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

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MULTI CAPITAL GROUP LLC,

Index No.: 652598/2011

Plaintiff,

DECISION & ORDER

-against-

MARK KARASICK and HARRY SKYDELL,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Defendants Mark Karasick and Harry Skydell move, pursuant to CPLR 3212, for summary judgment against plaintiff Multi Capital Group LLC. Plaintiff opposes and cross-moves for (1) summary judgment; and (2) leave to amend its complaint to add a quantum meruit cause of action. For the reasons that follow, defendants' motion is granted and plaintiff's cross-motion is denied.

I. Factual Background

The following facts are undisputed.[1]

In May 2007, non-party Abraham Rosenberg, then chairman of plaintiff, became aware that the U.S. Steel Tower (the Building) in Pittsburgh, Pennsylvania was for sale. In June 2007, plaintiff submitted the winning bid for the opportunity to purchase the Building. Plaintiff, however, never intended to purchase the Building on its own, nor did it have the means to do so. Rather, plaintiff's intent was to win the bid and then procure investors to purchase the Building. In July 2007, Rosenberg was introduced to defendant Skydell by a mutual friend, non-party Jon Kramer. Rosenberg proposed that defendants (through the 601 W Companies)[2] participate in the

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[1] *See* Dkt. 54 (joint statement of undisputed facts).

[2] Karasick and Skydell have worked together since 1996. Their first major purchase was the Starrett Lehigh Building, which is located at 601 West 26th Street in Manhattan – hence the

purchase of the Building, for which there was a letter of intent in place contemplating a $348 million purchase price. In exchange for the right to participate in this deal, plaintiff proposed being paid an $8 million finder's fee. Skydell advised plaintiff that this was unreasonable and rejected the offer. Plaintiff then proposed a finder's fee equal to 1% of the purchase price (i.e., approximately $3.5 million). Skydell again rejected the offer. Skydell was not interested in investing in real estate deals as a minority or passive partner and wanted to take the lead on any investment deals. Further, Skydell was not willing to agree upon the amount of a finder's fee until an agreement to purchase the Building was in place. A final *proposed* version[3] of a finder's fee agreement, dated August 6, 2007 – *which was never agreed to*[4] *and never signed* – provides:

> [Plaintiff] has referred in the facilitation of the acquisition by [defendants] of the fee simple interest in [the Building] from [the seller] which opportunity [defendants] acknowledges is directly the result of the introduction by [plaintiff]. [Plaintiff] shall receive and [defendants] agree to pay, a referral fee later than date of the closing of [defendants'] acquisition of [the Building] ("Fee"). Fee shall be deemed fully earned and payable without setoff of any kind only if closing occurs and upon closing of title. [Defendants] agree[] to provide [plaintiff] with [7] days

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name "the 601 W Companies." They have since been involved in the acquisition and management of commercial properties worth in excess of $5 billion. As is customary in the industry, they acquire each property through a separate single purpose corporate entity.

[3] Multiple drafts were exchanged in July and August 2007. *See* Dkt. 54 at 3-4.

[4] Plaintiff claims "Karasick admitted at his deposition that there was an agreement with [plaintiff] for defendants to pay [plaintiff] a $2 million fee if defendants closed on the Property." *See* Dkt. 76 at 10. Plaintiff cites to pages 199-200 of Karasick's deposition transcript (*see* Dkt. 78 at 9-10). There, however, Karasick recalls that there was a "discussion" about plaintiff being compensated and he recalled the parties were discussing paying plaintiff a $2 million fee. This, indeed, is what the parties were discussing at the time. However, Karasick did not testify, nor is there any evidence in the record to support the notion that the parties *actually* reached agreement to pay plaintiff a $2 million fee. The proposed agreement which provided for a $2 million fee *was never signed by the parties*. Notwithstanding the statute of frauds, nothing in the record constitutes prima facie proof of an agreement to pay plaintiff a $2 million fee. In any event, as discussed herein, no matter the amount of the fee (i.e., since the amount could be computed on a quantum meruit basis), the lack of a continuing causal connection between plaintiff's involvement in 2007 and the eventual sale in 2011 precludes plaintiff's claim for a finder's fee.

> prior written notice of the contemplated date of closing of said acquisition. The Fee shall be [$2 million].

See Dkt. 43 at 2.[5]

In January 2008, the proposed deal for defendants to purchase the Building fell through when the seller terminated negotiations. Plaintiff and defendants had no further discussions about the Building. In January 2010, non-party David Werner, a real estate investor and developer unaffiliated with plaintiff, came to defendants with an unsolicited proposed transaction involving the Building. Plaintiff had no involvement in this proposal, which never reached fruition.

