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

PRESENT: LOUIS B. YORK J.S.C. PART 2
Justice

Index Number : 603111/2008
RETAIL ADVISORS
VS.
IT HOLDING SPA
SEQUENCE NUMBER : # 001
DISMISS COMPLAINT

INDEX NO. 603111-08
MOTION DATE
MOTION SEQ. NO. #001
MOTION CAL. NO.

were read on this motion to/for

PAPERS NUMBERED

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

FILED
JUL 16 2009
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 7/13/09

LOUIS B. YORK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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RETAIL ADVISORS INC.,

Plaintiff,

Index No. 603111/2008

– against –

IT HOLDING SpA, GIANFRANCO FERRE SpA, IT USA INC. and FIRST N.Y. BOUTIQUE INC.,

Defendants.

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LOUIS B. YORK, J.:

Plaintiff, Retail Advisors originally brought this action for breach of a brokerage agreement (first cause of action against all defendants), acting improperly for the sole purpose of depriving Plaintiff of commission (second cause of action against all defendants), unjust enrichment (third cause of action against First N.Y. Boutique Inc. and IT USA Inc.), and reasonable attorney's fees and disbursements (fourth cause of action against all defendants). New York Defendants, First N.Y. Boutique and IT USA Inc. moved to dismiss under CPLR § 3211 (a)(7) for failure to state a cause of action. Plaintiff cross-moved pursuant to CPLR § 3124 for an order compelling production of discovery, following Plaintiff's first notice requesting production. The motion to dismiss is granted in part, and denied in part. Plaintiff's cross-motion for production of discovery is denied.

FACTS

In considering a motion to dismiss, the court must liberally interpret the complaint and accept as true the facts alleged as well as submissions offered in opposition to the

motion. 511 W. 232nd Owners v. Jennifer Realty, 98 N.Y.2d 144, 152, 746 N.Y.S.2d 131, 134 (2002). Therefore, for the purposes of this motion, this Court accepts all of Plaintiff's allegations as true.

Defendant Gianfranco Ferre SpA is an Italian corporation. Defendant IT Holding SpA is an Italian corporation that owns and controls Gianfranco Ferre SpA. Defendant IT USA Inc. was a New York corporation and a wholly owned subsidiary of IT Holding SpA and/or Gianfranco Ferre SpA. Defendant, First N.Y. Boutique, Inc. ("Boutique"), is a New York corporation and a wholly owned-subsidiary of IT USA Inc. Defendants IT USA Inc. and Boutique are allegedly lawful representatives of defendants Gianfranco Ferre SpA and IT Holding SpA.

At the center of this action is the lease of retail space at 870 Madison Avenue, New York, New York. Boutique was listed as tenant on the lease. Massimo Macchi, CEO of Gianfranco Ferre Spa and a member of the board of directors of IT Holding SpA, signed an agreement employing Plaintiff as exclusive real estate broker with respect to real estate in New York City (the "Agreement"). Macchi authorized Plaintiff to obtain a subtenant or assignee of Boutique's lease in exchange for a set commission of $325,000, an additional 10% of any amount in excess of $1,250,000 if the payment for the assignment exceeded $1,250,000, and interest if the commission was not paid when due. The Agreement provided that it was to be binding on the contracting parties' "lawful representatives."

Plaintiff organized and made two trips to Milan, Italy in furtherance of the Agreement, and secured Marc Jacobs as a prospective assignee of the lease provided that Louis Vuitton North America Inc. ("Louis Vuitton") would guarantee Marc Jacobs'

responsibilities as assignee. Louis Vuitton Moet Hennessey ("LVMH") is the parent company of both Louis Vuitton and Christian Dior Inc. The representative of LVMH who attended the meeting in Milan for the purpose of furthering the transaction between defendants and Marc Jacobs was also the CEO of Christian Dior Worldwide. As a result of this meeting in Milan, Italian Defendants negotiated an assignment of Boutique's lease directly to Christian Dior Inc., at terms similar to those negotiated by Plaintiff for Marc Jacobs. When the defendants did not pay Plaintiff a commission for the assignment, Plaintiff instituted this lawsuit.

