

Excel Realty Advisors, L.P. v SCP Capital, Inc.

2010 NY Slip Op 33447(U)

December 2, 2010

Sup Ct, Nassau County

Docket Number: 008730/2010

Judge: Ira B. Warshawsky

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SHORT FORM ORDER**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU****PRESENT:****HON. IRA B. WARSHAWSKY,
Justice.****TRIAL/IAS PART 8**

**EXCEL REALTY ADVISORS, L.P.,
a New York limited partnership,****Plaintiff,****INDEX NO.: 008730/2010
MOTION DATE: 09/24/2010
MOTION SEQUENCE: 001, 002
and 003****-against-****SCP CAPITAL, INC.;
SCP 2009-C34 L.P.;
SCP 2009-C34-009 LLC f/k/a
CVS 75705 FL, L.L.C.;
SCP 2009-C34-012 LLC f/k/a
CVS 4146 FL, L.C.C.;
SCP 2009-C34-014 LLC f/k/a
CVS 75296 FL, L.L.C.;
SCP 2009-C34-015 LLC f/k/a
CVS 75241 FL, L.L.C.;
LANDES INVESTMENT GROUP, INC.;
LLWG CAPITAL, INC.; CVS PHARMACY, INC.;
CVS CAREMARK CORPORATION;
ALAN POTAMKIN; ROBERT POTAMKIN;
2427 TX Property 1, LLC;
2427 TX PROPERTY 2, LLC;
2427 INVESTMENTS, INC.,****Defendants.**

The following papers read on these motions:

Notice of Motion, Affirmation, Affidavits & Exhibits Annexed	1
Memorandum of Law in Support of Defendants' Motion to Dismiss Complaint & Exhibits Annexed	2
Notice of Motion, Affirmation, Affidavit & Exhibits Annexed	3
Memorandum of Law in Support of Defendant CVS's Motion to Dismiss the Complaint	4
Notice of Motion, Affidavit & Exhibits Annexed	5
Memorandum of Law in Support of Below-Listed Moving Defendants' Motion to Dismiss	6
Affirmation of Steven R. Schlesinger in Opposition, Affidavit of Ivan M. Cochter in Opposition & Exhibits Annexed	7
Plaintiff's Memorandum of Law in Opposition to the Defendants' Motions to Dismiss and in Support of Cross-Motion & Appendix	8
Reply Memorandum of Law in Support of Defendants' Motion to Dismiss Complaint	9
Reply Memorandum of Law in Support of Below-Listed Moving Defendants' Motion to Dismiss	10
Reply Affidavit of Kyle T. Woo in Support of Defendants' Motion to Dismiss the Complaint & Exhibits Annexed	11
Reply Affirmation of Nicholas Fortuna	12

Motion pursuant to CPLR 3211[a][1], [5], [7] by the defendants SCP, Capital, Inc., SCP 2009-C34, LLP, Landes Investment Group, Inc. and LLWG Capital for an order dismissing the plaintiff's complaint insofar as interposed against them.

Motion pursuant to CPLR 3211[a][1], [3], [5], [7], [8], by the defendants SCP 2009-C34-009, LLC, f/k/a, CVS 75705 FL, LLC; SCP 2009-C34-012, LLC, f/k/a, CVS 4146, LLC; SCP 2009-C34-014 LLC, f/k/a, CVS 75296 FL, LLC; SCP 2009-C34-015 LLC, f/k/a, CVS 75241 FL, LLC, Alan Potamkin; Robert Potamkin; 2427 TX Property 1, LLC; 2427 TX Property 2, LLC; and 2427 Investments, Inc. for an order dismissing the plaintiff's complaint insofar as interposed against them.

Motion pursuant to CPLR 3211[a][1],[7] by the defendants CVS Pharmacy, Inc. and CVS Caremark Corporation, for an order dismissing the plaintiff's complaint insofar as interposed against them.

In 2009, the plaintiff Excel Realty Advisors, L.P ["Excel" or "the plaintiff"], a New York-licensed real estate broker, allegedly entered into a non-exclusive, oral brokerage agreement with, *inter alia*, co-defendant SCP Capital, Inc. ["SCP Capital"] and various other alleged sellers.

The purported oral brokerage agreement allegedly arose out of the sale and/or transfer, of six Florida and Texas real properties on which various CVS pharmacies are located (Cmplt., ¶¶ 24-34).

