SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

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FAR REALTY ASSOCIATES, INC.,

Plaintiff

-against-

9 WEST 46 LLC, TONY PECORA, and ORA LLC,

Defendants.

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Index No. 651370/12
Motion Date:
Motion Seq.: 001

**DECISION AND ORDER**

**Coin, J.:**

In motion sequence number 001, plaintiff Far Realty Associates, Inc. (Far Realty) moves to disqualify the law firm of Giannola and Associates, P.C. (the Giannola Firm) from acting as attorney for defendants 9 West 46 LLC (9 West), Tony Pecora (Pecora), and Ora LLC (Ora) on the ground that the Giannola Firm is a potential witness due to its involvement with certain transactions that are the subject of this litigation. 9 West and Ora cross-move pursuant to CPLR 3212 for summary judgment in their favor. Pecora cross-moves pursuant to CPLR 3211 (a) (1) to dismiss the complaint.

**Background**

In this action, Far Realty seeks to recover brokerage commissions allegedly owed for work it performed for defendants involving the leasing and/or selling of three buildings owned by

defendants 9 West and Ora.

It is alleged that sometime around the summer of 2010, Pecora, a member of 9 West, asked Jack Chanler (Chanler), president of Far Realty, to secure a tenant for a property owned by 9 West located at 9 West 46th Street, New York, New York (the 9 West Building). It is alleged that Pecora held himself out as having the authority to lease the 9 West Building on behalf of 9 West.

When Pecora first approached Chanler about a finding a tenant, 9 West was allegedly in contract to sell the 9 West Building, so it was looking for a short-term tenant who would accept a 90-day lease termination clause. Chanler told Pecora that with such a stipulation, he would not be able to find a tenant. In late 2010/early 2011, after the sale of the 9 West Building allegedly fell through, Pecora contacted Far Realty to find a tenant without the 90-day termination stipulation.

On January 4, 2011, Chanler sent a memorandum (the Memo) to Pecora outlining a deal proposed for a potential tenant, Calista Superfoods (Calista) (Affidavit of Jack Chanler, sworn to on September 8, 2015, Ex. B). There were three enclosures with the Memo: a personal financial statement for Calista's owner, Calista's menu, and Far Realty's commission rate schedule (the

Commission Rate Schedule). The Commission Rate Schedule listed the commission percentages, along with exceptions to the standard percentages charged. The Commission Rate Schedule stated that "[a]ll Commissions are due and payable upon execution of a lease by the Prospective Tenant and Owner unless otherwise agreed to in writing" (Affirmation of Danielle L. Sicari, dated August 14, 2015, Ex. D).

On January 28, 2011, Vito A. Giannola (Giannola), 9 West and Pecora's attorney for this deal, faxed Far Realty a proposed lease agreement (Chanler Aff., Ex. A). Calista returned the agreement to Giannola with proposed changes and additions (Sicari Aff., Ex. E).

In his affidavit, Chanler states that "[d]uring the process of working out some minor details with the lease, [Giannola] . . . told me to call [Pecora]" (Chanler Aff., ¶5). Pecora allegedly informed Chanler that he was selling the 9 West Building.[1] Pecora then withdrew the space for lease. On April 8, 2011, 9 West and nonparty 9 West 46th Owner LLC executed a sales contract for the 9 West Building (Chanler Aff., Ex. E).

As part of the sale of the 9 West Building, 9 West acquired a building located at 41 West 46th Street(the 41 West Building).

[1] Chanler and Far Realty were not involved in the sale of the 9 West Building.

Chanler alleges that as an attempt to placate him for the sale of the 9 West Building, Pecora offered to let Far Realty find a tenant or buyer for the 41 West Building. Far Realty allegedly presented a buyer willing and able to purchase the 41 West Building at the price and terms requested. Chanler alleges that Pecora, on behalf of 9 West, verbally agreed to the deal, but then changed the deal and withdrew the building from the market. In his deposition, Pecora denies that Far Realty presented him with a buyer for the 41 West Building (Chanler Aff., Ex. C [Pecora Dep. Tr.] at 32-33).

Pecora also asked Chanler to find a tenant for a space in a building owned by Ora at 807 Ninth Avenue (the Ora Building). Pecora was also member of Ora. Chanler alleges that Pecora held himself out as authorized to lease or sell the Ora Building.

