SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 47
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ARM REAL ESTATE GROUP, LLC,

Index No. 158967/2015

Plaintiff,

DECISION/ORDER

-against-

DALAN MANAGEMENT, 33RD STREET OWNER LLC ADW 33RD STREET, LLC, FLOURINE BROADWAY LLC, PAYOURENT BROADWAY LLC, ADEE ASSOCIATES, ADEE 12 ASSOCIATES, DATWANI HOLDINGS, LLC, CITICORE LLC, TIMOUR A. SHAFRAN, UP REAL ESTATE ADVISORS LLC, PAVAN M. UTTAM,

Defendants.

Present:
Hon. Geoffrey D. Wright
Acting Justice Supreme Court

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RECITATION , AS REQUIRED BY CPLR § 2219 (A), of the papers considered in the review of this Motion/Order for summary judgment.

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed.....	1, 2, 3, 4
Order to Show Cause and Affidavits Annexed	
Answering Affidavits.....	5, 6, 7, 8
Replying Affidavits.....	9, 10, 11, 12
Exhibits.....	
Memoranda.....	13, 14, 15, 16

Motion sequence numbers 001, 002, 003, and 004 are consolidated for disposition.

In this litigation, plaintiff ARM Real Estate Group, LLC (ARM), a licensed real estate broker, seeks payment of a commission that it contends it is owed in connection with the sale of real property located at 10 and 12 East 33rd Street, New York, N.Y. (the Premises).

Plaintiff alleges that it represented defendants Dalan Management, 33rd Street Owner LLC, ADW 33rd Street LLC, Flourine Broadway LLC and Payourent Broadway LLC (collectively, Dalan or the Buyer, or the Buyer defendants), as the Buyer's broker, in relation to Dalan's effort to purchase the Premises from defendants Adee 12 Associates, Adee Associates,

and Datwani Holdings, LLC (collectively, Adee or the Seller, or the Seller defendants).

The complaint alleges that, in May 2013, Dalan contacted plaintiff to procure commercial real estate on Dalan's behalf. Plaintiff further alleges that it introduced Dalan to the Premises, that it made multiple showings of the Premises to Dalan, sent Dalan documents regarding the Premises, had countless communications with both the Buyer and the Seller, and engaged in extensive negotiations with Adee on behalf of Dalan, including communications which allegedly involved discussions of the existing union contract for building employees and the price Dalan would be willing to pay for the building, depending on whether it would be bound by the union contract. Plaintiff further alleges that it entered into a commission agreement with Dalan pursuant to which Dalan agreed to pay plaintiff's 1% brokerage commission.

Plaintiff alleges that because of its efforts, on June 27, 2013, Dalan made a formal offer to purchase the Premises in a Letter of Understanding (LOI) that was emailed to the Seller on June 28, 2013. Among the general terms and conditions listed in the LOI were:

> "2. **Purchase Price.** Twenty Six Million Five Hundred Thousand Dollars ($26,500,000) payable in immediately available funds through escrow at the closing.
>
> ***
>
> "5. **Closing.** The closing shall occur approximately Sixty (60) days after execution of the Purchase Agreement.
>
> "6. **Real Estate Broker Commission.** Buyer shall pay all real estate brokerage commissions associated with this transaction."

Verified complaint, exhibit B at 1. The letter further states:

> "This letter is not intended as, and does not constitute, a binding agreement by any party, nor an agreement by any party to enter into a binding agreement, but is merely intended to specify some of the proposed terms and conditions of the transaction contemplated herein. Neither party may claim any legal rights against the other by reason of the signing of this letter of intent or by taking any action in

reliance thereon. Each party hereto fully understands that no party shall have any legal obligations to the other, or with respect to the proposed transaction, unless and until all of the terms and conditions of the proposed transaction have been negotiated and agreed to by all parties, in their respective sole discretion, and set forth in a definitive agreement which has been negotiated and delivered by all parties. The only legal obligations which any party shall have shall be those contained in such signed and delivered definitive agreement referred to above."

