

**Bridgewater Equities, LLC v Dominguez**

2011 NY Slip Op 30011(U)

January 3, 2011

Sup Ct, NY County

Docket Number: 109210/10

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD

PART 31

Index Number : 109210/2010  
 BRIDGEWATER EQUITIES, LLC  
 VS.  
 DOMINGUEZ, FRANCISCO  
 SEQUENCE NUMBER : 001  
 DISMISS

INDEX NO. \_\_\_\_\_  
 MOTION DATE 12.22.10  
 MOTION SEQ. NO. 001  
 MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

**FILED**

Cross-Motion:  Yes  No

JAN 06 2011

Upon the foregoing papers, It is ordered that this motion

NEW YORK  
COUNTY CLERK'S OFFICE

The instant motion (sequence 001) is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the motion of defendants Mehmet A. Capin and Man 371 LLC for an order dismissing the complaint is granted. And it is further

ORDERED that the Complaint is hereby severed and dismissed as against said defendants with costs and disbursements to said defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

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

ORDERED that the remaining parties shall appear for a Preliminary Conference before Justice Carol R. Edmead, Supreme Court, New York County, Part 35, 60 Centre Street, Room 438 on Tuesday, February 15, 2011 at 3:00 p.m.. And it is further

ORDERED that counsel for defendant Man 371 LLC shall serve a copy of this order with notice of entry within twenty (20) days of entry on counsel for all parties.

Dated: 1.3.11

HON. CAROL EDMEAD <sup>J.S.C.</sup>

Check one:  FINAL DISPOSITION,  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

\_\_\_\_\_  
BRIDGEWATER EQUITIES, LLC. X

Plaintiff,

-against-

FRANCISCO DOMINGUEZ, FRANDORA  
ASSOCIATES, MEHMET A. CAPIN,  
MAN 371 LLC, ENRIQUE CRUZ and  
SETH MILLER,

Defendants.

\_\_\_\_\_  
EDMEAD, J.S.C. X

Index No. 109210/10

**DECISION/ORDER**

**FILED**

**JAN 06 2011**

NEW YORK  
COUNTY CLERK'S OFFICE  
X

**MEMORANDUM DECISION**

Defendants Mehmet A. Capin and Man 371 LLC (the Moving Defendants) seek an order pursuant to CPLR 3211 (a)(1) dismissing the complaint based on documentary evidence and/or pursuant to CPLR 3211(a)(7) failure to state a cause of action, or in the alternative for summary judgment pursuant to CPLR 3212.

*Background*

Plaintiff's Complaint asserts that it was recruited by defendant Enrique Cruz (Cruz), who was acting as agent for defendant Frandora Associates (Frandora) to find a buyer for the premises known as 371 Wadsworth Avenue, New York, New York (the Premises). Frandora was the owner of the Premises. Plaintiff asserts that Frandora, defendant Francisco Dominguez (Dominguez) and Cruz contracted with plaintiff to sell the Premises. Further, plaintiff found and presented defendant Seth Miller (Miller) to the seller and the Premises was sold. And, although defendant Man 371 LLC is the corporate name of the purchaser, Miller and Capin are the principal shareholders of said corporation.. Thus Miller did effectively purchase the Premises.

Plaintiff sues the Moving Defendants for breach of a brokerage agreement and unjust enrichment, alleging that a commission was purported paid to either Miller Capin or Cruz.

*Moving Defendants' Contentions*

Capin asserts that he did not receive any commission from Frandora or anyone else with regard to the Premises. Further, defendant Man 371 is a single member limited liability company of which Capin is the sole member. Thus, contrary to plaintiff's allegations, Miller is not, and has never been a principal, shareholder or member of defendant Man 371 LLC.

*Plaintiff's Contentions*

Miller and Capin worked side by side in the purchase of the Premises. Plaintiff introduced Miller to the seller and/or through the seller's contract vendee, Cruz. As such, plaintiff has earned its commission.

A sales commission was paid to either Miller and/or Capin directly as a commission or indirectly as a reduction of the purchase price of the Premises.

Man 371 was created solely for the purchase of the Premises. That Miller's name does not appear therein is in no way dispositive of the issues herein, to wit, that Miller and Capin acted as partners and in collusion to purchase the Premises without plaintiff receiving the \$100,000.00 commission it earned and is owed.

