SHIRLEY WERNER KORNREICH J.S.C

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

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CARLTON GROUP, LTD.,

Index No.: 651323/2013

Plaintiff,

DECISION & ORDER

-against-

BCBG MAX AZRIA GROUP, INC.,

Defendant.

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SHIRLEY WERNER KORNREICH, J.:

Defendant BCBG Max Azria Group, Inc, (BCBG) and plaintiff Carlton Group, LTD. (Carlton), move and cross-move, respectively, for summary judgment. CPLR 3212. Carlton's motion is granted and BCBG's motion is denied for the reasons that follow.

I. Procedural History & Factual Background

The following facts are undisputed.

Carlton is a New York corporation which specializes in raising equity and debt on corporate transactions. BCBG is a California corporation which specializes in high-end fashion and has a portfolio of more than 20 brands. *See* Dkt. 47 at 271.[1] In or around the summer of 2012, BCBG was about to default on $228 million of its existing senior debt held by non-party Goldman Sachs or its affiliates. *See* Dkt. 21 at 1-19. A majority of the investors holding BCBG's first lien debt were threatening to accelerate foreclosure on BCBG's collateral, potentially forcing the company into bankruptcy. BCBG did not have the means to pay off the accelerated debt, and began to search for a long-term solution.

[1] References to "Dkt" followed by a number refer to documents in this action filed in the New York State Electronic Filing System.

In July 2012, BCBG met with Carlton to discuss securing approximately $500 million of long-term financing with other third party lenders. BCBG and Carlton entered into an Exclusive Debt Advisory Agreement (Agreement), dated June 12, 2012. *See* Dkt. 19 at 2. The Agreement sets forth the scope of Carlton's services and the circumstances that would entitle Carlton to earn a commission:

> CONTRACT TERMS
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> 1. EXCLUSIVE APPOINTMENT
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> Client hereby appoints Carlton as its sole and exclusive broker and agent with the exclusive right to negotiate and obtain for Client one or more letters of intent, applications, indications of interest or other financing arrangement (individually or in the aggregate, a "Commitment"), issued by one or more lender(s) (each a "Lender"), on terms acceptable to Client.
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> 2. TERM
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> A. This Agreement will commence on the date hereof and continue for a period of 75 days from the date the financing memorandum (to be completed by Carlton with information provided by Client) is approved by Client (the "**Term**").
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> B. During the Term of this Agreement, Client shall immediately refer to Carlton all inquiries and offerings received by Client with respect to a possible debt financing of Client by any and all Lenders, or their affiliates, correspondents, or other representatives, regardless of the source of such inquiries or offerings. All negotiations shall be concluded solely by Carlton or under Carlton's direction, subject to Client's review and final approval.
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> 3. CARLTON'S STRUCTURING FEES
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> A. If at any time during the Term Client accepts a Commitment in writing from a Lender for first priority senior financing or other credit or debt related loans or facilities for Client, then Client shall pay Carlton a commission in an amount equal to Two Percent (2.0%) of the maximum amount of the Commitment (the "Commission"), which Commission shall be considered earned and payable in full to Carlton upon the initial closing of such transaction. Notwithstanding anything contained in this Agreement to the contrary, if Carlton procures a **bona fide Commitment** from an institutional Lender on terms substantially equal to or better

than those of the Existing Debt (a "**BF Commitment**"), **but nevertheless Client closes on a refinancing (including, any workout or restructuring) of the Existing Debt with the Existing Lenders, then Carlton shall be paid the Commission in such amount and in the same manner as though Client Closed on such BF Commitment.**

C. Notwithstanding anything contained herein to the contrary, **if Client modifies or restructures the Existing Debt** (or any portion thereof) **with the Existing Lenders (as applicable, a "Restuturcing"), then Carlton shall still be paid its Commission by Client, to be calculated on the amount of the new "face amount" of such Existing Debt** (or such restructured portion thereof) after the Restructuring.

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8. LITIGATION

If either party commences litigation against the other party to enforce the terms of this Agreement, **the prevailing party shall be entitled to recover from the other party the costs and expenses (including, without limitation, reasonable attorneys' fees)** incurred in such litigation.