Id. at 1-2. On June 28, 2013, the Seller responded with a counter proposal OF $30,000,000.00. It is undisputed that Dalan did not respond to that counter proposal.

The complaint alleges that, after the June 28, 2013 counter proposal, plaintiff periodically "checked in with the Seller" as to the status of the Premises. Verified complaint, ¶ 40.

More than one year later, on October 9, 2014, the Buyer and the Seller entered into a contract for the purchase and sale of the Premises for a sum of $36,000,000.00 Plaintiff did not learn of the planned sale until December 2014.

The complaint alleges that the purchase agreement was negotiated and executed by defendant Timour A. Shafran (Shafran), who is employed by defendant Citicore LLC (Citicore, together, the Citicore defendants), representing the Buyer, and defendant Pavan M. Uttam (Uttam), who is employed by defendant Up Real Estate Advisors LLC (Up Real Estate, together, the Up Real Estate defendants), representing the seller.

Plaintiff contends that the building was never on the open market, and Dalan's purchase of the Premises for $36 million in January 2015 was a direct result of plaintiff's work on behalf of Dalan. Therefore, according to plaintiff, it was the procuring cause of the sale, and pursuant to the commission agreement, it is owed $360,000.00.

Pursuant to the contract entered into between the Buyer and Seller on October 9, 2014, the Seller agreed to pay the brokerage commissions of the brokers for the Buyer and Seller. That contract also stated with regard to the brokers:

"Each party represents and warrants to the other that it has not dealt with any broker, finder or consultant other than Manohar Pohani and Citicore LLC

> (collectively, the "Broker"), in connection with the transaction which is the subject of this Agreement, and that all negotiations involving Purchaser and Seller with respect to the terms of this Agreement, were conducted by or through Broker. ... Seller shall pay the brokerage commission to Broker in accordance with Seller's separate written agreement with Broker. This Section shall survive the Closing or earlier termination of this Agreement."

Agreement of Purchase and Sale, ¶ 22.1, Affirmation in Support of Gil Santamarina, dated October 27, 2015, exhibit C, motion sequence no. 002.

Plaintiff asserts eight causes of action: 1) breach of contract against Dalan; 2) unjust enrichment against all defendants; 3) fraud against all defendants; 4) negligent misrepresentation against all defendants; 5) constructive trust against all defendants; 6) promissory estoppel against defendants Dalan and Adee; 7) conspiracy against all defendants; and 8) interference with business relations against Citicore, Shafran, Up Real Estate and Uttam. Plaintiff seeks damages in the amount of $360,000.00 pursuant to each cause of action, attorneys' fees, and punitive damages in connection with the second through eighth causes of action.

In motion sequence nos. 001, 002, and 004, the Seller defendants, the Up Real Estate defendants and the Citicore defendants, respectively, move, pursuant to CPLR 3211, to dismiss the complaint. In motion sequence no. 003, the Buyer defendants move, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

Standards Governing Dismissal and Summary Judgment

In determining motions to dismiss pursuant to CPLR 3211, "the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine . . . whether the facts as alleged fit within any cognizable legal theory" (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570-571 [2005] [internal quotation marks and citation omitted]). However, allegations that are bare legal conclusions or are inherently incredible or that are flatly contradicted by the documentary evidence are not accorded such favorable inferences and need not be accepted as true (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]). Dismissal based upon

documentary evidence is appropriate where the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

On a motion for summary judgment the moving party has a greater burden to produce evidentiary facts than the adversary. *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 (1979).

> "[O]ne opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient."

Zuckerman v City of New York, 49 NY2d 557, 562 (1980).

MOTION SEQUENCE NO. 001

In motion sequence no. 001, the Seller defendants move, pursuant to CPLR 3211 (a) (1) and (a) (7), to dismiss the causes of action asserted against them (the second, third, fourth, fifth, sixth, and seventh) including the claims for punitive damages.

Noting that plaintiff's breach of contract cause of action is asserted against only the Buyer defendants, the Seller defendants contend that, though the causes of action are styled in various different ways, in each cause of action, plaintiff is essentially seeking to recover from the Seller the brokerage commission which it claims the Buyer promised to pay.

