

Katzap v Knickerbocker Vil., Inc.

2014 NY Slip Op 32781(U)

October 24, 2014

Supreme Court, New York County

Docket Number: 650251/07

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 59

-----X
CHAIM KATZAP,

Plaintiff ,

-against-

Index No.: 650251/07

KNICKERBOCKER VILLAGE, INC., CHERRY
GREEN MANAGEMENT CORP., CHERRY GREEN
PROPERTY CORP., CHERRY GREEN CORP.,
STUDLEY, INC., IRENE PLETKA, PETER PLETKA
and WOODY HELLER,

Defendants.

-----X
DEBRA A. JAMES, J.:

Motion sequence numbers 002 and 003 are consolidated for
disposition.

In this breach of real estate broker contract action,
plaintiff, Chaim Katzap (Katzap), moves, pursuant to CPLR 3212
for summary judgment on the complaint (motion sequence number
002).

By separate motion, defendants, Knickerbocker Village, Inc.
(KVI or Owner), Cherry Green Management Corp., Cherry Green
Property Corp., Cherry Green Corp. (collectively Cherry Green),
Studley, Inc. (Studley), Irene Pletka (Irene), Peter Pletka
(Peter), and Woody Heller (Heller) move for summary judgment
dismissing the complaint (motion sequence number 003).

Defendant KVI is an Article 4 limited dividend housing
company.¹ It was the fee owner of Knickerbocker Village, a

¹ Knickerbocker Village is an apartment complex regulated by
Article 4 of the New York Private Housing Finance Law, which

housing complex composed of twelve large apartment buildings in lower Manhattan. KVI's stock was owned by defendant Cherry Green. Irene owned 28.33% of Cheery Green's shares, her former husband, Peter, owned 25% of the shares, and five other shareholders owned the remaining 46.67% of the Cherry Green stock in roughly equal proportions.

The evidence reveals that in July 2006, Irene signed an "Authorization, Confidentiality, Non-Circumvention and Brokerage Agreement" (the Agreement) retaining Katzap to act as KVI's agent in connection with the planned disposition of Cherry Green Management Co.'s² shares of KVI (Heisenberg affirmation., exhibit 1). Cherry Green agreed to deal only through Katzap with regard to potential purchasers that the he introduced - including Taconic Investment Partners (Taconic). In addition, KVI agreed to pay Katzap a fee of 1.25% of the disposition price when, and if, KVI's shares were sold to a purchaser that Katzap had introduced to KVI, including, but not limited to Taconic. Pursuant to the Agreement, KVI also agreed that Katzap could

requires that the corporation be run on a not-for-profit basis under government supervision. Article 4 imposes a strict form of rent regulation and it places additional restrictions on the sale of the housing corporation's assets (see Knickerbocker Vil. Tenants Assn. v Calogero, 13 Misc 3d 755 [Sup Ct, NY County 2006], affd 44 AD3d 566 [1st Dept 2007]).

²Cherry Green Management Company was the parent company of KVI, Inc. The owner of the Knickerbocker Village property.

collect an additional commission from the purchaser. The agreement states in pertinent part:

BROKER requests to be furnished and OWNER agrees to furnish BROKER with necessary information concerning the PROPERTY, which may include an offering memorandum, if any exists, legal instruments, studies, brochures, computer output, etc. The aforementioned information, including oral discussions and PROPERTY inspections (collectively "Evaluation Material") shall be furnished to BROKER only on the condition that BROKER agrees to treat the Evaluation Material in confidence...

* * * *

4. owner AGREES: (I) to pay BROKER upon and simultaneously with the closing of the contemplated transaction a Brokerage Commission equivalent to 1.25% of the purchase price as per Contract for purchase and sale. . . .

5. OWNER hereby consents to BROKER collecting an additional fee or other compensation from PURCHASER under a separate agreement between BROKER and PURCHASER

(emphasis in the original).

The agreement, by its terms, expired on June 27, 2007.

The complaint alleges that, in furtherance of the agreement, Katzap assisted in negotiations between Irene and Peter and Taconic regarding the disposition of the shares, but that, in violation of the Agreement, Irene and Peter entered into one or more agreements with defendant Studley, Inc. (Studley), wherein they authorized Studley to act on their behalf to market the Property to prospective purchasers of KVI, including Taconic.

The evidence shows that in February 2007, Irene sought to

modify the Agreement to the extent that Katzap would waive his right to a brokerage commission from KVI, and would look only to Taconic for compensation. Katzap did not sign the modification agreement.

