

<b>Blue Rock Props., LLC v Mann</b>
2011 NY Slip Op 30713(U)
March 24, 2011
Sup Ct, NY County
Docket Number: 603200/09
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON  
Justice

PART 55

Blue Rock Properties

- v -

Maurice Mann, et al.

INDEX NO. 603202/09  
MOTION DATE 10/25/10  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 6 were read on this motion to/for dismiss

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits (filed w/ motion 02)  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
<u>1-3</u>
<u>4-6</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the memorandum decision and order entered heret, ~~which also is~~ the decision in motion 02.

N.B. — compliance conference scheduled for 5/2/11 at 11 AM.

**FILED**

MAR 25 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 3/24/11

JANE S. SOLOMON J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 55

-----X

BLUE ROCK PROPERTIES, LLC,

Plaintiff,

Index No. 603200/09

-against-

MAURICE MANN, individually and  
as General Partner of MANN REALTY  
ASSOCIATES, and APTHORP  
ASSOCIATES LLC,

DECISION and ORDER

**FILED**

Defendants.

**MAR 25 2011**

-----X

SOLOMON, J.:

NEW YORK  
COUNTY CLERK'S OFFICE

In this breach of contract action, motion sequence 001 and 002 are consolidated for disposition.

In motion sequence 001, defendant Apthorp Associates LLC (Apthorp Associates), moves to dismiss the third and fourth causes of action on the grounds of documentary evidence (CPLR 3211[a][1]), and failure to state a cause of action (CPLR 3211[a][7]).

In motion sequence 002, defendants Maurice Mann (Mann) and Mann Realty Associates (Mann Realty, together, the Mann Defendants) move for summary judgment (CPLR 3212) dismissing the first, second, fourth, and fifth causes of action in the complaint.

Plaintiff Blue Rock Properties, LLC cross moves for partial summary judgment as to the Mann Defendants' liability on its first cause of action, an order compelling defendants to comply with plaintiff's discovery requests, and an award of

attorney's fees.

The complaint alleges the following: Plaintiff is a Delaware limited liability company that is a licensed real estate broker doing business in the State of New York. It negotiates deals with respect to sophisticated and complex real estate transactions. Mann Realty is a New York general partnership that is engaged in negotiating various real estate transactions. On February 14, 2007, plaintiff entered into an agreement with the Mann Defendants (Agreement) under which Plaintiff would receive commissions for successfully pursuing funding for a residential real estate project in Manhattan, located at West 79<sup>th</sup> Street and Broadway, concerning the storied apartment building known as the Apthorp (Apthorp Project).

Under the Agreement, Plaintiff is entitled to receive a commission in the amount of \$750,000 for mezzanine financing up to \$135 million, 1.5% on the next \$20 million, and 2% on all funds in excess of \$155 million, if received from Apollo Real Estate Advisors or its affiliates (Apollo Fees). The Agreement further provides that Plaintiff is to receive 2.5% of all equity (Equity Fees) raised from "Vector and/or any other sources" for the Apthorp Project, payable at closing of all monies loaned or invested pursuant to the Agreement.

The complaint recites that on July 3, 2008, Plaintiff received \$2,125,000 in Apollo and Equity Fees pursuant to the

terms of the Agreement, which apparently is not in dispute. However, Plaintiff claims that Africa Israel (an entity that is not described in the complaint, but presumably is an investor) invested \$56 million in the Apthorp Project, but defendants paid Equity Fees based only on a \$55 million investment. Plaintiff argues that it is entitled to a 2.5% commission on the remaining \$1 million, or \$25,000. Next, Plaintiff contends that the Mann Defendants obtained an additional \$15 million in equity financing from other sources of which it is entitled to 2.5% in Equity Fees, or \$375,000. Plaintiff also alleges that the Mann Defendants are agents for Apthorp Associates, and that the Agreement was executed for the benefit of Apthorp Associates. No other explanation is given of the relationship of Apthorp Associates to the dispute.

Plaintiff avers that it has fulfilled its obligations according to the terms of the Agreement and, despite its demands, defendants have failed to pay what is due. As a result, Plaintiff commenced this lawsuit, asserting five causes of action for: breach of contract, an accounting from Apthorp Associates, unjust enrichment against Apthorp Associates, unjust enrichment against the Mann Defendants, and breach of fiduciary duty. Plaintiff also seeks interest on the sums due and attorney's fees.

As best can be discerned by reading between the lines

(because none of the parties' submissions meaningfully describe the relationships between Apthorp Associates and the Mann Defendants), Mann Realty sought financing to purchase the Apthorp building, and Apthorp Associates is a single purpose entity it created for that venture. A search of the New York Secretary of State website shows that Apthorp Associates is a Delaware limited liability corporation that filed with the New York Secretary of State on February 2, 2007.