In January 2011, three years after the initial proposed deal fell apart, non-party Cynthia Roberts, a real estate, due diligence professional unaffiliated with plaintiff, approached defendants with a new proposed deal involving the Building. Roberts submitted an affidavit (Dkt. 93) rebutting certain of plaintiff's allegations concerning her involvement. Plaintiff did not submit an affidavit rebutting her assertions.

Roberts explains that she was the principal of her own real estate due diligence firm (CBR Associates, Inc.), was never employed or retained by plaintiff, and does not even recall meeting or speaking with anyone associated with plaintiff. Rather, in July 2007, Roberts states she was retained by defendants to perform due diligence on materials provided by the seller of the Building. In January 2010, she explains, she was retained by Werner to provide due

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[5] Plaintiff originally averred that the fee was a referral fee, but now argues that it was compensation for "giving up its interest in the deal." The latter is simply not a cogent theory. Plaintiff never had any intention to purchase the Building, nor, as noted earlier, did it have the means to do so. Plaintiff was looking for investors, and defendants were the best prospect plaintiff found. The proposed 2007 sale never came to fruition. Myriad issues on the seller's side, such as issues with a major tenant's (the University of Pittsburgh Medical Center) lease terms and "tax recapture" considerations, got in the way. Plaintiff never gave anything up and never expressly negotiated compensation on account of "giving up the deal."

diligence in connection with his proposed deal. Roberts avers that the 2007 due diligence performed by plaintiff "was of no use whatsoever in 2010."[6] Roberts further explains that in January 2011, David Givner, a minority owner in the Building, called Roberts to inform her of tax issues preventing him from remaining on as a partner in the Building. Upon learning this information, Roberts says she called Skydell about the Building. Roberts further explains that she had actually closed CBR Associates back in August 2010 and was no longer providing due diligence services. However, remembering Skydell's prior interest in the Building, she made the call.

As a result of Roberts' call, defendants again commenced negotiations to purchase the Building, and, this time, a sale contract was entered into on February 10, 2011. Plaintiff had no involvement in the 2011 negotiations.[7] The sale price was $250 million, plus $39 million in

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[6] While plaintiff apparently performed some due diligence in 2007, defendants did not use plaintiff's due diligence and, instead, paid for their own and retained Roberts. The financial crisis, which very much involved the real estate market, intervened, affecting the viability of the 2007 due diligence. Moreover, the 2011 due diligence process was capable of being completed in mere days due to the availability of relevant materials on an internet platform.

[7] Skydell notes that Eli Verschleiser, a principal of plaintiff, actually called to congratulate him on the deal and asked to participate as an investor (plaintiff did not end up investing). Verschleiser, did not, however, mention an entitlement to a fee until after the deal closed. It should also be noted that Rosenberg sought payment of a fee in March 2011, albeit at a time when he no longer was affiliated with plaintiff. There appears to have been a religious arrangement between Karasick and Rosenberg, which initially involved a proposal to donate $18,000 (18 being a symbolic number in Judaism) to charity and the involvement of a rabbi. While defendants suggest that this may be an admission as to liability, Karasick's possible religious obligations towards Rosenberg have no legal relevance. The allegations in this case have always concerned a contractual obligation to plaintiff (the company), not to any of its principals. Any goodwill between Karasick and Rosenberg, religiously motivated or otherwise, is not probative of a contractual obligation to compensate plaintiff.

tenant improvements, $60 million less than the proposed deal in 2007. The sale closed on April 15, 2011.[8]

II. Procedural History

On September 21, 2011, plaintiff commenced this action to recover a fee related to the 2011 sale of the Building. The complaint (Dkt. 2), which has never been amended, asserts three causes of action, numbered as here: (1) breach of contract; (2) unjust enrichment; and (3) promissory estoppel. Defendants filed a motion to dismiss on November 15, 2011, which was denied in an order dated February 16, 2012 (*see* Dkt. 16), and answered the complaint on March 7, 2012. *See* Dkt. 25.[9] After the completion of discovery, plaintiff filed a note of issue on May 2, 2014. *See* Dkt. 33. The parties now move for summary judgment, and plaintiff also seeks to amend its complaint (*see* Dkt. 84) to add a fourth cause of action for quantum meruit.

III. Discussion

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 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

[8] Roberts was paid a referral fee for introducing Givner to defendants. Plaintiff, however, cannot take credit for Roberts' involvement since her involvement, at all times between 2007 and 2011, had nothing to do with plaintiff. Adam Spies, a broker at Eastdil Secured, L.L.C. (Eastdil), submitted an affidavit (Dkt. 92) attesting that plaintiff had nothing to do with the 2011 deal. Eastdil, the seller's broker, was involved in both 2007 and 2011, and was in a position to know the scope of plaintiff's involvement.