On September 28, 2007, Knickerbocker Village was conveyed to KVI Mezz Corp. (Apollo). It is undisputed that Taconic was an investor in Apollo, however, the only broker listed for the transaction was Studley.

In 2007, Katzap commenced a lawsuit against Taconic based on its alleged failure to pay his commission and, in February 2008, that suit was settled with an agreement requiring Taconic to pay Katzap \$581,750.

In addition to the action against Taconic, Katzap commenced this lawsuit.

In this lawsuit, the first cause of action in the complaint states a breach of contract claim against Irene and Peter on the ground that they breached their duty of good faith and fair dealing and/or repudiated the contract by: (a) refusing or ceasing to deal with or through Katzap during the term of the Agreement; (b) engaging Studley to serve as Cherry Green's exclusive agent for the sale of the Property; © intentionally excluding Katzap from the proposed transaction; and (d) failing to pay Katzap a brokerage commission, despite having conveyed a controlling interest in the Property to an entity owned, in part,

by Taconic.

The second cause of action alleges that the Studley defendants intentionally and tortiously interfered with Katzap's contractual rights with Cherry Green vis-a-vis the sale of the Property.

The third cause of action, pleaded in the alternative, asserts claims for quantum meruit and/or unjust enrichment, and the fourth cause of action claims that, based on Studley's actions, including but not limited to, contacting Taconic to become part of the transaction, Katzap is entitled to an equitable share of the commission that Cherry Green paid to Studley.

In 2010, defendants moved for summary judgment dismissing the complaint. By order entered September 27, 2011, this court granted summary judgment to the defendants dismissing the complaint and the counterclaims.

The parties appealed and, by order dated November 8, 2012, the First Department modified this court's decision reinstating the complaint and the counterclaims for breach of fiduciary duty and fraudulent inducement. Specifically, as relevant to the summary judgment motions now before the court, the First Department found that Taconic "participated, at least indirectly, in the final consummated transaction. Thus, there is a question of fact regarding whether plaintiff was a procuring cause of the

transaction, irrespective of whether that transaction was structured so that a separate entity, and not Taconic, was the actual purchaser" (Katzap v Knickerbocker Vil., Inc., 100 AD3d 423, 424 [1st Dept 2012]). The question of defendants' alleged repudiation of the contract was not decided on that appeal.

In support of his motion for summary judgment in his favor on the complaint, Katzap argues that: (1) Irene, Cherry Green's president, had actual authority to sign the Agreement and bind Cherry Green; (2) Cherry Green repudiated the Agreement by hiring Studley as their exclusive agent to market the Property and by refusing to deal with Taconic and Katzap until he agreed to amend the Agreement to provide that he would only seek a commission from Taconic; and (3) Cherry Green breached the Agreement by refusing to provide Taconic with due diligence materials and refusing to respond to Taconic for at least four months while negotiations with other prospective purchasers were ongoing. Alternatively, Katzap contends that he is entitled to a commission under the Agreement because he was a procuring cause of the ultimate sale of the Property.

In opposition to Katzap's motion for summary judgment on the complaint, defendants take the position that Cherry Green did not repudiate the Agreement and that Katzap is not entitled to a commission under the Agreement or a co-brokerage commission, because he was not a procuring cause of the transaction. They

also argue that Studley did not did not tortiously interfere with the Cherry Green/Katzap Agreement because the Agreement was not breached.

In support of the motion for summary judgment dismissing the complaint, the defendants argue that: 1) Katzap was not the exclusive broker for the property; 2) Katzap did not earn a commission, because the stock was not sold to a purchaser³ introduced by Katzap; 3) Taconic's small interest in the ultimate deal did not make Katzap a procuring cause of the transaction; 4) Taconic received the information it required to bid on the property; 5) there is no evidence that Katzap's services were instrumental in the ultimate sale of the Property; and 6) because Cherry Green did not breach the Agreement, Studley did not tortiously interfere with that contract.⁴

In opposition to defendants' motion for summary judgment dismissing the complaint, Katzap argues that: a) defendant's second motion for summary judgment is procedurally barred; b) the evidence establishes that defendants repudiated the Agreement; and c) alternatively, Katzap is entitled to a commission or a quantum meruit payment based on Taconic's involvement in the

³ The term "purchaser" is defined in the Agreement to include Taconic.

⁴ For the purposes of this motion, defendants do not dispute that the November 8, 2006 Agreement between Katzap and Cherry Hill was binding.

prior sale.

