Siegel Consultants, Ltd. v Nokia, Inc.
2010 NY Slip Op 33840(U)
August 9, 2010
Sup Ct, New York County
Docket Number: 603277/08
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. EILEEN BRANSTEN PART 3

Index Number : 603277/2008

SIEGEL CONSULTANTS, LTD

VS

NOKIA

Sequence Number : 004

DISMISS

INDEX NO. 603277/08

MOTION DATE 10/9/9

MOTION SEQ. NO. 4

MOTION CAL. NO. ______

E 8/12/10 ec

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

NYS SUPREME COURT
RECEIVED
AUG 11 2010
MOTION SUPPORT OFFICE

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

Dated: 8-9-10

HON. EILEEN BRANSTEN, J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

---------------------------------------X

SIEGEL CONSULTANTS, LTD.,

Plaintiff,

-against-

NOKIA, INC., AND 5 LLC,

Defendants.

Index No. 603277/08
Motion Seq. Nos.: 001, 004
Motion Date: 10/9/09

---------------------------------------X

5 LLC,

Third-Party Plaintiff,

-against-

FRIEDLAND REALTY, INC. and GENE MEER,

Third-party Defendants.

Index No. 590221/09

---------------------------------------X

BRANSTEN, J.:

This action arises out of a dispute concerning a real estate broker's commission for the rental of the premises located at 5 East 57th Street, New York, New York. Defendant/third-party plaintiff 5 LLC is the owner of the premises, and defendant Nokia, Inc. ("Nokia") is the tenant of the premises. Plaintiff Siegel Consultants, Ltd. ("Consultants"), a real estate broker, alleges that it was instrumental in effectuating a lease agreement between 5 LLC and Nokia, and claims entitlement to a full commission. Third-party defendant Friedland Realty, Inc. ("Friedland") was 5 LLC's exclusive agent for the subject property. Third-party defendant Gene Meer, Friedland's president, was the broker involved in the subject transaction.

001
004

Motion Sequence Nos. 001 and 004 are consolidated for disposition. In Motion Sequence No. 001, Consultants moves, pursuant to CPLR 3212, for summary judgment as to liability on its claims against 5 LLC. Defendant Nokia cross-moves for summary judgment dismissing the complaint against it.

In Motion Sequence No. 004, third-party defendants Friedland and Meer move, pursuant to CPLR 3211 (a) (1) and (a) (7), for an order dismissing the third-party complaint. Third-party defendants also move, pursuant to 22 NYCRR 130-1.1, for an order imposing sanctions on third-party plaintiff 5 LLC.

As set forth below, Consultants' motion for summary judgment is denied. Nokia's cross motion for summary judgment dismissing the complaint against it is granted. Third-party defendants' motion to dismiss the third-party complaint is granted in part and denied in part. Third-party defendants' motion for sanctions is denied.

Motion and Cross Motion for Summary Judgment (Motion Sequence No. 001)

1. *Consultants' Motion for Summary Judgment*

Background

Each side presents a completely different factual scenario underlying the dispute at bar. According to Joan Siegel, Consultants' president, "Consultants was the procuring cause of the lease that [5 LLC], as landlord, signed with [Nokia], as tenant," and thus, 5 LLC "is

liable to Consultants for the commission as a matter of law" (Siegel Aff., ¶ 4). Defendants deny that Consultants was the procuring cause of the lease, and sharply dispute Consultants' version of the facts.

Siegel alleges that, in January 2005, Nokia, acting through an agent (Ronald Austin of Austin & Associates), engaged Consultants to find suitable retail space in Manhattan (*id.*, ¶ 6; Siegel Reply Aff., ¶ 7). Siegel further alleges that Consultants proposed the subject property as a site suitable for Nokia, and that with 5 LLC's permission and consent, Consultants showed Nokia space in the Building (Siegel Aff., ¶¶ 6-7). According to Siegel, the showing was arranged and attended by one of 5 LLC's employees (*id.*, ¶ 7).

Siegel contends that she then opened negotiations with 5 LLC to lease the space (*id.*, ¶ 8). She asserts that, on February 8-9, 2005, she sent Nokia's offer to lease the subject property to both 5 LLC and 5 LLC's agent (*id.*, ¶ 8; *see* Ex. B). The offer stated that 5 LLC was to pay Consultants a commission based upon an attached rate schedule (*see id.*, Ex. B). Siegel asserts that a lease, "based on Consultants' proposal, was drawn by [5 LLC's] attorney very quickly and sent to Nokia's attorney," and that "after the proposal, the lease negotiations proceeded apace" (*id.*, ¶ 9).

On July 1, 2005, 5 LLC, as landlord, and Nokia, as tenant, signed a lease for the subject property (the "Lease") (*id.*, ¶ 10; *see* Ex. C). The Lease's definitional paragraphs include paragraph (o), which defines Consultants as a broker:

BROKER: NAI Friedland Realty, Inc.
Siegel Consultants Ltd.
Austin & Associates

(Lease, ¶ (o), at 2).