To recover a brokerage commission, the broker must establish:

"(1) that he or she is duly licensed, (2) that he or she had a contract, express or implied, with the party to be charged with paying the commission, and (3) that he or she was the procuring cause of the sale." *Cusumano Assoc., Inc. v Politoski*, 118 AD3d 936, 937 (2d Dept 2014)(internal quotation marks and citations omitted). As the Seller defendants assert, the complaint alleges that plaintiff had an agreement with the Buyer defendants to pay a 1% commission. Plaintiff alleges no such agreement with the Seller defendants. Therefore, according to the Seller, regardless of how the causes of action are styled, plaintiff cannot recover a brokerage commission from them. *See Julien J. Studley, Inc. v New York News*, 70 NY2d 628, 629

(1987)(to recover brokerage commission from the property owner defendants, plaintiffs must plead and prove that they were employed by those defendants; however, their effort to do so failed where they had an express contract covering the subject matter with the buyer).

Second Cause of Action (Unjust Enrichment)

> "[T]he theory of unjust enrichment lies as a quasi-contract claim and contemplates an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties. An unjust enrichment claim is rooted in the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another. Thus, in order to adequately plead such a claim, the plaintiff must allege that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered."

Georgia Malone & Co. v Rieder, 19 NY3d 511, 516 (2012)(internal quotation marks and citations omitted). Additionally, to establish a claim for unjust enrichment, there must be a close connection between the parties. "Although privity is not required for an unjust enrichment claim, a claim will not be supported if the connection between the parties is too attenuated." *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 (2011); *see also Sperry v Crompton Corp.*, 8 NY3d 204, 216 (2007)(unjust enrichment claim will not lie where the relationship between the parties is too attenuated).

In its unjust enrichment cause of action, plaintiff asserts that the Buyer, Dalan, had a duty to pay plaintiff a commission in connection with the sale of the Premises. It further alleges that the brokers representing the Seller and the Buyer received commissions as a result of the January 2015 sale.

Plaintiff does not explain how the Seller defendants were unjustly enriched by the Buyer's alleged failure to pay the commission that it agreed to pay plaintiff under the LOI, since under the October 2014 sales agreement, the Seller incurred an obligation to pay the brokerage commissions, which it was not obligated to do under the June 2013 LOI.

Moreover, as the Court of Appeals stated in *Georgia Malone*, "a plaintiff cannot succeed

on an unjust enrichment claim unless it has a sufficiently close relationship with the other party." 19 NY3d at 516. Here, Anand Melwani, plaintiff's managing member, claims that he "placed great trust in Eddie Datwanti," whom he describes as Seller's agent and refers to as "Uncle Eddie," because "Uncle Eddie" is a "close family friend." However, as Seller points out in their papers, in an affidavit opposing the motion to dismiss of defendants Up Real Estate Advisors LLC and Pavan M. Uttam (motion sequence no. 002), Melwani states that, "in the Indian community, the younger people often refer to older male family friends as 'Uncle'." Affidavit of Anand Melwani in opposition to motion by Up Real Estate Advisors LLC, ¶ 10. Thus, the fact that plaintiff repeatedly refers to Seller's agent as "uncle" does not evidence the kind of close relationship necessary to support an unjust enrichment claim. Rather, the complaint alleges no more than an arm's length relationship between the Buyer and the Seller, in which plaintiff represented the prospective Buyer.

Moreover, any services that plaintiff may have performed were on behalf of the Buyer, not the Seller, and, therefore, an unjust enrichment claim does not lie. *See Lopinyukelis II. LLC v Merchant Captial Funding, LLC*, 38 Misc 3d 1226(A), 2013 NY Slip Op 50289(U),*5 (Sup Ct, Kings County 2013) ("Plaintiff has no unjust enrichment claim against [defendant] because, despite any benefit [the moving defendant] may have obtained as a result of plaintiff's services, plaintiff performed its services at the behest of [another defendant], not [the moving defendant]"). Plaintiff's cause of action for unjust enrichment is, therefore, dismissed as to the Seller (the Adee defendants).

