006, LLC entered into a contract, procured by Corcoran, to sell Unit 3A to Thomas Harnett and Rachel George ("Harnett/George") for $3,700,000. *See*, Supp., Exh. D (Harnett/George Purchase Agreement). Although Corcoran obtained offers for other units, they were for amounts below the asking prices set forth in the Plan, and LLC thus did not consummate any related sales contracts. *See*, Young Aff'd, at ¶ 21; Stiefel Aff., at ¶¶ 17-18; Reply, at ¶ 6. On April 13, 2006, the parties executed a letter terminating the Brokerage Agreement (the "Termination Agreement"). The termination was subject to Corcoran's right to commissions on any units sold within sixty days to any individual that Corcoran had previously introduced. Defendants thereafter retained Douglas Elliman to market the units. *Id.* at 1.

By letter dated July 12, 2006, Harnett/George asserted that LLC had breached the contract of sale by failing to comply with the Plan and demanded the return of their down payment. *See*, Supp., Exh. E (Harnett/George letter). Specifically, they alleged that insofar as the first closing under the Plan had not occurred as required by January 30, 2006, LLC was required to submit an updated budget and offer any purchaser the right to rescind within 15 days. *Id.*, at 1. Harnett/George also noted that the Plan expired without amendment on May 26, 2006, and that the other units had been listed for sale at prices below those permitted by the Plan. *Id.* at 2. In a letter dated July 21, 2006, LLC enclosed a check refunding the down payment, and advising Harnett/George that their "offer to rescind the contract [was] accepted"

and that "the Contract is of no further force and effect and that neither party has any claim against the other with respect thereto." *See*, Supp., Exh. F (letter to Harnett/George attorney).

On July 26, 2006, Corcoran sent Properties an invoice for $185,000, purporting to represent a 5% commission due on the $3,700,000 price of the Harnett/George sale. *See*, Supp., Exh. H (Corcoran invoice). By letter dated July 27, 2006, LLC's attorney responded that no commission was due because "through no fault of the Seller, the contract was rescinded and the Purchasers' down payment was returned to them." *See*, Supp., Exh. I (letter, Stiefel to Chiang). LLC thereafter abandoned the Plan and sold the Building, in September 2006, to Laurence Gluck ("Gluck") for $21,000,000. See, Compl., ¶ 11; Ans ¶ 11; Young Aff'd, Exh.C (notice of abandonment of Plan).

Corcoran subsequently commenced this action for commissions and expenses under the real-estate-brokerage agreement, which had granted it the exclusive right to sell units in the condominium project. Its complaint sets forth seven causes of action. The first three claims all seek the $185,000 commission on the sale of Unit 3A under various provisions of the Agreement. The first cause of action relies on paragraph 10(e), alleging that defendants' voluntary acceptance of Harnett/George's demand to rescind the contract of sale triggered plaintiff's right to a commission. The third cause of action asserts that the right was triggered by the various defaults identified in the Harnett/George letter. The second cause of action asserts that LLC committed additional defaults under the Plan that thwarted the commission, including the failure to timely make the Building available for occupancy and file appropriate

amendments and budgets with the Attorney General. The fourth cause of action seeks the commission on Unit 3A on the theory that LLC breached the covenant of good faith and fair dealing by intentionally abandoning the Plan in order to pursue the sale of the Building to Gluck. The fifth cause of action seeks $1,344,750, representing lost commissions on the remaining six units, and the sixth cause of action pursues that same relief under a theory of breach of the covenant of good faith and fair dealing. Finally, the seventh cause of action demands reimbursement of $55,933.54 that Corcoran allegedly spent in marketing the units.

Analysis

First Cause of Action--Failure to Proceed With Sale as a Basis for Commission

Plaintiff moves for a summary judgment award of $185,000, arguing that it is entitled to its commission because LLC did not ultimately proceed with the sale despite the fact that it produced a buyer. LLC, in turn, cross-moves for dismissal of the cause of action based on the brokerage agreement.