Chanler alleges that Far Realty secured a tenant who was willing and able to rent the space at the Ora Building at a higher monthly rent than Pecora requested (the First Ora Tenant). However, once Far Realty presented the First Ora Tenant, Pecora allegedly demanded a change in the deal where he would take a lower rent, but the tenant would have to make a substantial payment outside the lease as "key money." The First Ora Tenant refused this offer. Chanler alleges that Pecora

wanted the payment of "key money" outside of the deal, so he would not have to share it with Ora's other members.

Far Realty allegedly found another tenant for the space in the Ora Building (the Second Ora Tenant). The Second Ora Tenant asked for verification of two legal means of egress out of the space. When it was revealed that one of the means was not actually legal, Pecora claimed that he would make the necessary filings to legalize it, but he allegedly took no action, and after several months, the Second Ora Tenant moved on from the deal.

In respect to these alleged potential tenants for the Ora Building, Pecora testified that he did not remember Far Realty presenting him with any proposed tenants, and, if it did, that none of those proposed tenants "made sense" (Pecora Dep. Tr. at 53). Pecora testified that he and a partner took over the space he was trying to rent in the building and that he asked Chanler to stop looking for a tenant (*id.* at 54-55).

On April 26, 2012, Far Realty commenced this action by filing a summons with notice. On October 10, 2012, Far Realty filed a complaint against defendants seeking commissions owed. On February 21, 2013, defendants Ora and 9 West filed a verified answer. On May 12, 2015, Pecora was deposed.

After Pecora's deposition, Far Realty brought this motion, seeking disqualification of the Giannola Firm on the ground that the Firm may be called as a witness in this litigation as the Firm drafted at least one of the leases subject to Far Realty's commission claims. Far Realty asserts that Pecora cannot remember the circumstances around drafting the lease because of a stroke he had in 2012.

9 West and Ora cross-move for summary judgment in their favor on the ground that Far Realty has failed to produce any executed leases or written agreements between the parties proving entitlement to the payment of commissions. Pecora cross-moves to dismiss the complaint on the ground that any alleged work performed by Far Realty was for 9 West and Ora, and not for his sole benefit as an individual.

**Analysis**

*Defendants' Cross-Motions*

1. Defendant Pecora's Cross-Motion to Dismiss

The complaint pleads six causes of action, all sounding in breach of contract, as each alleges an agreement to pay Far Realty commissions for its work in procuring a tenant or buyer, and defendants' failure to pay such commissions after Far Realty

performed its obligation under the agreement.

"It is well established that officers or agents of a company are not personally liable on a contract if they do not purport to bind themselves individually" (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011][citations omitted], *affd* 19 NY3d 511 [2012]). In this case, there is no dispute that the subject buildings were owned by the limited liability companies 9 West and Ora, and not by Pecora individually. Thus, Far Realty must allege that Pecora purported to bind himself individually under the alleged brokerage agreement (*id.*). As an alternative, Far Realty may pierce the companies' veil by alleging that Pecora exercised complete domination over these two entities in the transactions at issue and abused the privilege of doing business in the form of limited liability companies to perpetrate a wrong resulting in injury to Far Realty (*see generally D'Mel & Assoc. v Athco, Inc.*, 105 AD3d 451, 452 [1st Dept 2013]). The complaint contains no such allegations, and thus must be dismissed as against Pecora.

In its opposition to Pecora's cross-motion, Far Realty asks the court for leave to replead a cause of action for quantum meruit against Pecora. Far Realty's opposition/reply papers

state that it "can show that it has established the elements of quantum meruit" without further explanation aside from parroting the elements of this cause of action. While a plaintiff may request leave to amend the complaint, "[a]ny motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading" (CPLR 3025[b]). Here, there is not even a motion, much less a proposed amendment for the court's review. Accordingly, the court denies Far Realty's request.

2. Defendants 9 West and Ora's Cross-Motion for Summary Judgment

On a motion for summary judgment, the movant "must make a prima facie showing of entitlement to judgment as a matter of law" (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008]). Once the movant has demonstrated prima facie entitlement, the burden shifts to the opposing party to produce evidence sufficient to raise an issue of fact warranting a trial (*id.*). "Summary judgment permits a party to show, by affidavit or other evidence, that there is no material issue of fact to be tried, and that judgment may be directed as a matter of law, thereby avoiding needless litigation cost and delay" (*Brill v City of New York*, 2 NY3d 648, 651 [2004]).

"'It is well settled that absent an agreement to the contrary, a real estate broker earns his commission when he produces a party who is ready, willing and able to purchase or lease on the terms set by the seller lessor'" (*Dagar Group, Ltd. v South Hills Mall, LLC*, 12 AD3d 552, 554 [2d Dept 2004], quoting *Holzer v Robbins*, 141 AD2d 505, 506 [2d Dept 1988]). Even if a commission is expressly conditioned upon performance of an additional event, such as fully executing a lease, and that condition is not performed, "the seller will nevertheless be liable if he is responsible for the failure to perform the condition" (*Lane–Real Estate Dept. Store v Lawlet Corp.*, 28 NY2d 36, 42-43 [1971]; *see also A.J. Clarke Real Estate Corp. v Meyers*, 27 AD3d 230, 230 [1st Dept], *lv denied* 7 NY3d 711 [2006]).

a. The 9 West Building Transaction

9 West has met its burden of making a prima facie showing of entitlement to judgment as a matter of law. The evidence presented shows that Far Realty included the Commission Rate Schedule as part of this transaction (Chanler Aff., Ex. B). The Commission Rate Schedule stated that "[a]ll Commissions are due and payable upon execution of a lease by the Prospective Tenant and Owner unless otherwise agreed to in writing," creating a

condition precedent before a commission could be earned (*id.*). This condition was never met.

When Pecora told Chanler that he was selling the 9 West Building and withdrawing it from the rental market, the transaction between 9 West and Calista was clearly still in the negotiation stages. Giannola drafted a proposed lease agreement, and Calista returned the agreement with proposed changes and additions. These changes and additions concerned, *inter alia*, repairs to the roof and repairs of leaks above the kitchen and ice machine areas, assignment and subletting terms, rent concession terms, an insurance policy requirement covering all glass at the premises, and an option to renew the lease (Sicari Aff., Ex. E).

This "marked-up" rider agreement was not an agreement to the terms set forth by 9 West; it was a counter-offer to the lease originally proposed by 9 West (*see Eastern Consol. Props., Inc. v Morrie Golick Living Trust*, 83 AD3d 534, 534-535 [1st Dept 2011]). "These negotiations demonstrate that there never was a meeting of the minds on all essential terms" (*id.* at 535). Thus, 9 West has met its burden showing that Far Realty did not produce a party ready, able, and willing to lease on the terms 9 West required and did not meet the condition of the Commission

Rate Schedule.

The burden now falls on Far Realty to raise a triable issue of fact. Far Realty argues that the Commission Rate Schedule was not applicable to its dealings with 9 West, but rather, was part of packages sent to other real estate brokers to solicit their participation in obtaining a tenant for the 9 West Building. Even if this argument, unsupported and contradictory to the evidence presented, were accepted by the Court, Far Realty has failed to prove that it procured a tenant who was willing, able, and ready to agree to the terms presented by 9 West.

> [A] broker is never entitled to commissions for unsuccessful efforts; that the risk of failure is wholly his though he expend much time, effort and money, yet if he fails to effectuate an agreement or accomplish a bargain, or his authority is fairly terminated in good faith he gains no right to a commission

(*Thoens v J. A. Kennedy Realty Corp.*, 279 App Div 216, 220 [1st Dept 1951], *affd* 304 NY 753 [1952], citing *Sibbald v Bethlehem Iron Co.*, 83 NY 378, 384 [1881]). Again, Calista countered the terms 9 West presented (*see Eastern Consol. Props., Inc.*, 83 AD3d 534).

Far Realty also argues that because it was Pecora's conduct that preempted the transaction, it should still be entitled to a

commission even though the lease was not signed.

> [T]he right of the principal to terminate his authority is absolute and unrestricted, except only that he may not do it in bad faith, and as a mere device to escape the payment of the broker's commissions. But if the latter [the principal] acts in good faith, not seeking to escape the payment of commissions, but moved fairly by a view of his own interest; he has the absolute right before a bargain is made while the negotiations remain unsuccessful, before commissions are earned, to revoke the broker's authority

(*Thoens*, 279 App Div at 220) [internal quotation marks and citation omitted]). Here, Far Realty fails to present evidence that Pecora acted in bad faith, "deliberately attempt[ing] to destroy a potential transaction to avoid paying a brokerage commission" (*Eastern Consol. Props., Inc.*, 83 AD3d at 535). There is no evidence that the sale of the 9 West Building in April 2011 was consummated to avoid paying a brokerage commission to Far Realty. Rather, it appears to have been a business decision.

b. The 41 West Building

In regard to this transaction, there is no proof or allegation that a brokerage commission agreement existed between the parties. Thus, the issue is whether Far Realty produced a party ready, able, and willing to buy the 41 West Building on 9 West's terms.

Pecora testified that he did "not remember [Far Realty] bringing any potential purchaser" (Pecora Dep. Tr. at 32). However, in his affidavit, Chanler asserts that he did find a buyer willing and able to purchase the 41 West Building at the price and terms Pecora requested, and that Pecora verbally agreed to the deal, but then changed the deal and withdrew the building from the market (Chanler Aff., ¶10). Chanler does not identify the buyer by name or present any proof that the the buyer was ready, willing and able to close.

This is a classic case of "he said, she said" and creates an issue of credibility for a trier of fact to decide. Although the Court is wary of Far Realty's general claim that it produced a buyer, it is sufficient to raise an issue of fact, especially where Pecora's testimony in regard to this transaction is not unequivocal and does not meet the cross-movants' burden on a prima facie entitlement to summary judgment (*see Saunders Ventures, Inc. v Morrow*, 133 AD3d 584,585-86 [2d Dept 2015]; *A.J. Clarke Real Estate Corp.*, 27 AD3d at 230; *cf. Crisis Real Estate, Inc. v Harv Enters., Inc.*, 60 AD3d 802, 803 [2d Dept 2009]; *see also S.B. Schwartz & Co., Inc. v G. & H. Real Estate Holding Corp.*, 265 AD2d 316, 317 [2d Dept 1999]).

c. The Ora Building Transactions

As with the 41 West Building transaction, there is no proof or allegation that a brokerage commission agreement existed between Far Realty and Ora. Thus, the issue is again whether Far Realty produced a party ready, able, and willing to rent the Ora Building on Ora's terms.

In regard to the Ora Building transactions, once again, the court is presented with a credibility issue. Chanler claims that the First Ora Tenant was willing and able to rent the space at a higher monthly rent than Pecora requested, but once Far Realty presented him with the First Ora Tenant, Pecora allegedly demanded a change in the deal, requiring the First Ora Tenant to pay "key money." The First Ora Tenant refused. Chanler also asserts that he presented Pecora with the Second Ora Tenant, but that there was an issue with legalizing a second means of egress, which Pecora never took steps to do, so that tenant moved on.

Pecora does not deny that Far Realty presented tenants, but rather, testified that he could not remember if it did. Pecora testified that if Far Realty did present a tenant, it did not present a tenant who "made sense," so he told Chanler not

"bother" him anymore (Pecora Dep. Tr. at 53). Based on this testimony, and in view of the lack of documentary evidence, the Court cannot make a determination as a matter of law.

Therefore, summary judgment dismissing the complaint is granted, but only to the extent that the claim for commissions for the 9 West Building transaction is dismissed as against 9 West. The claims for the 41 West Building transaction and for the Ora Building transactions shall proceed against 9 West and Ora, respectively.

*Far Realty's Motion*

Far Realty seeks to have the Giannola Firm disqualified on the ground that it is a potential witness. It argues that it may be necessary to call the Giannola Firm at trial to testify about the leases the Firm prepared, which are central to Far Realty's claim for brokerage commissions. Far Realty has only presented evidence of one lease drafted by the Giannola Firm, and the claim for a commission based on that lease transaction has been dismissed. Thus, that lease is no longer in issue, and there cannot be any need for the Firm's testimony. This motion is denied as moot.

Accordingly, it is hereby

ORDERED that plaintiff Far Realty Associates, Inc.'s motion

to disqualify the law firm of Giannola and Associates, P.C. is denied; and it is further

ORDERED that defendant Tony Pecora's cross-motion to dismiss the complaint herein is granted, and Clerk of Court shall sever and dismiss the complaint as against said defendant Tony Pecora only; and it is further

ORDERED that defendants 9 West 46 LLC and Ora LLC's cross-motions for summary judgment are granted, in part, only to the extent that the claim for a commission for the building located at 9 West 46th Street, New York, New York is dismissed, and are otherwise denied; and it is further

ORDERED that the remainder of the action shall continue. This constitutes the Decision and order of the Court.

Dated: April 12, 2016

ENTER:

Ellen M. Coin, A.J.S.C.