

**Saunders v CFG/AGSCB Factory, L.L.C.**

2011 NY Slip Op 32607(U)

September 28, 2011

Supreme Court, New York County

Docket Number: 106884/11

Judge: Joan M. Kenney

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

JOAN M. KENNEY

PRESENT.

J.S.C.

PART 8

Index Number : 106884/2011

SAUNDERS, JAMES

vs

CFG/AGSCB FACTORY, L.L.C.

Sequence Number : 001

DISM ACTION/ INCONVENIENT FORUM

INDEX NO. 106884/11

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. 9/12/11

The following papers, numbered 1 to 13 were read on this motion to/for Dismiss + Cross-motion

PAPERS NUMBERED

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

1-5

Answering Affidavits — Exhibits /Cross Motion

6-11

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

12-13

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION**

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

**FILED**

OCT 07 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 9/28/11

  
**JOAN M. KENNEY** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS Part 8

-----X  
JAMES S. SAUNDERS

Plaintiff,

- against -

CFG/AGSCB FACTORY, L.L.C., LIC CROWN  
LEASEHOLD OWNER LLC, and LIC CROWN FEE  
OWNER LLC,

Defendants.  
-----X

**DECISION AND ORDER**

Index Number: 106884/11

Cal.: 9/21/2011

Motion Seq. No.: 001

**FILED**

**KENNEY, JOAN M., J.**

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**OCT 07 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion to dismiss and cross-motion:

**Papers**

Notice of Motion, Affirmation & Exhibits  
Notice of Cross-Motion, Affidavit & Exhibits  
Reply Affirmation & Exhibit

**Numbered**

1-5  
6-11  
12-13

In this breach of contract action, defendants LIC Crown Leasehold Owner LLC, and LIC Crown Fee Owner LLC (collectively, the LIC defendants) seek an Order, pursuant to CPLR 3211, dismissing the pre-answer complaint.

**FACTUAL AND PROCEDURAL BACKGROUND**

Defendants CFG/AGSCB Factory, LLC (CFG) and the LIC defendants were the owners of a commercial building located at 30-00 47th Avenue, Long Island City, New York (the Premises). Plaintiff alleges that, in or around September 13, 1999, defendant CFG, as landlord, entered into a lease (the Lease) with Century Letter Company, Inc. (Century), as tenant, for a portion of the premises for a term beginning on September 14, 1999 and ending on March 31, 2010 (*see* complaint attached as Ex. "A" to notice of motion, ¶ 9). Plaintiff alleges that the LIC defendants are successors-in-interest to CFG's interest in the premises under the Lease (*see id.*, ¶ 17).

Plaintiff James S. Saunders (Saunders) was an associate real estate broker for Douglas Elliman Commercial LLC (DEC) , which co-brokered the Lease with another brokerage firm,

Sholom & Zuckerbrot Realty LLC (Sholom). In his complaint, Saunders claims that the terms and conditions of brokers' fees for DEC and Sholom was expressly acknowledged in a "Broker's Agreement- Lease of Premises" dated in or around October 29, 1999 (the Brokers' Agreement). Pursuant to the Brokers' Agreement, which is not annexed to the motion or cross-motion papers, DEC and Sholom were entitled to an additional fee if the tenant in the Lease exercised a renewal option (*see* complaint, ¶ 13). Century exercised its option to renew the Lease to extend the lease term for an additional five years beginning on April 1, 2010 (*see* complaint, ¶ 15). Saunders claims that, while Sholom was paid the additional broker's fee for the Lease's renewal, DEC was not (*see* complaint, ¶ 18).<sup>1</sup>

As an alleged assignee of DEC (*id.*, ¶ 6), Saunders commenced the instant action in or around June 10, 2011 alleging breach of contract (first cause of action) and unjust enrichment (second cause of action) to recover the additional broker's fees for renewing the Lease.