Paragraph 40 of the Lease is entitled "Brokerage," and addresses 5 LLC's responsibility to pay the brokerage commission:

> Tenant [Nokia] and Owner [5 LLC] covenant, warrant and represent to the other that it dealt with no broker, finder or similar person entitled to a commission, fee or other compensation in connection with this Lease, and had no conversations or negotiations with any broker, finder or similar person with respect to the Demised Premises, except for the Broker (identified in paragraph "(o)" on page 2 of this Lease). Tenant and Owner agree[] to indemnify and save the other harmless against the claims, whether or not justified, of any broker other than the Broker and against any court costs, attorneys' fees, damages, or other expenses, incurred in connection with such claims ... Owner shall pay any and all commissions due NAI Friedland Realty, Inc. and Siegel Consultants, Ltd. (including Joan Siegel) pursuant to separate agreement or otherwise and Owner shall indemnify, defend and hold Tenant harmless from and against any claims made by NAI Friedland Realty, Inc. or Siegel Consultants, Ltd. (including Joan Siegel) for commissions or any other payments alleged to be due and payable with respect to the transactions contemplated by this Lease

(Lease, ¶ 40). Consultants contends that this paragraph admits Consultants' entitlement to a brokerage commission.

Defendants present a completely different version of the facts. According to defendants, on January 10, 2005, 5 LLC retained Friedland to find a lessee for the subject

property. 5 LLC and Friedland entered into a brokerage agreement (the Brokerage Agreement), pursuant to which Friedland was to serve as 5 LLC's sole and exclusive agent for the property (*see* Brokerage Agreement, at 1 [5/29/09 Aff. of Stephen Hoffman, Ex. A]). Pursuant to the Brokerage Agreement, Friedland agreed to pay all brokerage commissions, and was obligated to indemnify, defend and hold 5 LLC harmless from all claims for commissions from outside brokers (*see id.*, ¶ 4).

Around the same time that 5 LLC signed the Brokerage Agreement with Friedland, Nokia was looking for space in New York City to locate its flagship store. According to defendants, contrary to Siegel's claim, Consultants did not propose or locate the subject property. Rather, Jeremy Wright, a Nokia employee, found the property while in New York on business.

Wright alleges that, in January 2005, he was visiting New York with his boss, Cliff Crosbie, for the express purpose of scouting potential sites for Nokia's store (Wright Aff., ¶ 2 [5/29/09 Hoffman Aff., Ex. C]). While in New York, Wright observed a sign in the window of the subject property, which indicated that the property was available for lease (*id.*, ¶ 3). Wright then notified Andrew Bathurst, a real estate consultant working for Nokia, that the property was available (*see* 1/14/05 e-mail from Wright to Bathurst [5/29/09 Hoffman Aff., Ex. B]). Wright asserts that he and Crosbie located "the subject property without any assistance whatsoever from Joan Siegel, Siegel Consultants, Ltd., or their agents, servants or employees" (Wright Aff., ¶ 2).

After receiving Wright's e-mail, Bathurst contacted Ronald Austin, a real estate agent with the firm of Austin & Associates ("Austin") (*see* 1/14/05 e-mail from Bathurst to Wright [5/29/09 Hoffman Aff., Ex. B]). Austin then retained Siegel for its consulting services. Defendants present evidence that Siegel knew that Friedland was 5 LLC's exclusive agent for the property (*see* 2/4/05 e-mail from Siegel to Ron Austin [Hoffman Aff., Exh D] ["Just to confirm the appointment we have arranged to meet with you and the exclusive agent for the previous Swatch store, on Monday February 7th"]).

On January 19, 2005, 5 LLC arranged for Nokia to view the property (5/29/09 Hoffman Aff., ¶ 10). Defendants contend that Siegel did not attend this meeting (*id.*).

Defendants assert that, although Siegel claims that, on February 9, 2005, she sent 5 LLC an offer to lease the subject property, 5 LLC did not receive this proposal prior to the execution of the Lease (*see* Aff. of Josephine Mantellino, Vice President of Duell, LLC, 5 LLC's managing agent, ¶ 3 [Hoffman Aff., Ex. L]). Defendants further assert that 5 LLC did not have any agreement with Consultants regarding the subject property (*id.*, ¶ 3), and that, throughout the lease negotiations, 5 LLC never had any communication or interaction with anyone from Consultants (*id.*, ¶ 4).

In February 2005, Consultants raised the issue of its compensation for its work on the lease. This resulted several e-mails between Siegel and David Speciner of Alston & Bird, LLP, Nokia's general counsel. Defendants assert that after Consultants claimed entitlement

to a commission, Meer, Friedland's president, repeatedly assured both 5 LLC and Nokia that Consultants was not entitled to any commission, was not instrumental in bringing the parties together, and was not a procuring cause of the Lease (Mantellino Aff., ¶ 4). Thus, 5 LLC and Nokia took the position that they were not obligated to pay any commission to Consultants.

In a February 16, 2005, e-mail to Speciner, Siegel admitted that Consultants was not a party to a written commission agreement for the property, and that "[i]t has all been verbal" (*see* 5/29/09 Hoffman Aff., Ex. E). In her e-mail, she also admitted that Nokia was not responsible for paying a broker commission (*see id.* ["We all understand that the commission is to be paid by the owner and not by the tenant"]).

By letter dated April 12, 2005, and addressed to 5 LLC and Nokia, Consultants claimed "entitlement to a commission in the sum of $847,399.71 according to the terms listed in the proposal submitted" (*see* Siegel Aff., Ex. D). In response to this correspondence, Nokia notified Siegel in an April 25, 2005 e-mail that it was not obligated to pay the commission demanded (*see* 5/29/09 Hoffman Aff., Ex. G).

Defendants contend that, because they were now aware of Consultants' claim that it was entitled to a commission, they included an indemnity provision in the Lease of the property that inured exclusively for the benefit of the parties to the contract. The indemnification agreement provided that 5 LLC would "indemnify, defend and hold [Nokia] harmless from and against" any broker commission claims, in exchange for a payment of $300,000 (Lease, ¶ 40).