Although a real estate broker is ordinarily entitled to a commission merely upon producing a buyer ready, willing and able to purchase the property upon terms acceptable to the seller (*see Lane-Real Estate Dept. Store v Lawlet Corp.*, 28 NY2d 36 [1971]; *Rusciano Realty Servs. v Griffler*, 62 NY2d 696 [1984]), and "[t]he broker's ultimate right to compensation has never been held to be dependent upon the performance of the realty contract

or the receipt by the seller of the selling price," (*Hecht v. Meller* 23 NY2d 301, 305 [1968]; *Coldwell Banker Village Green Realty v Pillsworth*, 32 AD3d 568 [3d Dept 2006]), the "parties to a brokerage agreement are free to add whatever conditions they may wish to their agreement, including a condition that the contract of sale actually be consummated before the broker is deemed to have earned his commission" (*Levy v. Lacey*, 22 NY2d 271, 274[1968]; *Feinberg Bros Agency, Inc. v Berted Realty Co., Inc.*, 70 NY2d 828 [1987]). The agreement may thus, as here, specifically condition entitlement to the commission upon a closing (*Lane,* 28 NY2d at 43).

The Harnett/George transaction did not close; thus, the right to a commission never ripened. The exception invoked by plaintiff in the first cause of action--allowing recovery of a commission where the seller "voluntarily releases a Purchaser from its obligations under any Purchase Agreement"--does not apply (emphasis added). It is not disputed that under the existing circumstances, Harnett/George had no obligation under their purchase agreement to go forward with the closing. In demanding "rescission," they were exercising their rights consistent with their agreement, not attempting to evade the contract. Defendants' accession to the demand was not in reality a "voluntary release" it was simply upholding Harnett/Georges' rights under the purchase agreement[3] (*see, e.g., North Site Realty Corp. v*

[3] In the second and third causes of action, plaintiff concedes that Harnett/George had no obligation to close, asserting that they were excused from doing so by reason of defendants' alleged defaults. Neither side has moved with respect to those claims, and the court does not resolve herein whether defendants' alleged failures establish that it "wilfully default[ed]" within the meaning of paragraph 10(e), or whether the defaults were attributable to the numerous

Walsh, 123 AD2d 144, 146 [2d Dept1987][the "mere volitional act of the defendants herein in canceling the contract, which they had the legal right to do when they did not receive timely written notice from the purchasers regarding the latters' mortgage approval, hardly qualifies as a breach by the defendants of the underlying sales contract"]; *R.L. Friedland Realty, Inc. v Modern Cabinets Corp.*, 194 AD2d 657, 658 [2d Dept 1993][to collect commission broker must demonstrate that seller breached "legally enforceable" purchase agreement]).

Plaintiff nevertheless argues that defendants' letter to Harnett/George contained release-like language, and that letting the buyers out was voluntary in the sense that defendants *could* have elected to assert a contrary legal position and pursued enforcement. Such an interpretation would impermissibly "strain the contract language beyond its reasonable and ordinary meaning" (*Matter of Hirschfeld, Stern, Moyer & Ross*, 286 AD2d 611 [1st Dept 2001]). A common-sense reading of the Agreement would limit the application of a voluntary release to those situations in which the seller accommodates a buyer's request to walk away from a closing despite the existence of a fully enforceable purchase agreement. However, even if the Agreement were ambiguous and could be read to obligate the seller to pay a commission unless it refused to honor the purchaser's lawful rights and fought the non-defaulting buyer without any basis for doing so, Corcoran could not prevail on its first cause of action. The Court must construe the contractual language against the broker, which drafted

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alleged deficiencies in plaintiff's performance as a broker.

the Agreement, and reject that strained interpretation (*Graff v Billet*, 64 NY2d 899, 902 [1984]).

Fifth and Sixth Causes of Action--Lost Commissions on Other Units

Defendants move for partial summary judgment dismissal of Corcoran's fifth and sixth causes of action, which seek recovery for commissions on the remaining six condominium units.