Third Cause of Action (Fraud)

Where a cause of action for fraud is alleged, "the circumstances constituting the wrong shall be stated in detail." CPLR 3016 (b).

> "To plead a prima facie case of fraud the plaintiff must allege representation of a material existing fact, falsity, scienter, deception and injury. In addition, each of these essential elements must be supported by factual allegations sufficient to satisfy the requirement of CPLR 3016 (subd. [b]) that the circumstances constituting the wrong shall be stated in detail when a cause of action based upon fraud or breach of trust is alleged."

Lanzi v Brooks, 54 AD2d 1057, 1058 (3d Dept 1976), *affd* 43 NY2d 778 (1977)(internal quotation marks and citations omitted).

"Allegations of fraud should be dismissed as insufficient where the claim is unsupported by specific and detailed allegations of fact in the pleadings." *Callas v Eisenberg*, 192 AD2d 349, 350, (1st Dept 1993).

The heart of plaintiff's cause of action for fraud is the allegation that "Dalan never intended to adhere to the terms of the Commission Agreement and entered into the contract to purchase the Premises with the intent to circumvent ARM and avoid paying the one percent (1%) commission fee it owed to ARM." Verified complaint, ¶ 63. With respect to the Seller defendants, however, plaintiff only generally alleges that "[d]efendants made misrepresentations of material facts to ARM relating to the payment of commissions" which they "knew or should have known that ARM would rely upon." Verified complaint, ¶¶ 62 & 66. Plaintiff fails to state what representations the Seller, or any of the other defendants made, or when they made them. Rather, the Seller, and the other defendants, are left to guess just what misrepresentations they have allegedly made and when they allegedly made them. This is plainly inadequate under CPLR 3016 (b).

In its brief, citing paragraph 62 of the verified complaint, plaintiff mentions an allegedly false statement made by Seller that it was no longer interested in selling the Premises; however, such an allegation does not appear in paragraph 62, nor is it even relevant to the allegation regarding Dalan's purported intention not to adhere to the commission agreement alleged in paragraph 63 of the verified complaint.

Plaintiff next argues that it has adequately pleaded a cause of action for fraudulent concealment rather than fraud, based upon "Seller's failure to disclose to Plaintiff that it was going forward with the sale of the Premises to Buyer." Plaintiff's memorandum of law at 14. Though such a cause of action is not formally alleged in the complaint, the court must consider whether the facts alleged in the complaint "fit within [such a] legal theory" (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d at 570-571.

Plaintiff's new allegation is not contained in the third cause of action, which plainly

relates to Dalan's alleged intention never to adhere to the purported commission agreement between plaintiff and the Buyer. Moreover, like fraud, a cause of action for fraudulent concealment is governed by the specificity requirements of CPLR 3016 (b), which have not been met by plaintiff.

Finally, "[i]n the absence of a contractual relationship or a confidential or fiduciary relationship, a party may not recover for fraudulent concealment of fact, since absent such a relationship, there is no duty to disclose." *900 Unlimited v MCI Telecom. Corp.*, 215 AD2d 227, 227 (1st Dept 1995). Neither a contractual, nor a confidential or fiduciary relationship have been alleged between plaintiff and the Seller. Melwani's claim that "uncle" Eddie Datwani was a close family friend is insufficient to create such a relationship. For all of these reasons, the third cause of action for fraud is dismissed.

Fourth Cause of Action (Negligent Misrepresentation)

> "Liability for negligence may result only from the breach of a duty running between a tortfeasor and the injured party. ... In the commercial context, a duty to speak with care exists when the relationship of the parties, arising out of contract or otherwise, [is] such that in morals and good conscience the one has the right to rely upon the other for information."

Kimmell v Schaefer, 89 NY2d 257, 263 (1996)(internal quotation marks and citations omitted).

