

<b>Capin &amp; Assoc., Inc. v 599 W. 188th St., Inc.</b>
2015 NY Slip Op 30386(U)
March 12, 2015
Supreme Court, New York County
Docket Number: 650888/2013
Judge: Shlomo S. Hagler
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS Part 17

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CAPIN & ASSOCIATES, INC.,  
Plaintiff,

Index No.: 650888/2013

- against -

Motion Sequence Numbers:  
001 & 002

599 WEST 188TH STREET, INC., LEZE GAZIVODA,  
PR 599 WEST 188 LLC, NATHANIEL RAHAV,  
JOAN PRICE, and MICHAEL RAHAV,

DECISION & ORDER

Defendants.  
-----X

HON. SHLOMO S. HAGLER, J.S.C.

In motion sequence number 1, defendants 599 West 188th Street, Inc. ("599 Inc."), and Leze Gazivoda ("Gazivoda") (collectively "Gazivoda defendants" or "sellers") move to dismiss the entire complaint and/or various causes of action against Gazivoda and 599 Inc., pursuant to CPLR § 3211(a)(7) and § 3016(b). In motion sequence number 2, defendants PR 599 West 188 LLC ("PR 599 LLC"), and Nathaniel Rahav, Joan Price ("Price"), and Michael Rahav ("Rahav") (collectively "Rahav defendants," "buyers" or "purchasers") move to dismiss the entire complaint against the Rahav defendants, pursuant to CPLR § 3211(a)(7) and § 3016(b). Plaintiff opposes both motions, which are consolidated herein for disposition.

FACTUAL BACKGROUND<sup>1</sup>

In or about January, 2008, Capin & Associates, Inc. ("Capin" or "plaintiff"), a real estate broker licensed by the New York State Department of State, received a listing for the property at 599

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1. The factual information in this decision is based on the facts as alleged by the plaintiff in its Amended Complaint, except as noted, as is required on a motion to dismiss pursuant to CPLR § 3211.

West 188th Street (“the Property”) by the Gazivoda defendants. On or about January, 2008, defendant Gazivoda, acting on behalf of both himself and 599 Inc., entered into an oral real estate brokerage agreement (“First Brokerage Agreement”) with plaintiff. In the First Brokerage Agreement, Gazivoda retained the plaintiff as a real estate broker to procure a purchaser for the Property. The First Agreement provided that if the plaintiff procured a ready, willing, and able purchaser for the Property, the purchaser would agree to pay plaintiff a commission of six percent of the gross sales price. The First Agreement further provided that the Gazivoda defendants would cover and protect plaintiff by recognizing plaintiff as the procuring broker, and consummating the transaction with a purchaser procured by the plaintiff. The First Agreement also provided that the Gazivoda defendants would not impede with the plaintiff’s claims for the commission.

During January, 2008, the plaintiff procured Rahav and Price<sup>2</sup> as ready willing and able purchasers for the Property, in that plaintiff introduced them to the sellers, arranged for them to inspect the Property, facilitated the exchange of information between them and the sellers, scheduled and attended meetings between them and the sellers, and submitted offers from them to the sellers.

On or about January 11, 2008, Rahav and Price submitted an offer of \$2,800,000.00 for the Property which the sellers accepted in the latter part of January, 2008. In or about April, 2008, the attorneys for the Gazivoda defendants prepared and submitted to Rahav and Price a contract of sale for the Property, containing terms and conditions acceptable to all parties, and with a higher negotiated purchase price of \$2,850,000.000 (First Sale Contract”). On or about April 29, 2008, Rahav and Price executed the contract of sale and submitted it to the attorneys for the Gazivoda defendants together with a down payment of \$100,000.00. Thereafter, the Gazivoda defendants

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2. Defendants Rahav and Price are allegedly the parents of defendant Nathaniel Rahav.

refused and failed to proceed with the sale of the Property and no closing on the Property occurred, even though Rahav and Price were ready willing and able to proceed with the purchase of the Property. As a result, plaintiff alleges it was deprived of its commission through no fault of its own.

In or about January 2012, plaintiff received a second listing from the Gazivoda defendants for the same Property. Defendant Gazivoda, again on behalf of 599 Inc. and himself, then entered into a second oral real estate brokerage agreement with the plaintiff (“Second Brokerage Agreement”) and retained plaintiff as a real estate broker to procure a purchaser of the Property. The provisions of the Second Brokerage Agreement were identical to the ones stated in the First Brokerage Agreement.

Plaintiff alleges that in or about January, 2012, plaintiff again “contacted Defendant Michael Rahav, introduced him to the Property and informed him of the acceptable terms and conditions upon which the Defendants 599 West 188th and Gazivoda were willing to sell the Property” (Amended Complaint at ¶ 52). Rahav responded that he and Price, Nathaniel Rahav and PR 599 LLC,<sup>3</sup> who he represented, were no longer interested in purchasing the Property and didn’t want again to deal with the Gazivoda defendants. After informing Gazivoda about having approached the Rahav defendants, Gazivoda informed plaintiff’s representative that the Gazivoda defendants were not interested in dealing with any of the Rahav defendants.

Thereafter, plaintiff procured another interested purchaser for the Property who was allegedly ready, willing and able to close on the Property on the terms and conditions set by the Gazivoda defendants. However, Gazivoda informed plaintiff’s representative that the sellers were already in negotiations with a “mother and son” for the sale of the Property but represented that it was neither

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3. Rahav, Price, Nathaniel Rahav are allegedly the principals of PR 599 LLC.

Price nor Nathaniel Rahav. Despite the representations of the Gazivoda defendants and the Rahav defendants, on or about May 9, 2012, the Gazivoda defendants sold the Property to the Rahav defendants or an entity controlled by them.