[emphasis supplied] *Id.* at 2-4.

In July 2012, Carlton met with BCBG to obtain more detailed financial information about the company. Carlton drafted and circulated a financing memorandum to numerous lenders in the debt market, including non-parties CIT Group Inc. (CIT) and Union Bank of Switzerland AG (UBS). On September 5, 2012, Carlton met with CIT in New York to discuss achieving BCBG's financial objectives. *See* Dkt. 47 at 3-4. On September 5, 2012, CIT produced two working term sheets: (1) a $150 million asset-based revolving credit facility for a 5-year term at an initial rate of less than 3%; and (2) a $350 million loan facility of subordinate financing for a 6-year term at an initial rate of less than 7% (term sheets). *See* Dkt. 36 at 1-3; *See also* Dkt. 47 at 4. The term sheets included the header, "This is not a commitment by CIT and is subject to further due diligence as discussed below." *See* Dkt. 36 at 2-3. Carlton sent BCBG the term sheets.

During the term of BCBG and Carlton's Agreement, BCBG also engaged in negotiations with its existing lenders, including non-party Guggenheim Partners (Guggenheim). *See* Dkt. 52

at 1. Guggenheim held a minority portion of the existing senior debt and approximately $234 million of BCBG's mezzanine debt. As an existing lender and second lien holder, Guggenheim would be inclined to prevent BCBG's default, to protect its subordinate lien position. *See* Dkt. 53 at 2. On August 28, 2012, BCBG closed on a Credit and Guarantee Agreement with Guggenheim in the amount of $237,980,540.83 (Guggenheim Financing), resolving the threatened default of BCBG's existing debt. *See* Dkt. 26 at ¶37. The amended complaint seeks a commission of $4.76 million, approximately 2% of the Guggenheim Financing.[2] On October 11, 2012, BCBG notified Carlton that it no longer needed its financial services. *See* Dkt. 47 at 6. Later that day, Carlton sent BCBG an invoice for its commission. *Id.* BCBG did not make payment. *Id.* at 7.

The amended complaint contains one cause of action for breach of contract. Carlton claims that BCBG breached §§ 2 & 3(C) of the Agreement, i.e., failure to refer Guggenheim's offer of financing to Carlton and failure to pay Carlton a 2% commission on the Guggenheim Financing. BCBG moves to dismiss the amended complaint. Carlton's cross-motion seeks a $4.76 million commission, costs, disbursements and statutory interest from August 28, 2012, and requests that the issue of the amount of its attorneys' fees be referred to a Special Referee.

II. Discussion

A. Standard of Review

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon 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, Inc. v Associated*

[2] Two percent of $237,980,540.83 equals $4,759,610.82.

Fur Mfrs., Inc., 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez,* 68 NY2d at 324; *Zuckerman,* 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman,* 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

B. Commission for "Bona Fide" Commitment, i.e., Term Sheets

BCBG argues that Carlton is not entitled to a 2% commission under §3(A) of the Agreement because the term sheets were not a "bona fide" commitment. This argument is irrelevant because the amended complaint does not assert a claim for relief under 3(A). The only relief sought by Carlton is for a commission pursuant to §3(A) of the Agreement, i.e., 2% of the Guggenheim Financing, plus costs and attorneys' fees pursuant to §8. Dkt. 26, ¶¶ 29-43 and Wherefore Clause.[3]

[3] Carlton's memorandum of law purports to reserve the right to seek more money allegedly owed under the Agreement and its notice of motion purports to be for ***partial*** summary judgment. However, the amended complaint contains no claim for relief beyond what Carlton seeks on this motion. As the court is granting Carlton summary judgment for all the relief sought in its pleading, it cannot maintain a future action for additional monies it could have sought for breach of the Agreement. *930 Fifth Corp. v King*, 42 NY2d 886, 887 (1977)(lease entailed single obligation which thus required plaintiff to assert entire claim in one action because splitting

C. *Commission for Refinance/Restructure of Existing Debt*

BCBG argues that Carlton is not entitled to a commission fee under Section 3(C) of the Agreement because BCBG did not modify or restructure its existing debt with existing lenders, but rather, refinanced its existing debt. *See* Dkt. 33 at 12. BCBG claims that Carlton uses the terms "refinance", "restructure" and "modified" interchangeably, when refinance is different from the other two terms, and refinance does not appear in 3(C). *Id.* According to BCBG, the distinction is that a restructure is a modification or alteration of an existing loan, while a refinance is a completely new loan. *Id* at 13.