Summary judgment will be granted if it is clear that no triable issue of fact exists (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). The burden is on the moving party to make a prima facie showing of entitlement to summary judgment as a matter of law (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065, 1067 [1979]). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of a triable issue of fact (Alvarez v Prospect Hosp., 68 NY2d at 324; Zuckerman v City of New York, 49 NY2d at 562). Mere conclusions, unsubstantiated allegations or expressions of hope are insufficient to defeat a summary judgment motion (Zuckerman v City of New York, 49 NY2d at 562).

"A [real estate] broker is entitled to recover a commission upon establishing that it (1) is duly licensed, (2) had a contract, express or implied, with the party to be charged with paying the commission and (3) it was the procuring cause of the [transaction]" (Zere Real Estate Servs., Inc. v Parr Gen. Contr. Co., Inc., 102 AD3d 770, 773 [2d Dept 2013] [internal quotation marks and citation omitted]; see Sholom & Zuckerbrot Realty Corp. v Citibank, 205 AD2d 336, 338 [1st Dept 1994]). The procuring cause standard requires "a direct and proximate link, as

distinguished from one that is indirect and remote, between the introduction by the broker and the consummation of the transaction" (SPRE Realty Ltd. v Dienst, 119 AD3d 93, 95 [1st Dept 2014] [internal citation and quotation marks omitted]).

"[W]hether a [broker] is a 'procuring cause' of a transaction so as to be entitled to a fee is a question of fact to be decided on the evidence" (Gregory v Universal Certificate Group LLC, 32 AD3d 777, 778 [1st Dept 2006]).

Alternatively, a broker may be entitled to a commission if it can prove that the defendant prevented it from becoming the procuring cause by repudiating the contract "in bad faith and as a mere device to escape the payment of the commission" (SPRE Realty Ltd. v Dienst, 119 AD3d at 97 [internal quotation marks and citation omitted]).

Anticipatory repudiation occurs when a party attempt[s] to avoid its obligations by advancing an untenable interpretation of the contract, or . . . communicates its intent to perform only upon the satisfaction of extra contractual conditions. Such conduct excuses the non-repudiating party from further performance and entitles it to claim damages for total breach. Whether such repudiation took place is a factual determination [and] heavily dependent upon a determination of whether a breaching party's words or deeds are unequivocal"

(Fonda v First Pioneer Farm Credit, ACA, 86 AD3d 693, 694-695 [3d Dept 2011] [internal quotation marks and citations omitted]).

Here, Katzap has made a prima facie showing that defendants repudiated the contract by submitting documentary evidence that,

in December 2006, Taconic sent Cherry Green a letter of intent offering \$285 million for the shares of Cherry Green, to which Cherry Green never responded but rather forwarded Taconic's offer to Studley for Studley's review. In addition, Peter sent a copy of the Agreement to Studley, which Studley forwarded to its counsel. Thereafter, following counsel's review of the Agreement, by letter dated February 19, 2007 Cherry Green sent Katzap a proposed modification of the Agreement (Modification) which states, in pertinent part:

notwithstanding anything to the contrary that may have been stated or agreed to, your sole retention in any capacity in connection with any transaction that involves in any way whatsoever Knickerbocker Village, Inc., Cherry Green Management Corporation, their respective assets (including, without limitation, the property known as Knickerbocker Village), . . . is limited to such transactions as you have proposed for Taconic Investment Partners You have also agreed that you will look solely to Taconic . . . for any and all compensation to which you may be entitled by reason of such a transaction and that you have waived and will not assert any claims against Cherry Green, Knickerbocker, respective shareholders, officers, directors, managers, employees, agents and/or representatives.

Katzap did not sign the modification.

The evidence also reveals that, beginning in December 2006, Irene and Peter were in discussions with Studley about Katzap and Taconic's offer, and, that in February 2007, Studley advised Irene that they should give Katzap the message that there would be no further discussions about the Taconic offer, until Katzap signed the modification. Thereafter, during the term of Cherry

Green's Agreement with Katzap, Cherry Green and Studley entered into an agreement which states "that Studley, Inc. . . . has been engaged as the exclusive financial advisor to Cherry Green Property Corp . . . with **exclusive rights** regarding the potential Transaction (as hereinafter defined) with respect to [Cherry Green Property Corp.] The term Transaction is defined as "(a) any acquisition by a purchaser, in a single transaction or a series of related transactions, of (I) some or all of the assets of the [Cherry Green] or (ii) all or a portion of the [Cherry Green's] outstanding capital stock . . . " (*id.*)⁵. That agreement also states:

[Cherry Green] shall pay to Studley and Studley shall receive a transaction fee . . . , due and payable upon the closing of any Transaction with a third party [sometimes referred to herein as a 'purchaser'] introduced to [Cherry Green] by Studley and/or with whom Studley or [Cherry Green] or its shareholders . . . had substantive discussions regarding a Transaction during the term of this agreement . . . , and equal to one and one-quarter percent [1.25%] of the total consideration received by [Cherry Green]. . .

