Spearin v New 345 LLC
2011 NY Slip Op 33876(U)
September 21, 2011
Sup Ct, New York County
Docket Number: 651971/2010E
Judge: Paul G. Feinman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. PAUL G. FEINMAN**
Justice

PART 12

Index Number : 651971/2010 E
SPEARIN, SAMUEL A
vs
NEW 345 LLC DEVELOPMENT LLC
Sequence Number : 001
DISMISS ACTION

INDEX NO. 651971/10 E

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

motion to/for

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

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION AND CROSS MOTION(S) ARE DECIDED IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.

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

Dated: 9/21/2011

PGF
J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

---X

SAMUEL A. SPEARIN,

Plaintiff,

- against -

NEW 345 LLC; 345 DEVELOPMENT LLC; CAPITAL SOURCE FINANCE LLC; CS 345 W 14TH STREET LLC; SK DEVELOPMENT GROUP LLC; and DDG PARTNERS LLC,

Defendants.

---X

Index No. 651971/2010E
Mot. Seq. Nos. 001, 002 & 003

DECISION and ORDER

Appearances:

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Papers considered in connection with these motions:	E-Filing Document Number
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PAUL G. FEINMAN, J.:

Motions bearing sequence numbers 001, 002 and 003 are consolidated for purposes of this decision and order.

In motion sequence number 001, defendants 345 Development LLC and SK Development Group LLC (collectively, "SK Defendants") move to dismiss plaintiff's complaint pursuant to CPLR 3211 (a) (1) and (7). In motion sequence number 002, defendants New 345 LLC and DDG Partners LLC (collectively, "DDG Defendants") move to dismiss pursuant to CPLR 3211. In motion sequence number 003, defendants Capital Source Finance, LLC and CS 345 W 14th Street, LLC (collectively, "CS Defendants") "join" the motions filed by the DDG Defendants and the SK Defendants and move for dismissal pursuant to CPLR 3211 (a) (1) and (7). Plaintiff has opposed each of the above motions, and cross-moved for leave to amend his complaint as necessary to state a cause of action. Defendants oppose the cross motion.

For the reasons provided below, the defendants' motions are each granted and plaintiff's complaint dismissed in its entirety; plaintiff's cross motion is denied.

Background

Plaintiff Samuel A. Spearin is a real estate broker licensed in the State of New York. In or about September of 2009, plaintiff and his associate Aryn Spahr were introduced to defendant Capital Source, the holder of a mortgage on the property located at 345 West 14th Street, New York, New York (the "Property"), which secured debt of $24,559,000.00. The complaint alleges that Capital Source "was anxious to be relieved of its risk under such loan and wished to engage plaintiff's services in (1) persuading the owners of the 345 West 14th Street Property, an entity

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controlled by SK Development LLC[,] to sell the [Property] and (2) to obtain a buyer for the property or the indebtedness" (Doc. 8, Complaint at ¶ 8). No where in the record is there any indication that plaintiff's "associate," Spahr, was a licensed real estate broker in the State of New York. In his affidavit, Spahr describes himself as a "consultant and advisor specializing in real estate finance" (Doc. 22, Spahr affid. at ¶ 1).

However, according to plaintiff's affidavit, he had already been looking into a potential transaction involving the Property in July of 2009 (Doc. 22, Spearin affid. at ¶ 9). He claims that one day in July of 2009 he was "in the field, walking past" the Property, and noticed that it appeared to be a vacant space. Because the Property was located "near the heart of an area known as the "Meat Packing District," an area that had "witnessed a tremendous growth in the past five years ...," plaintiff was "intrigued by the property and undertook to determine who the owners of the property were" (*id.* at ¶ ¶ 9-10). Then, still in July of 2009, plaintiff contacted Scott Schnay of SK Development Group LLC, who owned the Property through its affiliate, 345 Development LLC, and "introduced [himself] as a broker and indicated that [he] had potential buyers or lessees" for the Property (*id.* at ¶ 11). By July 28, 2009, Schnay had told plaintiff the development plans for the space and what terms SK Development would need for a buyer or triple net lessee of the property. From these discussions, "[i]t was expressly understood that [plaintiff] was a broker and that [he] expected to be compensated for [his] work. Schnay encouraged [him] to proceed on SK Development's behalf" (*id.* at ¶ 14). There is no allegation that a written agreement was entered or that they reached an oral agreement providing the terms of what conditions would have to occur in order for plaintiff to have a right to a commission, the amount of the commission, or whether SK Development, and not the buyer, would be

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responsible for compensating plaintiff for his efforts. Plaintiff also notes that he "had the impression that SK no longer had the means or the vision to develop or manage properly the property" (*id.* at ¶ 15).

