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| <b>Retail Advisors, Inc. v SLG 625 Lessee LLC</b>  |
| 2013 NY Slip Op 32288(U)   |
| September 23, 2013   |
| Sup Ct, NY County  |
| Docket Number: 650779/13   |
| Judge: Manuel J. Mendez  |
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13
Justice

RETAIL ADVISORS, INC.,

Plaintiff,

-against-

SLG 625 LESSEE LLC, and
FRATELLI ROSSETTI NEW YORK LTD.,

Defendants.

INDEX NO. 650779/13
MOTION DATE 09-11-13
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to 8 were read on this motion to/for to Dismiss pursuant to CPLR 3211[a][1]:

Table with 2 columns: Description of papers and PAPERS NUMBERED. Rows include Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that defendants' motion to dismiss this action pursuant to CPLR §3211[a][1], is denied.

Defendants seek an Order pursuant to CPLR §3211[a][1], dismissing this action based on documentary evidence.

Retail Advisors, Inc. (hereinafter referred to as "RAI") is a licensed commercial real estate broker. SLG 625 Lessee LLC (hereinafter referred to as "SLG") formerly known as Green 625 Lessee LLC, was the owner and landlord of commercial property located at 625 Madison Avenue, New York, New York. Fratelli Rossetti New York Ltd. (hereinafter referred to as "Fratelli Rossetti") and it's predecessor in interest, Fratelli Rossetti, 625, Inc., are the tenants of the ground floor space, "Store 113," in 625 Madison Avenue, New York, New York. The lease was subsequently amended to alter the location of basement storage space in 2001. The amended lease was scheduled to expire as of August 31, 2013 (Mot. Exh.1).

In 2010, Fratelli Rossetti advised RAI of its interest in early renewal of the lease. Plaintiff contacted non-party Newmark & Company Real Estate Inc., then known as Newmark Knight Frank (hereinafter referred to as "Newmark"), an outside retail leasing broker for SLG about potential early renewal of the lease. From February 11, 2010 through November of 2010, the parties negotiated the preliminary lease renewal terms. Negotiations were conducted through Newmark and RAI. The proposals included a provision for broker fees, that would give each broker, "One half of the full commission to be paid upon lease execution and subject to a separate agreement" (Opp. Exhs. 2-7).

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

On January 26, 2011, Newmark advised plaintiff that negotiations had reached a point where, “we must either agree to these terms or postpone discussions until a later date” (Opp. Exh. 17). On February 25, 2011, a final proposed lease renewal was sent by Newmark to RAI, which included the same language concerning brokerage fees as the December 22, 2010 proposal. Defendants claim that RAI had indicated to SLG that Fratelli Rossetti was prepared to accept the demands. On April 20, 2011, Diego Rossetti, president of Fratelli Rossetti sent an e-mail to Larry Swiger, senior vice-president of SLG, stating that Fratelli Rossetti could not accept the terms of the proposed modification of the lease renewal (Mot. Exh. 8). Mr. Swiger sent a return e-mail stating, “Since your lease does not expire for more than two (2) years there is nothing more to discuss” (Mot. Exh. 9).

On May 10, 2012, Larry Swiger sent an e-mail only to Diego Rossetti about a possible lease renewal (Mot. Exh. 10). The defendants re-negotiated the lease renewal without RAI. On November 14, 2012, the defendants entered into a lease renewal (Mot. Exh. 11). Throughout 2012, RAI conducted searches for locations for Fratelli Rossetti to lease. On November 26, 2012, Diego Rossetti sent an e-mail to Richard Seligman advising RAI that a renewal lease was entered into with SLG (Opp. Exh. 22).

A motion to dismiss pursuant to CPLR §3211[a][1], requires that the party seeking dismissal produce documentary evidence that “utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” (Leon v. Martinez, 84 N.Y. 2d 83, 638 N.E. 2d 511, 614 N.Y.S. 2d 972 [1994]). Plaintiff is provided with every favorable inference and the complaint is construed liberally. A motion to dismiss pursuant to CPLR §3211[a][1], does not require that the plaintiff establish the ultimate success of the allegations (African Diaspora Maritime Corp. v. Golden Gate Yacht Club, 968 N.Y.S. 2d 459 [N.Y.A.D. 1<sup>st</sup> Dept., 2013]).

To establish a breach of contract claim, a party must allege, “(1) the existence of an agreement, (2) performance of the agreement by one party, (3) breach by the other party, and (4) damages” (Noise in the Attic Productions, Inc. v. London Records, 10 A.D. 3d 303, 782 N.Y.S. 2d 1 [N.Y.A.D. 1<sup>st</sup> Dept., 2004]). A broker establishes entitlement to a commission by pleading and proving the existence of either an express or implied contract for employment with the defendant. Proof of the existence of a contract may be established by an express written agreement concerning services to be rendered or, “a conscious appropriation of the labors of the broker” (Joseph P. Day Realty Corp. v. Chera, 308 A.D. 2d 148, 762 N.Y.S. 2d 373 [N.Y.A.D. 1<sup>st</sup> Dept., 2003]). An owner may be liable under the theory of implied contract where, in the absence of an express agreement to pay the commission, the owner accepted and benefitted from the brokers services. It cannot be assumed that a broker acts gratuitously and the landlord and tenant are held to that knowledge when they accept the broker’s services (Gronich & Co., Inc. v. 649 Broadway Equities Co., 169 A.D. 2d 600, 565 N.Y.S. 2d 18 [N.Y.A.D. 1<sup>st</sup> Dept., 1991]).