[9] The answer was not e-filed until June 10, 2013.

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 of 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).

When analyzing claims for a fee allegedly earned in connection with the sale of real estate, one must distinguish between a "finder" and a "broker," as each are entitled to a fee under difference circumstances. *See N.E. Gen. Corp. v Wellington Adv., Inc.*, 82 NY2d 158, 162-63 (1993). "The finder is required to introduce and bring the parties together, without any obligation or power to negotiate the transaction, in order to earn the finder's fee. While a broker performs that same introduction task, the broker must ordinarily also bring the parties to an agreement." *Id.* at 163 (citations omitted). "[A] finder has far less involvement in the ultimate transaction quantitatively and qualitatively, and thus has significantly fewer and different responsibilities to the hiring client. Often, for example, the finder may accomplish work in as little as two phone calls." *Id.*, citing *Minichiello v Royal Bus. Funds Corp.*, 18 NY2d 521, 527 (1966).

The parties here do not dispute that plaintiff was a finder and not a broker, nor do the parties dispute that for plaintiff to be entitled to a finder's fee, it must have brought the sale of

the Building to defendants. It is further undisputed that in 2007, plaintiff brought the opportunity to purchase the building to defendants. Hence, the question here is not whether the quantum of work performed by plaintiff was sufficient to merit a finder's fee – it clearly was. Rather, the relevant inquiry is whether the introduction plaintiff made in 2007 entitles it to a finder's fee for the sale that occurred in 2011, after the 2007 negotiations fell through and after the prospect of the 2011 deal was brought to defendants in a manner wholly uncaused by anything reasonably attributable to plaintiff. The question is causation.

To establish causation on a finder's fee claim, it is well settled that merely establishing "but for" causation is insufficient. Rather, "[t]here must be some 'continuing connection between plaintiff's initial efforts and the [transaction] that came about.'" *Edward Gottlieb, Inc. v City & Comm. Commc'ns PLC*, 200 AD2d 395, 399 (1st Dept 1994), quoting *Simon v Electrospace Corp.*, 28 NY2d 136, 142 (1971); *see Rosenblatt v Christie, Manson & Woods Ltd.*, 2005 WL 2649027, at *6 (SDNY 2005) ("To establish [the required connection], the courts have consistently required that the finder show more than that his service was a necessary 'but for' condition. Rather, the finder must show that the final deal which was carried through flowed directly from [the] introduction. He must establish a continuing connection between the finder's service and the ultimate transaction."), quoting *Moore v Sutton Resources, Ltd.*, 1998 WL 67664, at *4 (SDNY 1998) (collecting cases on New York finder's fee law), *aff'd* 165 F3d 14 (2d Cir 1998); *see also Ferghana Partners Inc. v Bioniche Life Sciences Inc.*, 33 Misc3d 1220(A), at *6-7 (Sup Ct, NY County 2011) (Schweitzer, J.) (citing *Moore* for the proposition that "a significant lapse of time between introduction and deal, significant unforeseen changes in circumstances,

and a prior relationship and multiple third-party interventions can provide an independent basis for the transaction barring recovery of the finder's fee").

There is no bright-line rule setting forth what constitutes the requisite "continuing connection," nor is there a definitive, minimal amount of time elapsed that would preclude establishing such causation. On the contrary, these are ordinarily questions of fact. *See Gregory v Universal Certificate Group LLC*, 32 AD3d 777, 778 (1st Dept 2006).

At oral argument, plaintiff urged the court to consider two cases – *Train v Ardshiel Assocs., Inc.*, 635 FSupp 274 (SDNY 1986), and *Seckendorff v Halsey, Stuart & Co.*, 234 AD 61 (1st Dept 1931), *rev'd on other grounds*, 259 NY 353 (1932). These cases, however, are easily distinguishable from the instant case. *Train* merely involved two, one-month hiatuses in negotiations; less than one year transpired from the initial introduction until the deal closed. *See id.* at 275-76, 280. In *Seckendorff*, a mere 9 months transpired between the first deal falling through and when discussions that led to the ultimately consummated deal began. *See id.* at 68-69. Unlike this case where, for instance, plaintiff was unconnected to Roberts' due diligence, the *Seckendorff* court noted numerous connections between the first and second deals that warranted a finding "that the final financing flowed directly from the original effort." *Id.* at 72. Here, unlike *Train* and *Seckendorff*, three years transpired between the first and final negotiations, and plaintiff had no continuous involvement. No reasonable finder of fact could conclude otherwise. For these reasons, defendants are entitled to summary judgment.