Carlton correctly argues that §3(A) of the Agreement defines refinancing as including, any workout or restructuring of BCBG's existing Debt with its existing lenders. *See* Dkt. 19 at 3. In addition, under 3(C), Carlton is entitled to a 2% commission on the new "face amount" when BCBG's existing debt is restructured, which clearly refers to a loan for a new amount, i.e., a new loan. The distinction BCBG tries to draw between restructuring and refinancing is not a reasonable interpretation of the language of the Agreement, which clearly contemplated that Carlton would earn a commission if BCBG got a new loan from an existing lender. The Agreement makes clear that Carlton could earn a commission under 3(A) or 3(C), but would be paid 2% of the commitment negotiated by Carlton under 3(A), while under 3(C) Carlton would receive 2% of financing BCBG received from an existing lender. The clear and unambiguous terms of the Agreement allowed BCBG to strike a deal with its existing lenders, but obligated BCBG to pay Carlton a commission in that event. Essentially, Carlton would be rewarded with a

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cause of action is prohibited."); *Roe v Smyth*, 278 NY 364, 369 (1938)(plaintiff bound to assert full claim in earlier action on note because he cannot split cause of action).

higher commission, pursuant to 3(A), if it procured a bona fide Commitment from a lender that could provide terms better than an offer BCBG got from an existing lender.

In sum, Carlton is granted partial summary judgment under a breach of Section 3(C), in the amount of $4,759,610.82, with interest at the statutory rate from August 28, 2012, the date BCBG closed on the Guggenheim Financing. As Carlton prevailed, it is entitled to recover its costs and expenses, including reasonable attorneys' fees pursuant to §8 of the Agreement. The issue of the amount of costs, expenses and reasonable attorneys' fees that Carlton incurred in enforcing its rights under the Agreement is referred to a Special Referee.[4] Accordingly, it is

ORDERED that the motion for summary judgment dismissing the amended complaint by defendant BCBG Max Azria Group, Inc. (BCBG), is denied; and it is further

ORDERED that the cross-motion for summary judgment by plaintiff Carlton Group, LTD. (Carlton), is granted against BCBG, in the amount of $4,759,610.82, with interest at the statutory rate from August 28, 2012 and with costs; and it is further

ORDERED that the issue of the amount of costs, expenses and reasonable attorneys' fees Carlton incurred in enforcing its rights under the Agreement (as defined in this decision) is referred to a Special Referee to hear and report with recommendations, or, if the parties consent, to hear and determine; and it is further

[4] The court also agrees with Carlton that during the term of the Agreement, pursuant to §2(B), BCBG was obligated to refer negotiations with existing lenders to Carlton and that BCBG's failure to refer Guggenheim to Carlton was a breach. Section 2(B) clearly required BCBG to refer inquiries and offers from "any and all Lenders." However, that issue is moot, as the court is awarding Carlton all money damages sought in the amended complaint.

ORDERED that Carlton shall serve a copy of this order with notice of entry, as well as a completed information sheet,[5] on the Special Referee Clerk at spref-nyef@nycourts.gov, who is directed to place this matter on the calendar of the Special Referee's part for the earliest convenient date; and it further

Ordered that upon service upon him/her of a copy of this order with notice of entry and the order awarding costs, expenses and reasonable attorney fees, the Clerk is directed to enter judgment accordingly, unless plaintiff withdraws its request for expenses and attorney fees, in which case the Clerk shall enter judgment in accordance with this order and for costs upon submission of a bill of costs.

Dated: November 19, 2014

ENTER:

J.S.C

SHIRLEY WERNER KORNREICH
J.S.C

[5] Copies are available in Rm. 119M at 60 Centre Street, New York, NY, and on the court's website by following the links to "Court Operations", "Courthouse Procedures", and "References".