### **Plaintiff's Amended Complaint and Defendants' Motions to Dismiss**

Following service of the motions to dismiss the complaint by both the Gazivoda defendants and the Rahav defendants, plaintiff filed an amended complaint as of right pursuant to CPLR § 3025 which was also served upon the defendants along with its opposition to the defendants' motions. An amended complaint does not automatically abate a motion to dismiss that was addressed to the original pleading but gives the party that made the motion to dismiss the option to decide whether its motion should be applied to the new pleadings (*Sage Realty Corp. v Proskauer Rose*, 251 AD2d 35, 38 [1st Dept 1998]; *see also* Siegel, Practice Commentaries (McKinney's Cons Laws of NY, Book 7B, CPLR C3211:65, at 94). The defendants herein have both elected to proceed with their motions and apply them to the amended complaint. All references to the complaint will, therefore, refer to plaintiff's amended complaint.

### **Plaintiff's Causes of Action**

Plaintiff's first cause of action is against the Gazivoda defendants for breach of the oral First Brokerage Agreement for refusing and failing to close on the sale of the Property in 2008, which impeded and interfered with the plaintiff's ability to collect its commission. Plaintiff's second cause of action is against the Gazivoda defendants for breach of an implied brokerage agreement in that the Gazivoda defendants, knowing that the plaintiff was in the real estate brokerage business and expected to be paid the commission that is customarily charged for similar transactions, accepted

plaintiff's brokerage services which procured a ready, willing and able purchaser for the Property upon the terms, conditions, and price demanded by the Gazivoda defendants.

Plaintiff's third cause of action is against the Gazivoda defendants for quantum meruit by providing brokerage services as a licensed real estate broker at the specific request of the Gazivoda defendants who accepted those services which procured a ready, willing and able purchaser for the Property upon the terms, conditions, and price demanded by the Gazivoda defendants. Plaintiff's fourth cause of action is against the Gazivoda defendants for unjust enrichment by providing the Gazivoda defendants with brokerage services as a licensed real estate broker which procured a ready, willing and able purchaser for the Property upon the terms, conditions, and price demanded by the Gazivoda defendants, which conferred a compensable benefit upon those defendants.

Plaintiff's fifth cause of action is against the Gazivoda defendants for breach of the oral Second Brokerage Agreement in that the purchaser of the Property in May, 2012 was the Rahav defendants which had been procured by the plaintiff, but plaintiff was deprived of its earned commission as a direct conduct of the Gazivoda defendants which deliberately and intentionally impeded and interfered with plaintiff's ability to collect its commission from the Rahav defendants.

Plaintiff's sixth cause of action is against the Gazivoda defendants for breach of an implied Second Brokerage Agreement in that the purchaser of the Property in May, 2012 was the Rahav defendants which had been procured by the plaintiff but plaintiff was deprived of its earned commission as a direct conduct of the Gazivoda defendants which deliberately and intentionally impeded and interfered with plaintiff's ability to collect its commission from the Rahav defendants.

Plaintiff's seventh cause of action is against the Gazivoda defendants for quantum meruit by providing brokerage services as a licensed real estate broker for the sale of the Property in May 2012,

at the specific request of the Gazivoda defendants and the acceptance of those services which procured a ready, willing and able purchaser for the Property upon the terms, conditions, and price demanded by the Gazivoda defendants, thus earning plaintiff its commission. Plaintiff's eighth cause of action is against the Gazivoda defendants for unjust enrichment by providing the Gazivoda defendants with brokerage services as a licensed real estate broker for the sale of the Property in May 2012, which procured a ready, willing and able purchaser for the Property upon the terms, conditions, and price demanded by the Gazivoda defendants, and conferred a compensable benefit upon those defendants.

Plaintiff's ninth cause of action is against all the Gazivoda defendants and Rahav defendants in that their representations to the plaintiff that they were not interested in dealing with each other regarding the sale of the Property in early 2012 were false, were known to be false at the time such representations were made, and were made by the defendants with the intent to deceive and defraud the plaintiff from receiving its earned commission. Plaintiff's tenth cause of action is against all the Gazivoda defendants and Rahav defendants in that by making the foregoing false representations to the plaintiff that they were not interested in dealing with each other regarding the sale of the Property in early 2012, all the defendants consciously and tortuously conspired together to deprive plaintiff of its earned commission on the sale of the Property. As a result, plaintiff claims to have suffered financial damages.

## DISCUSSION

### Standard for Deciding a Motion to Dismiss Pursuant to CPLR § 3211(a)

In deciding a motion brought pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, the complaint should be liberally construed and the facts alleged in the complaint and any

submissions in opposition to the dismissal motion accepted as true, according plaintiffs the benefit of every possible favorable inference (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]). “The motion must be denied if from the pleadings’ four corners ‘factual allegations are discerned which taken together manifest any cause of action cognizable at law’ ” (*id.*; *Vitale v Rowland*, 88 AD3d 692, 693 [2d Dept 2011]; *McCarthy v Young*, 57 AD3d 955, 955 [2d Dept 2008]). On a motion to dismiss pursuant to CPLR § 3211(a), the defendant has the burden of demonstrating that the documentary evidence conclusively resolves all factual issues, and that plaintiff’s claims fail as a matter of law. (*Robinson v. Robinson*, 303 AD2d 234, 235 [1st Dept. 2003]).

#### **Dismissal of All Causes of Action Against Defendant Gazivoda Individually**

Defendant Gazivoda moves to dismiss all of the causes of action in the complaint against him in his individual capacity. The Gazivoda defendants only allege that plaintiff has failed to plead a basis for “alter ego” liability and/or for “piercing the corporate veil” to hold Gazivoda individually liable for the debts or obligations of 599 Inc. with respect to plaintiff’s claims to recover a commission.

