[* 1]

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

HON. RICHARD B. LOWE, III

PRESENT: _____ PART 56

Index Number : 604215/2007
CUTAIA, RORY
VS
GVA WILLIAMS LLC
Sequence Number : 001
DISMISS ACTION

INDEX NO. _____

MOTION DATE 4/29/08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
AUG 28 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 8/21/08

HON. RICHARD B. LOWE, III
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: Part 56

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RORY CUTAIA, in his individual capacity
and in his capacity as duly appointed
Representative of the former
shareholders of the Telx Group, Inc.,

Plaintiff,

-against-

GVA WILLIAMS LLC; WILLIAMS REAL ESTATE
CO. INC.; GI PARTNERS FUND II, LP and
GI PARTNERS SIDE FUND II, L.P.,

Defendants.

Index No. 604215/07

----------X

Richard B. Lowe, III, J.:

In this action based on a broker's commission, defendants GI Partners Fund II, L.P. and GI Partners Side Fund II, L.P. (together, GI Partners) move to dismiss the cross claim of defendants GVA Williams LLC and Williams Real Estate Co. Inc (together, Williams) or, alternatively, to dismiss plaintiff Rory Cutaia's claims against GI Partners, pursuant to CPLR 3211 (a) (1) and (7).

BACKGROUND

This action begins with two leases (Leases) for property located at 60 Hudson Street in Manhattan. Aff. of Fields, Ex. D. The tenant by assignment of the Leases is non-party Colo Properties, Inc. (Colo), a wholly-owned subsidiary of a company known as the Telx Group, Inc. (Telx), of which plaintiff is a former shareholder, and representative of Telx's other

shareholders. The landlord of the property is non-party Hudson Telegraph Associates, L.P. (Landlord).

On September 20, 2006, plaintiff entered into an Agreement and Plan of Merger with GI Partners (Merger Agreement)(Aff. of Fields, Ex. C), in order to sell their stock in Telx to GI Partners. Section 3.19 of the Merger Agreement reads, as pertinent, as follows: "No Brokers. Except as set forth in Section 3.19 of the Disclosure Schedule, neither [Telx] or any Subsidiary has employed or incurred any Liability to any broker, finder, investment banker or other agent in connection with the transactions contemplated by this Agreement ... ." Section 3.19 of the Disclosure Schedule, under the heading "Brokers," lists (1) UBS Securities LLC (UBS) as having provided "advisory services" to GI Partners, entitling it to a fee upon completion of the merger, and (2) Hill Street Capital, LLC (Hill), as having been "engaged by the Board of Directors of [GI Partners] to provide an opinion as to the fairness, from a financial point of view, of the Total Per Share Amount to [GI Partners] Stockholders," entitling it to a fee "upon delivery of such opinion." *Id.* UBS and Hill have been identified as investment banks.

The Merger Agreement also provides for the establishment of an escrow fund (Escrow Fund), setting aside a portion of the purchase price until March 31, 2008. The Escrow Fund, which is governed by an Escrow Agreement, dated September 20, 2006, is intended to provide funds for the benefit of GI Partners to cover any liabilities which might arise in connection with the Merger Agreement. As relevant, Section 9.1 of the Merger Agreement states that GI Partners:

> shall be entitled to recover from the Indemnity Escrow (and only from the Indemnity Escrow) all Liabilities resulting from, imposed upon or incurred by [GI Partners], directly or indirectly, and arising from, related to or resulting from ... (b) subject to Section 5.11, any breach of a representation or warranty by

> [plaintiff] set forth in this Agreement as if such representation or warranty had been made as of the Closing Date.

Several provisions of the Leases govern the parties' actions. Section 44 (A) provides that (1) the tenant may neither publicly advertise (except through a broker) the availability of the premises at a rental rate below that charged by the Landlord; nor (2) lease or sublease the premises to a tenant, or to any party with whom the Landlord has negotiated for space in the building. The section ends "Tenant shall designate Williams Real Estate Co. Inc. (or the then rental agent for the Building) as its exclusive agent in connection with any subletting of all or any part of the premises or any assignment of this lease."

Section 44 (B) of the Leases states that:

> [i]f Tenant wishes to assign this lease (a transfer of more than a fifty percent (50%) beneficial interest in Tenant ... whether of stock, partnership interests or otherwise, by any party in interest being deemed an assignment of this lease), sublet all or any part of the demised premises or permit the demised premises to be occupied by any other party, Tenant shall first notify Landlord ... .

Section 44 (C) provides that "[o]nce Landlord has received Tenant's Notice [of a proposed assignment, sublease or occupancy] and such additional information as landlord may reasonably request, it shall not unreasonably withhold its consent to the proposed assignment, sublease or occupancy ... ."