MOTION TO DISMISS

As previously stated, three of Plaintiff's four causes of action are based on the breach of the Agreement. New York Defendants' motion to dismiss first alleges that Plaintiff, by neither attaching the Agreement to the complaint nor making explicit reference to the applicable parts of the Agreement which point toward Plaintiff's entitlement to recovery, has not properly alleged the provisions of the Agreement upon which its breach of contract claim is based. In an action for breach of contract, a plaintiff, in its complaint, must set forth the material terms of the contract upon which liability is predicated. See Matter of Sud v. Sud, 211 A.D.2d 423, 424, 621 N.Y.S.2d 37, 38 (1st Dept. 1995); see also Chrysler Capital Corp. v. Hilltop Egg Farms, 129 A.D.2d 927, 928 514 N.Y.S.2d 1002, 1003 (3d Dept. 1987) (holding to recover for breach of contract complaint must set forth terms of agreement by express reference or by attaching copy of contract).

In this case, Plaintiff's complaint presented in detail the terms of the Agreement, including the promise that Plaintiff would secure an assignee of the lease in exchange for

commission and the provision that the Agreement would be binding on all lawful representatives. The complaint set forth the relationship between Italian Defendants and New York Defendants, and explained that while Boutique's name was on the lease, it was the Italian Defendants who contracted to find an assignee for the lease. The complaint also discussed Plaintiff's role in securing Marc Jacobs as a prospective lessee and Defendant's breach of the Agreement. As Plaintiff pled the material terms of the contract upon which liability is predicated, New York Defendants' argument must fail. Also, even if Plaintiff's complaint had been deficient, Plaintiff resolved the issue when it annexed the Agreement to its cross-moving papers. See Leon v. Martinez, 84 N.Y.2d 83, 88, 614 N.Y.S.2d 972, 975 (1994) ("[U]nder CPLR 3211 (a) (7) . . . a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint.").

Next, New York Defendants claim that Plaintiff has not alleged that it was acting under a contract with either of the New York Defendants and therefore Plaintiff's first, second, and fourth causes of action fail as a matter of law. New York Defendants argue that it was Italian Defendants, not New York Defendants, who directly contracted with Plaintiff; that there is no language in the Agreement that purports to bind New York defendants; and that subsidiaries cannot be liable for breach of a contract entered into solely by the parent company. Plaintiff counters that New York Defendants were bound by the Agreement as Macchi was acting on behalf of New York Defendants in executing the contract. According to Plaintiff, the term "lawful representatives" in the Agreement binds the New York Defendants.

The Court denies this portion of the motion because Plaintiff has raised an issue of fact as to whether New York Defendants were lawful representatives of Italian

Defendants and consequently are bound by the contract. See Campaign for Fiscal Equity v. State, 86 N.Y.2d 307, 318, 631 N.Y.S.2d 565, 571 (1995). First, although New York Defendants did not sign the Agreement, the complaint alleges that all defendants, not just the Italian Defendants, agreed to pay Plaintiff for its services. Plaintiff supports this argument with the affidavit of Richard Seligman, President of Plaintiff, in opposition to this motion. The Seligman affidavit alleges that Massimo Macchi acted as CEO and employed Plaintiff on behalf of all defendants, claiming that he "was authorized to engage Retail Advisors on behalf of [New York Defendants] and was responsible for their business in the United States and any real estate judgments that needed to be made." Affidavit of Richard Seligman, dated Dec. 30, 2008, ¶ 11 (alteration in original). Seligman understood that his company was hired to benefit New York Defendants, as Boutique was the direct lessee of the Madison Avenue retail property.

Second, Plaintiff points to the term "lawful representatives" in the Agreement to support its argument that New York Defendants are bound by the contract. As New York Defendants properly note, a contract entered into by a parent corporation, with the parent corporation as the sole signatory, is typically not binding on the subsidiaries. See Daley v. Related, 198 A.D.2d 118, 119 603 N.Y.S.2d 160, 161 (1st Dept. 1993). However, this rule does not stand if, as Plaintiff alleges here, a provision in the contract purports to bind the subsidiaries. See id. Plaintiff alleges that New York Defendants are lawful representatives of Italian Defendants because they are subsidiaries of the Italian companies, they directly benefited from the transaction, and Boutique assigned the lease in a manner determined by the Italian Defendants thus carrying out the terms of the contract on Italian Defendants' behalf. Plaintiff concludes that New York Defendants are

lawful representatives of Italian defendants, and the language in the Agreement binds New York Defendants to the terms of the Agreement.

As stated, the Court accepts Plaintiff's version of the facts for the purpose of this motion. Accordingly, it finds that Plaintiff raises a viable claim that New York Defendants are lawful representatives of Italian Defendants and are bound by the terms of the Agreement. See Campaign for Fiscal Equity v. State, 86 N.Y.2d at 318, 631 N.Y.S.2d at 571. The complaint is clumsily drafted, and the supporting affidavit is self-serving. Nevertheless, Plaintiff alleges a plausible breach of contract cause of action sufficient for pleading purposes. See id.

In further support of this part of the motion, New York Defendants imply that because Plaintiff procured only a prospective assignee, Marc Jacobs, and the lease ultimately was assigned to Christian Dior Inc., Plaintiff cannot show that it procured the assignee of the lease. This position lacks merit. Marc Jacobs and Christian Dior Inc. share a common parent company, Louis Vuitton Moet Hennessey (LVMH). The representative of LVMH who attended the meeting in Milan, Italy, organized by Plaintiff for the purpose of furthering the transaction between the defendants and March Jacobs, was also the Chief Executive Officer of Christian Dior. Because Plaintiff brought Italian Defendants together with the ultimate assignee, Plaintiff has asserted a valid claim that it was the procuring cause of the transaction. See Brown Harris Stevens v. Rosenberg, 156 A.D.2d 249, 250, 548 N.Y.S.2d 512, 513 (1st Dept. 1989) (holding that broker earns commission if ultimate transaction is result of his bringing parties together).

Finally, New York Defendants seek to dismiss Plaintiff's unjust enrichment cause of action. As New York Defendants note, under New York law the existence of a

contract covering a specific subject matter prohibits recovery under an unjust enrichment theory of liability for actions involving the same subject matter. PKO Television v. Time Life Films, 169 A.D.2d 582, 583, 564 N.Y.S.2d 434, 435 (1st Dept. 1991). Plaintiff's existing contract governing the broker's commission, whether binding solely on Italian Defendants or on both Italian and New York Defendants, precludes recovery on a theory of unjust enrichment against New York Defendants as the claim is for recovery of the same commission. Therefore, the Court dismisses Plaintiff's third cause of action.

CROSS-MOTION FOR THE PRODUCTION OF DOCUMENTS

Plaintiff argues that pursuant to its first request for the production of documents, the documents should have been produced before this motion was received. Plaintiff cross-moves pursuant to CPLR 3124 for an order directing New York Defendants to produce documents. The Court denies Plaintiff's cross-motion. New York Defendants properly served Plaintiff with the Motion to Dismiss which stayed discovery under CPLR 3214 (b). As New York Defendants made a pre-answer motion, issue has not yet been joined. In addition, Plaintiff has not raised any argument that discovery is necessary at this moment. Therefore, Plaintiff's motion is premature. However, the court schedules a discovery conference for August 19, 2009 and the parties are expected to respond to each other's preliminary demands before that date.

In addition to the above, New York Defendants argue that Plaintiff has not properly pled the issue of alter-ego liability. As Plaintiff has not raised alter-ego liability in its complaint, the court does not consider this argument.

Based on the above, therefore it is

ORDERED that the portion of defendants' motion seeking to dismiss the third cause of action for unjust enrichment is granted and the third cause of action is severed and dismissed; and it is further

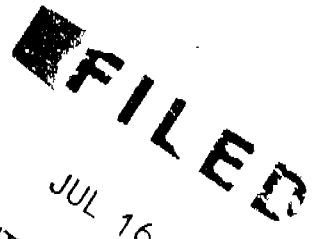
ORDERED that the remainder of the motion is denied and the remainder of the action shall continue; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry; and it is further

ORDERED that plaintiff's cross-motion to compel discovery is denied; and it is further

ORDERED that the parties shall appear in Part 2, 80 Centre Street, room 289 at 2 p.m. on August 19, 2009 for a preliminary conference.

Dated: July 13, 2009



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LOUIS B. YORK, J.S.C.