A cause of action for tortious inducement of a breach of contract requires, the existence of a contract; a third-party’s knowledge of the contract; intentional efforts by the third party to cause a breach of the contract or to render performance impossible; and damages. A claim for tortious inducement of a breach of contract is

not enforceable until damages are sustained (*Kronos, Inc. v. AVX Corporation*, 81 N.Y. 2d 90, 612 N.E. 2d 289, 595 N.Y.S. 2d 931 [1993]).

Unjust enrichment is a quasi-contract claim that only applies in the absence of an express written agreement (*Zolotar v. New York Life Ins. Co.*, 172 A.D. 2d 27, 576 A.D. 2d 850 [N.Y.A.D. 1<sup>st</sup> Dept., 1991] and *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y. 2d 382, 516 N.E. 2d 190, 521 N.Y.S. 2d 653 [1987]). A claim for unjust enrichment requires the plaintiff establish that services were rendered on behalf of the defendant resulting in his unjust enrichment (*Kagan v. K-Tel Entertainment Inc.*, 172 A.D. 2d 375, 568 N.Y.S. 2d 756 [N.Y.A.D. 1<sup>st</sup> Dept., 1991]). A licensed real estate broker is not precluded from a claim sounding in quasi-contract for the recovery of the reasonable value of their services (*Fidelity Bus. Brokers v. Gamaldi*, 190 A.D. 2d 709, 593 N.Y.S. 2d 315 [N.Y.A.D. 2<sup>nd</sup> Dept., 1993]). Claims for both breach of contract and for unjust enrichment may be asserted where it is alleged that performance of a contract was prevented or money is owed outside the scope of the agreement (*Loheac, P.C. v. Children's Corner Learning Center*, 51 A.D. 3d 476, 857 N.Y.S. 2d 143 [N.Y.A.D. 1<sup>st</sup> Dept., 2008] and *Sabre Intern. Sec., Ltd. v. Vulcan Capital Management, Inc.*, 95 A.D. 3d 434, 944 N.Y.S. 2d 36 [N.Y.A.D. 1<sup>st</sup> Dept., 2012]).

The complaint asserts causes of action for breach of an express special contract, breach of contract, tortious inducement of breach of contract and unjust enrichment. Defendants contend that the documentary evidence establishes that in 2011 the proposed lease amendments, which included inconsistent terms, were all rejected and plaintiff did not procure a lease renewal. A renewal lease was not entered into as of 2011 and there was no express special agreement with RAI that would prohibit the parties from negotiating without brokers. Starting in May of 2012, defendants entered into negotiations for a "new deal," which was a separate agreement without any brokers, over a year after the plaintiff's proposed amendments were rejected. There is no contractual basis for the claim of breach of contract or tortious inducement of breach of contract because RAI did not have an exclusive agreement after the 2011 proposed lease amendments were rejected by Fratelli Rossetti. There is no basis for the claim of unjust enrichment because plaintiff was not the procuring cause of the lease renewal.

Plaintiff opposes the motion contending that the documentary evidence provided by the defendants does not address any of the four causes of action asserted in the complaint. Defendants are only addressing the procuring cause of the renewal lease, but RAI is seeking damages based on other factors. Plaintiff also contends that it had an oral express special agreement with SLG for its commissions. RAI solely initiated the lease renewal on behalf of Fratelli Rossetti. Correspondence clearly establishes that negotiations were ongoing and that defendants fully intended to continue negotiations at, "a later date." The proposed lease amendments do not limit the amount of brokerage activity that would lead to commission. Fratelli Rossetti by negotiating solely with SLG, violated the exclusive broker agreement and is in breach of contract. SLG intentionally interfered with and induced Fratelli Rossetti not to enter into a lease renewal with RAI as its broker. SLG obtained the renewal of the lease through its affiliate SL Green Retail Corp. and in the process excluded RAI's fees from the process, resulting in unjust enrichment.

Upon review of all the papers submitted this Court finds that defendants have failed to establish a basis to dismiss the complaint with evidence that "utterly" refutes plaintiff's claims. A licensed real estate broker can recover a commission under an implied contract as well as an express contract and there is potentially a valid breach of contract cause of action. Defendants have not stated a basis for this Court to find that there was a separate "new deal" resulting in the renewal lease. Plaintiff may, alternatively, be entitled to recover under the cause of action for unjust enrichment based on over a year of services provided on behalf of the defendants without compensation. There remain issues of fact concerning whether SLG interfered with Frattelli Rosetti's agreement with RAI.

Accordingly, it is ORDERED that defendants' motion to dismiss pursuant to CPLR §3211[a][1], is denied, and it is further,

ORDERED that, plaintiff is directed to serve a copy of this Order with Notice of Entry on the defendants, and it is further,

ORDERED that, the defendants shall within twenty (20) days from the date of service of a copy of this Order with Notice of Entry serve and file an Answer on the plaintiff and the Clerk of this Court.

ENTER:

  
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MANUEL J. MENDEZ,  
J.S.C.

MANUEL J. MENDEZ  
J.S.C.

Dated: September 23, 2013

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