In sum, Excel contends that SCP Capital and its principal, Kyle T. Woo, served as an agent of, *inter alia*, codefendants CVS Pharmacy, CVS Caremark Corporation [the “CVS” entities], and several other allegedly related and/or affiliated co-defendants – which Excel has collectively described in its complaint as the “Seller” defendants (Cmplt., ¶¶ 4-13).

Excel claims that the CVS entities and other “seller” codefendants – all of whom were supposedly represented by Woo – agreed to pay a 2% broker’s commission upon Excel’s procuring of a buyer ready, willing and able to enter into one of the contemplated transactions (Cmplt., ¶¶ 24-25; 30, 32; Dochter Aff., ¶¶ 2-5).

Excel claims that it did, in fact, locate such a purchaser; namely, the group of defendants collectively described in its complaint as the “buyers” – which primarily include Alan Potamkin, Robert Potamkin, and certain entities they allegedly control or own, *i.e.*, 2427 TX Property 1, LLC; 2427 TX Property 2, LLC; and 2427 Investments, Inc [sometimes the “Potamkin defendants”] (Cmplt., ¶¶ 14-23). According to Excel, in mid-December of 2009, these “buyer” entities collectively acquired the six, specifically described Texas and Florida properties listed in the complaint, for the principal sum of \$39,368,331.32 (Cmplt., ¶¶ 23, 30-33).

Thereafter, and despite the Excel’s due demand, the “seller” defendants refused and declined to pay the \$787,366.00 commission then allegedly due and owing (Cmplt., ¶¶ 33-34).

In light of the sellers’ refusal to pay the commission, Excel commenced the within action against the variously denominated “buyer” and “seller” defendants identified in its complaint.

The complaint interposes two causes of action: the first, sounding in breach of the brokerage agreement as against the “seller” group of ten defendants; and a second cause of action interposed exclusively against the “buyer” defendants, which sounds in fraud (Cmplt., ¶¶ 23-26; 30, 32; 33-36).

The plaintiff’s complaint identifies the so-called “seller” group of defendants as including: (1) SCP Capital, a Texas Corporation formed in 2006; (2) SCP 2009-C34-09, L.P [“SCP 2009”], a Texas partnership formed in October 2009; (3) LLWG Capital Inc., [“LLWG”]

and Landes Investment Group, Inc [“Landes”] – both Texas Corporations; and (4) the so-called “SCP-CVS”, LLC “single purpose” entities, *i.e.*, co-defendants, SCP 2009-C34-009; SCP 2009-C34-012; SCP 2009-C34-014; and SCP 2009-C34-015 – all of which are Delaware-registered companies and subsidiaries of CVS Pharmacy [collectively the “CVS-SCP defendants”](Cmplt., ¶¶ 4-13; Dochter Aff., ¶¶ 4, fn 1, 47-49, Exhs., “K” - “M”; Schlesinger Aff., ¶ 8).

Notably, the above-referenced “SCP-CVS” “seller” codefendants were previously known as “CVS 75705 FL, LLC”; “CVS 4146, LLC”; “CVS 75296 FL, LLC”; and “CVS 75241 FL, LLC” until November of 2009 – after which their names were changed to reflect the currently prevailing “SCP” prefixes and numbering references reflected above (Dochter Aff., ¶¶ 45, 47, 63; Exhs., “K” - “M”; Pltff’s Brief, at 2, fn 1).

With respect to the events leading up to the December 2009 closing, Excel’s principal, Ivan M. Dochter, contends that at some point in August of 2009, Kyle Woo – the principal of “seller” defendant SCP Capital – e-mailed Excel a list of what Dochter has described as the “ever changing” inventory of CVS properties then available for sale (Dochter Aff., ¶¶ 17-18). Although the complaint alleges in imprecise fashion that the commission agreement was reached “[i]n 2009” (Cmplt., ¶ 24), Dochter claims that it was at some point in August that Woo first allegedly – and orally – employed Excel and agreed to pay the 2% brokerage commission (Dochter Aff., ¶¶ 17-18).

In doing so, Woo was allegedly acting as the agent for all the allegedly related and affiliated “seller” defendants which Excel has grouped together in the complaint, including the CVS Entities and the “SCP-CVS” defendants, Landes and its alleged affiliate, LLWG (Dochter Aff., ¶¶ 17-19).