The LIC defendants allege that, pursuant to an "Assignment and Assumption of Contracts and Telephon/Telcom Agreements (the Assignment), dated December 21, 2000, CFG assigned the lease to non-party 30th Place Holdings, LLC (30th Place). By affirmation of its attorney, Eric S. Horowitz, Esq. (Horowitz affirmation), the LIC defendants allege that, after the commencement of this action, Saunders' attorney mailed a letter, dated August 3, 2011 (the Demand Letter), to non-party 30th Place. The Demand Letter, which is annexed to the notice of motion, states in pertinent part:

"I have learned that in December 2000, [the Lease] was assigned to 30th Place Holdings LLC and that the contractual obligations owed to [DEC] were expressly assumed by your company . . . In light of the foregoing, I demand payment of the commission."

In opposition to the motion-in-chief, Saunders annexes an affidavit from the Chief Executive Officer of Century, Mr. Michael T. Kellog (Mr. Kellog). Mr. Kellog confirms that Century duly exercised its option to renew under the Lease for an additional five years, beginning on April 1, 2010 (*see* Kellog affidavit, ¶ 3). Mr. Kellog further attests that, in or around January 2011, Century was

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<sup>1</sup> Plaintiff alleges that DEC is now known as Milstein Brothers Real Estate LLC with respect to the instant action (*see* complaint, ¶ 6).

notified that the rent should be remitted to the new landlord, 30th Place (see *id.*, ¶ 5). Mr. Kellog attests that, after Century was told to remit rent payments to 30th Place, he was later told to remit rent to “LIC Crown Leaseholder LLC” as the new landlord (see *id.*, ¶ 6). Mr. Kellog now believes that “LIC Crown Leaseholder LLC” is the new owner of the Premises.

It is noted that the LIC defendants do not dispute that they receive rent payments made by Century.

### ARGUMENTS

The LIC defendants argue that this action should be dismissed because: (1) the Demand Letter, pursuant to CPLR 3211 (a) (1), constitutes documentary evidence disposing of plaintiff’s claims against the LIC defendants as said letter, in asserting that 30th Place assumed the Broker’s Agreement, implicitly absolves the LIC defendants of any obligation to pay the broker’s fee; (2) Saunders has failed, pursuant to CPLR 1001 (a) and 3211 (a) (10), to join 30th Place as a necessary party to this action; (3) Saunder’s second cause of action, sounding in unjust enrichment, is based on the same facts as Saunder’s first cause of action for breach of contract and is therefore fails to state a cause of action under CPLR 3211 (a) (7).

In opposition, Saunders contends that the LIC defendants’ motion to dismiss should be denied because: (1) the Demand Letter, pursuant to CPLR 3211 (a) (1), does not constitute “documentary evidence” as a matter of law and does not dispose of the case since Saunders’ assertion that 30th Place assumed CFG’s obligation to pay the broker’s fee does not necessarily absolve the LIC defendants from liability; (2) Saunders’ failure to join non-party 30th Place as a party does not render the instant suit fatal as Saunders can subsequently join said non-party; (3) Saunders’ second cause of action for unjust enrichment should not be dismissed since, at this procedural stage, Saunders is allowed to plead in the alternative.

Saunders also cross-moves for sanctions and costs, including attorneys’ fees, on the grounds that the LIC defendants’ instant motion amounts to frivolous conduct.

### DISCUSSION

The standards of review on a motion to dismiss under either CPLR 3211 (a) (1) or (a) (7) are well-settled. “[T]he pleading is to be afforded a “liberal construction” (CPLR 3026) and the “court

is obliged to accept the complaint's factual allegations as true, according to plaintiff the benefit of every possible favorable inference, and determining only whether the facts as alleged fit within any cognizable legal theory” (*see Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 270 [1st Dept 2004]).

Where the motion to dismiss is brought under CPLR 3211 (a) (1) based on documentary evidence, “[the motion] may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002] citing *Leon v Martinez*, 84 NY2d 83, 88 [1994]). Furthermore, “to be considered documentary, the evidence interposed must be unambiguous and of undisputed authenticity” (*Fontanetta v John Doe*, 73 AD 78, 84-86 [2010]).

Here, the LIC defendants have failed to demonstrate that the Demand Letter meets the definition of “documentary evidence” within the meaning of 3211 (a) (1). Namely, and although Saunders does not dispute the authenticity of the Demand Letter, said document fails to conclusively establish the LIC defendants’ contention that 30th Place is solely liable to Saunders as a matter of law. As Saunders aptly notes, that 30th Place, as alleged assignee of the Broker’s Agreement, and CFG, as obligor under the Broker’s Agreement, are liable to Saunders for the commission does not mean that the LIC defendants are not also liable to plaintiff. Indeed, the LIC defendants do not dispute that they received rent payments allegedly made by Century’s representative, Mr. Kellog, whose affidavit is the only sworn statement made by an individual with personal knowledge attached to any of the motion or cross-motion papers.