While an individual principal, director, officer or disclosed agent of a corporation is not ordinarily personally liable for actions he or she may take on behalf of the corporation, there are certain situations when he or she can be held personally liable. As the Gazivoda defendants assert, one of these exceptions when the corporation is the “alter ego” of the principal determined after the “corporate veil” has been pierced. However there are also other exceptions to the above rule, two of which may apply in this case. One is when a principal, director, officer or agent of the corporation

commits a tortuous act or acts, even if it is within the scope of his duties and in furtherance of the interests of the corporation (*see, e.g., Faulk v Milton*, 25 AD2d 314 [1st Dept 1966]; *Greenway Plaza Off. Park-1 v Metro Constr. Servs.*, 4 AD3d 328, 329-330 [2d Dept 2004]; *Williams & Co. v Collins Tuttle & Co.*, 6 AD2d 302, 304-305 [1st Dept 1958]). Another situation is when the agent acted outside the scope of his duties or powers (*East Patchogue Contr. Co. v Magesty Sec. Corp.*, 181 AD2d 714, 715 [2d Dept 1992], citing *Riverside Research Inst. v KMGA, Inc.*, 68 NY2d 689 [1986]; *Greene v Hellman*, 51 NY2d 197 [1980]), or if the corporation repudiates the agent's actions.

In this matter, plaintiff's ninth and tenth causes of action, if sustained, constitute torts for which an individual director, officer or principal can be held personally liable. Furthermore, plaintiff has alleged that Gazivoda acted both for himself as well as on behalf of 599 Inc. (Amended Complaint at ¶ 15), and since there has not yet been discovery, an answer or even affidavits submitted by the Gazivoda defendants regarding the authority of Gazivoda to enter into the brokerage agreements on behalf of 599 Inc., this Court cannot at this time grant the Gazivoda defendants' motion to dismiss pursuant to CPLR § 3211(a) the remaining causes of action against defendant Gazivoda individually (*see, e.g., Vitale v Rowland*, 88 AD3d at 693; *McCarthy v Young*, 57 AD3d at 955). As the court in *McCarthy v Young* noted,

“Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff[s] will ultimately prove [their] claims, of course, plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss (*Shaya B. Pac., LLC v Wilson. Elser, Moskowitz, Edelman & Dicker, LLP.*, 38 AD3d 34, 38 [2006]).”

(57 AD3d at 955).

### **First and Second Causes of Action**

Plaintiff's first cause of action is against the Gazivoda defendants for breach of the oral First Brokerage Agreement for refusing and failing to close on the sale of the Property in 2008, which impeded and interfered with the plaintiff's ability to collect its commission. Plaintiff's second cause of action is against the Gazivoda defendants for breach of an implied brokerage agreement in that the Gazivoda defendants, knowing that the plaintiff was in the real estate brokerage business and expected to be paid the commission that is customarily charged for similar transactions, accepted plaintiff's brokerage services which procured a ready, willing and able purchaser for the Property upon the terms, conditions, and price demanded by the Gazivoda defendants.

599 Inc. has not moved to dismiss plaintiff's first and second causes of action and, other than the "alter ego" argument discussed above, Gazivoda individually has also not presented any defenses to these two causes of action. Since this Court has denied Gazivoda's motion to dismiss the complaint against him individually based on the "alter ego" arguments, the first and second causes of action can be maintained against the Gazivoda defendants and that portion of their motion to dismiss is denied.

### **Third Cause of Action for Quantum Meruit and Fourth Cause of Action for Unjust Enrichment**

Plaintiff's third cause of action is against the Gazivoda defendants for quantum meruit by providing brokerage services as a licensed real estate broker at the specific request of the Gazivoda defendants who accepted those services which procured a ready, willing and able purchaser for the Property upon the terms, conditions, and price demanded by the Gazivoda defendants, which earned

plaintiff its commission. Plaintiff's fourth cause of action is against the Gazivoda defendants for unjust enrichment by providing the Gazivoda defendants with brokerage services as a licensed real estate broker which procured a ready, willing and able purchaser for the Property upon the terms, conditions, and price demanded by the Gazivoda defendants, which conferred a compensable benefit upon those defendants.

"In order to state a claim for quantum meruit, the plaintiff must assert: the performance of services in good faith; the acceptance of those services by the entity to which they were rendered; an expectation of compensation therefor; and the reasonable value of the services" (*Lehrer McGovern Bovis, Inc. v New York Yankees*, 207 AD2d 256, 259 [1st Dept 1994]; *see also Farina v Bastianich*, 116 AD3d 546, 548 [1st Dept 2014]). To state a cause of action for unjust enrichment, a plaintiff must demonstrate that "(1) defendant was enriched, (2) at plaintiff's expense, and (3) that 'it is against equity and good conscience to permit [ ] defendant to retain what is sought to be recovered' (*Farina v Bastianich*, 116 AD3d at 548). A party may be unjustly enriched not only when he or she receives money or property but also when he or she receives a benefit and such a benefit may be conferred where he or she is otherwise saved expense or loss (*id.*).

In sum, a claim for quantum meruit involves seeking the reasonable value of services provided by a claimant while an unjust enrichment claim seeks payment for benefits obtained by the recipient. Both quantum meruit and unjust enrichment are considered quasi-contracts, where the obligation is imposed by law rather than through an express contract (*Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 388 [1987]).

The Gazivoda defendants move to dismiss plaintiff's third cause of action for quantum meruit and fourth cause of action for unjust enrichment as being duplicative of plaintiff's first and

second causes of action for breach of contract, citing *Martin H. Bauman Assoc. v H & M Intl. Transp.*, 171 AD2d 479 (1st Dept 1991) and *Kaprall v WE: Women's Entertainment LLC*, 20 Misc 3d 1132(A)(Sup Ct, Nassau County 2008). However, in *Martin H. Bauman Assoc.* the court specifically found that “no benefit was conferred upon defendant, and . . . plaintiff’s complaint, as well as its other submissions, is entirely devoid of any indication of what it spent or, in fact, of the reasonable value of any services it may have performed” (171 AD2d at 484). The *Kaprall* case involved the allegation of an express contract which the defendants did not refute, and as such the “quasi-contract” basis for quantum meruit or unjust enrichment was not applicable.