Thereafter, in September of 2009, approximately one month after allegedly being retained by Woo, Excel located the Potamkin defendants as prospective purchasers (Dochter Aff., ¶¶ 18-21, 61).

Excel claims that in mid-October of 2009, it arranged a key and determinative transactional meeting in New York at the offices of the Potmakins’ counsel, at which Dochter, Dochter’s son, Woo and the Potamkins were in attendance, together with their respective

attorneys (Cmplt., ¶¶ 22-31; Dochter Aff., ¶¶ 22-21, 27-30). It is undisputed, however, that no CVS or CVS-SCP employees or personnel attended the October 2009 meeting (Marcello Aff., ¶¶ 5-10). At this October 15, 2009 meeting, the parties discussed cost and expense issues and then “agreed to the proposed structure of the transaction” including matters relevant to Excel’s fee (Cmplt., ¶¶ 28-29; 30, 58-59; Dochter Aff., ¶¶ 27-30 58).

Excel claims that, at one point, upon being questioned by the Potamkins during the meeting, Woo allegedly and publicly declared that the “sellers” or the “sell side” of the deal would assume responsibility for any broker’s commission – although the particular entities which comprised the “sell side” are not identified in the statement attributed by Dochter to Woo (Dochter Aff., ¶¶ 29-30, 41, 43-54).

Woo also allegedly confirmed at the same time that he was, in fact, acting as the agent for all the “seller” defendants at the meeting (Dochter Aff., ¶¶ 49, 53-56, 73; Cmplt., ¶ 29; Pltff’s Brief at 15, 29-30).

Within days of the October meeting, Woo prepared and transmitted to the Potamkins, a so-called October 19, 2009, “Letter of Intent” on SCP Capital letterhead, which is addressed to Alan Potamkin (Dochter Aff., Exh., “R”; Woo Reply Aff., ¶¶ 12-13).

Excel contends that this letter was highly significant since it allegedly establishes that the parties had reached an essentially completed agreement at the October meeting, *i.e.*, that parties outlined “the basic terms and conditions which Seller [listed as “SCP Capital, Inc., or nominee”], would agree [to] in pursuit of a sale of the Properties” (Dochter Aff., ¶¶ 59-60; Exh., “R”; Pltff’s Brief at 7). In fact, Excel contends that the agreement was complete to the extent that the only outstanding term left to be resolved was “fungible” in nature; namely, the precise location of the CVS stores to be conveyed, as listed in the “ever changing inventory of available [CVS] stores” (Dochter Aff., ¶ 59; Pltff’s Brief at 25, 32; Woo Reply Aff., ¶¶ 10-18).

The Letter of Intent, which is unsigned and does not mention any specific properties, refers to Excel as the participating broker, but also states that its terms were to be general and non-binding – unless a “purchase and sale agreement * * * acceptable to both parties” was reached “on or before November 6, 2009” (Letter of Intent at 1).

Significantly, the Letter of Intent specifically provides that SCP Capital, Inc. or its

“nominee” – not CVS or any other “seller” entity – would be responsible for any broker’s commission, which was to be payable pursuant to a “separate” agreement, which insofar as the record indicates, was never reached (Letter of Intent at 2).

The transaction was closed shortly thereafter, in December of 2009, when the “sellers” conveyed to the “buyers”, title to – and/or interests in – six properties (two in Texas and four in Florida), for a total sum of \$39,368,331.32 (Cmplt., ¶¶ 33-33).

The various defendants now separately move to dismiss the complaint insofar as interposed against them, pursuant to CPLR 3211[a][1], [3], [5],[7]).

Specifically, motions to dismiss pursuant to CPLR 3211 have been made by (1) “seller” defendants SCP 2009-C34-009, LLC; SCP 2009-C34-012, LLC; SCP 2009-C34-014, LLC; SCP 2009-C34-015, LLC who are jointly represented by – are moving together with – “buyer” defendants Alan Potamkin; Robert Potamkin; 2427 TX Property 1, LLC; 2427 TX Property 2, LLC; and 2427 Investments, Inc.

There is a second motion to dismiss made by additional “buyer” defendants CVS Pharmacy and CVS Caremark.

A third motion has been made by “seller” defendants SCP Capital, SCP 2009, Landes and LLWG, in which the Potamkin movants have joined (Potamkin Brief at 12). The motions should be granted for the reasons indicated below.