"It has long been the law in New York that a plaintiff in an action for negligent misrepresentation must show either privity of contract between the plaintiff and the defendant or a relationship 'so close as to approach that of privity.'" *Sykes v RFD Third Ave. 1 Assoc., LLC*, 15 NY3d 370, 372 (2010)(citation omitted). Here, there is no allegation that there was a contract between the plaintiff and the Seller, nor of a relationship "so close as to approach that of privity." *Id.*

Furthermore, pursuant to CPLR 3016 (b), where a cause of action is based upon misrepresentation, like one based upon fraud, the circumstances constituting the wrong must be stated in detail. *Colasacco v Robert E. Lawrence Real Estate*, 68 AD3d 706, 708 (2d Dept 2009). Here, the fourth cause of action merely alleges that defendants represented that they

would honor their obligations owed to plaintiff without stating the substance of the Seller's alleged obligations, or when, where and by whom the alleged representations were made.

In its brief, citing to paragraphs 71-76 of the verified complaint, plaintiff claims that the Seller falsely represented that the Premises was no longer for sale and the Seller was no longer interested in selling the Premises. Those paragraphs, however, contain merely general allegations that the "defendants represented to ARM that they would honor their obligations owed to ARM." Verified complaint, ¶ 72. Furthermore, even assuming that the Seller was, in fact, still interested in selling the property when he said it was no longer on the market, given that the Buyer did not respond to the Seller's counter offer in June 2013, plaintiff fails to show a basis for any obligation owed by the Seller to plaintiff. The fourth cause of action is, therefore, dismissed as against the Seller defendants.

Fifth Cause of Action (Constructive Trust)

The fifth cause of action alleges that, as a result of their conduct and material misrepresentations, "Defendants were able to convert and misappropriate funds that lawfully belong to ARM, and have been unjustly enriched thereby." Verified complaint, ¶ 78. "There are four requirements for the imposition of a constructive trust: '(1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment.'" *Manufacturers & Traders Trust Co. v Berthole*, 130 AD3d 881, 882, (2d Dept 2015), quoting *Sharp v Kosmalski*, 40 NY2d 119, 121 (1976).

Here again, plaintiff fails to establish a confidential or fiduciary relationship with the Seller, let alone a promise to plaintiff by Seller, or a transfer made in reliance thereon. Therefore, the fifth cause of action is dismissed.

Sixth Cause of Action (Promissory Estoppel)

"To avoid dismissal of a promissory estoppel claim, a plaintiff must allege 1) an unambiguous promise; 2) reasonable and foreseeable reliance on the promise; and 3) injury as a result of that reliance." *Brine v 65th St. Townhouse LLC*, 20 Misc 3d 1138(A), 2008 NY Slip Op 51780(U), *6 (Sup Ct, NY County 2008), citing *Urban Holding Corp. v Haberman*, 162 AD2d 230, 231 (1st Dept 1990)(internal quotation marks omitted). Plaintiff alleges that the Commission Agreement which it entered into with the Buyer, contained a promise for *the Buyer*

to pay plaintiff a commission. Plaintiff does not allege any promise made by the Seller to plaintiff, but rather alleges that the Seller "acknowledged the terms" of the agreement. Verified complaint, ¶ 82. That is inadequate to support a cause of action for promissory estoppel against the Seller. The sixth cause of action is, therefore, dismissed.

Seventh Cause of Action (Conspiracy)

The seventh cause of action alleges that all of the defendants were aware that the Buyer had a duty to pay a commission to plaintiff and that they, led by the Buyer, conspired with one another to execute a sale of the Premises that failed to include the commission for plaintiff. Plaintiff further alleges that the Buyer and the Seller "have breached their promise to pay the Commission fee due and owing under the terms of the Commission Agreement." Verified complaint, ¶ 83.

"New York does not recognize an independent cause of action for civil conspiracy." *Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 110 (1st Dept 2009). Furthermore, the complaint alleges no promise by Seller to pay plaintiff a commission. The documents it submits in opposition to the Seller's motion to dismiss show only a promise by the Buyer, and at best, indicate an awareness of that promise by the Seller.

Plaintiff argues that a cause of action for conspiracy will stand if plaintiff can establish a primary tort "plus the following four elements: (1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury." *Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 474 (1st Dept 2010)(internal quotation marks and citation omitted).

