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SHIRLEY WERNER KORNREICH J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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PENNCOLAB LLC,

Index No.: 653806/2013

Plaintiff,

DECISION & ORDER

-against-

118 EAST 59TH STREET REALTY LLC, and
EURO GROUP OF COMPANIES, INC.
D/B/A EURO GROUP and NEO QUE YAO,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 001 and 002 are consolidated for disposition.

Defendants 118 East 59th Street Realty LLC (118 East), Euro Group of Companies, Inc., d/b/a Euro Group (Euro Group), and Neo Que Yao move, pursuant to CPLR 3211, to dismiss the Amended Complaint (the AC).[1] Plaintiff Penncolab LLC (Penncolab) cross-moves for an extension of time to serve Euro Group and Yao. Defendants' motion is granted and plaintiff's cross-motion is denied for the reasons that follow.

I. Procedural History & Factual Background

As this is a motion to dismiss, the facts recited are taken from the AC.

Penncolab is a real estate development firm that provides a broad range of services to assist clients acquire and develop investment properties. AC ¶¶ 4-5.[2] Penncolab helps clients

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[1] As noted in an interim order dated March 14, 2014 (Dkt. 20), motion 001 is a motion to dismiss the original complaint. Penncolab improperly filed the AC on the return date instead of filing opposition papers. Motion 002 is a motion to dismiss the AC. Since, as discussed herein, the AC (which purports to remedy the original complaint's deficiencies) lacks merit, the court will not separately address the original complaint or the arguments regarding its sufficiency.

[2] It should be noted that the original complaint stated that Penncolab "is in the business of locating property for particular investors." *See* Complaint ¶ 7. The AC tries to reframe the nature of Penncolab's services to get around the statute of frauds. However, as discussed herein,

locate a property, conducts due diligence on the property, and assists the client in developing the property after the purchase. *Id.* Penncolab's principals are two brothers, non-parties Aamir and Ali Rahim. ¶¶ 5-7. Aamir lives in Hong Kong and Ali lives in New York. ¶ 7. Aamir's job is to locate potential international investors in New York real estate while Ali's job is to facilitate the investment in New York. *Id.*

Euro Group is a foreign real estate investment corporation based in Hong Kong. ¶ 8. Its principal, Yao, who also lives in Hong Kong, is a close friend of Aamir. ¶ 10. On October 7, 2012, Aamir, Ali, and Yao met to discuss doing business together. ¶ 25. On March 22, 2013, Aamir sent Yao a proposal for Euro Group to invest in a New York property using Penncolab's services. ¶ 14. The AC alleges that a "certain written communication" (which the AC defines as the "March 22 Retention Agreement") was sent to Yao. ¶ 29. It allegedly contains a description of Penncolab's services and sets forth that its fee would be "a [12%] fee based upon the total costs to develop the piece of real property." ¶¶ 29-30. The March 22 Retention Agreement is not annexed to the AC, nor did Penncolab submit it to the court in opposition to this motion. Though the AC does not allege that Yao agreed to the terms of the March 22 Retention Agreement, the AC does claim that Yao directed Penncolab to attempt to locate other properties for Euro Group. ¶ 31. Penncolab claims it relied on Yao's directives and believed, based on Yao's representations, that Penncolab would be paid for its services. ¶¶ 31-32.

On July 31, 2013, Yao came to New York to view three properties[3] on which Penncolab performed due diligence. ¶ 33. During August 2013, Penncolab worked with Euro Group to

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the services described in the AC fall squarely within the statute of frauds.

[3] The properties are located at 134-136 West 18th Street, 108 Charlton Street, and 125 Perry Street.

determine if these properties were suitable for development. ¶¶ 34-35. Euro Group eventually decided not to invest in these properties. ¶ 36.

On September 10, 2013, Euro Group informed Penncolab that it was interested in a property located at 113-119 East 55th Street (the 55th Street Property) and that it wanted to use Penncolab's services. ¶ 37. The parties exchanged emails regarding this property, but Euro Group eventually decided not to invest. ¶¶ 38-40.

On October 3, 2013, Penncolab introduced defendants to a property located at 118 East 59th Street (the Property). ¶ 42. Ali described the Property in an email to Yao:

> Hi [Yao]: New property on the market. It is appealing as it is delivered as one piece-has no problems with landmarks-is a 50 foot lot ... 76,000 buildable, 53 bucks. We can get this if we close prior to [December 15, 2013]. Let me know your thoughts.

¶ 42. Yao immediately responded "Looks good, can we have more details?", and then followed up by writing:

> Hi Ali, Location[] looks great. From the pack it seems that max FAR is 10 in a C5-2.5 zone. So assuming no bonus we can build 50,210 [square feet] of residential. I can't see how you can get 76,000 [square feet]? If the economics work out this could be very nice...