On a motion to dismiss pursuant to CPLR 3211[a][7], the Court must accept as true and favorably construe, the facts alleged in the complaint and submissions in opposition to the motion (*People ex rel. Cuomo v. Coventry First LLC*, 13 NY3d 108 [2009]; *Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]), while 2010'pursuant to CPLR 3211[a][1], the documentary evidence submitted must resolve all factual issues and conclusively dispose of the plaintiff's claim (*Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez, supra*, at 87-88; *Moore v. Liberty Power Corp., LLC*, 72 AD3d 660, 661; *May Cheung v. Chao Fu*, 75 AD3d 615, 616).

Nevertheless, bare legal conclusions or factual claims flatly contradicted by the evidence are not presumed to be true (*Godfrey v. Spano*, 13 NY3d 358, 373 [2009]; *Maas v. Cornell Univ.*, 94 NY2d 87, 91-92 [1999]), and “[i]f the documentary proof disproves an essential allegation of

the complaint, dismissal pursuant to CPLR 3211[a][7] is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action” (*see Deutsche Bank Nat. Trust Co. v. Sinclair*, 68 AD3d 914; *Peter F. Gaito Architecture, LLC v. Simone Development Corp.*, 46 AD3d 530, 531 *see, Zanani v. Meisels*, ___AD3d___, 2010 WL 4539457 [2nd Dept. 2010]).

With these principles in mind, that Court agrees that the branch of the Potamkin defendants’ motion which is to dismiss the complaint as against the CVS-SCP defendants as “sellers,” and the individual Potamkins and 2427 Investments Inc., as alleged “buyers,” should be granted.

More particularly, although the named CVS-SCP “seller” entities each owned one of the four, Florida CVS properties mentioned in the plaintiff’s complaint (Cmplt., ¶¶ 30, 32), the controlling documentary materials submitted by the Potamkins establish that these properties were never sold by the “SCP-CVS” “seller” entities – and that the above-referenced “buyer” defendants never purchased the involved properties (Potamkin Brief at 14-15).

Rather, as evidenced by a series of December, 2009 assignment agreements – CVS Pharmacy, as seller or “transferor” – assigned and sold *membership* interests in those entities to four corresponding, “parent” transferee companies – one “parent” entity for each of the four, separate SCP-CVS companies involved (Winton Aff., ¶¶ 16-19 *see, Winston Exh., “B”*). The parent transferees which acquired the membership interests from CVS were: (1) 2247 FI Parent 4, LLC; 2247; (2) FI Parent 3, LLC; (3) 2247 FI Parent 2, LLC; and (4) 2247 FI Parent 1, LLC. Each “parent” entity is denominated as a 100% membership owner in the four, SCP CVS co-defendants.

Significantly, none of the “parent” LLC entities which actually acquired those membership interests, is currently a party to the subject action (Winton Aff., ¶¶ 23, 25-26, Exh., “C”).

Similarly, and upon submission of the two Texas, “Special Warranty” Deeds of conveyance, both dated December 11, 2009, the Potamkin movants have established that the contracting parties to these sale transactions were exclusively CVS Pharmacy, as seller, and the two codefendant “buyer” entities; namely, “2427 TX Property 1, LLC” and “2427 TX Property 2,

LLC” (Winton Aff., ¶¶ 15, 23, Exh., “C”)(*cf.*, *Datena v. JP Morgan Chase Bank*, 73 AD3d 683; *Fontanetta v. Doe*, 73 AD3d 78, 84-85).

The plaintiff’s opposing submissions with respect to the transactions evidenced by these documents are circular and conclusory and fail to impeach the conclusive import of these additional materials (*e.g.*, *Dochter Aff.*, ¶¶ 2, 80-81; *Pltff’s Brief*, at 1 fn 1).

It bears noting that Excel has placed reliance upon the October 19, 2009 Letter of Intent, as reflecting the terms of the agreement on which its commission claim is based (*Pltff’s Brief* at 7, 32). Indeed, Excel has argued in this respect that “it is beyond peradventure that the [seller] * * Defendants owe * * * [it] the brokerage commission [as] specified in the October 19, 2009 Letter of Intent” (*Pltff’s Brief* at 7, 32; *Cmplt.*, ¶ 29; *Dochter Aff.*, ¶ 59).