Plaintiff claims that he did not believe that the transaction contemplated in the Merger Agreement required the consent of the Landlord, because, under plaintiff's reading of the Leases, the transaction did not give rise to an assignment under Section 44 (B) of the Leases. The reason plaintiff puts forth is the fact that the Leases speak of consent required upon a transfer of a beneficial interest in "the Tenant," and that Telx simply was not the tenant of the premises; Colo was. Plaintiff was so convinced that this was the case that he drafted a letter to the Landlord, for

GI Partners' approval, in which he allegedly "memorialized oral conversations" he had had with the Landlord's representative (Aff. of Cutaia, at 3). The draft stressed that, as these parties had evidently discussed, "there will not be a change of control in the entity that holds our leases with you, and as such, the Consent provisions under the lease will not be triggered." *Id.*, Ex. 4.

Apparently, GI Partners did not see the matter in the same light, believing instead that obtaining the Landlord's consent under Section 44 (B) of the Leases was necessary. GI Partners prevailed upon plaintiff to execute a letter dated September 25, 2006 (Consent Letter)(*id.*, Ex. 5), in which plaintiff, representing both Colo and Telx, asked for, and acquired, the Landlord's consent to the transfer. The Consent Letter expressly states that the parties agree that the proposed "transfer of a greater than 50% interest in Telx, the parent entity of Tenant," would be "an assignment of the Leases ... pursuant to the applicable provisions of the Leases." The Landlord provided its consent, upon a payment to it of $300,000. The Consent Letter said nothing about possible commissions on the transfer to any party.

A year after the consummation of the transfer of Telx to GI Partners, Williams requested that GI Partners pay it a commission, in the sum of $1,301,431.04, on the transfer of Telx to GI Partners, on the ground that Williams was intended to be the exclusive broker for the resulting assignment of the Leases. It is undisputed, however, that Williams played no role in connection with the stock transfer memorialized in the Merger Agreement.

GI Partners tendered Williams's commission demand to plaintiff, and informed plaintiff that it would be withholding the amount of the demand, as well as a sum for attorney's fees, from the Escrow Fund. Plaintiff, while denying any liability for the commission, agreed to take over the defense of the matter.

The present action is brought by plaintiff for a declaration that it is not obligated to pay a commission to Williams stemming from the transfer of Telx to GI Partners, because the transfer did not involve an assignment of the Leases. In its second and third causes of action, plaintiff denies that it had any obligation to indemnify GI Partners for a commission claim by Williams, but that, if a commission is owed, it is solely the responsibility of GI Partners.

Williams, in its answer, makes a combined counterclaim and cross claim for a declaration against plaintiff and GI Partners that the Merger Agreement effected an assignment of the Leases, and that, as the tenant's "exclusive agent" in relation to such assignment, it is entitled to a commission.

Contrary to Williams theory of recovery, GI Partners' motion is based on the argument that the sale of Telx "did not result in an open-market assignment that would trigger an obligation to designate Williams as an exclusive agent or to pay it any commission." GI Partners' Memorandum of Law, at 6. Alternatively, should the court find that Williams was entitled to a commission, GI Partners identifies the commission claim as an "indemnifiable liability" under the Merger Agreement, which plaintiff is obligated to pay. *Id.*

Discussion

"On a CPLR 3211 motion to dismiss, the court will 'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.'" *Nonnon v City of New York*, 9 NY3d 825, 827 (2007), quoting *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). However, "[a]llegations consisting of bare legal conclusions, as well as factual claims that are either inherently incredible or flatly contradicted by documentary evidence, are not

presumed to be true and accorded every favorable inference [citation omitted]. *M & B Joint Venture, Inc. v Laurus Master Fund, Ltd.*, 49 AD3d 258, 261 (1st Dept 2008); *see also Leder v Spiegel*, 31 AD3d 266 (1st Dept 2006), *affd* 9 NY3d 836 (2007). It is also well settled that a motion to dismiss based on CPLR 3211 (a) (1) may be granted where the "'documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.'" *Held v Kaufman*, 91 NY2d 425, 430-431 (1998), quoting *Leon v Martinez*, 84 NY2d at 88.

The interpretation of unambiguous contracts "is an issue of law for the courts to decide." *Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 (2002), citing *W.W.W. Associates v Giancontieri*, 77 NY2d 157, 162 (1990); *see also Horewitz v 1025 Fifth Avenue, Inc.*, 34 AD3d 248 (1st Dept 2006). "A contract is unambiguous if the language it uses has 'a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion.'" *Greenfield v Philles Records, Inc.*, 98 NY2d at 569, quoting *Breed v Insurance Company of North America*, 46 NY2d 351, 355 (1978). Therefore, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Greenfield v Philles Records, Inc.*, 98 NY2d at 569.

As an initial matter, it is clear that Williams is intended to be a third-party beneficiary of the Leases, by virtue of having been expressly named therein as the exclusive broker. *See Joseph P. Day Realty Corp. v Chera*, 308 AD2d 148 (1st Dept 2003)(express promise by seller in agreement to pay a broker's commission contained in a contract of sale or lease makes the broker a third-party beneficiary of the agreement); *see also Edwards S. Gordon Company, Inc. v Blodnick, Schultz & Abramowitz, P.C.*, 150 AD2d 212 (1st Dept 1989)(same). The question here

is whether that agency applies to the present situation.