Defendants further contend that, because several parties had been involved in initial communications regarding the subject property, they disclosed in the lease all brokers and consultants who could potentially make a claim for commissions, including plaintiff. However, defendants urge, the inclusion of the brokers in the lease was not an acknowledgment that any specific broker was entitled to a commission.

On November 10, 2008, Consultants filed suit against Nokia and 5 LLC. In the complaint, Consultants alleges that it is entitled to the full broker commission arising from the Lease, in the amount of $847,399.71. Consultants asserts two causes of action against each defendant – breach of implied contract, and quantum meruit.

Analysis

In support of its motion for summary judgment against 5 LLC, Consultants asserts that it was the procuring cause of the Lease. Consultants further asserts that, because the Lease names it as a broker, and states that 5 LLC will pay any commission due, 5 LLC is liable to Consultants for the commission, as a matter of law.

To earn a commission, a broker must prove that he or she had a contract, either express or implied, with the party to be charged with paying the commission and that he or she was the procuring cause of the sale (*Sutton & Edwards, Inc. v 68-60 Austin St. Realty Corp.*, 70 AD3d 810, 810 [2d Dept 2010]; *Marciano v Ran Oil Co. East, LLC*, 63 AD3d 1118, 1119 [2d Dept 2009]; *Joseph P. Day Realty Corp. v Chera*, 308 AD2d 148, 151 [1st

Dept 2003]). "Where the broker is not involved in the negotiations leading up to completion of the deal, the broker must establish that he created an amicable atmosphere in which negotiations proceeded or that he generated a chain of circumstances that proximately led to the sale" (*Dagar Group, Ltd. v Hannaford Bros. Co.*, 295 AD2d 554, 555 [2d Dept 2002]; *see also Friedland Realty v Piazza*, 273 AD2d 351, 351 [2d Dept 2000]).

However, it is not enough to merely establish that the broker called the property in question to the attention of the potential buyer or lessor (*Greene v Hellman*, 51 NY2d 197, 205 [1980] ["It has long been recognized that a broker, save when he enjoys the benefit of a special agreement to the contrary, does not automatically and without more make out a case for commissions simply because he initially called the property to the attention of the ultimate purchaser"]; *accord Hentze-Dor Real Estate, Inc. v D'Allessio*, 40 AD3d 813, 815-16 [2d Dept 2007]). Rather, to be the procuring cause of the sale, "there must be a direct and proximate link, as distinguished from one that is indirect and remote, between the bare introduction and the consummation" (*Greene*, 51 NY2d at 206). "Whether a broker is the procuring cause of a sale generally is an issue of fact for the jury" (*Cappuccilli v Krupp Equity Ltd. Partnership*, 269 AD2d 822, 823 [4th Dept 2000]).

Here, the evidence submitted by defendants raises an issue of fact as to whether Consultants was the procuring cause of the Lease. Summary judgment is therefore precluded. Consultants alleges that it "created an amicable atmosphere as between 5 and

Nokia and was the procuring cause of the Lease" (Complaint, ¶ 17), because 5 LLC "receiv[ed] and retain[ed] without objection [Consultants'] offer dated February 8, 2005, which included a provision reciting that [5 LLC] was to pay [Consultants] according to [Consultants'] rate schedule" (*id.*, ¶ 18). However, 5 LLC presents evidence that it did not see this proposal before the Lease was executed (*see* Mantellino Aff., ¶ 3). Indeed, 5 LCC contends that the first time it saw Consultants' proposal was after this action was commenced (*see id.*). Moreover, a review of the fax transmittal sheet reveals that the proposal was sent to Friedland, 5 LLC's exclusive agent, rather than to 5 LLC, or Duell, its management company (*see* Siegel Aff., Ex. B).

Consultants also alleges that it was the procuring cause of the Lease because it "negotiat[ed] with Nokia through Siegel" (Complaint, ¶ 28). However, in her affidavit, Siegel fails to recount any specific conversations or negotiations that she had with any 5 LLC employees or principals regarding the Lease. Indeed, 5 LLC alleges that, throughout the lease negotiations, it never had any communication or interaction with anyone from Consultants (Mantellino Aff., ¶ 4). Rather, 5 LLC asserts, Friedland and Meer conducted the negotiations that resulted in the Lease (*see id.*).

Although Consultants also claims that it proposed the subject property as a site suitable for Nokia (*see* Siegel Aff., ¶ 6), 5 LLC presents evidence that Wright found the property on a business trip while in New York, and then notified Bathurst of its availability

(*see* Wright Aff., ¶¶ 2-3). Moreover, even assuming, arguendo, that Consultants located the site, merely alerting the prospective lessor to the property is not enough (*see Greene v Hellman*, 51 NY2d 197, *supra*; *see also Douglas, Payton & Co., Inc. v We're Assoc.*, 197 AD2d 559 [2d Dept 1993]).

Accordingly, 5 LLC has raised material issues of triable fact as to whether Consultants generated the chain of circumstances leading to the Lease, and thus, whether Consultants was the procuring cause of the Lease (*see Marciano v Ran Oil Co. East, LLC*, 63 AD3d 1118, *supra*; *Brown, Harris, Stevens, Inc. v Rosenberg*, 156 AD2d 249 [1st Dept 1989]). Therefore, Consultants' motion for summary judgment must be denied.