It should be noted that, as discussed earlier, and despite plaintiff's arguments to the contrary, whether plaintiff was a "but for" cause of the 2011 sale is not dispositive. In fact, in granting summary judgment to defendants, the court assumes, *arguendo*, that plaintiff was

indeed a "but for" cause. Nonetheless, in the absence of any involvement after January 2008, no reasonable finder of fact could conclude that a continuing connection exists. To hold otherwise would be tantamount to holding that the mere passage of time suffices to establish a continuing connection. No case stands for this proposition. To hold that the passage of a significant amount of time, without more, can suffice to warrant a finder's fee, would render the continuing connection element meaningless. To satisfy this element, at a minimum, some meaningful aspect of the prospective deal attributable to plaintiff must bridge the gap between the original introduction and the eventual deal. No such nexus exists here. Moreover, where, as here, multiple, subsequent opportunities to purchase the Building were brought to defendants by parties unaffiliated with plaintiff; where, as here, the facts surrounding the deal (i.e., the changed tenancy of the University of Pittsburgh Medical Center and the financial crises; and where, as here, the deal itself varied greatly in price, the causal link to plaintiff's introduction in 2007 was severed.

To the extent anyone can be said to be the link between the 2007 and 2011 negotiations, no one fits this bill more than Roberts, whose repeated involvement is more akin to the continual presence that ordinarily warrants a finder's fee. Plaintiff had nothing to do with Roberts' involvement. The mere fact that Roberts was involved both in 2007 and 2011 does not vicariously create involvement on the part of plaintiff. All subsequent iterations of a prior, unconsummated deal will necessarily share some commonalities with the original deal. A plaintiff can always point to something or someone involved in the first deal to claim a continuing connection. The only sensible way to find that common elements establish a

continuing connection is for that similar variable to have a nexus to plaintiff. That is not the case with Roberts, nor is any other aspect of the 2011 deal attributable to plaintiff in this way.

To be sure, there may be some minimal amount of elapsed time that might necessarily entitle (or at least create a question of fact) plaintiff to a fee after the initial deal fell though. Here, however, the time elapsed between the 2007 deal negotiations and the 2011 deal negotiations was not de minimis. In the intervening years, plaintiff did nothing to make a sale of the Building occur. In sum, while plaintiff argues that but for its 2007 introduction, the 2010 and 2011 negotiations would never have taken place,[10] the requisite continuing causal connection is not present in this case. Plaintiff's claims for a finder's fee, therefore, are dismissed.

Finally, plaintiff's remaining equitable claims fail since an equitable entitlement to a finder's fee is inherently intertwined with the existence of a connection with the 2011 sale. In other words, plaintiff is not equitably entitled to a finder's fee if it was not the reason the deal occurred. *See Nemeroff v Coby Group*, 54 AD3d 649, 650 (1st Dept 2008) (unjust enrichment claims should be dismissed when there is no evidence that his services "were 'instrumental to the realization of [defendants'] gain.'"), quoting *Galbreath Riverbank, L.P. v Shefi & Shefi*, 273 AD2d 35, 36 (1st Dept 2000). Nor is granting leave to allow a quantum meruit claim warranted. Quantum meruit is merely a basis for computing a fee where entitlement to the fee is established, but no enforceable agreement (e.g., the statute of frauds) as to the amount exists. *Chapman, Spira & Carson, LLC v Helix BioPharma Corp.*, 115 AD3d 526, 528 (1st Dept 2014), citing *Morris Cohon & Co. v Russell*, 23 NY2d 569, 575-76 (1969); *see Stone Capital Advisors, LLC v Fortrend Int'l, LLC*, 15 AD3d 300, 301 (1st Dept 2005) (noting that "oral finder's agreements

[10] It is worth bearing in mind that the 2010 and 2011 prospective deals were brought to defendants unsolicited. No evidence was submitted suggesting that defendants were actively seeking to rekindle the opportunity plaintiff presented to them in 2007.

are barred by the statute of frauds" and are enforceable only where defendant admits the existence of agreement). Since plaintiff is not entitled to a fee, a quantum meruit claim to compute the amount is pointless. *See Pomerance v McGrath*, 124 AD3d 481, 482 (1st Dept 2015) (leave to amend should be denied when proposed additional claims are "palpably insufficient or patently devoid of merit"), quoting *MBIA Ins. Corp. v Greystone & Co.*, 74 AD3d 499, 500 (1st Dept 2010). Accordingly, it is

ORDERED that the motion by defendants Mark Karasick and Harry Skydell for summary judgment against plaintiff Multi Capital Group LLC is granted, plaintiff's cross-motion for summary judgment and to amend the complaint is denied, and the Clerk is directed to enter judgment dismissing the complaint with prejudice.

Dated: April 22, 2015

ENTER:

J.S.C.