*Discussion*

CPLR 3211 [a] [1]: Defense is founded upon documentary evidence

Pursuant to CPLR 3211 [a] [1], a party may move for judgment dismissing one or more causes of action asserted against him on the ground that "a defense is founded upon documentary evidence." Thus, where the "documentary evidence submitted conclusively establishes a defense

to the asserted claims as a matter of law," dismissal is warranted (*Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 N.E.2d 511 [1994]). The test on a CPLR 3211 [a][1] motion is whether the documentary evidence submitted "conclusively establishes a defense to the asserted claims as a matter of law" (*Scott v Bell Atlantic Corp.*, 282 AD2d 180, 726 NYS2d 60 [1<sup>st</sup> Dept 2001] citing *Leon v Martinez*, 84 NY2d 83, 88, *supra*; *IMO Indus., Inc. v Anderson Kill & Olick, P.C.*, 267 AD2d 10, 11, 699 NYS2d 43 [1<sup>st</sup> Dept 1999]).

Where documentary evidence and undisputed facts negate or dispose of the claims in the complaint or conclusively establish a defense, dismissal may be granted pursuant to CPLR 3211[a][1] (*Biondi v Beekman Hill Housing Apt. Corp.*, 257 AD2d 76, 692 NYS2d 304 [1<sup>st</sup> Dept 1999]; *Kliebert v McKoan*, 228 AD2d 232, 43 NYS2d 114 [1<sup>st</sup> Dept 1996]; *Gephardt v Morgan Guaranty Trust Co. of N.Y.*, 191 AD2d 229, 594 NYS2d 248 [1<sup>st</sup> Dept 1993]; *Juliano v McEntee*, 150 AD2d 524, 541 NYS2d 232 [1<sup>st</sup> Dept 1989]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 N.E.2d 511 [1994]; *Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1<sup>st</sup> Dept 2002]).

In view of the documentary evidence, to wit, the Limited Liability Company Operating Agreement of Man 371 LLC, dismissal of the Complaint as to the Moving Defendants is warranted. (*Igarashi v Higashi*, 289 AD2d 128, 735 NYS2d 33 [1<sup>st</sup> Dept 2001] While pleadings should be liberally construed on a motion to dismiss, claims "flatly contradicted by documentary evidence" must be rejected], citing *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1<sup>st</sup> Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279, 675 NE2d 1232 [1996]).

CPLR 3211 [a] [7]: Dismiss for Failure to State a Cause of Action

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR §3026). On a motion to dismiss made pursuant to CPLR § 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]). However, in those circumstances where the bare legal conclusions and factual allegations are "flatly contradicted by documentary evidence," they are not presumed to be true or accorded every favorable inference (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861, 731 NE2d 577 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279, 675 NE2d 1232 [1996], and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43

NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]; *WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d 257, 259, 590 NYS2d 460 [1<sup>st</sup> Dept], *lv denied* 81 NY2d 709, 599 NYS2d 804, 616 NE2d 159 [1993] [CPLR 3211 motion granted where defendant submitted letter from plaintiff's counsel which flatly contradicted plaintiff's current allegations of prima facie tort]).

Plaintiff fails to allege that it had any agreement with the Moving Defendants. Plaintiff fails to allege that it acted on behalf of the Moving Defendants. And it is no more than a bald allegation that defendant Capin [the purchaser] received a commission. As such, plaintiff's second cause of action for unjust enrichment as against the Moving Defendants is unable to be maintained.

The Moving Defendants' application for attorney's fees and sanctions is denied. 22 NYCRR § 130-1.1 gives the Court, in its discretion, authority to award costs "in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees" and/or the imposition of financial sanctions upon a party or attorney who engages in frivolous conduct." 22 NYCRR § 130-1.1 (c) states that conduct is frivolous if:

- (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
- (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
- (3) it asserts material factual statements that are false.

Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall

consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party. While the Moving Defendants' motion to dismiss plaintiff's Complaint was granted, that judgment, in and of itself, does not necessarily automatically entitle them to sanctions herein *Dunn v. Khan* 19 Misc.3d 1121(A), 862 N.Y.S.2d 814 (Table) N.Y.Sup.,2008. There is an insufficient showing the plaintiff's claims asserted against the Moving Defendants in the Complaint were asserted completely without basis or a reasonable assumption.

### **Conclusion**

Based on the foregoing, it is hereby

ORDERED that the motion of defendants Mehmet A. Capin and Man 371 LLC for an order dismissing the complaint is granted. And it is further

ORDERED that the Complaint is hereby severed and dismissed as against said defendants with costs and disbursements to said defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

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

ORDERED that the remaining parties shall appear for a Preliminary Conference before Justice Carol R. Edmead, Supreme Court, New York County, Part 35, 60 Centre Street, Room

438 on Tuesday, February 15, 2011 at 3:00 p.m.. And it is further

ORDERED that counsel for defendant Man 371 LLC shall serve a copy of this order with notice of entry within twenty (20) days of entry on counsel for all parties.

Dated: January 3, 2011



Carol Robinson Edmead, J.S.C.

**HON. CAROL EDMEAD**

**FILED**

JAN 06 2011

NEW YORK  
COUNTY CLERK'S OFFICE