However, the defendants contend – and that Court agrees – that the terms of that document, if anything, undermine and serve to defeat the plaintiff’s commission claim (*Peter F. Gaito Architecture, LLC v Simone Dev. Corp.*, *supra* 46 AD3d 530, 531 *cf.*, *M & B Joint Venture, Inc. v Laurus Master Fund, Ltd.*, 12 NY3d 798, 800 [2009])(*e.g.*, *Woo Reply Aff.*, ¶¶ 10-18; *Potamkin Reply Brief*, at 5-6).

Among other things, the Letter of Intent depicts a proposed agreement under which: (1) SCP Capital or its “nominee” would be the sole “seller” – not CVS – or a group of alleged “sellers”; (2) SCP was to be exclusively responsible for payment of the broker’s commission; and (3) any broker’s fee would be paid pursuant to a “separate” agreement to be reached at a later date – an agreement which was never concluded insofar as the complaint and the parties’ submissions reveal. Further, the letter’s reference to the payment of a commission upon the execution of “separate” agreement, suggests, if anything, that the October, 2009 Letter of Intent constituted the latest, controlling and/or superseding recitation of the parties’ understanding with respect to the transaction and brokerage agreement issue which it addresses.

More fundamentally, the Letter of Intent expressly self-terminates the proposed transaction supposedly struck only days earlier at the October 2009 meeting – and the brokerage commission provision which it memorializes as part of that deal.

Specifically, the Letter of Intent declares that it would have no effect if the terms referenced therein were not reduced to a signed agreement by or before November 6, 2009 – an

event which did not occur. It is undisputed that the subject transaction occurred subsequent to November 6, 2009 termination date and that the involved properties were not even identified until after the proposed agreement memorialized in the Letter of Intent had long since expired.

In light of the foregoing, the motion by the Potamkin defendants for an order dismissing (1) the first cause of action as against the SCP-CVS “seller” codefendants; and the (2) second cause of action cause of action as against those Potamkin defendants erroneously denominated as “buyers,” should be granted,

The Potamkins have also and additionally established their entitlement to an order dismissing the second, fraud cause of action, which has been interposed collectively and solely against all “buyer” defendants.

In sum, the second cause of action is predicated on the theory that both “sellers” and “buyers” intentionally identified and referred to another broker – not Excel – upon conveying the properties, when they supposedly knew that Excel had acted as broker and was the entity actually entitled to any commission due and owing (*e.g.*, Cmplt., ¶¶ 38-42).

To succeed on a fraud claim, a party must allege a misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages (*see, Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 488 [2007]; *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]; *Deutsche Bank Nat. Trust Co. v. Sinclair*, 68 AD3d 914; *Colasacco v. Robert E. Lawrence Real Estate*, 68 AD3d 706, 708).

“The plaintiff must show not only that he actually relied on the misrepresentation, but also that such reliance was reasonable” (*Regina v. Marotta*, 67 AD3d 766; *Spector v. Wendy*, 63 AD3d 820).

Moreover, “[a] claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016[b]” (*Eurycleia Partners, LP v. Seward & Kissel, LLP, supra*, at 559), and “mere conclusory language, without specific and detailed allegations establishing material misrepresentations of fact” will not suffice (*Heffez v. L & G General Const., Inc.*, 56 AD3d 526, 527). Further, “sweeping references to acts by all or some of the defendants * * * ” will not suffice (*Henry v. City of New York, supra*, at 5, quoting from, *Center Cadillac, Inc. v. Bank Leumi*

Trust Co., 808 F.Supp. 213, 230 [S.D.N.Y. 1992], *aff'd*, 99 F3d 401 [2nd Cir.1995]; *Aetna Cas. & Sur. Co. v. Merchants Mut. Ins. Co.*, *supra see, Daly v. Kochanowicz, supra*).

Excel's fraud claim at bar is primarily based upon a series of oblique averments which, in relevant part, lump the defendants together "without any specification as to the precise" fraudulent conduct attributed to each (*Aetna Cas. & Sur. Co. v. Merchants Mut. Ins. Co.*, 84 AD2d 736), *i.e.*, without identifying the discrete, fraudulent acts supposedly committed by the separately named parties (*e.g.*, *Daly v. Kochanowicz*, 67 AD3d 78, 90-91; *Aetna Cas. & Sur. Co. v. Merchants Mut. Ins. Co.*, *supra*; *Henry v. City of New York*, ___ F.Supp2d ___, 2007 WL 1062519 at 5 [E.D.N.Y. 2007] *cf.*, *Daly v. Kochanowicz*, 67 AD3d 78, 90-91; *Pastavilla Makarnacilik Sanyı Ticaret as v. Wakefern Food Corp.*, ___ Misc3d ___, 2010 WL 2158239 [Supreme Court, Nassau County 2010]).