Based on the above, it appears that plaintiff alleges that he was already working on SK Development's behalf when, in September 2009, he and his associate, Spahr, had already been engaged by Capital Source to persuade SK Development LLC to sell the Property, and to obtain a buyer for the Property or indebtedness. There is nothing in the record to indicate that plaintiff had disclosed this dual retention to either Capital Source or SK Development.

Also in September 2009, plaintiff contacted Joseph A. McMillan of DDG Partners LLC and advised him that a commercial property was available in the "Meat Packing District" for purchase or net lease. McMillan was "advised that the developers were underwater with respect to their financial obligations and that the lender was desirous of persuading the owners/debtors to sell" (Doc. 8, Complaint at ¶ 10). According to plaintiff's affidavit, he "advised McMillan that the principal actor in the sale of this as yet un-identified property was a bank, and that [plaintiff] could put him in touch with the bank, but that he would have to sign a confidentiality and non-circumvention agreement with Aryn Spahr, the person acting on behalf of the bank" (Doc. 22, Spearin affid. at ¶ 22). McMillan told plaintiff that DDG was interested and asked plaintiff to "set up a meeting with Aryn Spahr to discuss the bank's position on pricing the loan" (*id.* at ¶ 23). On September 22, McMillan, Spahr, and plaintiff met to discuss the "potential development situation," and "McMillan agreed ... to execute an agreement with Aryn Spahr concerning the property" (*id.* at ¶ 24). The next day, Spahr emailed McMillan, copying plaintiff, attaching a copy of a proposed non-circumvention agreement between Spahr, as an advisor, and DDG

Partners, as the investor (Doc. 22, Ex. A to Spearin affid.). The proposed agreement does not make any references to plaintiff's involvement in the transaction. According to a document submitted by the DDG Defendants in further support of their motion, McMillan responded by email to Spahr, copying plaintiff, stating that the "CA is ready to execute. Before we do I would like to verify the address and bank to make sure it's not one were looking at" (Doc. 38-2, Ex. 2 to McMillan reply affid.).

The complaint alleges that McMillan was advised that "were this transaction to close, the purchaser would be liable for the commission," and McMillan told plaintiff that "before he agreed to become obligated to pay a real estate broker's commission for such purchase, he needed to know if the property was one he had already seen and with which he was already familiar" (*id.* at ¶ 12). Once the location was disclosed, McMillan "confirmed that he had not previously known" of the Property, and "DDG agreed to compensate plaintiffs a sum not less than 2% of the purchase price..." (*id.* at ¶ ¶14-15). However, in contrast to what was alleged in the complaint, plaintiff's affidavit states that McMillan agreed to pay the commission "whether or not he already was aware of the property if the deal could be made" (Doc. 22, Spearin affid. at ¶ 21).

On September 23, 2009, once McMillan indicated that he was signing the non-circumvention and confidentiality agreement with Spahr, plaintiff identified the address of the Property to McMillan and provided him "substantial portions of the plans and zoning information that had been given to [plaintiff] on July 28, 2009[,] by Scott Schnay of SK Development. [He] also gave McMillan an overall summary of the pricing of the Capital Source loan which [] had [been] provided to [plaintiff] by Spahr" (*id.* at ¶ 30). Plaintiff attaches "[t]rue