¶¶ 43-44. Yao then directed Penncolab to perform the following services: (1) view the Property; (2) discuss the "correct purchase price"; (3) hire professionals to acquire the Property and its air rights; and (4) discuss contractual terms for such acquisitions. Penncolab does not allege that these directives were made in writing, nor does Penncolab allege that a fee agreement was set forth in writing at the time these directives were allegedly issued. ¶¶ 45-46.

On October 5, 2013, Ali sent an email to Yao, stating:

> I have a meeting with the Owner of [the Property] next week and will send you along all the information requested after my meeting as he has it in his possession and does not want to release it to anyone but "buyers who are serious and have

integrity."

¶ 47. On October 7, 2013, Yao replied to Ali:

> [Please] link up fast as I have to get up to speed with this ... Would be best if I can talk to any lawyers or professional who may already have done work or studies to this plot ... Else I have to deal on the [55th Street Property] as it's all ready to go [and] they [are] giving tight deadline with competitor now stepping in.

¶ 48. On October 9, 2013, Yao emailed Ali, stating:

> We are willing to make an offer now **$50 million with 30 day inspection and 15th December close**. This should be more than enough time to do our analysis and due diligence. Can you put us in contact with you broker and let's get it done.

¶ 51 (bold and underline in original).

On October 10, 2013, Penncolab alleges that the following things "became clear": (1) that the owner of the Property had other buyers lined up, causing Yao to direct Penncolab to expeditiously move the acquisition process along; and (2) that defendants were no longer interested in retaining Penncolab to develop the Property and its air rights after the deal closed. ¶ 53. On October 12, 2013, Ali emailed Yao:

> As per our discussion yesterday, here is what has transpired to date: We made an offer of 51.5 with a November 15 closing date. **[Penncolab] has done a tremendous amount of work over the last year on finding properties, developing financial models, legal fees etc. This should be compensated by the investors for the property as we are bringing you in to the deal. Our Compensation is [1.5%] of deal amount**.

¶ 54 (bold and underline added in AC). Penncolab alleges that it was proposing a significantly lower fee (1.5% vs. 12%) since its fee could no longer factor in post-closing development work because Penncolab was not going to be retained for such work. ¶ 55-56. Penncolab alleges that defendants orally agreed to pay the proposed 1.5% fee. ¶ 57. Penncolab also alleges that it was orally agreed that it "would be the named purchaser under the contract of sale for the [Property]

and the Air Rights." ¶ 59. Penncolab further alleges that on October 13, 2013, Yao again orally confirmed to Ali that the 1.5% fee would be paid. ¶ 62.

On October 15, 2013, the owner of the Property informed Ali (through a broker) that Yao's $55 million offer was being accepted. ¶ 63. Ali notified Yao, and the parties' lawyers immediately began drafting the contract. ¶¶ 63-64. Yao instructed Ali to "work with my team analysis legal [and] investment comment staff … to ensure all the [due diligence and] checkings are done." ¶ 66.

On October 17, 2013, Yao came to New York to close on the sale of the Property. ¶ 76. At 8:00 a.m. on October 17, Ali and Yao had a breakfast meeting at which Yao allegedly confirmed that he would pay the 1.5% fee. ¶ 79. At 9:30 a.m., Ali and Yao were joined by Yao's attorney, non-party William Zaccaria. ¶ 80. Yao told Ali that Zaccaria was there to review the contract and ensure the suitability of its terms. ¶ 81. Zaccaria orally told Ali that he had "no problem" with paying the 1.5% fee. *Id.* Ali then took Yao and Zaccaria to tour the Property. ¶ 82. Afterward, Ali, Yao, and Zaccaria met with the owner of the Property to sign the contract. ¶ 83. Again, in the presence of the seller, Yao expressed his commitment to pay the 1.5% fee. *Id.*

The contract, as executed, was between the owner and 118 East, the entity Yao formed to hold title to the Property.[4] ¶ 84. Immediately after the contract was signed, Ali again asked to be

[4] Penncolab further alleges that it agreed "to relinquish its name from the Contract of Sale and to allow the Defendants to acquire the Premises and the Air Rights." The court has no idea what this means. Penncolab seems to imply that it wanted to use this as leverage to ensure its fee got paid. However, aside from the fact that Penncolab had no right to insert itself as a party to a contract where the seller had no interest in contracting with it, such a maneuver would fail since Penncolab's inability to pay the $55 million would negate the contract, allowing the seller to contract with defendants. In any event, it is the seller's right to decide who it wants its contractual counterparty to be. Furthermore, it is unremarkable that Yao created a specific

paid. ¶ 85. Yao "stated that while [he] would not pay the [fee] at that exact moment" the fee would be paid "shortly thereafter." *Id.* Ali and Yao then went to a "celebratory" meal, during which Aamir called Yao to demand payment of the fee. ¶ 87. 118 East eventually closed on the Property on November 20, 2013. ¶ 92.