Here, as in *Thome*, "[s]ince none of plaintiff's tort claims [as against the Seller] are viable ..., those claims cannot form the basis for a civil conspiracy cause of action." *Thome*, 70 AD3d at 110. Plaintiff's seventh cause of action is, therefore, dismissed.

As the substantive causes of action against the Seller are dismissed, the court need not reach the Seller defendants' arguments opposing plaintiff's claims for punitive damages and attorneys' fees.

MOTION SEQUENCE NO. 002

In motion sequence no. 002, defendants Uttam and Up Real Estate, Uttam's employer,

move, pursuant to CPLR 3211 (a) (1) and (a) (7), to dismiss the causes of action asserted against them.

The complaint alleges, on information and belief, that the Up Real Estate defendants were the brokers that represented the Seller in the January 2015 sale of the Premises to the Buyer, and that they received a commission on the sale. The complaint asserts six of the eight causes of action against the Up Real Estate defendants (all of the causes of action other than breach of contract and promissory estoppel). In its memorandum of law in opposition to the Up Real Estate defendants' motion to dismiss, however, plaintiff indicates that it is withdrawing the causes of action for fraud, negligent misrepresentation and constructive trust as against these defendants. Only the three remaining causes of action will, therefore, be addressed in this opinion.

Second Cause of Action (Unjust Enrichment)

As this court noted in its discussion of the unjust enrichment cause of action in connection with the motion of the Seller defendants (motion sequence no. 001), "a plaintiff cannot succeed on an unjust enrichment claim unless it has a sufficiently close relationship with the other party." *Georgia Malone & Co. v Rieder*, 19 NY3d at 516. In *Georgia Malone*, a real estate broker sued a rival broker, who had acquired, from the developer, the due diligence reports prepared by the first broker, and who received a commission for the ultimate sale. The *Georgia Malone* Court affirmed the dismissal of the unjust enrichment claim against the rival broker, stating that the relationship between the brokers was too attenuated, despite the fact that the rival broker actually paid the developer for the reports paid by the first broker. Here, there are no allegations that plaintiff and the Up Real Estate defendants had any relationship at all. Moreover, the complaint alleges that these defendants represented the Seller, not the Buyer. The cause of action for unjust enrichment must, therefore, be denied.

Seventh Cause of Action (Conspiracy)

The seventh cause of action alleges that all of the defendants conspired with one another to defraud plaintiff of its commission. As the court noted with respect to motion sequence no. 001, there is no independent cause of action for civil conspiracy under New York State law. *Thome v Alexander & Louisa Calder Found.*, 70 AD3d at 110. Although a cause of action for

civil conspiracy may stand where it relates to an underlying tort (*see Abacus Fed. Sav. Bank v Lim*, 75 AD3d at 474), here, the only tort alleged in the cause of action for conspiracy is fraud, a cause of action which plaintiff has withdrawn against the Up Real Estate defendants.

In its brief in opposition to the Up Real Estate defendants' motion to dismiss, plaintiff argues that its cause of action for conspiracy can stand because the underlying tort of tortious interference with business relations (the eighth cause of action) has been asserted against these defendants. As the court concludes below, however, that cause of action must also be dismissed because it fails to allege a crucial element of the tort. The cause of action for conspiracy, therefore, fails as well.

Eighth Cause of Action (Tortious Interference with Business Relations)

The eighth cause of action alleges, upon information and belief, that "Citicore, Shafran, Up Real Estate and Uttam, knew of ARMS's business relationship with Dalan and improperly and intentionally interfered, so as to receive the commission from the sale of the Premises that belonged to ARM." Verified complaint, ¶ 93. It further alleges that "[a]s a result of their improper conduct, ARM was excluded from the sale and did not receive its commission fee." *Id.*, ¶ 94.

> "To prevail on a claim for tortious interference with business relations in New York, a party must prove (1) that it had a business relationship with a third party; (2) that the defendant knew of that relationship and intentionally interfered with it; (3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and (4) that the defendant's interference caused injury to the relationship with the third party."