Consultants also rely on the following language set forth in paragraph 40 of the Lease as the basis of its entitlement to a commission: "Owner shall pay any and all commissions due NAI Friedland Realty, Inc. and Siegel Consultants, Ltd. (including Joan Siegel) pursuant to separate agreement or otherwise." Consultants contends that this language "acknowledges Consultants' involvement and states that [5 LLC] will pay Consultants" and that Consultants "is therefore entitled to summary judgment on liability" (Pl Mem., at 4).

"Where a contract of sale admits the broker's performance of services, the broker is entitled to summary judgment on its claim for commissions" (*Helmsley-Spear, Inc. v New York Blood Ctr., Inc.*, 257 AD2d 64, 67 [1st Dept 1999], citing *Holiday Mgt. Assocs., Inc. v Albanese*, 173 AD2d 775 [2d Dept 1991]; *William B. May Co., Inc. v Monaco Assocs.*, 80

AD2d 798 [1st Dept 1981]; *see also Halstead Brooklyn, LLC v 96-98 Baltic, LLC*, 49 AD3d 602, 602-603 [2d Dept 2008]; *Joseph P. Day Realty Corp. v Chera*, 308 AD2d 148, *supra*).

Consultants has not met its burden of establishing a prima facie entitlement to summary judgment as a matter of law. While a clause in a lease or sale contract that acknowledges a broker's services and states that the seller shall pay the broker's commission would normally entitle the broker to sue as third-party beneficiary (*see id.*), the clause in question in the Lease states that the 5 LLC will pay Consultants "pursuant to separate agreement or otherwise." Consultants has failed to allege the existence, or provide any evidence, of a separate brokerage agreement between itself and 5 LLC, pursuant to which Consultants performed services for which it would receive a commission. None of the cases cited by Consultants state that a broker need not allege a separate agreement between itself and the owner when the brokerage commission clause expressly states that the commission will be paid pursuant to a separate agreement (*see Halstead Brooklyn, LLC v 96-98 Baltic, LLC*, 49 AD3d 602, *supra*; *Helmsley-Spear, Inc. v New York Blood Ctr.*, 257 AD2d 64, *supra*; *Holiday Mgt. Assocs., Inc. v Albanese*, 173 AD2d 775, *supra*; *Ambrose Mar-Elia Co., Inc. v Dinstein*, 151 AD2d 416 [1st Dept], *appeal denied* 74 NY2d 615 [1989]; *William B. May Co., Inc. v Monaco Assocs.*, 80 AD2d 798, *supra*). Thus, Consultants' motion for summary judgment is denied (*see Halstead Property LLC v Gluck*, 9 Misc 3d 1123[A], 2005 NY Slip Op 51759[U] [Sup Ct, NY County 2005], *appeal withdrawn* 25 AD3d 1069 [1st

Dept 2006] [denying broker's motion for summary judgment against seller on ground that broker failed to allege the existence of a separate agreement between itself and seller, where brokerage commission clause expressly stated that commission would be paid pursuant to separate agreement]).

In addition, paragraph 40 also contains the language "pursuant to express agreement *or otherwise*." If Consultants cannot establish that it is entitled to a commission pursuant to a express agreement, the only logical interpretation of the "or otherwise" language is that Consultants must establish that it is entitled to a commission because it was the procuring cause of the Lease. As previously discussed, material issues of fact exist as to whether Consultants was the procuring clause of the Lease. Thus, it cannot establish that is entitled to summary judgment based on this language.

Accordingly, Consultants' motion for summary judgment is denied.

2. *Nokia's Cross Motion for Summary Judgment*

<u>Background</u>

Nokia cross-moves for summary judgment dismissing the complaint against it on the ground that, because no contractual obligations exist between Nokia and Consultants, it is not liable for any broker commissions. In the absence of a special agreement or special circumstances, a broker employed by a seller/owner cannot hold the purchaser/lessee liable

for a commission (*see Selinger Enters., Inc. v Cassuto*, 50 AD3d 766 [2d Dept 2008] [lessee of premises that broker had shown to lessee's employee was not a party to brokerage agreement between broker and client, and thus had no liability under the brokerage agreement]).

Analysis

As evidenced by the Lease, Nokia is the tenant, rather than the owner, of the subject property. It is undisputed that there is no written brokerage agreement, retainer, or any other written employment agreement between Nokia and Consultants. Indeed, Consultants previously admitted that Nokia has no duty to pay it a commission. In a February 16, 2005 e-mail to Nokia's general counsel, Siegel wrote: "We all understand that the commission is to be paid by the owner and not by the tenant" (*see* 5/29/09 Hoffman Aff., Ex. E). Accordingly, Nokia has established its entitlement to summary judgment as a matter of law.

In response to Nokia's cross motion, Consultants fails to raise any triable issue of fact. Consultants presents no evidence that Nokia employed it to locate and procure the subject property on its behalf. In contrast, Wright asserts that he located the subject property while he was in New York on business, without any assistance from Consultants. Nevertheless, Consultants asserts that "the Lease itself, and correspondence and e-mails flowing back and forth among Nokia, Nokia's representatives and Consultants ... demonstrates that Nokia *expressly* employed Consultants to find and obtain space for it" (Pl Reply Mem., at 17

[emphasis in original]). However, the e-mails that Consultants submits in opposition to the cross motion do not establish that Nokia retained Consultants as a broker. At best, the e-mails show that Nokia consulted with Austin & Associates for advice, and that Austin & Associates contacted Siegel.

Consultants also fails to raise an issue of fact as to whether it had an implied contract with Nokia. Although Consultants claims that it had an "expectation to be paid for [its] services" (*see* Pl Reply Mem., at 19), that claim is refuted by Siegel's admission that she understood that the broker's commission would be paid by owner and not by the tenant. This claim is further refuted by the fact that Siegel knew, as early as January 31, 2005, that 5 LLC had an exclusive agency agreement with Friedland (*see* Siegel Reply Aff., at 12).