The LIC defendants’ also contend that Saunders’ second cause of action for unjust enrichment should be dismissed, pursuant to CPLR 3211 (a) (7), as it is duplicative of Saunders’ first breach of contract cause of action. This argument fails as the LIC defendants’ misapprehends the procedural posture of the instant motion to dismiss with regard to the facts in this case.

It is well-settled that a plaintiff is not required to elect his remedies until trial “at a time within the discretion of the Trial Judge” (*see Wilmoth v Sandor*, 259 AD2d 252, 254 [1st Dept 1999]). Although summary judgment is the procedural equivalent of a trial, a motion to dismiss is not (*see id.*, at 254 [reversing motion court’s decision & order granting converted motion to

dismiss unjust enrichment cause of action]). Moreover, the rule precluding a claim in quasi contract due to the existence of a valid and enforceable contract only applies where the plaintiff “has fully performed on a valid written agreement, the existence of which is undisputed, and the scope of which clearly covers the dispute between the parties” (*see Clark-Fitzpatrick, Inc. v Long Is. R. Co.*, 70 NY2d 382, 388 [1987]).

At this pre-answer stage, the LIC defendants have not admitted the validity or enforceability of the Broker’s Agreement. In fact, the LIC defendants have not even attached the Broker’s Agreement or any other contract in support of their instant motion. Finally, as no discovery has been conducted to confirm the existence of the Broker’s Agreement, Saunders is not precluded from demanding relief in the alternative.

The LIC defendants’ motion to dismiss based on Saunders’ alleged failure to join 30th Place as a necessary party, is denied in view of Saunders’ ability to join 30th Place separately or later. Moreover, the LIC defendants have not shown that 30th Place constitutes a party which “ought to be joined”, pursuant to CPLR 1001, since the Kellog affidavit raises questions of fact as to which entity, 30th Place or the LIC defendants, are the current assignees of the Lease.

Lastly, Saunders cross-moves for sanctions and costs against the LIC defendants arguing that the LIC defendants’ motion-in-chief is frivolous pursuant to 22 NYCRR § 130-1.1. Namely, Saunders claims that the LIC defendants failed to assert a coherent argument for each branch of their motion to dismiss, only filing the motion to stall litigation. Conduct is frivolous, and therefore subject to sanctions and costs, 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 (*see* 22 NYCRR § 130-1.1).

In applying the above standard, Saunders’ cross-motion is denied. In the absence of a determination as to the identity of the current landlord of the Premises and/or assignee of the Lease, the LIC defendants’ argument that the Demand Letter absolves them of liability is not completely without merit as they further clarify that the argument is based on the Assignment and not merely correspondence by Saunder’s attorney. Moreover, that branch of the LIC defendants’ motion seeking

to dismiss Saunders' unjust enrichment cause of action is also not without merit, since Saunders alleges the existence of a written contract (i.e. Broker's Agreement) which governs his entitlement to a broker's fee. Nor is there is any indication that the motion-in-chief was undertaken to primarily delay or prolong the resolution of this lawsuit or that the LIC defendants asserted a factually false material statement. As such, Saunder's application is hereby denied. Accordingly, it is:

ORDERED that defendants LIC Crown Leasehold Owner LLC, and LIC Crown Fee Owner LLC's motion to dismiss is denied, in its entirety; and it is further

ORDERED that plaintiff James S. Saunders' cross-motion for sanctions and costs is denied; and it is further

ORDERED that the aforementioned defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

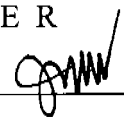
ORDERED that the parties are to appear for a preliminary conference in Room 304 at 71 Thomas Street, New York, New York on December 15, 2011, 9:30 A.M.

Dated: September 28, 2011

**FILED**

**OCT 07 2011**

**NEW YORK  
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E N T E R  
  
\_\_\_\_\_  
Hon. Joan M. Kenney  
J.S.C.