Penncolab commenced this action on October 30, 2013. The AC, filed on February 28, 2014, contains 5 causes of action: (1) breach of contract; (2) fraud; (3) unjust enrichment; (4) promissory estoppel; and (5) tortious interference with business relations. Defendants move to dismiss for failure to state a claim and for improper service. The court will not address the service issues since, were Penncolab's claims viable, its cross-motion for an extension of time to serve would be granted in the interest of justice. However, as explained below, Penncolab's claims are barred by the statute of frauds.

II. Discussion

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1992); *see also Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of

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corporate entity, 118 East, to hold title to the Property. This is standard practice in commercial real estate transactions. Nor did the use of 118 East as the purchaser defraud Penncolab in any way. The AC alleges an agreement between Penncolab and Euro Group, as negotiated between Aamir, Ali, and Yao. If such agreement were enforceable, and not barred by the statute of frauds, Euro Group would be liable. That being said, the AC lacks any of the legally required specificity for maintaining a veil piercing claim [*see Morris v NY State Dep't of Taxation & Finance*, 82 NY2d 135, 140 (1993)], as the AC merely parrots the legal elements and provides no facts to buttress the allegation that 118 East and Euro Group are not operated as formal corporate entities. *See* AC ¶¶ 94-100. Regardless, since Penncolab's claims fail on the merits, the veil piercing allegations are moot.

its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action. *Skillgames, id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "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 N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

"GOL § 5-701(a)(10) requires that every agreement to pay compensation for services rendered in negotiating a business opportunity be (1) in writing and (2) subscribed by the party to be charged therewith." *Mark Bruce Int'l, Inc. v Blank Rome LLP*, 19 Misc3d 1140(A), at *5 (Sup Ct, NY County 2008), *aff'd* 60 AD3d 550 (1st Dept 2009), accord *Parma Tile Mosaic & Marble Co. v Estate of Short*, 87 NY2d 524 (1996). § 5-701(a)(10) provides that "'negotiating' includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction." *See JF Capital Advisors, LLC v Lightstone Group, LLC*, 115 AD3d 591, 592 (1st Dept 2014). In *JF Capital*, the First Department addressed a case with virtually identical facts:

> Plaintiff is an investment advisory firm ... and defendants are real estate investment companies. Plaintiff commenced this action seeking compensation from defendants for financial advisory services it provided under an alleged oral

> contract in connection with defendants' acquisition of certain hotels and other investment opportunities.
>
> Specifically, the complaint alleges that [], in connection with eight different projects that defendants were "interested in pursuing," plaintiff performed a broad range of advisory services for which defendants have not compensated plaintiff; **these services allegedly include financial analysis and modeling, market research, data analysis, due diligence, property tours, site visits, investment analysis and evaluation services**. The complaint asserts causes of action for quantum meruit and unjust enrichment in connection with these services. **Plaintiff generally does not seek compensation for negotiations that it performed on defendants' behalf, but does seek compensation for the other services it allegedly performed for example, preparing investment committee materials and reviewing documents for loan portfolios**.

JF Capital, 115 AD3d at 591-92 (emphasis added).

Here, as in *JF Capital*, "the parties disagree on whether the statute of frauds applies to plaintiff's claims." *Id.* at 592. In *JF Capital*, the Court held that all of plaintiff's services rendered in connection with the real estate investment negotiations fall under the ambit of the statute of frauds. *Id.* The Appellate Division found it irrelevant "[t]hat plaintiff provided other services in addition to negotiating deals ... [because] plaintiff undertook those other services to assist defendants' negotiations, largely by determining the value to defendants of pursuing the deal." *Id.*, citing *Whitman Heffernan Rhein & Co. v Griffin Co.*, 163 AD2d 86, 87 (1st Dept 1990). In other words, all services rendered in connection with the facilitation of a real estate sale are subject to the statute of frauds. *See Whitman*, 163 AD3d at 87 ("the general rule is that if part of an entire contract is void under the Statute of Frauds, the whole of such contract is void").

The Appellate Division has foreclosed the possibility of severing claims to recoup compensation for services relating to the "negotiation or consummation of [] investment opportunities" from claims to recoup compensation for ancillary services related to those investment opportunities. Rather, such ancillary services "clearly fall within" § 5-701(a)(10).