Nor will a fraud claim lie when the only fraud charged relates to a breach of contract, since "[a] simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated" (*Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]; *Stangel v. Chen*, 74 AD3d 1050; *Marcantonio v. Picozzi*, 70 AD3d 655 656; *Yenrab, Inc. v. 794 Linden Realty, LLC*, 68 AD3d 755, 757; *Clemens Realty, LLC v. New York City Dept. of Educ.*, 47 AD3d 666, 667).

Here, the complaint does not contain non-concursory allegations which allege the collectively identified "buyers" violated any specific duty to the plaintiff collateral to, or separate from, the contract itself (*e.g.*, *Stangel v. Chen, supra*, 74 AD3d 1050; *Rogowsky v. McGarry*, 55 AD3d 815, 817; *Clemens Realty, LLC v. New York City Dept. of Educ.*, *supra see also, Praedia Realty Corp. v. Durst*, 233 AD2d 380).

Rather, the plaintiff has merely recast, in varying factual permutations and utilizing "slightly different language, * * * the * * * contractual obligations asserted in the cause of action for breach of contract" (*Clark-Fitzpatrick, Inc. v. Long Island Railroad Co.*, *supra* at 390; *Yenrab, Inc. v. 794 Linden Realty, LLC, supra*, 68 AD3d at 757; *Heffez v. L & G General Const., Inc.*, *supra*, 56 AD3d 526, 527; *Clemens Realty, LLC v. New York City Dept. of Educ.*, *supra*; *Lawlor v. Cablevision Systems Corp.*, ___ Misc3d ___, 2008 WL 4212442 at 6 [Supreme Court, Nassau County 2008]).

The essentially contract-based derivation of Excel's purported fraud theory is evidenced by the absence of any credible reference to the required element justifiable reliance. Indeed, there is no allegation that the "buyers" made any statement or representation to Excel on which it relied to its detriment; instead, the complaint effectively identifies a purported statement or misrepresentation that the "sellers" and "buyers" made jointly to each other (Potamkin Brief at 18)(*see generally, Regina v. Marotta*, 67 AD3d 766; *Spector v. Wendy*, 63 AD3d 820, 821-822).

With respect to the motion by the CVS entities, CVS argues, *inter alia*, that the allegations set forth in the complaint are insufficient to establish that Woo – or any of the named defendants – were cloaked with "apparent authority" authorizing them to act on CVS's behalf and/or bind CVS with respect to the alleged brokerage agreement. The Court agrees.

"Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction" (*Hallock v. State of New York*, 64 NY2d 224, 231 [1984] *see, Marshall v. Marshall*, 73 AD3d 870; *ER Holdings, LLC v. 122 W.P.R. Corp.*, 65 AD3d 1275, 1277 *see also, Standard Funding Corp. v. Lewitt*, 89 NY2d 546, 551-552 [1997]; *Ford v. Unity Hospital*, 32 NY2d 464, 472 [1973]).

Notably, "[i]t is axiomatic that apparent authority must be based on the actions or statements of the principal" (*56 E. 87th Units Corp. v. Kingsland Group, Inc.*, 30 AD3d 1134, 1135; *Fleet Bank v. Consola, Riccitelli, Squadere Post No. 17 Inc.*, 268 AD2d 627, 629), and "[t]he agent cannot by his [or her] own acts imbue himself [or herself] with apparent authority" (*Hallock v. State of New York, supra*, 64 NY2d at 231; *Chelsea Nat. Bank v. Lincoln Plaza Towers Associates*, 61 NY2d 817 [1984] *see also, Greene v. Hellman*, 51 NY2d 197, 204 [1980]; *1230 Park Associates, LLC v. Northern Source, LLC*, 48 AD3d 355, 356; *150 Beach 120th Street, Inc. v. Washington Brooklyn Ltd. Partnership*, 39 AD3d 722).