Accordingly, Nokia's motion for summary judgment dismissing the complaint against it is granted.

Motion to Dismiss the Third-Party Complaint (Motion Sequence No. 004)

Background

On January 10, 2005, 5 LLC retained third-party defendant-broker Friedland to find a lessee for the subject property. 5 LLC and Friedland entered into the Brokerage Agreement, pursuant to which Friedland was retained as 5 LLC's sole and exclusive agent for the subject property (Third-Party Complaint, ¶¶ 4-5). The agreement was executed by Meer, Friedland's president (*id.*, ¶ 4).

Pursuant to the Brokerage Agreement, Friedland was authorized to investigate and develop all offers and inquiries to rent the property (*id.*, ¶ 9). Friedland was also authorized to solicit the cooperation of other licensed real estate brokers not in Friedland's employ (*id.*, ¶ 10). Under the terms of the Brokerage Agreement, if a lease or other transaction contemplated by the terms of the Brokerage Agreement was executed whereby an outside broker or finder was the procuring cause, 5 LLC would pay Friedland 65% of one full commission (*id.*, ¶ 11; *see* Brokerage Agreement, Ex. A). Friedland would then split the commission with the outside broker, pursuant to a separate agreement (*id.*, ¶ 12). Pursuant to the Brokerage Agreement, Friedland agreed to pay all co-broker commissions, and was obligated to indemnify, defend and hold 5 LLC harmless from all claims for commissions by outside brokers (*id.*, ¶ 13).

5 LLC and Nokia included an indemnity provision in the Lease, inuring exclusively for the benefit of the parties to the contract. The indemnification agreement provided that 5 LLC would defend, indemnify and hold Nokia harmless for any broker commission claims, in exchange for a payment of $300,000 (*see* Lease, ¶ 40).

Third-party defendants assert that, once 5 LLC became aware of Siegel's claim, it was reluctant to pay the Friedland/Meer commission until the issue was resolved. The parties came to a compromise, which was memorialized in an agreement dated October 31, 2006 (the "October Agreement" [7/23/09 Hoffman Aff., Ex. B). Pursuant to that agreement, it was

agreed that 5 LLC would hold back a portion of the Friedland/Meer commission – $110,778.23 – until the commission dispute was resolved.

On April 7, 2008, Meer sent an e-mail to 5 LLC in which he claimed that he was nearly destitute, and was in dire need of the funds that were being held by 5 LLC in accordance with the October Agreement (*see* 7/23/09 Hoffman Aff., Ex. C). The first sentence of Meer's e-mail states: "My situation is a matter of life and death." As a result of Meer's pleas, on April 14, 2008, an agreement was executed pursuant to which 5 LLC agreed to release $110,778.23 to Friedland/Meer, and Friedland and Meer agreed to guaranty that amount to 5 LLC in the event that 5 LLC became obligated to pay that amount to Consultants (the "April Agreement") (*see id.*, Ex. E).

On January 5, 2009, counsel for 5 LLC sent a tender letter to Friedland and Meer, demanding that Friedland defend, indemnify and hold harmless 5 LLC, pursuant to the Brokerage Agreement (*see id.*, Ex. F). During two meetings held on January 12 and 15, 2009, Friedland's counsel, Paul Frohman, Esq., stated that his client would not defend, indemnify and hold 5 LLC harmless, pursuant to the contract (*id.*, ¶ 17).

On March 20, 2009, due to Friedland's failure to honor its contract with 5 LLC without reservation of rights or pre-condition, 5 LLC commenced the third-party action against Friedland and Meer. The third-party complaint asserts eight causes of action – breach of contract; contribution; fraud; breach of the implied covenant of good faith and fair dealing; breach of loyalty; breach of fiduciary duty; unjust enrichment; and alter-ego liability.

Analysis

1. ***Breach of Contract***

In its first cause of action, 5 LCC alleges that third-party defendants breached the Brokerage Agreement, the October Agreement and the April Agreement in two respects: (1) their failure to pay Consultants its claimed commission of $847,399.71 constitutes a breach of contract (Third-Party Complaint, ¶ 25), and (2) their failure to hold harmless, defend and indemnify 5 LLC in the main action constitutes a breach of contract (*id.*, ¶ 26).

The Brokerage Agreement is signed by Meer, as president, expressly in the name of Friedland, the corporate entity. Indeed, 5 LLC explicitly alleges that Meer, "as President of [Friedland] entered into the [Brokerage Agreement]" (*id.*, ¶ 4). The October Agreement is signed by another person only in the name of the corporation, and it authorizes 5 LLC to retain $110,778.23 as collateral payable in the event it is adjudicated that 5 LLC is indebted to Consultants in the main action. The April Agreement is signed by both third-party defendants as guarantors limited to the amount of $110,778.23, which is held by 5 LLC, and payable only in the event it is adjudicated that 5 LLC is indebted to Consultants. The Brokerage Agreement is the only one of the three agreements that contains an indemnification clause.