With respect to the breach of contract alleged in the fifth cause of action, it is undisputed that defendants did not enter into purchase agreements for any of those units. Accordingly, plaintiff cannot invoke the provision of the Agreement requiring payment of a commission upon the seller's willful default, because such a provision is triggered only once a purchase agreement has been entered into and when the default specifically relates to performance under that agreement (*Graff*, 64 NY2d 899, 901). It is undisputed, moreover, that Corcoran did not procure any buyers ready, willing and able to purchase units at the Plan's listing prices. Given that the Agreement conferred upon defendants the "sole and absolute discretion" to reject any offer, they plainly acted within their in rights in refusing to entertain offers below the asking price (*see, e.g.*, *Howard Taylor & Co., Inc. v Terra Capital Assocs.*, 292 A.D.2d 836 [4th Dept 2002]). Thus, the fifth cause of action must be dismissed.

In its sixth cause of action, Corcoran asserts that defendants breached the implied

covenant of good faith and fair dealing in that they "failed to analyze the market from the perspective of establishing the appropriate Offering Prices," failed to be "flexible in setting asking prices for the condominium units when the market required such flexibility," and "failed to accept offers from prospective buyers procured by [plaintiff] . . . which reflected reasonable offering prices." That cause of action must be dismissed as well.

The implied covenant of good faith and fair dealing cannot be invoked when it would "effectively annul other express terms of the contract and create contractual rights independent of the contract" (*Cushman & Wakefield, Inc. v Amer. Mgmt. Assoc. Int'l*, 8 AD3d 67, 68 [1st Dept 2004]; *Dalton v Educational Testing Service*, 87 NY2d 384, 389 [1995] [the "duty of good faith and fair dealing, however, is not without limits, and no obligation can be implied that would be inconsistent with other terms of the contractual relationship"]). Read plaintiff's standards of "flexibility" and "reasonableness" into the Agreement in the proposed manner would strip defendants of their core contractual right to establish the asking prices for the units, and nullify the provision granting defendants sole and absolute discretion in considering offers.

Plaintiff additionally cites as bad faith defendants' failure to complete the Building, to timely file amendments under the Plan, and their ultimate abandonment of the Plan in favor of a private sale of the entire building. However, the Plan expressly granted to defendants the "sole discretion" to declare an abandonment prior to the sale of 80% of the units. Accordingly, although plaintiff retained the exclusive right to sell any unit or units in the

context of the condominium offering, defendants were free to sell the Building as whole outside of the Plan. Defendants acted within their rights in abandoning the Plan and selling the Building to Gluck. Moreover, plaintiff's speculation regarding a protracted, secret scheme to avoid commissions by abandoning the Plan is belied by the record, which establishes that defendants filed an amendment to the Plan and attempted to sell units through another broker even after plaintiff's services were terminated.

Affirmative Defenses

Defendants' second through fifth affirmative defenses, which invoke doctrines such as promissory estoppel and unclean hands, are completely conclusory and, as such, must be dismissed (*see Kronish Lieb Weiner & Hellman LLP v Tahari, Ltd.*, 35 AD3d 317 [1st Dept 2006]; *Robbins v. Growney*, 229 AD2d 356, 358 [1st Dept 1996]["bare legal conclusions are insufficient to raise an affirmative defense"]). Although the first affirmative defense for failure to state a claim would ordinarily be permitted to stand as harmless surplusage (*see Riland v Frederick S. Todman & Co.*56 AD2d 350, 352 [1st Dept 1977]), it is subject to dismissal where, as here, the remaining affirmative defenses have been dismissed (*see Raine v Allied Artists Productions, Inc.*, 63 AD2d 914 [1st Dept 1978]).

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment on the first cause of action is DENIED, and it is further

ORDERED that plaintiff's motion to dismiss the affirmative defenses is granted, and it is further

ORDERED that defendants' cross-motion for summary judgment dismissing the first, fifth and sixth causes of action is GRANTED, and it is further

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

ORDERED that the remainder of the action shall continue.

This constitutes the Decision and Order of the Court.

Dated: June 27, 2008
New York, N.Y.

ENTER:

Hon. Eileen Bransten