In general, "[o]ne who deals with an agent does so at his peril, and must make the necessary effort to discover the actual scope of authority" (*Ford v. Unity Hosp., supra*, 32 NY2d at 472 *see, Collision Plan Unlimited, Inc. v. Bankers Trust Co.*, 63 NY2d 827, 830 [1984]; *1230 Park Associates, LLC v. Northern Source, LLC, supra*).

A review of the complaint reveals that there are no factual averments meaningfully

addressing or elaborating upon the basis and source of Woo's authority to represent CVS as its agent. Indeed, the complaint's averments are nebulous in explaining the amalgam of affiliations the plaintiff so heavily relies upon, and similarly fails to allege facts supporting SCP Capital's sweeping authority to bind the entire group "seller" defendants (Cmplt., ¶¶ 22-24).

More specifically, and as to CVS, Excel's papers make no reference to an express or foundational, agency agreement between that entity and Woo – or any of the other codefendants. Similarly, Excel has not identified any specific statements, affirmative conduct – or any overt input or involvement at all – by CVS supporting a conclusion that an agency relationship arose with respect to the involved, 2009 transaction (*see, Marshall v. Marshall, supra*, 73 AD3d 870; *ER Holdings, LLC v. 122 W.P.R. Corp., supra*, 65 AD3d at 1277; *RWSP Realty, LLC v. Augusta*, 42 AD3d 490, 491).

Nor has Excel claimed or shown that it made any inquiries or conducted due diligence to discover the actual scope of Woo's authority in connection with the subject transaction (*ER Holdings, LLC v. 122 W.P.R. Corp., supra*, at 1277; *1230 Park Associates, LLC v. Northern Source, LLC, supra*; *Beizer v. Bunsis*, 38 AD3d 813, 814; *Lindenbaum v. Albany Post Property Associates, Inc.*, 297 AD2d 661, 662-663).

Excel's contention that it engaged in a series of prior transactions with Woo since 2002 involving similar CVS properties and brokerage transactions, does not establish that the principles applicable to apparent authority claims are inapplicable (Dochter Aff., ¶¶ 11-15, 16)(*cf., 56 E. 87th Units Corp. v. Kingsland Group, Inc., supra*, 30 AD3d at 1135 *see, Fleet Bank v. Consola, Riccitelli, Squadere Post No. 17 Inc., supra*, 268 AD2d 627, 630).

Specifically, the plaintiff has not alleged that CVS made statements or engaged in affirmative conduct indicating that Woo would be representing it in the current transaction. Excel has not identified the steps it undertook to confirm that Woo's agency status – whatever it may have been in the past – still existed with respect to the subject transaction (*Collision Plan Unlimited, Inc. v. Bankers Trust Co., supra*).

A review of the Dochter affidavit further confirms that it avoids making any factual claim that CVS ever paid Excel a commission in connection with these prior transactions (*e.g.,* Dochter Aff., ¶ 13, ¶¶ 11-15; Woo Reply Aff., ¶¶ 8-9; 20-22). The apparently self-generated

document attached to Dochter's affidavit which lists these prior "CVS" transactions, does not reveal the identities of the parties who actually paid the commissions (e.g., Dochter Aff., Exh., "C").

With respect to the motion by codefendants SCP Capital, SCP 2009, Landes and LLWG, these movants assert that pursuant to governing choice of law authorities, Texas and Florida law are applicable since, *inter alia*, the properties underlying brokerage claim are located in these states, where Excel is not licensed. The Court agrees.

It has been held that "New York precedent clearly supports giving deference to the law of the foreign jurisdiction in determining claims for commissions by New York brokers unlicensed in the states where the property is located," and that upon "[a]plying choice of law analysis, New York courts have held that the law of the state where the land is situated is to be applied" (*Klein v. Antebi*, 15 Misc.3d 901, 908-909 [Supreme Court, Kings County 2007], *aff'd*, 53 AD3d 529 *see also*, *TDH-Berkshire, Inc. v. Korff*, 33 AD3d 437; *Equis Corp. v. Mack-Cali Realty Corp.*, 6 AD3d 264; *Madison Realty, Inc. v. Neiss*, 253 AD2d 482; *Interglobal Realty Corp. v. American Standard Inc.*, 174 AD2d 436 *see also*, *Terra CRG LLC v. Marke*, ___ Misc3d ___, 2010 WL 4105568, at 4-5 [Supreme Court, Kings County 2010] *cf.*, *Fieger v. Pitney Bowes Credit Corp.*, 251 F.3d 386 [2nd Cir. 2001]).