JF Capital, 115 AD3d at 593, citing *GEM Advisors, Inc. v Corporacion Sidenor, S.A.*, 667 FSupp2d 308, 323 n.5 (SDNY 2009) ("Such activities have all been found to fall within the broad umbrella of § 5-701(a)(10), which embraces the [] use of connections, ability, and knowledge to facilitate or assist in the transaction by helping the acquirer of the business opportunity meet the right people and have the right information") (quotation marks omitted); *see also Snyder v Bronfman*, 13 NY3d 504, 510 (2009) ("'where ... the intermediary's activity is ... that of providing 'know-how' or 'know-who', in bringing about between principals an enterprise of some complexity or an acquisition of a significant interest in an enterprise,' the statute of frauds applies"), quoting *Freedman v Chemical Const. Corp.*, 43 NY2d 260, 267 (1977).

Penncolab, like the plaintiff in *JF Capital*, provided a broad array of services to help defendants purchase the Property. Such services ran the gamut from conducting due diligence, valuing the property, procuring legal services, and interfacing with the seller. To wit, while some of the properties defendants were interested in were located by defendants, the Property actually purchased by 118 East was suggested to defendants by Penncolab. *See* AC ¶ 42. Penncolab's breach of contract claim, therefore, is barred by the statute of frauds because its services were rendered in connection to defendants' purchase of the Property and no signed, written agreement exists.[5]

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[5] To be sure, email exchanges can satisfy the statute of frauds. *Kasowitz, Benson, Torres & Friedman, LLP v Reade*, 98 AD3d 403, 404 (1st Dept 2012) ("An exchange of e-mails may constitute an enforceable agreement if the writings include all of the agreement's essential terms, *including the fee*") (emphasis added); *Mark Bruce, supra*, 60 AD3d at 551 ("The exchange of e-mails, *which did not set forth the fee for plaintiff's services or an objective standard to determine it*, was too indefinite to be enforceable") (emphasis added). However, the proffered emails contain nothing remotely resembling an explicit agreement by defendants to pay the 1.5% fee proposed by Penncolab. This is fatal to Penncolab's claim because the statute of frauds requires

Nor can Penncolab maintain a duplicative tort or quasi contract claim. *See JF Capital*, 115 AD3d at 592; *MP Innovations, Inc. v Atlantic Horizon Int'l, Inc.*, 72 AD3d 571, 572 (1st Dept 2010) (plaintiff cannot maintain unjust enrichment claim for breach of contract claim barred by § 5-701(a)(10) nor can plaintiff maintain fraud claim based that essentially alleges "that defendant never intended to honor its promise to pay plaintiff"), citing *Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 436 (1st Dept 1988) (a fraud claim does not lie where it simply "alleges that a defendant did not intend to perform a contract with a plaintiff when he made it"); *see also Komolov v Segal*, 40 Misc3d 1228(A), at *4 (Sup Ct, NY County 2013) (quasi contract claim "is not viable when the claim merely seeks the enforcement of the unenforceable contract itself"), *aff'd* 117 AD3d 557 (1st Dept 2014) (unjust enrichment claim precluded "because it seeks precisely the same relief that was barred by the statute of frauds").

Furthermore, here, as in *JF Capital*, plaintiff cannot argue that "dismissal of its claims before discovery is [] premature, because it had available all of the facts necessary to describe the services it allegedly performed, and thus to establish whether its claims fell outside of the statute of frauds. It also acknowledged in the complaint that no written agreement ever came to fruition and no amount of discovery will remedy that." *JF Capital*, 115 AD3d at 593. Accordingly, it is

ORDERED that the motions to dismiss by defendants Defendants 118 East 59th Street Realty LLC, Euro Group of Companies, Inc., d/b/a Euro Group, and Neo Que Yao are granted, the cross-motion by plaintiff Penncolab LLC for an extension of time to serve defendants is

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the agreement to be signed "by the party to be charged." *Parma*, 87 NY2d at 527. Since defendants did not send a written email response acceding to the fee, the signed writing requirement is not met.

denied as moot, and the Clerk is directed to enter judgment dismissing the Amended Complaint with prejudice.

Dated: July 30, 2014

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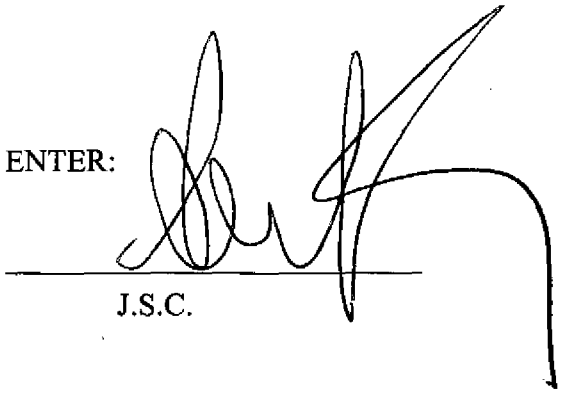

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