In this action, the question of whether there was either an express or implied contract has not been resolved. Although the Gazivoda defendants have not moved to dismiss plaintiff’s first and second causes of action for breach of an express or implied oral contract for the failed 2008 sale of the Property, they have also not conceded the existence of such an express or implied brokerage agreement and have expressly reserved the right to challenge plaintiff’s factual claims which would include the existence of such agreements (Gazivoda defendants’ Memorandum of Law in Support of Motion to Dismiss, at p. 3, n 3). Thus, these defendants may still dispute the existence of an express or implied oral brokerage agreement.

A plaintiff may sustain a quasi-contract claim such as a quantum meruit or an unjust enrichment cause of action as an alternative to a disputed contract cause of action (*see, e.g., SPRE Realty*, 119 AD3d 93, 101 [1st Dept 2014]; *Resource Finance Co. v Cynergy Data LLC*, 106 AD3d 562, 563 [1st Dept 2013] [“The fact that there are express agreements does not bar the pleading of a quasi-contract claim, where, as here, defendants contest the validity of those agreements.”]; *Veritas Capital Management LLC v Campbell*, 82 AD3d 529, 530 [1st Dept 2011] [“Campbell did

adequately plead an oral contract and a breach of it. The fact that the terms and validity of the contract are in dispute allows Campbell to plead a parallel quantum meruit claim.]; *Breslin Realty Dev. Corp. v 112 Leaseholds*, 270 AD2d 299 [2d Dept 2000] [“Inasmuch as there is a bona fide dispute as to the existence of a contract, the plaintiff may proceed on theories of breach of contract and quantum meruit”]; *Curtis Props. Corp. v Greif Cos.*, 236 AD2d 237, 239 [1st Dept 1997] [“[A] party is not precluded from proceeding on both breach of contract and quasi-contract theories where there is a bona fide dispute as to the existence of a contract . . .]; *Joseph Sternberg, Inc. v Walber 36th Street Assoc.*, 187 AD2d 225, 227-228 [1st Dept 1993] [“where there is a bona fide dispute as to the existence of a contract . . . plaintiff may proceed upon a theory of quantum meruit and will not be required to elect his or her remedies.”]).

Since the question of whether there was a brokerage contract between the plaintiff and the Gazivoda defendants for the failed 2008 sale of the property has not been resolved or conceded, plaintiff may proceed on the third cause of action for quantum meruit and the fourth cause of action for unjust enrichment. Thus, the branch of the Gazivoda defendants’ motion seeking dismissal of those causes of action is denied at this time.

#### **Fifth and Sixth Causes of Action - Breach of Second Brokerage Agreement**

The Gazivoda defendants move to dismiss plaintiff’s fifth cause of action, which was for the alleged breach of an express oral Second Brokerage Agreement and the sixth cause of action for breach of an implied brokerage agreement for the 2012 sale of the Property. The Gazivoda defendants argue that plaintiff is not entitled to any commission for the 2012 sale of the Property because it was not the “procuring cause of the sale.” The Gazivoda defendants argue that the

plaintiff was not at all involved in the ultimate sale of the Property and did nothing more than introduce the Property to the purchaser.

In support of their position, the Gazivoda defendants cite to a number of cases where the courts found the broker's actions were insufficient to earn a commission. For example, in *Jagarnauth v Massey Knakal Realty Servs., Inc.*, 104 AD3d 564 (1st Dept 2013), on cross-summary judgment motions involving two brokers in a co-brokerage agreement, the plaintiff broker assisted in the negotiation of the first contract of sale executed in October 2003 but which was properly cancelled in May 2004 (104 AD3d at 564-565). While the original prospective buyer and the seller executed a contract more than two years later, after the co-brokerage agreement had expired, plaintiff's own testimony supported the conclusion that he had no communication with the buyer about the property from the first prospective sale period in 2004 until after the closing of the second sales contract and did not discuss the transaction with the buyer, seller or other broker from 2004 until after the sale of the property in 2007 (104 AD3d at 565). Similarly, in *Douglas Elliman LLC v Corcoran Group Mktg.*, 93 AD3d 539 (1st Dept 2012), which also involved two brokers, the plaintiff broker was not entitled to a commission when the co-brokerage agreement had expired, the plaintiff broker did no more than introduce a husband and wife prospective purchasers to the seller one year before the husband's father's corporation purchased the units, did not show the units to the purchaser, and had no involvement in any attempted negotiations (93 AD3d at 540). In *Good Life Realty, Inc. v Massey Knakal Realty of Manhattan, LLC*, 93 AD3d 490 (1st Dept 2012), the court granted defendant's summary judgment motion and denied the plaintiff brokerage's cross-motion for summary judgment, holding that plaintiff was not the procuring cause of the sale of the cooperative unit where, while the plaintiff's principal made the buyer aware of that the unit was for

sale, he did not introduce the buyer to the seller, did not show the unit to the buyer, did not negotiate the sale price, did not himself personally see the unit, and did not have any contact with the seller (93 AD3d at 491). In addition, plaintiff admitted that neither he nor Klaynberg, the unlicensed third party who allegedly performed brokerage services for the plaintiff, had entered into a co-brokerage agreement with the defendant. Finally, plaintiff was barred by Real Property Law § 442-d from collecting any commission based upon the services of Klaynberg, who was not a duly licensed real estate broker or salesperson (*id.*). Lastly, in *Manning v Briar Hall N.*, 151 AD2d 650, 651 (2d Dept 1989), the court found that the plaintiff failed to show that it was the procuring cause of the sale of the property where her only effort with respect to the purchaser was merely a telephone call alerting him regarding the availability of the property. Plaintiff did not show the purchaser the property, tell him the price of the property, introduce the purchaser to the seller, do any negotiating on the purchaser's behalf, and refused the seller's specific request to inform the purchaser of a substantial reduction in the price of the property (*id.*). It was only through the efforts of a different broker who contacted the purchaser several months later that the purchaser became interested in the property and ultimately purchased it after two months of negotiations (*id.*). Finally, the court rejected plaintiff's claim that it did not need to be the procuring cause of the sale because there was an brokerage agreement between the defendant seller and plaintiff (*id.*).