In an analogous brokerage commission dispute, the Appellate Division, Second Department observed that the "center of gravity" or "grouping of contacts" choice of law doctrine applies, and that thereunder, "'contracts referring to the transfer of title to land are governed by the law of the place where the land is situated'" (*Madison Realty, Inc. v. Neiss*, *supra* 253 AD2d at 483-484, *quoting from*, *Andover Realty, Inc. v. Western Elec. Co.*, 100 AD2d 157, 162, *aff'd*, 64 NY2d 1006 [1985] *see generally* *Indosuez International Finance B.V. v. National Reserve Bank*, 98 NY2d 238, 245 [2002]; *Matter of Allstate Ins. Co. (Stolarz)*, 81 NY2d 219 [1993]).

Here, and insofar as alleged in the complaint, the six transactions underlying the subject commission all involve real property located in the jurisdictions of Florida and Texas.

Cognizant of the principle that the location of the property is of material import (*Madison Realty, Inc. v. Neiss*, *supra*), and upon considering all the relevant factors, the Court

agrees that Florida and Texas possess the stronger “interests in regulating the activities of real estate brokers who perform services in connection with the sale of * * * property” in their respective jurisdictions, and that their laws are applicable (*Madison Realty, Inc. v. Neiss, supra* 253 AD2d at 483-484).

Although Excel argues, *inter alia*, that the instant dispute is separate and distinct from the involved land transactions, the broker in the Second Department’s *Madison* holding made the same assertion, which the Court rejected by noting that, “it cannot be overlooked that * * * [the brokers] allegedly earned a commission by procuring a purchaser for Florida property” (*Madison Realty, Inc. v. Neiss, supra*, 253 AD2d at 484 *see also, TDH-Berkshire Inc. v. Korff, supra*, 33 AD3d at 438).

Excel’s reliance upon the Second Circuit’s holding in *Fieger v. Pitney Bowes Credit Corp., supra*, is misplaced, both because the facts are distinguishable, and because – to the extent that the *Fieger* departs from the Second Department’s choice of law” analysis – this Court is bound by the Appellate Division’s holdings and analytical approach (*see generally, Seltzer v. New York State Democratic Committee*, 293 AD2d 172).

The Court wishes also to comment upon its prior decision in *Rose v. Gallagher*, Index No. 4432/2009 (Sup. Ct. Nassau Co. April 30, 2010)(Warshawsky, J.) cited by Excel in its Memorandum of Law at p. 8. In that case the issue was the a choice of law between Louisiana and New York with respect to claimed negligence by a New York insurance broker in the placement of insurance on properties in a flood zone. In that case all negotiations took place in New York, and there was no involvement with the land per se. It was a contract action, which did not involve the transfer of title to land. The property was not the focus of the action as it is in the instant case.

Lastly, it is settled that “a parent company will not be held liable for the torts of its subsidiary unless it can be shown that the parent exercises complete domination and control over the subsidiary” (*Nassau County v. Richard Dattner Architect, P.C.*, 57 AD3d 494, 868; *Serrano v. New York Times Co., Inc.*, 19 AD3d 577, 578 *see generally, Billy v. Consolidated Mach. Tool Corp.*, 51 NY2d 152 [1980]).

As to the allegedly affiliated/subsidiary status of, *inter alia*, SCP, Capital, Landes and

LLWG, neither the complaint nor the additional materials submitted by Excel, alleges or adequately establishes the requisite domination and control with respect to the subject transaction so as to impute liability to and among these defendants as affiliated and/or subsidiary entities (*Nassau County v. Richard Dattner Architect, P.C.*, *supra cf.*, *Williams v. Lovell Safety Management Co., LLC*, *supra*, 71 AD3d 671, 672).

The Court has considered Excel's remaining contentions in opposition to the movants' respective applications and concludes that they are lacking in merit.

Accordingly, it is,

ORDERED that the respective motions to dismiss the complaint by the moving defendants are granted to the extent indicated above.

The foregoing constitutes the decision and order of the Court.

Dated: December 2, 2010


J.S.C.

ENTERED
DEC 08 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE