

Broadway W. Enters., Ltd. v Doral Money, Inc.

2013 NY Slip Op 31914(U)

August 9, 2013

Sup Ct, NY County

Docket Number: 653638/2011

Judge: O. Peter Sherwood

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

PRESENT: O. PETER SHERWOOD
Justice

PART 49

BROADWAY WEST ENTERPRISES, LTD.,

Plaintiff,

-against-

DORAL MONEY, INC., et al.,

Defendants.

INDEX NO. 653638/2011

MOTION DATE

MOTION SEQ. NO. 004

MOTION CAL. NO.

The following papers, numbered 1 to were read on this motion

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

Answering Affidavits — Exhibits

Replying Affidavits

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying decision and order.

Dated: August 9, 2013

O. Peter Sherwood signature and name O. PETER SHERWOOD, J.S.C.

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 : IAS PART 49**

-----x
BROADWAY WEST ENTERPRISES, LTD.,

Plaintiff,

- against -

**DORAL MONEY, INC., SL WHALE REALTY, LLC,
BRICKELL 13 WHALE LLC, WHALE REALTY LLC,
SUZUKI CAPITAL FUNDING LTD., NAKAZAWA &
SUZUKI CAPITAL LLC, MARK KARASICK,
HARRY SKYDELL, ELI KASS, NISSAN PERLA
and SOLOMON KNOPF,**

Defendants.

-----x
O. PETER SHERWOOD, J.:

Motions designated sequence numbers 004 and 005 are consolidated for disposition.

In motion sequence number 004, defendants SL Whale Realty, LLC (“SL Whale”), Brickell 13 Whale LLC (“Brickell 13”), Mark Karasick, and Harry Skydell (collectively, the “Purchaser Defendants”) move, pursuant to CPLR 3211(a)(7), to dismiss the Amended Complaint.

In motion sequence number 005, defendants Nissan Perla and Whale Realty LLC (collectively, the “Whale Defendants”) move, pursuant to CPLR 3211(a)(7), to dismiss the Amended Complaint.

BACKGROUND

Plaintiff, Broadway West Enterprises (“Broadway West”), commenced this action seeking to recover compensatory damages for breach of contract and related claims arising out of the sale of real property located at 14 53rd Street, Brooklyn, New York (the “subject premises”). Broadway West is a licensed real estate broker. Defendant Doral Money, Inc. (“Doral”) held a

**DECISION AND ORDER
Motion Seq. Nos.:
004 & 005**

Index No. 653638/2011

deed in lieu of foreclosure to the subject premises. Broadway West essentially claims that all defendants owe it a two percent broker commission, plus interest, upon the sale of the subject premises to defendants SL Whale and Brickell 13.

The facts are derived from a prior decision and order in this action (Dec & Order dated September 18, 2012), as well as the allegations in the Amended Complaint, which, on a motion to dismiss, must be accepted as true. Doral had a first priority lien on the subject premises owned by Whale Realty. Whale Realty defaulted on the mortgage held by Doral. As a result, Doral actively solicited offers from potential purchasers in order to sell the subject premises and satisfy the mortgage.

Doral enlisted the services of Nakazawa & Suzuki Capital LLC (“NS Capital”) and/or Suzuki Capital LLC (“Suzuki Capital”) to assist in finding a buyer for the subject premises. NS Capital, in turn, retained the real estate brokerage firm Marcus & Millichap, which “retained Broadway West as a cooperating broker in furtherance of identifying prospective purchasers of the Property” (Amended Compl. ¶20). The Amended Complaint does not allege that any broker or a “cooperating broker” agreement involving plaintiff was ever executed. No broker or “cooperating broker” agreement is attached to the papers submitted. At oral argument on a prior motion, counsel for Broadway West declined to claim that the action is based on breach of any such agreement or that Broadway West is an intended third party beneficiary of any contract.

In or about April 2011, Broadway West contacted defendant Solomon Knopf (“Knopf”) as a prospective purchaser. Knopf referred Broadway West to defendant Eli Kass, who advised that he was Knopf’s business partner and president of non-party 974 East Associates, Inc. (“974 East”). Plaintiff also advised Marcus & Millichap of the potential interest of Knopf and Kass in the subject premises.

In May 2011, Broadway West introduced 974 East to Doral as a potential purchaser of the subject premises. Doral issued confidential and proprietary information relating to the project, including copies of abstracts of commercial leases and appraisal of the subject premises to Suzuki Capital. 974 East showed serious interest in the subject premises and, after extensive negotiations, the parties executed an “Offer Sheet” on June 7, 2011. Defendants Mark Karasick (“Karasick”) and Harry Skydell (“Skydell”) were investors in 974 East and active participants in the negotiations. Broadway West alleges that it also assisted in the negotiation process.

At oral argument on the prior motion, counsel for Broadway West identified the Offer Sheet as the contract on which Broadway West’s claims were based. The Offer Sheet provides that “[s]eller agrees that brokerage commissions of 2% of the total purchase price, in connection with a consummation of a sale from Seller to 974 East Associates, Inc. ... shall be the sole responsibility of Seller” (Offer Sheet, Lieblich Affid, Exh A). The Offer Sheet also recites: “Brokers: Adelaide Polsinelli” (*id.*). Ms. Polsinelli is associated with Marcus & Millichap.

The Amended Complaint alleges that without knowledge of brokers, Broadway West or Marcus & Millichap, Doral and defendant Nessa Perla, president of Whale Realty, instead sold the subject premises to SL Whale and Brickell 13 on August 31, 2011. The SL Whale and Brickel 13 limited liability companies were formed on August 9, 2011 and August 15, 2011, respectively. Karasick and Skydell were members of the newly formed entities. Plaintiff alleges that the contract terms of the final sale were identical to those of the pending sale to 974 East, and, therefore, Doral took advantage of the negotiations and due diligence performed by the brokerage firms on behalf of 974 East. Plaintiff alleges that defendants schemed to defraud plaintiff of a 2% brokerage commission, as contracted for in the June 7, 2011 Offer Sheet. This action ensued.

Broadway West filed a Complaint alleging causes of action against all defendants, without any distinction, for scheme to defraud (first cause of action), breach of contract/tortious interference with contractual relations (second cause of action), *quantum meruit* (third cause of action), unjust enrichment (fourth cause of action), punitive damages (fifth cause of action), and attorneys' fees (sixth cause of action).

By Decision and Order, dated September 18, 2012 ("Decision and Order"), this Court (Sherwood, J.) granted so much of Doral's motion to dismiss as sought to dismiss the first cause of action for scheme to defraud; the tortious interference with contract branch of the second cause of action; the fifth cause of action for punitive damages, and sixth cause of action for attorneys' fees. The Court also granted the Purchaser Defendants' motion to dismiss the complaint, with leave to file an amended complaint to allege a cause of action against SL Whale and Brickell 13 for tortious interference with contractual relations. In addition, the Court dismissed the complaint as to defendants Nakazawa & Suzuki Capital LLC ("NS Capital") and Suzuki Capital Funding Ltd. ("Suzuki Capital").

Broadway West filed an Amended Complaint alleging causes of action for breach of contract against Doral (first cause of action), tortious interference with contract against all defendants except Doral (second cause of action), *quantum meruit* against all defendants (third cause of action), and unjust enrichment against all defendants (fourth cause of action). It is noteworthy that the factual allegations in the Amended Complaint do not vary significantly from those in the original Complaint. In fact, the Amended Complaint continues to name NS Capital and Suzuki Capital, parties who were dismissed from the action by the prior Decision and Order, and Broadway West does not allege any facts on which to base a cause of action against these defendants.

The Purchaser Defendants and the Whale Defendants now move separately to dismiss the Amended Complaint. The Purchaser Defendants argue, in essence, that Broadway West failed to comply with the limited grant of leave in the Decision and Order and, in any event, the Amended Complaint fails to remedy the defects of the original Complaint. The Whale Defendants also argue that the causes of action in the Amended Complaint fail to state valid claims for relief. Broadway West opposes both motions.

DISCUSSION

A. Legal Standard on a Motion to Dismiss

On a motion to dismiss, pursuant to CPLR 3211(a), the pleading is to be afforded a liberal construction (*see* CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine whether the facts as alleged fit within any legally cognizable legal theory (*Leon v Martinez, supra*). The court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and “the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” (*id.*, quoting *Guggenheimer v Ginsburg*, 43 NY2d 268 [1977]).