Third-party defendants contend that the breach of contract cause of action must be dismissed against Meer. When an agent acts on behalf of a disclosed principal, the agent will not be personally liable for a breach of contract, unless there is clear and explicit evidence

of the agent's intention to be personally bound (*see Savoy Record Co. v Cardinal Export Corp.*, 15 NY2d 1, 4 [1964]; *accord Anderson v Pods, Inc.*, 70 AD3d 820 [2d Dept 2010]). Because the third-party complaint alleges that Meer signed the Brokerage Agreement for his disclosed corporate principal, he cannot be personally liable for the alleged breach of contract (*see Savoy Record Co.*, 15 NY2d at 4-5). In addition, he cannot be liable for the alleged breach of the October Agreement, which he did not sign, and to which he was not a party (*see Black Car & Livery Ins., Inc. v H&W Brokerage, Inc.*, 28 AD3d 595, 595 [2d Dept 2006]; *La Barte v Seneca Resources Corp.*, 285 AD2d 974, 975 [4th Dept 2001]).

5 LLC does not allege that any contract exists pursuant to which Meer personally agreed to indemnify 5 LLC, or to guarantee Friedland's indemnification. Thus, Meer's contingent personal liability could arise only from the limited guaranty in the April Agreement, pursuant to which Meer agreed to personally guarantee to 5 LLC the amount of $110,778.23 in the event of an adjudication in Consultants' favor. However, 5 LLC does not allege in this action that Meer breached that guaranty. As such, the breach of contract cause of action against Meer must be dismissed. Moreover, because, as set forth below, the remainder of the causes of action are being dismissed, the entire complaint is dismissed as against Meer.

With respect to Friedland's contractual liability, 5 LLC alleges that the failure to pay Consultants' commission constitutes a breach of the Brokerage Agreement. The first cause

of action does not allege any promise running from Friedland to 5 LLC which was breached by the conduct alleged therein. Rather, it merely alleges a breach by reason of Friedland's failure to pay Consultants' commission. However, Consultants was neither a party to the Brokerage Agreement, nor a third-party beneficiary of that agreement, which was entered into long before Consultants became an actor in the leasing transaction at issue. A contracting party does not owe a duty to a non-contracting party, unless the third party was a beneficiary thereof (*Decolator, Cohen & DiPrisco, LLP v Lysaght, Lysaght & Kramer, P.C.*, 304 AD2d 86 [1st Dept 2003]; *Perkins v Cosmopolitan Care Corp.*, 308 AD2d 437 [2d Dept 2003], *lv denied* 2 NY3d 704 [2004]). Accordingly, the branch of the first cause of action seeking damages for breach of contract for failure to pay Consultants' commission is dismissed.

However, the branch of the first cause of action alleging that Friedland's failure to hold harmless, defend and indemnify Consultants constitutes a breach of the Brokerage Agreement does state a cause of action. Third-party defendants claim that this branch of the breach of contract cause of action must be dismissed because "on March 25, 2009 this Court ruled from the bench that 5 LLC may not claim that Friedland Realty, Inc. failed and refused to defend it in the main action" (Third-Party Defs Mem., at 4). Third-party defendants are incorrect. On March 5, 2009, this court heard oral argument on an order to show cause dealing with a separate issue. Contrary to third-party defendants' claims, during this

argument, this court did not make any rulings with respect to the scope of third-party defendants' contractual obligations, or whether it fulfilled those obligations.

Moreover, the Brokerage Agreement unequivocally requires Friedland to defend and indemnify 5 LLC in case of a lawsuit. 5 LLC alleges that, to date, Friedland has failed to do so, arguing that 5 LLC is incorrect in its interpretation of the Brokerage Agreement. These allegations clearly state a cause of action for breach of the indemnification provisions of the Brokerage Agreement. Accordingly, third-party defendants' motion to dismiss this branch of the breach of contract cause of action is denied.

2. *Contribution*

In the second cause of action, 5 LLC seeks recovery of an alleged economic loss as contribution, asserting that "if third-party plaintiff is found to be liable to the plaintiff, and if complete indemnity is not granted in furtherance of the first cause of action [for breach of contract] ... then third-party plaintiff is, nevertheless, entitled to contribution from third-party defendants in proportion to the relative degrees of wrongdoings" between 5 LLC and third-party defendants (Third-Party Complaint, ¶ 29).

However, it is well established that contribution is not available for "purely economic loss resulting from a breach of contract," and that thus, a defendant may not seek contribution from other defendants where the alleged tort is essentially a breach of contract claim (*Board of Educ. of Hudson City School District v Sargent, Webster, Crenshaw & Folley*, 71 NY2d

21, 26 [1987]; *Bleecker St. Health & Beauty Aids, Inc. v Granite State Ins. Co.*, 38 AD3d 231, 233 [1st Dept 2007]).

The "determining factor as to the availability of contribution is not the theory behind the underlying claim but the measure of damages sought" (*Rockefeller University v Tishman Constr. Corp. of New York*, 240 AD2d 341, 343 [1st Dept], *lv denied* 91 NY2d 803 [1997]). Thus, where a plaintiff's direct claims seek only the contractual benefit of its bargain, contribution is unavailable (*Board of Educ. of Hudson City School District v Sargent, Webster, Crenshaw & Folley*, 71 NY2d at 28; *Trump Village Section 3, Inc. v New York State Hous. Fin. Agency*, 307 AD2d 891, 897 [1st Dept], *lv denied* 1 NY3d 504 [2003]).

The allegations of the complaint make clear that 5 LLC is seeking only the contractual benefit of its bargain. Although 5 LCC contends that its claim for contribution is based upon third-party defendants' "negligence and failure to comply with the standards of care owed to 5 LLC" (7/23/09 Hoffman Aff., ¶ 17), the third-party complaint does not contain a cause of action for negligence. Thus, the contribution claim must be dismissed.

3. *Fraud*

In the third cause of action, 5 LLC alleges a claim for fraud in the inducement and deceit.

It is well settled that "[a] fraud claim that only restates a breach of contract claim may not be maintained" (*Orix Credit Alliance, Inc. v R.E. Hable Co.*, 256 AD2d 114, 115 [1st

Dept 1998]; *see also Ross v DeLorenzo*, 28 AD3d 631, 636 [2d Dept 2006] ["'A cause of action alleging fraud does not lie where the only fraud claim relates to a breach of contract'"] [citation omitted]; *Martian Entertainment, LLC v Harris*, 12 Misc 3d 1190[A], 2006 NY Slip Op 51517[U], *5 [Sup Ct, NY County 2006] ["A claim for fraud that merely states a breach of contract claim may not be maintained"]). To sustain a fraud claim arising from a contractual relationship, the material misrepresentation must concern "an intention to perform a duty which is collateral or extraneous to the purported contract between the parties" (*Marlowe v Ferrari of Long Island, Inc.*, 61 AD3d 645, 646 [2d Dept 2009] [citation omitted]; *see also Krantz v Chateau Stores of Canada Ltd.*, 256 AD2d 186, 187 [1st Dept 1998]).

5 LLC's fraud cause of action consists only of bald allegations that third-party defendants acted fraudulently when they allegedly failed to perform their obligations under the Brokerage Agreement. Specifically, 5 LLC alleges that "[t]hird-party defendants intentionally made material misrepresentations to third-party plaintiff concerning events and occurrences arising from the Brokerage Agreement and concerning transactions arising from the rental of the Property" (Third-Party Complaint, ¶ 32) that they knew were false (*id.*, ¶ 33), and that were made to induce 5 LLC to enter into the Lease with Nokia and to release commissions (*id.*, ¶¶ 34-36). 5 LLC fails, however, to allege that third-party defendants made any misrepresentations that are collateral or extraneous to the Brokerage Agreement,

or seek relief for a breach of any duty that is independent of any obligations that third-party defendants may have had under the Brokerage Agreement. Moreover, 5 LLC seeks precisely the same dollar amount in its fraud claim as it seeks in its contract claim (*see* Third-Party Complaint, Wherefore Clause, ¶ [b]).

Accordingly, because the fraud cause of action is based on the same allegations as set forth in the breach of contract cause of action, third-party defendants are entitled to dismissal of this cause of action (*see e.g. New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995] [affirming dismissal of fraud claim, where plaintiff alleged "nothing more than a breach of the contract and any covenants implied"]; *Contacare, Inc. v CIBA-Geigy Corp.*, 49 AD3d 1215, 1216 [4th Dept], *lv denied* 10 NY3d 714 [2008] [cause of action for fraud, which was based on same allegations as cause of action for breach of contract, was subject to dismissal as duplicative]).

4. *Breach of the Implied Covenant of Good Faith and Fair Dealing*

In its fourth cause of action, 5 LLC contends that "[t]hird-party defendants' misrepresentations throughout several transactions arising from the Lease constitute a breach of the implied covenant of good faith and fair dealing" contained in the Brokerage Agreement, the April Agreement and the October Agreement (Third-Party Complaint, ¶ 44).

This cause of action lacks merit. New York courts do not recognize breach of the implied duty of good faith and fair dealing as a claim distinct from breach of contract. Under

New York law, there is no separate cause of action for breach of the implied duty of good faith and fair dealing because it "'is merely a breach of the underlying contract'" (*Commerce and Indus. Ins. Co. v U.S. Bank Natl. Assn.*, 2008 WL 4178474, * 3 [SD NY 2008] [citation omitted]; *see also TeeVee Toons, Inc. v Prudential Sec. Credit Corp., L.L.C.*, 8 AD3d 134, 134 [1st Dept 2004] [affirming dismissal of claim for breach of the implied covenant of good faith because it was "redundant" of breach of contract claim]; *Triton Partners LLC v Prudential Sec. Inc.*, 301 AD2d 411, 411 [1st Dept 2003] [same]). This cause of action is "duplicative of the [underlying] cause of action for breach of contract," and must be dismissed (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 320 [1995]).

5. *Breach of Loyalty and Breach of Fiduciary Duty*

In the fifth and sixth causes of action, 5 LLC alleges two separate causes of action for breach of loyalty and breach of fiduciary duty as if they are separate and distinct obligations. In fact, they are, by definition, one and the same. Fidelity and loyalty are synonymous words (*see* Webster's Ninth New Collegiate Dictionary). Moreover a fiduciary duty includes an obligation of loyalty (*Dubbs v Stribling & Assoc.*, 96 NY2d 337, 340 [2001] "it is well settled that a real estate broker is a fiduciary with a duty of loyalty and an obligation to act in the best interests of the principal"]).

5 LLC's allegation that third-party defendants owed it a fiduciary duty or duty of loyalty is without legal or factual basis. Generally, a cause of action for breach of fiduciary

duty that is merely duplicative of a breach of contract claim cannot stand (*Centro Empresarial Cempresa S.A. v. America Movil, S.A.B. de C.V.*, ___ AD3d ___, 2010 NY Slip Op 04719 [1st Dept 2010]). The only duty owed by third-party defendants to 5 LLC was a contractual one arising out of the Brokerage Agreement. Thus, 5 LLC's fifth and sixth causes of action are duplicative of its breach of contract claim. The claims fail to allege breach of any fiduciary duty or duty of loyalty independent of the contract itself, and must be dismissed (*see Morgenroth v Toll Bros., Inc.*, 60 AD3d 596 [1st Dept 2009] [shareholders' breach of fiduciary duty claim was precluded as duplicative of breach of contract claim due to lack of allegations of breach of any fiduciary duty independent of contract itself]; *AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 40 AD3d 392, 394 [1st Dept 2007], *affd as mod* 11 NY3d 146 [2008] [affirming dismissal of breach of fiduciary duty claim as "essentially duplicative of the claims for breach of contract"]).

6. *Unjust Enrichment*

In its seventh cause of action, 5 LLC asserts a claim for unjust enrichment, alleging that third-party defendants "fraudulently obtained funds from third-party plaintiff that it was not otherwise entitled to possess" (Third-Party Complaint, ¶ 55). In this cause of action, 5 LLC seeks the identical amount of damages that it seeks in its breach of contract cause of action (*see* Third-Party Complaint, Wherefore Clause, ¶ [g]).

However, under New York law, the existence of a written contract covering the particular subject matter of the claims asserted precludes recovery in quasi contract (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987] ["The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter"]; *see also Goldstein v CIBC World Markets Corp.*, 6 AD3d 295, 296 [1st Dept 2004] ["A claim for unjust enrichment, or quasi contract, may not be maintained where a contract exists between the parties covering the same subject matter"]). Thus, because 5 LLC has alleged the existence of a written contract governing the relationship between the parties, it may only recover under that contract, and thus, this cause of action must be dismissed (*see, e.g., Sheiffer v Shenkman Capital Mgt., Inc.*, 291 AD2d 295, 295 [1st Dept 2002] ["the existence of a valid and enforceable written contract governing the disputed subject matter precludes plaintiffs from recovering in quantum meruit"]; *Scavenger, Inc. v GT Interactive Software Corp.*, 289 AD2d 58, 59 [1st Dept 2001] ["since the matters here in dispute are governed by an express contract, defendant's counterclaim for unjust enrichment was properly found untenable"]).

7. *Alter Ego Liability*

In the eighth cause of action, 5 LLC seeks to hold Meer personally liable for the acts of Friedland by piercing the corporate veil. However, New York "'does not recognize a

separate cause of action to pierce the corporate veil'" (*Hart v Jassem*, 43 AD3d 997, 998 [2d Dept 2007] [citation omitted]; *9 East 38th Street Associates, L.P. v George Feher Assocs., Inc.*, 226 AD2d 167 [1st Dept 1996]).

Moreover, a party seeking to pierce the corporate veil must establish that "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*Matter of Morris v New York State Dept. of Taxation and Finance*, 82 NY2d 135, 141 [1993]; *see also TNS Holdings, Inc. v MKI Securities Corp.*, 92 NY2d 335, 339 [1998] ["Those seeking to pierce a corporate veil of course bear a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences"]).

The allegations in this cause of action consist solely of the bare conclusory elements of a claim to pierce the corporate veil, bereft of a single fact supporting the claim. These allegations are insufficient to satisfy the heavy burden required for this claim (*see Goldman v Chapman*, 44 AD3d 938, 939 [2d Dept 2007], *lv denied* 10 NY3d 702 [2008] [a bare claim that the corporation was "completely dominated by the owners, or conclusory assertions that the corporation acted as their 'alter ego'" will not give rise to piercing the corporate veil]). Although counsel alleges in his affidavit that Meer repeatedly represented that "he, and he

alone, was entitled to a commission" (*see* 7/23/09 Hoffman Aff., ¶ 80), no such allegation appears in the third-party complaint.

Accordingly, the eighth cause of action is dismissed.

8. *Motion for Sanctions*

5 LLC's motion for sanctions is denied. 5 LCC has failed to demonstrate that the third-party complaint completely lacks merit, especially in light of the fact that the main branch of the breach of contract cause of action is not being dismissed. As such, the imposition of sanctions is not appropriate (*see Grossman v Pendant Realty Corp.*, 221 AD2d 240, 241 [1st Dept 1995], *lv dismissed* 88 NY2d 919 [1996]; *North American Van Lines, Inc. v American Intl. Cos.*, 11 Misc 3d 1076[A], 2006 NY Slip Op 50576[U], *4 [Sup Ct, NY County 2006], *affd* 38 AD3d 450 [1st Dept 2007]).

The court has considered the remaining arguments, and finds them to be without merit.

(Order on Following Page)

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment (Motion Sequence No. 001) is denied; and it is further

ORDERED that the cross motion of defendant Nokia, Inc. for summary judgment dismissing the complaint herein against it (Motion Sequence No. 001) is granted and the complaint is dismissed in its entirety as against Nokia, Inc., with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against 5 LLC, the remaining defendant; and it is further

ORDERED that third-party defendants' motion to dismiss the third-party complaint (Motion Sequence No. 004) is granted to the limited extent that the branch of the first cause of action seeking damages for breach of contract for failure to pay Consultants' commission, and the second, third, fourth, fifth, sixth, seventh and eighth causes of action are severed and dismissed; and it is further

ORDERED that the third-party complaint is dismissed in its entirety as against third-party defendant Gene Meer, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

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ORDERED that the third-party action is severed and continued as to the branch of the first cause of action alleging that the failure of the remaining third-party defendant Friedland Realty, Inc. to hold harmless, defend and indemnify Consultants constitutes a breach of the Brokerage Agreement; and it is further

ORDERED that third-party defendants' motion for the imposition of sanctions is denied.

Dated: New York, New York
August 9, 2010

ENTER:

Hon. Eileen Bransten, J.S.C.