#### **APTHORP ASSOCIATES' MOTION**

Apthorp Associates argues that it is entitled to dismissal of the third and fourth causes of action for an accounting and unjust enrichment because: (1) Plaintiff has failed to establish that there was a fiduciary or trust relationship between the parties to support an equitable accounting claim; and (2) documentary evidence establishes that it was not a party to the Agreement, so there can be no resultant harm or unjust enrichment upon which Plaintiff could have anticipated any form of compensation. The documentary evidence is the February 14, 2007 Agreement, which states that it "is a restatement of our commission agreement" (Apthorp Associates Motion, Ex B); and an earlier agreement, dated January 8, 2007 (January 2007 Agreement), executed by Blue Rock and Mann Realty that more specifically describes the commission rates. The complaint clearly refers to the two documents, neither of which

makes any mention of Apthorp Associates. Also, the complaint does not allege any factual basis for the unjust enrichment claim. These causes of action are the only ones directed against Apthorp Associates, so if the motion is granted, the complaint will be dismissed against Apthorp Associates in its entirety.

Plaintiff counters that: (1) in the absence of an Agreement with Apthorp Associates, it is entitled to plead a cause of action for unjust enrichment given the circumstances surrounding the parties' transactions; (2) there was a second round of equity raised by Apthorp Associates from Africa Israel, and if it is determined that there was no contract with the respect to that second round of equity, then Plaintiff will have an unjust enrichment claim; and (3) Mann Defendants are agents of Apthorp Associates, and as an undisclosed principal, Apthorp Associates is liable to Plaintiff for the benefit it received.

On a motion to dismiss made pursuant to CPLR 3211, the complaint is to be construed liberally and the Plaintiff is afforded the "benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). While a plaintiff's allegations are presumed true on a motion to dismiss, conclusory allegations "consisting of bare legal conclusions" are insufficient to survive a motion to dismiss (see *Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233, 233 [1<sup>st</sup> Dept 1994]). However, if, from the facts alleged in the complaint and

the inferences which can be drawn from the facts, the court determines that the pleader has a cognizable cause of action, the motion must be denied (*Stucklen v Kabro Assoc.*, 18 AD3d 461 [2d Dept 2005]).

Plaintiff's third cause of action seeks an accounting from Apthorp Associates. In order to sustain a valid common-law cause of action for an accounting, a plaintiff must plead,

[T]he existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest. An allegation of wrongdoing is not an indispensable element of a demand for an accounting where the complaint indicates a fiduciary relationship between the parties or some other special circumstance warranting equitable relief

(*Adam v Cutner & Rathkopf*, 238 AD2d 234, 242 [1<sup>st</sup> Dept 1997] [internal quotation marks and citation omitted]). However, a plaintiff is not entitled to an accounting in equity where the amount sought is known (see 1 NY Jur 2d, Accounts and Accounting § 34).

Plaintiff's third cause of action fails to set forth sufficient facts to state a valid claim for an accounting. The complaint alleges that Mann Defendants were the agents of Apthorp Associates and executed the Agreement on behalf of Apthorp Associates (and for the benefit of Mann), and as a result, Plaintiff is entitled to an accounting against Apthorp of all monies raised pursuant to the Agreement and for fees due and owing to Plaintiff in the amount of \$400,000. Plaintiff avers

that the parties worked together for a long period of time and that their relationship generated large sums of money, thereby establishing a fiduciary relationship (Affidavit of Steven Novick, dated September 3, 2010) (Novick Aff.). However, said allegations are insufficient to support its claim that Apthorp Associates owed Plaintiff a fiduciary duty. Plaintiff's right to commission under the Agreement creates a contractual, not a fiduciary, obligation. "[A] cause of action alleging breach of a fiduciary duty, which, as here, is merely duplicative of a breach of contract claim, cannot stand" (see *Hylan Elec. Contr., Inc. v MasTec N. Am., Inc.*, 74 AD3d 1148, 1150 [2d Dept 2010]). Additionally, "an arms-length business relationship does not give rise to a fiduciary obligation" (*WIT Holding Corp. v Klein*, 282 AD2d 527, 529 [2d Dept 2001]).

When a plaintiff merely recites that the defendant owes the plaintiff a fiduciary duty, and the agreement between the parties sets forth the details of the relationship, then plaintiff is unable to plead a special relationship to support its fiduciary claims (see *L. Magarian & Co. v Timberland Co.*, 245 AD2d 69 [1<sup>st</sup> Dept 1997]). Accordingly, Plaintiff has not supported its claim that Apthorp Associates owes it a fiduciary duty.

Plaintiff's fourth case of action is for unjust enrichment against all defendants for the \$400,000 in unpaid

fees. A claim for unjust enrichment requires allegations of: "(1) the performance of the services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services" (*Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 108 [1<sup>st</sup> Dept 2002] [internal quotation marks and citation omitted]).