Courts have cited as a general rule that in the absence of an agreement to the contrary, “[a] real estate broker is entitled to a brokerage commission where it is established that the broker was the procuring cause of the sale by producing a purchaser who is ready, willing, and able to buy on terms acceptable to the seller” (*Lane – Real Estate Dept. Store, Inc. v Lawlet Corp.*, 28 NY2d 36, 42 [1971]; *SPRE Realty, Ltd. v Dienst*, 119 AD3d 93, 97 [1st Dept 2014]). The First Department

has stated that the standard that governs procurement is “[a] direct and proximate link as distinguished from one that is indirect and remote” (*SPRE Realty, Ltd.*, 119 AD3d at 98). However, the broker does not have to be dominant force in the conduct of the ensuing negotiations or in the completion of the sale (*id.* at 97, citing *Green v Hellman*, 51 NY2d 197, 206 [1980]). A broker was held to be the procuring cause entitling it to its commission where it “generated a chain of circumstances which proximately led to” a lease transaction (*id.* at 98, quoting *Eugene J. Busher Co. v Galbreath-Ruffin Realty Co.*, 22 AD2d 879, 879 [1st Dept 1964] *affd* 15 NY2d 992 [1965]; *Buck v Cimino*, 243 AD2d 681, 684-685 [2d Dept 1997] [based on the evidence presented “plaintiff may be credited with setting in motion the chain of circumstances that proximately led to the sale”).

In contrast to the cases cited by the Gazivoda defendants, both plaintiff’s amended complaint and Luca Capin’s affidavit sufficiently allege facts showing that the plaintiff procured the Rahav defendants as ready, willing, and able buyers for the Property in 2008, in that it introduced the Rahav defendants to the Gazivoda defendants, arranged for the Rahav defendants to inspect the Property, scheduled and attended meetings between the Rahav defendants and the Gazivoda defendants, facilitated the exchange of information between the Rahav defendants and the Gazivoda defendants, submitted offers from the Rahav defendants to the Gazivoda defendants which resulted in a mutually agreed upon purchase price and a contract of sale for the Property between the Gazivoda defendants and the Rahav defendants. Although that 2008 sale was cancelled by the Gazivoda defendants, plaintiff alleges that in January 2012 it again received a listing for the Property from the Gazivoda defendants along with the terms and conditions for the sale, resulting in the oral Second Brokerage Agreement for the plaintiff to find a purchaser for the Property, that if the plaintiff procured a ready, willing, and able purchaser for the Property that the plaintiff would be entitled to a brokerage

commission from the purchaser of six percent (6%) of the gross sales price, that the Gazivoda defendants would proceed to consummate the sale with the purchaser procured by the plaintiff, that plaintiff would be recognized as the procuring broker, that the Gazivoda defendants would not impede or interfere with plaintiff's claims for a brokerage commission from the purchaser, and that the Gazivoda defendants would cover and protect the plaintiff as to its commission.

In paragraphs 52 and 53 of its amended complaint, plaintiff alleges that in or about January 2012, it contacted defendant Rahav and notified him that the Property he was previously interested in purchasing was still on the market and available for purchase. Plaintiff also informed Rahav of the acceptable terms and conditions that the defendant sellers were willing to sell the Property (*id.*). Plaintiff then alleges that defendant Rahav and the PR 559 principals represented to the plaintiff, or an authorized representative thereof, that they were not interested in purchasing the Property and that they did not want to deal with the Gazivoda defendants (Amended Complaint at ¶ 53). Plaintiff also alleged that after contacting Rahav, it was informed by the Gazivoda defendants that they did not want to deal with the Rahav defendants regarding the sale of the Property (Amended Complaint at ¶ 54). Plaintiff further alleges that it thereafter procured a different purchaser who was ready willing and able to purchase the Property upon the terms and conditions acceptable to the Gazivoda defendants (Amended Complaint at ¶ 55), but that the Gazivoda defendants represented to the plaintiff that they were already in negotiation with "a mother and son" for the sale of Property and that these parties were not any of the Rahav defendants (Amended Complaint at ¶ 56).<sup>4</sup> In

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4. Plaintiff's procuring of a different ready, willing and able purchaser for the Property at the terms and conditions set by the Gazivoda defendants, as alleged in ¶ 54 of the Amended Complaint, would also fulfill the provisions for the entitlement to a commission as set forth in the Second Brokerage Agreement.

paragraphs 57 of the Amended Complaint, plaintiff alleges that on or about May 9, 2012, the Gazivoda defendants sold the Property to the Rahav defendants or an entity controlled by them. Therefore, as a direct result of the conduct of the Gazivoda defendants, the plaintiff alleges that they intentionally impeded and interfered with the plaintiff's ability to collect a commission in violation of the provisions of the Second Brokerage Agreement (Amended Complaint at ¶¶ 58 - 61).

Although many of the brokerage services alleged by the plaintiff were performed following the First Brokerage Agreement in 2008, the facts alleged by the plaintiff following the Second Brokerage Agreement are still sufficiently pleaded for a cause of action for a breach of that Agreement. The reason for this is that despite the lapse of several years between the Gazivoda defendants backing out of the 2008 sale and the subsequent purchase of the Property on or about May 9, 2012 by the same Rahav defendants, it is possible that but for the plaintiff's reintroduction of the availability of the Property for sale to the Rahav defendants as well as the informing them of the Gazivoda defendants' terms and conditions, the Rahav defendants would not have reconnected with the Gazivoda defendants and purchased the Property. Instead, the plaintiff's alleged informing of the Rahav defendants of the renewed availability of the Property can, if proved, lead to the conclusion that the plaintiff renewed the Rahav defendants' interest in the Property and led to them purchasing it directly from the Gazivoda defendants shortly afterward.