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and correct copies of portions of these documents" to his affidavit, which appear to be plans drafted by an architect for certain floors of the Property. On October 2, 2009, McMillan, Spahr and plaintiff had a conference call to discuss the information provided to McMillan on September 23, 2009. Plaintiff alleges that as a result of this discussion, a pricing matrix was generated "which details the acquisition of the note with some additional air rights - which appeared possible to be acquired" (*id.* at ¶ 32). A copy of this pricing matrix, consisting of a single-page print-out of a spreadsheet, is attached as Exhibit A to the affidavit of Spahr (Doc. 22, Ex. A to Spahr affid.). It shows a "note acquisition price" of $16,000,000, and a "target price on note sale" of $137 per square foot for additional air rights, but plaintiff claims that they had calculated that $20,000,000 was the price at which DDG should seek to make the purchase (Doc. 22, Spearin affid. at ¶ 32). Plaintiff claims that he provided this pricing matrix to McMillan "to further assist him in negotiations and to solidify his understanding of the deal that [plaintiff] was proposing" (*id.* at ¶ 33). However, plaintiff later offers as Exhibit A to his reply affidavit an email from Spahr to McMillan, dated September 28, 2009. The email attached a copy of the spreadsheet "outlining the purchase targets and [providing a] break down per square foot," and states, "[a]s I mentioned, my contact at Capsource is currently working internally to get a deal in place that would include a release of the PG's for the air rights" (Doc. 42, Ex. A to Spearin reply affid.). Plaintiff is not listed as a recipient of this email.

Plaintiff's affidavit states that he "knew ... Capital Source[,] when presented with a viable opportunity to reduce its exposure[,] would pressure SK to sell to DDG" (Doc. 22, Spearin affid. at ¶ 34). However, "it was still essential to a successful deal that Scott Schnay and his partners remain amicable to the concept of the sale, and that they maintain involvement, for a number of

reasons, not the least of which was maintaining their ability to exit the deal without further recourse on the loan" (*id.* at ¶ 34). Although not mentioned in the complaint, plaintiff's affidavit states that on October 5, 2009, "confident that DDG was extremely interested and in a good position to purchase SK Development's interest, [he] advised Schnay that DDG was the entity [he] had found for the deal" (*id.* at ¶ 35). Plaintiff gives no indication as to whether DDG requested or consented to plaintiff's disclosure of its identity and intent to SK Development.

On October 9, 2009, plaintiff sent an email to McMillan and Schnay, which purports to introduce the parties and states that McMillan was interested in discussing the "14th [S]treet deal" (Doc. 22, Ex. C to Spearin affid.). After this email, plaintiff does not allege that he had any further contact with either McMillan, Schnay, or their associated entities regarding the proposed transaction. Plaintiff's attorney suggests in his opposition affirmation that they "chose either not to seek [plaintiff's] continued participation subsequent to the introductions made on October 5 and October 9, 2009 or, indeed, actively sought to exclude his continued participation in an attempt to circumvent the obligation to pay a brokerage commission" (Doc. 22, Barr affirm. at ¶ 9). The complaint alleges that plaintiff later learned that on April 27, 2010, DDG Partners LLC, through its affiliate New 345 LLC, acquired title to the Property from 345 Development LLC (Doc. 8, Complaint at ¶ 18). Also on that date, New 345 LLC acquired the mortgage by assignment from CS 345 W 14th Street LLC, and "executed a satisfaction of mortgage to 345 Development LLC, thereby constituting and providing consideration of $24,559,000.00 for the transfer of 345 Development LLC's ownership interest in the ... Property" (*id.* at ¶ 19). Although not alleged in the complaint, plaintiff claims in his affidavit that upon learning of the closing of the deal, he "demanded payment from DDG" (Doc. 22, Spearin affid. at ¶ 46). DDG Partners

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LLC responded by a letter from its attorney, dated April 30, 2010, rejecting plaintiff's demand (Doc. 22, Ex. D to Spearin affid.). The letter, which plaintiff has attached to his affidavit, indicates that plaintiff, "either individually or in tandem with Mr. Aryn Spahr," had claimed entitlement to a commission, but DDG Partners argued that neither plaintiff nor Spahr "did anything to procure the transaction for DDG" (*id.*).

Although the letter suggests that Spahr also asserted a claim for a commission, he is not a party to this action. However, plaintiff has submitted an affidavit from Spahr in opposition to defendants' motions to dismiss and in support of plaintiff's cross motion to amend the complaint. This affidavit reveals additional information about Spahr's role throughout the events at issue, which had not been alleged in the complaint. Spahr avers

> "[w]e agree[d] to work together to see if there was a way to get Capital Source in touch with DDG and see if some pressure could be placed on SK Development, the defaulting owner, to either sell at a reasonable price, or to arrange that DDG could take over title from SK and take over at the same time, by assignment, the mortgage from Capital Source"

(Doc. 22, Spahr affid. at ¶ 10).

The complaint asserts two causes of action. The first cause of action alleges plaintiff was the procuring cause of the transaction described above and "by virtue of the foregoing, plaintiff is entitled to compensation for the value of their services on a quantum meruit basis as real estate brokers" (*id.* at ¶ 22). As such, plaintiff argues that he is entitled to a judgment against all defendants jointly and severally for the sum of $982,360.00. The second cause of action alleges that "[o]n or about September 27, 2009, Defendant DDG agreed to compensate plaintiff a commission of 2% of the purchase price of the 345 West 14th Street Property if it was able to

acquire title, whether by purchasing the indebtedness from Capital Source or directly from SK Development" (*id.* at ¶ 25). Based on these allegations, plaintiff argues that it is entitled to judgment against DDG and New 345 LLC in the sum of $491,180.00 (*id.* at ¶ 26).

The defendants, by three separate motions, move to dismiss the complaint. Plaintiff opposes and cross-moves for leave to amend the complaint. Plaintiff has not included a copy of the proposed amended complaint with its papers in support of its cross motion. Plaintiff's attorney's affirmation states plaintiff's request "to amend to pleading if needed to assert causes of action for breach of a commission agreement and quantum meruit/unjust enrichment separately against each of the defendants" (Doc. 22, Barr affirm. at ¶ 1). Plaintiff's attorney's reply affirmation adds,

> "to [the] extent it may be deemed necessary to amend the complaint to add the specific allegation that Spahr and his company Cornerstone Hospitality Advisors were agents of Capital Source at the time that Spearin brought Spahr and McMillan together to discuss Capital Source's now amply documented efforts to sell the loan, it is respectfully requested that leave to amend the complaint be granted"

(Doc. 40, Barr reply affirm. at ¶ 22).

Analysis

1. Standard for motion to dismiss

"In the posture of defendants' CPLR 3211 motion to dismiss, [the court's] task is to determine whether plaintiff['s] pleadings state a cause of action" (*511 W. Corp. v Jennifer Realty*, 98 NY2d 144, 152 [2002]). The motion must be denied "if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law'" (*id.*; quoting *Polonetsky v Better Homes Depot*, 97 NY2d 46, 54 [2001];

quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). In determining whether a claim has been properly stated, the complaint is to be liberally construed and the court will "accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" (*id.*; citing CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). In opposition to a motion to dismiss under CPLR 3211 (a) (7), the plaintiff may submit affidavits "to remedy defects in the complaint" and "preserve inartfully pleaded, but potentially meritorious claims" (*Cron v Hargro Fabrics*, 367 [1998]; citing *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]). The criterion is whether plaintiff "has a cause of action, not whether he [or she] has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

To prevail on a motion to dismiss pursuant to CPLR 3211 (a) (1), the defendant has the burden of demonstrating that the documentary evidence conclusively resolves all factual issues and that the plaintiff's claim fails as a matter of law (*Fortis Fin. Servs., LLC v Fimat Futures USA, Inc.*, 290 AD2d 383 [1st Dept 2002]). Although "a complaint is to be liberally construed in favor of plaintiff on a CPLR 3211 motion to dismiss, the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence" (*Excel Graphics Tech., Inc. v CFG/AGSCB 75 Ninth Ave., LLC*, 1 AD3d 65, 69 [1st Dept 2003]).

2. Real estate broker commissions

Under Real Property Law § 440 (1), a "real estate broker" means any person who,

> "for another and for a fee, commission or other valuable consideration, lists for sale, sells ... buys ... or offers or attempts to negotiate a sale ... exchange, purchase or rental of an estate or interest in real estate ... or negotiates or offers or attempts to negotiate, a loan secured or to be secured by a mortgage, other than

a residential mortgage loan."

Under RPL § 440-a, a person engaged in the business of a real estate broker must be licensed. Moreover, a person cannot bring an action in any court for the recovery of compensation for services rendered "in the buying, selling, exchanging, leasing, renting or negotiating a loan upon any real estate without alleging and proving that such person was a duly licensed real estate broker ... on the date when the alleged cause of action arose" (RPL § 442-d). A licensed broker is prohibited by RPL § 442 from splitting part of any fee, commission or other compensation for help or aid rendering in connection with a real estate transaction with an unlicensed individual. A licensed broker may not recover in an action brought for a brokerage commission for services performed by an unlicensed person (*Small v Marchese*, 98 Misc.2d 295, 296 [App Term, 1st Dept 1978]), or based on a cobrokerage agreement involving an unlicensed broker (*City Center Real Estate, Inc. v Berger*, 39 AD3d 267, 268 [1st Dept 2007]). In *City Center Real Estate, Inc.*, the court noted that the prohibition was necessary because the "intent of the licensing requirement under the Real Property Law, i.e., 'to protect the public from inept, inexperienced, or dishonest persons who might perpetrate or aid in the perpetration of fraud' (*Kavian v Vernah Homes Co.*, 19 AD3d 649, 650 [2005]), would be undermined if such cobrokerage agreements were enforceable, even in part" (*id.* at 268). RPL § 442 is intended to ensure that no one acts as a real estate broker without a license, and to prevent unlicensed persons from shielding themselves from its penalties by using the name of a licensed broker to obtain commissions (11 NY Jur Brokers § 129).

Furthermore, in New York, "it is well settled that real estate broker is a fiduciary with a duty of loyalty and an obligation to act in the best interests of the principal" (*Dubbs v Stribling &*

Assocs., 96 NY2d 337, 340 [2001]). Therefore, "[w]here a broker's interests or loyalties are divided due to a personal stake in the transaction or representation of multiple parties, the broker must disclose to the principal the nature and extent of the broker's interest in the transaction or the material facts illuminating the broker's divided loyalties" (*id.* at 340). To be effective, the disclosure must "lay bare the truth, without ambiguity or reservation, in all it stark significance" (*id.* at 340-341 [*internal citation omitted*]). Also, under 19 NYCRR 175.7, a real estate broker must "make it clear for which party he [or she] is acting and he [or she] shall not receive compensation from more than one party except with the full knowledge and consent of all parties."

To state a claim for a brokerage commission in New York, a plaintiff must plead the following three elements: (1) the broker is duly licensed; (2) the existence of an express or implied contract for a broker's commission with the defendant; and (3) the broker was the procuring cause of the sale (*see Greene v Hellman*, 51 NY2d 197, 206 [1980]; *Joseph P. Day Realty Corp. v Chera*, 308 AD2d 148, 151 [1st Dept 2003]). An express agreement for brokerage services may be oral, and does not fall within the Statute of Frauds (*see* General Obligations Law § 5-701 [a] [10]; *Sholom & Zuckerbrot Realty Corp. v Citibank*, 205 AD2d 336, 338 [1st Dept 1994]). In absence of an express agreement, the contract of employment may be established by facts showing a "conscious appropriation of the labors of the broker" (*Joseph P. Day Realty Corp.*, 308 AD2d at 152; quoting *Sibbald v Bethlehem Iron Co.*, 83 NY 378, 380 [1881]). In some cases, the contract may even be established "by the mere acceptance of the labors of a broker" (*id.*). New York courts have held an owner liable for a broker's commission under a theory of a broker's implied employment where, even in the absence of an express agreement, the

"the owner accepted and benefitted from the broker's services" (*id.* at 153; citing *Gronich & Co. v 649 Broadway Equities Co.*, 169 AD2d 600 [1st Dept 1991]). In *Gronich & Co.*, the Appellate Division, First Department, noted that "it cannot be assumed that a broker works gratuitously and the [buyer and seller] are held to such knowledge when they accept the result of the broker's services" (169 AD2d at 602).

Here, if, as it must at this juncture, the court assumes the truth of all of the allegations made in the complaint and the affidavits submitted by plaintiff, plaintiff was allegedly retained to act on behalf of SK Development in July 2009 in connection with a potential sale or net lease of the Property. Then, in September 2009, plaintiff and Spahr were both retained by Capital Source to persuade SK Development to sell the Property, and to locate a buyer for both the Property and mortgage. Also in September of 2009, plaintiff entered into an express oral agreement with DDG Partners, whereby DDG Partners agreed to pay plaintiff a 2% commission if it purchased the Property, regardless of whether DDG Partners had already known about the Property. Thus, plaintiff has alleged that he simultaneously worked as a broker for three different principals in connection with this transaction. However, plaintiff fails to allege any facts indicating that he made an unambiguous disclosure to each of the parties that he was representing other parties in connection with the same transaction. The failure to disclose to defendants, his purported principals, that he had been retained by the other parties to pursue their interests, violates his fiduciary duty and therefore forfeits any right to compensation for his services (*Kenneth D. Laub & Co. v Bear Stearns Cos.*, 278 AD2d 121, 121 [1st Dept 2000]).

In addition, there is no question that the transaction at issue is covered by Real Property Law § 440, as it involved the sale of real property and a related mortgage. Furthermore, the facts

alleged by plaintiff demonstrate that he seeks recovery for services that were rendered, in part, by Spahr, who is not a licensed real estate broker. The complaint alleges that Spahr and plaintiff were both retained by Capital Source to persuade SK Development to sell the Property and find a buyer for the Property and related mortgage. Plaintiff stated in his affidavit, the "principal actor in the sale" of the Property was the bank (Doc. 22, Spearin affid. at ¶ 22). Plaintiff also has submitted an affidavit in Spahr which unambiguously states that Spahr and plaintiff "agreed to work together" in structuring the transaction and pressuring the buyer to sell. After they made this agreement, they both met with McMillan for initial discussions on this transaction. The next day, Spahr sent McMillan an email attaching a proposed confidentiality and non-circumvention agreement. This agreement was made by and between Aryn Spahr, as an "advisor," and DDG Partners, an an "investor" (Doc. 22, Ex. A to Spearin affid.). The agreement states that it relates to "the introduction by Advisor to an opportunity to explore the purchase of a development site ..." and that "Investor, for itself and its Affiliates, further agrees that they or their principals will not, directly or indirectly, consummate a Transaction with a Contact unless and until a written agreement has been reached with the Advisor and his co-agents ... for their compensation related to the Transaction on terms acceptable to Seller's Agent and the Co-Agent" (*id.*). It does not specifically mention plaintiff or his role in setting up the transaction. Spahr's email that enclosed the proposed agreement added that he was "[a]round this afternoon to go through it with you if desired. [He] believe[d] this is one of the best deals of its nature in the city at the moment" (*id.*).

Plaintiff, Spahr and McMillan next conducted a conference call to discuss pricing the Capital Source loan based on information provided by Spahr. Based on these discussions, Spahr put together a pricing index spreadsheet, which he provided directly to McMillan, as shown in

the email plaintiff has submitted in connection with the pending motions. Plaintiff is not listed as a recipient of this email. Furthermore, the accompanying email provides additional comments including that Spahr's "contact at Capsource is currently working internally to get a deal in place that would include a release of the PG's for the air rights" (Doc. 42, Ex. A to Spearin reply affid.).

The court notes that plaintiff's claim that he is entitled to payment of a commission from all defendants is based on his contention that he "brought the necessary parties together, provided each side with adequate information about the property and the other parties and instilled in each of the parties a level of confidence and certainty necessary for them to conclude this deal on reasonable terms" (Doc. 22, Spearin affid. at ¶ 43). He adds that he "created an amicable and constructive environment where the parties were able to negotiate further and consummate their April 30, 2010 transaction" (*id.* at ¶ 44). There is no dispute that plaintiff sent an email to Schnay of SK Development, the Property owners, and McMillan of DDG Partners, the potential purchaser, on October 9, 2009, which introduces the parties and expresses their interests in discussing a transaction. As of that date, plaintiff believes DDG Partners, "by virtue of [plaintiff's] discussions with [McMillan, DDG Partners] was fully cognizant of Capital Source's desire to facilitate a transfer of title and what the approximate terms of that transfer would be" and McMillan "also knew whom at Capital Source to contact to negotiate the price at which Capital Source would divest itself of the mortgage ..."(*id.* at ¶ 40). However, plaintiff's affidavits indicate that Spahr also participated in these discussions and was the source of the information provided to DDG Partners under a confidentiality agreement.