"The essence of unjust enrichment is that one party has received money or a benefit at the expense of another. . . . A cause of action for money had and received sounds in quasi contract and arises when, in the absence of an agreement, one party possesses money that in equity and good conscience it ought not retain"

(*Goldman v Simon Prop. Group, Inc.*, 58 AD3d 208, 220 [2d Dept 2008][citation & internal quotation marks omitted]).

The complaint alleges that "each of the defendants was enriched by reason of his or its conduct, which enrichment was at Plaintiff's expense" (Complaint, ¶ 24), and by which, Plaintiff is entitled to damages of \$400,000 in equity fees and commissions.

Aphorp Associates argues that this cause of action should be dismissed based on documentary evidence. Dismissal based on documentary evidence is warranted where the evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (see *Fortis Fin. Serv. v Fimat Futures USA*, 290 AD2d 383, 383 [1<sup>st</sup> Dept 2002]).

The documentary evidence demonstrates the existence of

a valid Agreement between Plaintiff and Mann Realty, to which Apthorp Associates was not a signatory. Generally, "the existence of a valid and enforceable contract governing a particular subject matter ... precludes recovery in quasi contract" (*Goldman v Simon Prop. Group, Inc.*, 58 AD3d at 220). However, "where there is a bona fide dispute as to the existence of a contract or the application of a contract in the dispute in issue, a plaintiff may proceed upon a theory of quasi contract as well as breach of contract, and will not be required to elect his or her remedies" (*id.*).

The Agreement directly governs Equity Fees and commissions. Its existence and relevance is not challenged; only the monetary values collected under the Agreement are contested. As the Agreement relates directly to the dispute, Plaintiff's cause of action cannot proceed on a theory of quasi-contract against Apthorp Associates (*Goldman v Simon Prop. Group, Inc.*, 58 AD3d 208, *supra*).

To recover in unjust enrichment from a particular defendant,

"a plaintiff must demonstrate that services were performed for the defendant resulting in its unjust enrichment. It is not enough that the defendant received a benefit from the activities of the plaintiff; if services were performed at the behest of someone other than the defendant, the plaintiff must look to that person for recovery"

(*Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*,

296 AD2d at 108). [internal citations omitted]). It is not enough that Apthorp Associates may have received a benefit from the activities of Plaintiff, when those services were performed at the behest of Mann Realty. The complaint contains no facts to show that Plaintiff had any reasonable expectation of compensation from Apthorp Associates, or any other basis for finding that Apthorp Associates was unjustly enriched (*id.*). Accordingly, the unjust enrichment claim against Apthorp Associates also is dismissed.

#### **THE MANN DEFENDANTS' MOTION**

The Mann Defendants argue that they are entitled to summary judgment dismissing the first, second, fourth and fifth causes of action as against them because: (1) documentary evidence demonstrates that they fulfilled all financial obligations to Plaintiff under to the commission agreement; and (2) Plaintiff has not demonstrated that it raised additional equity from other sources in the amount of \$15 Million.

Plaintiff argues that summary judgment is inappropriate because: (1) Mann Defendants rely on one undated closing statement to determine the commissions owed; and (2) Plaintiff has sufficiently pled all the elements to support causes of action for breach of contract, an accounting, unjust enrichment, and piercing the corporate veil.

A party seeking summary judgment must establish a prima

facie entitlement to judgment as a matter of law. The motion must be denied if the party seeking summary judgment fails to do so (see, *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

The Mann Defendants have not established evidence sufficient to warrant dismissal of the breach of contract cause of action. They argue that all fees due were paid (Aff. of Maurice Mann, paragraphs 7, 9). Mann alleges that the additional funds sought by Plaintiff relate to financing obtained after the Apthorp Project closed (*id.*, paragraph 8), and because the Agreement states that Plaintiff will be payable at the closing, post-closing financing cannot be within the scope of the Agreement terms. While this argument seems sensible, Plaintiff argues that the Agreement did not have a time limit for financing obtained from Africa Israel, and since the Agreement does not specify that it applies only to pre-closing financing, a fact issue is presented. Moreover, although the Mann Defendants provide a copy of the closing statement, it is not dated, and Mann does not say when the closing occurred, so there is a question of fact as to whether the closing occurred before the additional financing from Africa Israel.

Concerning Plaintiff's second cause of action for an accounting, the Mann Defendants are entitled to summary judgment. As stated above, a breach of fiduciary duty claim will not stand when, as here, there is an agreement covering the precise subject

matter of the alleged breach of the fiduciary duty (*Hylon Elec Contractors, Inc. v Mas Tec N.A.*, 74 AD3d 1148, *supra*).

Summary judgment is also granted in favor of the Mann Defendants on the unjust enrichment cause of action. Mann Realty submitted documentary evidence demonstrating the existence of a valid Agreement between it and Plaintiff. A quasi-contract cause of action cannot stand where a valid contract exists (*Goldman v Simon Prop. Group, Inc.*, 58 AD3d 208, *supra*).

Next, summary judgment is granted in favor of Mann on the fifth cause of action, which seeks to pierce the corporate veil and hold him personally liable for breach of the Agreement.

"In general, 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 each domination was used to commit a fraud or wrong against the plaintiff which resulted in the plaintiff's injury'"

(*AHA Sales, Inc. v Creative Bath Prods., Inc.*, 58 AD3d 6, 23-24 [2d Dept 2008]).

"Factors to be considered . . . include failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use. Other relevant factors that must be included in the calculus are the use of 'common office space, address and telephone numbers of corporate entities . . . [and] the amount of business discretion displayed by the allegedly dominated corporation'"

(*id.* at 24) [internal citations omitted]. The doctrine applies to limited liability companies (*Retropolis, Inc. v 14<sup>th</sup> St. Dev. LLC*, 17 AD3d 209, 210 [1<sup>st</sup> Dept 2005]).

Plaintiff alleges that Mann is the General Partner and the alter ego of Mann Realty (Novick Aff.). The complaint states that Mann used Mann Realty for his own personal purposes, co-mingled personal funds with Mann Realty, failed to keep Mann Realty's records and documents, failed to hold meetings, disregarded all corporate formalities, and inadequately capitalized, dominated, and treated Mann Realty as not having a separate existence of its own. It further alleges that, in breach of his fiduciary duty, Mann caused payments to be used for his own benefit and to the detriment of plaintiff. While this recitation of accusations in the complaint sounds comprehensive, there are no specific facts in support any of these claims, which amount to "mere bare-bones allegations . . . completely devoid of any sufficient particularized support, as required" (*Retropolis, Inc. v 14<sup>th</sup> St. Dev. LLC*, 17 AD3d 211).

#### **PLAINTIFF'S CROSS MOTION**

Plaintiff cross moves for summary judgment on its first cause of action for breach of contract, on the issue of liability. There is opposing testimony in the record as to Plaintiff's entitlement to additional compensation. As discussed above, there are material issues of fact with respect to Plaintiff's entitlement to payment, so the cross motion is denied on the issue of liability on the breach of contract claim.

As for Plaintiff's motion to compel the Mann Defendants' production of certain documents, pursuant to CPLR 3101 (a), a party is entitled to full disclosure of all evidence

"material and necessary in the prosecution or defense of an action" (CPLR 3101[a]; *Kavanagh v Ogden Allied Maintenance Corp.*, 92 NY2d 952, 954 [1998]). The Mann Defendants argue that they were awaiting the outcome of its summary judgment motion prior to answering plaintiff's discovery requests. Following this decision and order, Mann Realty must now respond to Plaintiff's discovery requests. A compliance conference is scheduled below to address all outstanding issues.

Finally, Plaintiff's request for attorney's fees is denied because it has not demonstrated entitlement to such an award (*Mount Vernon City School Dist. v Nova Cas. Co.*, 78 AD3d 1028 [2d Dept 2010][attorney fees awarded pursuant to agreement, by statute or court rule only]).

Accordingly, it is

ORDERED that the motion (001) by defendant Apthorp Associates LLC to dismiss is granted, and the complaint is severed and dismissed as against it, and the Clerk shall enter judgment accordingly, with costs and disbursements to Apthorp Associates as taxed; and it further is

ORDERED that the motion (002) by defendants Maurice Mann and Mann Realty Associates for summary judgment is granted to the extent that the second, fourth, and fifth causes of action are dismissed, and the complaint is severed and dismissed as against Maurice Mann, and the Clerk shall enter judgment accordingly, with costs and disbursements to Maurice Mann as

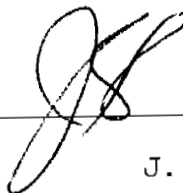
taxed; and it further is

ORDERED that the plaintiff's cross motion for partial summary judgment is denied, and that part of the motion seeking to compel disclosure is granted to the extent that Mann Realty is directed to respond to Plaintiff's demand for discovery and inspection annexed to Exhibit 5 of the cross-motion; and it further is

ORDERED that counsel for the remaining parties shall appear for a compliance conference in Part 55, 60 Centre Street, Room 432, New York, NY, on May 2, 2011 at 11 AM.

Dated: March 24, 2011

ENTER:



J.S.C.

**JANE S. SOLOMON**

**FILED**

**MAR 25 2011**

**NEW YORK  
COUNTY CLERK'S OFFICE**