Although a broker does not make out a case for a commission simply because he initially called the Property to the attention of the ultimate purchaser, the facts alleged by the plaintiff here indicate that the plaintiff took more steps than merely calling the Property to the attention of the ultimate purchaser, especially considering the initial efforts made by plaintiff with the both the Rahav defendants and the Gazivoda defendants in 2008. The plaintiff's claim to its commission in

the case at bar is even stronger than that of the plaintiff in the recent First Department case of *SPRE Realty, Ltd. v Dienst, supra*. In that case, a broker introduced the husband and wife defendants to a condominium building under construction (“the Building”), brought them to the developer’s office to view the layout and renderings of the Building and to a home to view an example of the developer’s work, and negotiated with the developer on the defendants’ behalf for a duplex condominium at the Building. Based on those negotiations, the broker sent a deal sheet to the developer for the purchase of two units at the Building. Soon thereafter, attorneys for the defendants and the developer exchanged and reviewed a contract of sale for the two units which, according to the broker, contained the same material terms as the deal sheet it had prepared. The defendants, however, pulled out of the deal, claiming they had changed their minds and were no longer in the market for a new home.

The broker contacted the defendants a few months after this deal fell through to inquire whether they had any renewed interest in purchasing a home but the defendants reiterated that they were no longer seeking to purchase a residence and had no continued interest in the Building.<sup>5</sup> However, approximately eighteen (18) months after the first deal fell through, the defendants purchased a duplex at the same Building but consisting of two units different from the ones for which they had previously contracted. The broker sued the defendants claiming that it was entitled to a brokerage commission on the sale and alleging that the defendants deliberately had concealed their intention to purchase the condo units at the Building in order to avoid paying the broker its commission.

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5. The broker also continued to seek a commercial property for the defendant wife’s planned business.

Defendants moved to dismiss pursuant to CPLR § 3211(a) claiming that they never signed the deal sheet or contract of sale for the first duplex units and that the broker was not involved in the ultimate sale of the units. The defendants' motion to dismiss was denied by the Supreme Court and the Appellate Division affirmed. The appellate court held that the factual allegations by the broker were sufficient to establish that it was the "direct and proximate link" between the introduction of the defendants to the developer and the defendants' eventual purchase of the second duplex at the Building. The appellate court also held that the issue of whether the broker was the "procuring cause" of the eventual sale was a question of fact to be determined by the trier of fact on the evidence presented at trial (119 AD3d at 99-100, citing *Gregory v Universal Certificate Group LLC*, 32 AD3d 777, 778 [1st Dept 2006]). The appellate court also noted that another factor to be considered was whether the eventual sale was fundamentally different from the abandoned transaction and a different final price alone would not be dispositive (*id.* at 100-101, citation omitted).

The Appellate Division in *SPRE Realty* went further and stated that even if the broker "is unable to prove that it was the procuring cause of the defendants' purchase, it may be able to prove that the defendants terminated its activities 'in bad faith and as a mere device to escape the payment of the commission' . . . and that is also a question of fact (*id.* at 100, citations omitted). Finally, the appellate court also permitted the broker's cause of action for quantum meruit to survive the defendants motion to dismiss (*id.* at 101-102)

Thus, accepting the facts alleged by plaintiff in the present case as true, as we must on a motion to dismiss pursuant to CPLR § 3211(a), the plaintiff alleges sufficient facts to establish a prima facie case that it was the "direct and proximate link" between the Gazivoda defendants as the sellers and the Rahav defendants as the purchasers of the Property. It is, therefore, a question of fact

to be determined upon the evidence whether the plaintiff here was the “procuring cause” for the sale of the Property from the Gazivoda defendants to the Rahav defendants (*id.*; *Lane – Real Estate Dept. Store, Inc. v Lawlet Corp.*, 28 NY2d at 44). Accordingly, the motion by the Gazivoda defendants to dismiss the fifth and sixth causes of action for breach of an express or implied oral Second Brokerage Agreement pursuant to CPLR § 3211(a) is hereby denied.

**Seventh Cause of Action for Quantum Meruit and  
Eighth Cause of Action for Unjust Enrichment**

Plaintiff’s seventh cause of action is against the Gazivoda defendants for quantum meruit by providing brokerage services as a licensed real estate broker for the sale of the Property in May 2012, at the specific request of the Gazivoda defendants and the acceptance of those services which procured a ready, willing and able purchaser for the Property upon the terms, conditions, and price demanded by the Gazivoda defendants, which earned plaintiff its commission. Plaintiff’s eighth cause of action is against the Gazivoda defendants for unjust enrichment by providing the Gazivoda defendants with brokerage services as a licensed real estate broker for the sale of the Property in May 2012, which procured a ready, willing and able purchaser for the Property upon the terms, conditions, and price demanded by the Gazivoda defendants, which conferred a compensable benefit upon those defendants.

The arguments and resolution regarding the seventh and eighth causes of action are the same as those presented previously regarding plaintiff’s third and fourth causes of action. As discussed above, plaintiff is entitled to proceed on these causes of action and the motion by the Gazivoda defendants pursuant to CPLR § 3211(a) to dismiss the seventh cause of action for quantum meruit

and the eighth cause of action for unjust enrichment for the 2012 sale of the Property is hereby denied.

**Ninth Cause of Action for Fraudulent Misrepresentations and  
Tenth Cause of Action for Tortuous Conspiracy**

Plaintiff's ninth cause of action is against all the Gazivoda defendants and Rahav defendants in that their representations to the plaintiff that they were not interested in dealing with each other regarding the sale of the Property in early 2012 were false, were known to be false at the time such representations were made, and were made by the defendants with the intent to deceive and defraud the plaintiff from receiving its earned commission. Plaintiff's tenth cause of action is against all the Gazivoda defendants and Rahav defendants in that by making the foregoing false representations to the plaintiff that they were not interested in dealing with each other regarding the sale of the Property in early 2012, all the defendants consciously and tortuously conspired together to deprive plaintiff of its earned commission on the sale of the Property.

The Gazivoda defendants in motion sequence number 001 and the Rahav defendants in motion sequence number 002, have moved to dismiss the fraudulent misrepresentation cause of action alleging that it failed to meet the particularity standard set forth in CPLR § 3016(b) which states that "[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail." Practice commentary C3016:3 notes that CPLR § 3016(b) presumably requires more detail than the more liberal pleading requirements set forth in CPLR § 3013. However, as the commentary also notes, this provision is not popular or always accepted by the courts. The First Department has held that the pleading requirement under CPLR § 3016(b) is subordinated to the

notice standard of CPLR § 3013, *i.e.*, the pleading standard under CPLR § 3016(b) is the same as the standard under CPLR § 3013 (*Ackerman v Vertical Club Corp.*, 94 AD2d 655, 660 [1st Dept 1983], citing *Foley v D'Agostino*, 21 AD2d 60, 64 [1st Dept 1964] and *Limmer v Medallion Group, Inc.*, 75 AD2d 299, 302 [1st Dept 1980] [“the complaint need only allege the misconduct complained of in sufficient detail to inform the defendants of the substance of the claims,” citing *Lanzi v Brooks*, 43 NY2d 778, 780 (1977)]. *See also Williams & Co. v Collins Tuttle & Co.*, 6 AD2d 302, 304-305 [1st Dept 1958]).

To state a cause of action for fraudulent misrepresentation, “a plaintiff must allege ‘a misrepresentation or a material omission of fact which was false and known to be false by the defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury’ ” (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]). In the instant case, plaintiff has alleged that in January 2012, Frieda Benelyahou (“Benelyahou”), a licensed salesperson with plaintiff received the listing for the Property from Gazivoda, along with the terms and conditions upon which the Gazivoda defendants would be willing to sell the Property (Amended Complaint at ¶ 48; Affidavit of Luca Capin, president of plaintiff Capin & Associates, Inc., sworn to on June 21, 2013 [“Capin Aff.”], at ¶ 14). Also in January 2012, Benelyahou contacted defendant Rahav and informed him of the renewed availability of the Property as well as the terms and conditions for the sale (Amended Complaint at ¶ 52; Capin Aff. at ¶ 18). However, after Benelyahou informed defendant Rahav of the terms and conditions upon which the Gazivoda defendants would be willing to sell the Property, Rahav informed Benelyahou that the Rahav defendants were not interested in purchasing the Property (Amended Complaint at ¶ 53; Capin Aff. at ¶ 19). Contemporaneously with Benelyahou’s

approaching Rahav, Capin suggested to Gazivoda that the Rahav defendants would be potential purchasers for the Property because they had been interested in it previously (Amended Complaint at ¶ 53; Capin Aff. at ¶ 17-18). However, Gazivoda informed plaintiff that the Gazivoda defendants were not interested in selling the Property to the Rahav defendants and did not want to deal with the Rahav defendants (Amended Complaint at ¶ 54; Capin Aff. at ¶ 17).

Based on these representations by the defendants Gazivoda and Rahav, plaintiff did not pursue further negotiations between those parties and was not afforded the opportunity to complete a deal between these parties (Capin Aff. at ¶ 20). Furthermore, plaintiff alleges that, relying on the representations by the Gazivoda defendants and the Rahav defendants, plaintiff began searching for other potential purchasers for the Property (*id.*). In the Spring of 2012, plaintiff procured another purchaser who was ready, willing and able to purchase the Property on the terms and conditions set forth by the Gazivoda defendants (Amended Complaint at ¶ 55; Capin Aff. at ¶¶ 20-21). However, when Benelyahou brought the new purchaser to Gazivoda rejected the new purchaser and told Benelyahou that the Gazivoda defendants were already in negotiations with a “mother and son” for the sale of the Property and therefore would not consider the new purchaser procured by Capin (Amended Complaint at ¶ 56; Capin Aff. at ¶ 21). When Luca Capin personally asked Gazivoda if the mother and son were Price and Nathaniel Rahav, Gazivoda responded that the Gazivoda defendants were not negotiating with the Rahav defendants and reiterated that the Gazivoda defendants would not sell the Property to the Rahav defendants (Capin Aff. at ¶ 22). Nevertheless, despite the repeated representations by Gazivoda and Rahav that they would not deal with each other regarding the sale of the Property, on or about May 9, 2012, the Gazivoda defendants sold the Property to the Rahav defendants (Amended Complaint at ¶ 57; Capin Aff. at ¶ 23). As a result of

the defendants' alleged misrepresentations, upon which plaintiff reasonably relied to its detriment, and defendants' conduct by freezing out plaintiff from the negotiations and sale of the Property, plaintiff was allegedly injured by being deprived of the commission it earned and to which would have been entitled if not for the defendants' actions (Amended Complaint at ¶¶ 58-61; Capin Aff. at ¶¶ 24-25).

The Court of Appeals has stated that the rule is well-established that in brokerage cases that interference with the opportunity for a broker to complete his services does not bar his right to commissions (*Simon v Electrospace Corp.*, 28 NY2d 136, 142 [1971]). The Court of Appeals explained that this rule is but a species of the more general doctrine that a promisor is not discharged by the nonperformance of a condition precedent or return promise imposed on the promisee but which the promisor prevented or hindered (*id.* at 142).

In the instant case, this Court holds that the plaintiff has sufficiently pled the essential elements of fraudulent misrepresentation to survive defendants motions to dismiss the Amended Complaint's ninth cause of action

Regarding plaintiff's tenth cause of action alleging that the defendants conspired together to tortiously deprive plaintiff from obtaining its earned commission, defendants argue that such a cause of action is not recognized by New York law. However, there are several cases which allow a broker to allege a cause of action for a buyer and seller conspiring to prevent or deprive a broker from receiving its commission. In *Keviczky v Lorber*, 290 NY 297 (1943), the Court of Appeals found that the evidence presented at trial, which the jury accepted, stated that:

What the plaintiff [broker] is here claiming is that through a conspiracy which was illegal and fraudulent, entered into by these defendants, plaintiff was prevented from procuring a purchaser, and

that if that scheme had not been put into operation plaintiff [broker] could have procured the purchaser and would have earned his commission. . . . Upon this record it is a fair inference, and in the finding of the jury the inference is implicit, that the deal would have closed and that plaintiff [broker] would have received his commission had not defendants, by means of this conspiracy to refrain from dealing with plaintiff, prevented plaintiff from earning his commission. . . . When appellants and [another party] conspired to refrain from dealing with plaintiff [broker] and thus, although accepting the fruits of his labors, prevented him from earning the commission which was due him as a part of the transaction, the closing of which brought benefits to all the conspirators, an actionable wrong arose, giving rise to liability for the damages arising therefrom to plaintiff which consisted of the amount of commissions which plaintiff would otherwise have earned (*Id.* at 304-305.).