GI Partners first attacks Williams's characterization of the assignment as one which might trigger its claim for a commission, offering its view that the assignment was not an "open-market transaction with an unrelated third party," which, according to GI Partners, is the only kind of transaction which might give rise to a brokerage commission under the Leases. GI Partners Memorandum of Law, at 8. However, this exact language appears nowhere in the Leases. As the transaction was not an "open- ended" one with a third party, but was instead, a "transfer of ownership of the tenant's corporate parent" which did not change the tenancy or possession of the premises, GI Partners denies that Williams's right to a commission was triggered. *Id.* at 8-9.

While it is true that the tenant in question was Colo, and not Telx, GI Partners itself believed that the transaction was an assignment of the Leases, and insisted that Telx do so as well, in the Consent Letter. GI Partners should not be permitted to back away from this choice, and now deny that the purchase of Telx effected an assignment of the Leases, now that it would be efficacious to do so. Therefore, the question is whether Williams has any right to seek a fee following the assignment of the Leases to GI Partners, regardless who was the actual tenant of the premises.

GI Partners focuses on the language in Section 44 (A) of the Leases providing that Williams will be the tenant's "exclusive agent," in making the argument that such language does not prohibit a seller from finding a buyer itself, without the aid of an "exclusive agent." GI Partners also argues that Williams, by the terms of the Leases, was only to receive a commission in relation to any "leasing activity" which may have occurred, but not in relation to the

assignment of the Leases following a corporate buy-out.

"Generally, pursuant to an exclusive agency agreement, if the owner finds his own buyer, then no commission is due the broker. However, if another broker finds a buyer, then a commission is due the broker who was given the exclusive agency." *U.S. No. 1 Laffey Real Estate v Hanna*, 215 AD2d 552, 553 (2d Dept 1995). An exclusive agency to find a buyer is different from an exclusive agency to sell to a buyer, and "[a] contract will not be interpreted as creating an exclusive right to sell unless it clearly and expressly provided that a commission was due upon sale by the owner or excluded the owner from independently negotiating a sale [internal quotation marks and citation omitted]." *CV Holdings, LLC v Artisan Advisors, LLC*, 9 AD3d 654, 656 (3rd Dept 2004).

Section 44 (A) designates Williams "or any other rental agency" as exclusive agent "in connection with any subletting of all or any part of the premises or any assignment of this lease." This language does not contain any limitation on Telx's right to procure an assignment of the Leases on its own, such as resulted from GI Partners's purchase of Telx, and reflected in the Merger Agreement and the Consent Letter.

Williams does not claim to have found a buyer for Telx. It did nothing. Rather, it suggests that the two brokers mentioned in Section 3.19 of the Disclosure Schedule in the Leases may have had a role in finding GI Partners as a buyer for plaintiff, and in so doing, eclipsed Williams's exclusive agency. Williams insists that discovery is necessary in order to clarify the nature of the brokerage activities of UBS and Hill.

Section 44 (A) of the Leases provides that Williams is entitled to a commission as exclusive agent "in connection with" subletting or assignment of the Leases. However, Section

44 (A) also states that a commission is due either Williams *"or the then rental agent for the building* (emphasis added)." Therefore, this court reads the Leases as limiting "in connection with" to Williams's role as a broker to a party who actually procures a sublet or assignment (which, in this case, was solely accomplished by a corporate buy-out of Telx), and not to a provider of any other extraneous services rendered in connection with the Merger. In consequence, Williams is only entitled to a commission if some other entity usurped Williams's right to act as an exclusive broker (i.e., as a "rental agent"), by bringing Telx and GI Partners together.

The documentary evidence establishes that there was no such entity, and there is no need for discovery to flesh-out the role of the two investment banks. Section 3.19 of the Disclosure Schedule is not ambiguous. Hill's provision of "advisory services" and UBS's role in "provid[ing] an opinion as to the fairness" of one aspect of the transaction, do not equate to activities serving to procure a buyer for Telx, such as would effect an assignment of the Leases. Williams's claim that there is some mystery about their roles, and that, perhaps, they had something to do with procuring a buyer for Telx, is conclusory and speculative, and, as such, cannot suffice to avoid dismissal of its cross claim and counterclaim. *See M & B Joint Venture, Inc. v Laurus Master Fund, Ltd.,* 49 AD3d 258, *supra.*

As a result of the foregoing, GI Partners is entitled to an order dismissing Williams's cross claim and counterclaim, as far as that combined claim is directed at GI Partners. It is unnecessary to reach the issue of whether Telx is required to indemnify GI Partners for any commission Williams may demand, as there is no claim left to indemnify GI Partners for.

Accordingly, it is

ORDERED that the motion brought by GI Partners Fund II, LP and GI Partners Side Fund II, L.P. is granted, and the cross claim brought against these parties by defendants GVA Williams LLC and Williams Real Estate Co. Inc. is dismissed, with costs and disbursements as taxed by the Clerk of the Court; 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.

Date: August 21, 2008

ENTER:

HON. RICHARD B. LOWE, III

FILED

AUG 28 2008

COUNTY CLERK'S OFFICE
NEW YORK