(*id.*).

On March 15, 2007 Taconic contacted Studley, expressing it's desire to get into the KVI deal. Studley continued its refusal to talk to Taconic, stating "Chaim and his attorney are your problem. Until they drop their legal threats and he signs the seller's agreement I can't help you. Pitty [sic]").

⁵ It is undisputed that Cherry Green was the owner of the stock of KVI.

In June 2007, with Katzap's permission, Cherry Green and Studley resumed discussions with Taconic. However, Katzap comes forward with evidence that despite Taconic's willingness to bid on the property, Studley and Cherry Green were unwilling to provide Taconic with the information it requested⁶.

The evidence also demonstrates that in June 2007, Studley was attempting to finalize a deal with Apollo. On June 28, 2007, Cherry Green decided to proceed with a new transaction structure and it verbally agreed to accept Apollo's offer. On July 13, 2007 by email to Studley, Irene stated, "[w]hat we all want is an unequivocal yes from Apollo and the money in the bank. In the meantime, jerking [Katzap] and Taconic around is not a bad form of amusement. And working out the phrasing of the 'So long, suckers' message at the end is not bad either".

Katzap comes forward with evidence that thereafter, Apollo was unable to raise all the funding necessary to complete the purchase of KVI and, forcing Apollo to partner with Taconic to form KVI Holdings, LLC in order to complete the acquisition of the property.

In opposition, Cherry Green has raised questions of fact about whether it repudiated the contract. Although Katzap takes

⁶Although Taconic signed a confidentiality agreement that contained certain modifications, Studley refused to discuss the modifications or accept that agreement and it demanded that Taconic sign an unchanged agreement.

the position that Cherry Hill repudiated the contract in February or March of 2007, Cherry Hill submits evidence that demonstrates that in early June, despite the fact that Katzap had not signed the modification, it agreed to allow Taconic to talk directly to Studley, that both Apollo and Taconic bid on the property in June and July 2007, and that Taconic's bids were below the amounts that Apollo was offering.

There is also a question about whether, in June and July 2007, Studley negotiated with Taconic in good faith, or whether those negotiations were merely a subterfuge.

Moreover, regarding Cherry Hill's willingness to release documents for Taconic's review, the evidence demonstrates that, although Taconic was told, in early June 2007, that Cherry Hill required Taconic to sign the confidentiality agreement, dated June 12, before it would release documents, Taconic did not return the confidentiality agreement until July 18th, and the agreement that Taconic did return had been unilaterally modified by Taconic in several places. Therefore, there is a question about whether Taconic complied with Cherry Green's request for an appropriate confidentiality agreement.

Accordingly, in this case there is a question of fact regarding whether Cherry Green's refusal to talk to Taconic from February 2007 to May 2007 and its unwillingness to provide certain documents for Taconic's review amounted to an unequivocal

repudiation of the contract (Windley v City of New York, 104 AD3d 597, 598-599 [1st Dept 2013] [evidence does not evince defendant's clear and unequivocal repudiation or abandonment of the contract], see also, Gardiner Intl., Inc. v J.W. Townsend & Assoc., Inc., 13 AD3d 246, 247 [1st Dept 2004] [conflicting allegations raise questions of fact as to whether contract was repudiated]).

Assuming arguendo that Cherry Green did not breach the Agreement, there is a question as to whether Katzap was the procuring cause of the transaction.

In SPRE Realty, Ltd v Dienst (119 AD3d at 96 [internal citation omitted]), the First Department clarified that a broker will be considered the procuring cause of a transaction, and, thus, entitled to a fee, where there is "'a direct and proximate link, as distinguished from one that is indirect and remote' between the introduction by the broker and the consummation of the transaction."

The Court explained that the standard "requires something beyond a brokers mere creation of an 'amicable atmosphere' or an 'amicable frame of mind' that might have led to the ultimate transaction. At the same time, a broker need not negotiate the transaction's final terms or be present at the closing" (id. at 99).