In *Williams & Co. v Collins Tuttle & Co.*, 6 AD2d 302, 304-305 (1st Dept 1958), the rental agent for the owner's office building solicited real estate brokers generally for tenants. A real estate broker procured an advertising agency which wanted to rent an entire floor in the building. While the owner and rental agent found the prospective tenant acceptable at first, they subsequently falsely informed the broker that they would not rent to this prospective tenant as it was objected to by another advertising agency which was already a tenant in the building. The rental agent then arranged with a second broker to negotiate between the owner and the prospective tenant at a reduced commission, the lease was signed and the financial arrangements concluded. The first broker then sued the owner, the rental agent, the tenant, the second broker, in both their corporate and individual capacities for conspiring and acting in concert to deprive the plaintiff of its commission in its first cause of action.

On appeal by the plaintiff, the appellate court reversed the Supreme Court, Special Term which had granted the defendants' motions to dismiss plaintiff's first cause of action. The appellate court held that plaintiff's allegations against all the corporate and individual defendants for

conspiring and acting in concert to deprive the plaintiff of its commission was a valid cause of action. In addition, while the plaintiff would have to prove at trial or on a motion which presents the evidence that the alleged tortious conduct by the defendants caused his loss of commission, plaintiff did not need to plead in exact detail the circumstances which would prove its success on a motion to dismiss (*id.*).

In *Hornstein v. Podwitz*, 254 NY 443 (1930), the plaintiff's complaint alleged that, acting as a broker, he procured the defendant purchasers for a property at the price and on the terms specified by the defendant owners and a written contract of sale was executed by the parties (254 NY 446). The complaint further alleged that:

“Tenth. Upon information and belief that the defendants conspired together and entered into an agreement wherein and whereby they sought to deprive this plaintiff of the commissions to which he was entitled by reason of such sale and agreed among themselves to withhold from plaintiff the fact that such sale had been made and to deprive plaintiff of the commissions to which he was entitled by reason of such sale . . .” (*id.*)

The Court of Appeals, *inter alia*, reversed the Appellate Division's dismissal of the complaint on the ground that it failed to state a cause of action, and held that the complaint was sufficiently pled, despite being “inartfully drawn.” Furthermore, the Court of Appeals also held that the individual defendants could be held liable for unlawfully, intentionally, knowingly, and without reasonable justification or excuse, inducing a breach of the broker's contract with profit to the defendant and damages to the plaintiff broker.

In *Pilger v Ramati*, 37 AD2d 581 (2d Dept 1971), the appellate court, affirming the trial court, held that the evidence supported a finding that the defendant purchaser of a car wash business, who had been introduced to the business by the plaintiff broker, conspired with the defendant seller

to deprive the broker of its commission. The appellate court stated that the evidence presented at trial showed that the broker had been asked by the seller to find a purchaser for the business, the broker introduced the purchaser to the business, the purchaser, after making an offer then told the broker he was not interested in the business but several weeks later the purchaser contacted the seller directly and they negotiated a sale between their fathers-in-law at a price less than the original price sought by the seller by approximately the amount of the commission, and the contract contained a provision representing that no broker brought about the transaction (37 AD2d at 581). The appellate court held that such conduct “permitted a finding of a deliberate purpose to simulate an interruption in the negotiation, to misrepresent plaintiff’s interest in the transaction and to profit from the reduction in price due to the removal of plaintiff from the deal (*id.* [citations omitted]). (*See also Smith & De Groat, Inc. v Vita*, 178 AD2d 591 [2d Dept 1991] [allegation that buyer and seller conspired to deprive broker of duly earned real estate brokerage commission supported by evidence adduced at trial]; *cf. Katz v Thompson*, 9 AD2d 951 [2d Dept 1959] [appellate court affirmed denial of defendants’ motion to dismiss the plaintiff real estate broker’s complaint seeking damages for conspiracy to deprive him of commissions earned]).

Thus, it appears from the above case law that plaintiff in the instant case is entitled to pursue its tenth cause of action alleging that the defendants tortiously conspired to deprive it of its commission due to defendants’ alleged fraudulent misrepresentations. A result to the contrary would allow buyers and sellers to effectively cut out a middleman broker despite all the efforts expended by the broker in bringing the buyer and seller together. Such a result would be inequitable.

CONCLUSION

Accordingly, based upon the foregoing, it is hereby

ORDERED that the motion to dismiss pursuant to CPLR §§ 3211(a) and 3016(b) by the Gazivoda defendants under motion sequence number 001 is denied in its entirety; and it is further

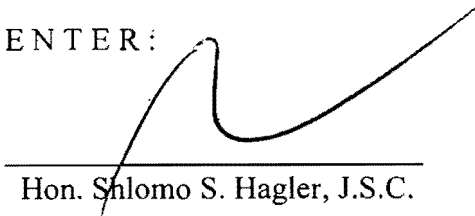
ORDERED that the motion to dismiss pursuant to CPLR §§ 3211(a) and 3016(b) by the Rahav defendants under motion sequence number 002 is also denied in its entirety; and it is further

ORDERED that defendants shall file their respective answers to the Amended Complaint within twenty (20) days after the service of the Notice of Entry of this Decision and Order.

The foregoing constitutes the decision and order of this Court.

ENTER :

Dated: March 12, 2015  
New York, New York

  
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Hon. Shlomo S. Hagler, J.S.C.