These facts, *which plaintiff has himself alleged*, demonstrate that plaintiff and Spahr

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proceeded in accordance with their agreement to work together on this transaction by putting Capital Source and DDG Partners in contact, and thereby putting pressure on SK Development to sell the Property. The facts also show that Spahr was involved in the particular actions that plaintiff relies on in arguing that he was the "procuring cause of the transaction." The only fact that is not alleged in plaintiff's papers is how Spahr was to be compensated or whether and to what extent fees were to be split as between Spahr and plaintiff. Of course, it cannot be presumed that Spahr's services were performed gratuitously (*see Gronich & Co.*, 169 AD2d at 602). Furthermore, the confidentiality and non-circumvention agreement between Spahr and DDG Partners does provide that DDG Partners could not consummate the transaction for the Property unless and until a written agreement had been reached with Spahr and "his co-agents" for their compensation. Although plaintiff is not listed as a "co-agent" or otherwise referenced in the agreement, the record need not contain facts specifically establishing what arrangement had been made for compensation, where plaintiff has set forth facts showing that he performed services pursuant to an agreement with Spahr, an unlicensed broker (*see City Center Real Estate, Inc.*, 39 AD3d at 268).

Plaintiff cannot rely on the actions of an unlicensed broker to establish his entitlement to a commission, and cannot recover based on his own actions pursuant to a co-brokerage agreement with an unlicensed broker. In reaching this conclusion, the court has relied solely upon the facts as alleged by plaintiff. Therefore, plaintiff is barred from obtaining compensation for the services he allegedly rendered pursuant to an agreement, either express or implied, with defendants. Because violations of the licensing provisions of the Real Property Law serve as a complete bar to recovery of the services allegedly rendered by plaintiff, the court need not

consider whether plaintiff has stated a cause of action under a theory of quantum meruit (*Wharton Realty v Main 38 Realty, Inc.*, 289 AD2d 177, 177 [1st Dept 2001]). Accordingly, the motions of all defendants are granted and the complaint is dismissed in its entirety.

3. Cross motion to amend the complaint

Plaintiff has also cross-moved to amend the complaint, although he fails to provide a proposed amended complaint in support of his cross motion. In the papers submitted in support of the cross motion, plaintiff asks the court to grant leave to amend the complaint, "if needed to assert a cause of action for breach of a commission agreement and quantum meruit/unjust enrichment separately against each of the defendants" (Doc. 22, Barr affirm. at ¶ 1). While amendment of a pleading should ordinarily be freely granted (CPLR 3025 [b]), it may be denied where the proposed amendment is plainly lacking in merit (*see Sharon Ava & Co., Inc. v Olympic Tower Assocs.*, 259 AD2d 315, 316 [1st Dept 1999]). Here, plaintiff relies on the same affidavits in support of his cross motion that he offered in opposition to defendants' motions. Because the court has already determined based on those affidavits that plaintiff cannot maintain an action to recover a commission, plaintiff's cross motion is denied.

Accordingly, it is

ORDERED that the motion of defendants SK Development Group LLC and 345 Development LLC, sequence number 001, is granted and the complaint is dismissed as against them in its entirety; and it is further

ORDERED that the motion of defendants New 345 LLC and DDG Partners LLC, sequence number 002, is granted and the complaint as against them is dismissed in its entirety; and it is further

ORDERED that the motion of defendants CapitalSource Finance LLC and CS 345 W14th Street LLC, sequence number 003, is granted and the complaint as against them is dismissed in its entirety; and it is further

ORDERED that plaintiff's cross motion is deemed to have been filed under motion sequence 001, 002 and 003, and, as such, the cross motion to amend the complaint is denied in its entirety; and it is further

ORDERED that the Clerk of Court shall enter judgment accordingly, dismissing the complaint and any cross claims in their entirety, together with costs and disbursements.

This constitutes the decision and order of the court.

Dated: September 21, 2011
New York, New York

J.S.C.

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