On appeal of this court's previous order, the First

Department found that there was a question of fact "regarding whether plaintiff was a procuring cause of the transaction, irrespective of whether that transaction was structured so that a separate entity, not Taconic, was the actual purchaser" (Katzap v Knickerbocker Vil., Inc., 100 AD3d at 424; see Gregory v Universal Certificate Group LLC, 32 AD3d 777, 778 [1st Dept 2006] [whether a broker is a procuring cause is a question of fact to be decided on the evidence]). The appellate court stated that Cherry Green's argument that Katzap was not involved in the final transaction and/or that he did not encourage Taconic to increase its final offer did not resolve the question of whether or not Katzap was a procuring cause.

The opposing affidavits and evidence on the present motion do not present sufficient additional facts to resolve the question of whether Katzap was a procuring cause of the transaction, and implicates credibility. As such, the question of whether Katzap was the procuring cause is an issue for the trier of fact (see Kronish v Koffman, 199 AD2d 136, 138 [1st Dept 1993]).

As there are questions of fact regarding Cherry Green's breach of the Agreement and whether Katzap was the procuring cause of the transaction, the question of whether Katzap is entitled to recovery in quantum meruit likewise cannot be determined at this time. A cause of action under the quasi-

contract theory of quantum meruit "'only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed to prevent a party's unjust enrichment'" (Martin H. Bauman Assoc., Inc. v H&M Intl. Transp., 171 AD2d 479, 484 [1st Dept 1991] quoting Clark-Fitzpatrick, Inc. v Long Is. R. R. Co., 70 NY2d 382, 388 [1987]).

Accordingly, the question of Katzap's entitlement to a fee based on a quantum meruit theory must await resolution of the contract causes of action (Adelaide Prods., Inc. v BKN Intl. AG, 38 AD3d 221, 225 [1st Dept 2007] ["the existence of a valid, [written] contract covering the subject matter generally precludes recovery in quasi contract for events arising out of the same subject matter"] [internal quotation marks and citations omitted]).

In the same vein, since there is question of fact regarding Cherry Green's breach of the agreement, the question of Studley and Heller's alleged tortious interference with contract cannot be resolved at this time. To establish a claim of tortious interference with contract, "the plaintiff must show the existence of its valid contract with a third party, defendant's knowledge of that contract, defendant's intentional and improper procuring of the breach, and damages" (White Plains Coat & Apron Co., Inc. v Cintas Corp., 8 NY3d 422, 426 [2007]).

If it is determined that the contract was breached, the

question of whether Studley improperly procured the breach can be decided.

Alternatively, there is a question of fact regarding whether Studley and Heller are liable to Katzap for co-brokerage commissions under the equitable theory of quasi contract to prevent Studley's unjust enrichment at Katzap's expense. Katzap has come forward with evidence that Studley, with full knowledge of Katzap's brokerage contract with Cherry Green, entered into a contract with Cherry Green, during the term of Katzap's contract, with exclusive rights regarding a potential sale of the property to a purchaser introduced after the date of the agreement. The parties have submitted conflicting evidence about Studley's cooperation with Katzap and Taconic and, thus, there are questions about whether Studley negotiated with Taconic in good faith (see Alan B. Greenfield, M.D., P.C. v Long Beach Imaging Holdings, LLC, 114 AD3d 888, 889 [2d Dept 2014] [essential question for an unjust enrichment action is "whether it is against equity and good conscience to permit defendant to retain what is sought to be recovered (internal quotation marks and citation omitted)]; Magnum Real Estate Servs., Inc. v 133-134-135 Assoc., LLC, 103 AD3d 453, 453-454 [1st Dept 2013] [claim for unjust enrichment permitted to proceed where there was no enforceable agreement covering the subject matter and there were questions of fact])).

For the same reasons defendants' motion for summary judgment shall be denied.

Accordingly, it is

ORDERED that plaintiff Chaim Katzap's motion for summary judgment on the complaint is denied in its entirety; and it is further

ORDERED that defendants Knickerbocker Village, Inc, Cherry Green Management Corp., Cherry Green Property Corp., Cherry Green Corp., Studley, Inc., Irene Pletka, Peter Pletka and Woody Heller's motion for summary judgment dismissing the amended complaint is denied in its entirety; and it is further

ORDERED that the parties are directed to appear for a pre-trial conference in IAS Part 59, 71 Thomas Street, New York, New York on December 2, 2014, 12 noon.

Dated: October 24, 2014

ENTER:


DEBRA A. JAMES J.S.C.