B. Breach of Contract

The Amended Complaint alleges that the June 7, 2011 Offer Sheet represents a valid contract between Broadway West and Doral, pursuant to which, Doral agreed to pay Broadway West a commission equal to 2% of the total purchase price in connection with the sale of the subject premises to 974 East, and that Broadway West was the procuring cause of the sale of the premises to SL Whale and Brickell 13. Doral invokes the Offer Sheet term providing that “the

seller agrees not to negotiate any other offers for the property or issue any other contracts to purchase the property [T]he exclusivity provision shall not extend beyond 30 days from the date of this letter” (Lieblich Affid, Exh A). The Court refers the parties to its determination in the prior Decision and Order declining to dismiss the breach of contract claim against Doral.

C. Tortious Interference With Contract

A claim for tortious interference with contract requires (1) the existence of a valid contract between the plaintiff and a third party, (2) the defendant’s knowledge of the contract; (3) the defendant’s intentional and improper procurement of a breach of the contract, and (4) resulting damages (*White Plains Coat & Apron Co. v Cintas*, 8 NY3d 422, 426 [2007]). The pleading “must allege that the contract would not have been breached ‘but for’ the defendant’s conduct” (*id*; see *Burrowes v Comps*, 25 AD3d 370, 373 [1st Dept. 2006], *lv denied* 7 NY3d 704[2006]).

The Amended Complaint alleges that the June 7, 2011 Offer Sheet represents a contract between Broadway West and Doral; that all of the defendants knew of the existence of the contract; that defendants (with the exception of (1) Doral and (2) SL Whale and Brickell 13, but only to the extent that said entities may be deemed to be the successors or assigns of 974 East with regard to the June 7, 2011 Offer Sheet), jointly and severally, intentionally induced Doral to breach its contractual obligations to Broadway West, or otherwise rendered performance of said obligations impossible, resulting in financial injury to Broadway West. Apart from the inclusion of all defendants, with the qualifying exception, the allegations are unchanged from those in the original Complaint, and even include defendants against whom the Complaint has been dismissed without leave to replead.

The Decision and Order on the prior motion to dismiss states that the tortious interference with contract claim against the Purchaser Defendants:

“[m]ay be viable only if the Purchaser Defendants are deemed not to be the successor or assign of 947 East. In any event the claim must be dismissed because plaintiff has failed to allege with particularity that the Purchase defendants intentionally induced a third party to breach a contract between plaintiff and a third party [internal citation omitted]. Further ... plaintiff [has] not alleged that but for the Purchaser Defendants’ alleged interference there would have been no breach”

(Dec & Order dated September 18, 2012). As noted, Broadway West asserts a claim for tortious interference with contract against Doral only in the absence of an enforceable contract between it and Doral. However, the only alleged contract to which Broadway West is a party is set forth in the Offer Sheet, and Doral is also a party, not a third-party, to that contract. Furthermore, the Amended Complaint alleges that the commission is due from the seller, not a third party. As such, as to Doral, the pleading cannot establish the existence of a contract between Broadway West and a third party.

As to the Purchaser Defendants, the Court noted in the prior Decision and Order that the tortious interference with contract claim may be viable only if the Purchaser Defendants are deemed not to be the successor or assign of 947 East. However, the pleading fails to allege, with sufficient particularity, that the Purchaser Defendants intentionally induced a third party to breach a contract between plaintiff and a third party. Nor does the pleading allege that there would have been no breach but for the alleged interference of the Purchaser Defendants. Thus, the cause of action for tortious interference with contract must also be dismissed.

D. *Quantum Meruit* and Unjust Enrichment

At oral argument of the present motions, held on April 9, 2013, Broadway West acknowledged that it abandoned its attempt to replead those claims (*see*, Transcript, p. 6). Thus, the claims for *quantum meruit* and unjust enrichment are dismissed.

CONCLUSION AND ORDER

Accordingly it is

ORDERED that the motions to dismiss are granted and the Amended Complaint is dismissed in its entirety as against the Purchaser Defendants and the Whale Defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption in the Amended Complaint is amended to reflect the dismissal and to read:

Broadway West Enterprises, Ltd. v Doral Money, Inc., Eli Kass, and Solomon Knopf; and that all future papers filed with the Court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein.

DATED: August 9, 2013

ENTER,



O. PETER SHERWOOD

J.S.C.