Amaranth LLC v J.P. Morgan Chase & Co., 71 AD3d 40, 47 (1st Dept 2009), citing *Carvel Corp. v Noonan*, 3 NY3d 182, 189 [2004]; *NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614 [1996]; *Guard-Life Corp. v Parker Hardware Mfg. Corp.*, 50 NY2d 183, 191 (1980). In *Guard-Life*, the Court of Appeals explained the meaning of improper or illegal means stating that "'[w]rongful means' include physical violence, fraud or misrepresentation, civil suits and

criminal prosecutions, and some degrees of economic pressure; they do not, however, include persuasion alone although it is knowingly directed at interference with the contract." 50 NY3d at 191.

Here plaintiff alleges the first, second and fourth elements, but other than alleging, in a conclusory fashion, that defendants "improperly" interfered with their relationship with the Buyer, plaintiff fails to even mention the third element, "that the defendant acted solely out of malice or used improper or illegal means *that amounted to a crime or independent tort.*" *Amaranth*, 71 AD3d at 47 (emphasis supplied); *see also Guard-Life*, 50 NY2d at 191. To the contrary, rather than alleging that the Up Real Estate defendants acted out of malice or used means that amounted to a crime or independent tort, plaintiff alleges that the defendants acted so as to receive the commission themselves, that is, for their own economic enrichment. On its face, such an allegation of economic interest is an inadequate basis for the tort alleged. *See Thome v Alexander & Louisa Calder Found.*, 70 AD3d at 108 ("Plaintiff has not alleged any facts suggesting that defendants violated the law or undertook actions with the sole purpose of harming him; indeed, by plaintiff's own theory of the case, defendants acted with the intent of benefitting themselves"). Plaintiff's cause of action for interference with business relations, therefore, fails.

Plaintiff tries to rescue its eighth cause of action by contending that it has sufficiently alleged a claim for tortious interference with a contract, which, unlike interference with business relations, does not require an allegation of malice or illegal means. No such cause of action, however, has been alleged in the complaint.

Considering whether the facts as alleged fit the legal theory of tortious interference with a contract, the court concludes that the allegations in the complaint fall short. "Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom." *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 (1996). To establish a contract between itself and the Buyer, plaintiff must show an "(1) offer, (2) acceptance, (3) consideration, (4) mutual assent, and (5) mutual intent to be bound." *OTG*

Brands, LLC v Walgreen Co., 2015 WL 1499559, *6, 2015 US Dist LEXIS 42629, *18 (SD NY 2015), No. 1:13-cv-09066 (ALC). Here, based upon the Buyer's letter of intent to the Seller, plaintiff has alleged that, in June 2013, the Buyer offered to pay the Seller $26,000,000.00 for the Premises and as part of that offer, stated that it would pay plaintiff's brokerage commission.[1] As the complaint alleges, however, the Buyer's offer was not accepted by the Seller, and the Buyer did not respond to the Seller's counter proposal.

As discussed at greater length in connection with motion sequence no. 003, *infra*, the provision governing the brokerage commission in the LOI does not indicate that an obligation between plaintiff and the Buyer existed after the Buyer's offer was rejected by the Seller, and plaintiff fails to allege a basis for a mutual intent to be bound if the Buyer's offer to purchase the Premises was rejected, which it was. Rather, more than one year later, apparently without the involvement of plaintiff between June 2013 and October 2014, the Buyer offered Seller an additional $10,000,000.00 for the Premises. That substantially higher offer was accepted by the Seller. Thus, plaintiff has failed to allege an ongoing contract between itself and the Buyer with which the Up Real Estate defendants interfered. The eighth cause of action, therefore, fails as well.

MOTION SEQUENCE NO. 003

In motion sequence no. 003, the Buyer defendants move, pursuant to CPLR 3212, for summary judgment against plaintiff.

In support of their motion, the Buyer defendants submit the affidavit of Daniel Wrublin, the founding principal of Dalan, and member of the other LLC Buyer defendants. Wrublin states that Dalan is a real estate owner and manager of multi-family and commercial properties and is always interested in acquiring new properties. Wrublin further states that he met Melwani at a

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[1] The only other reference in writing to a commission to be paid by the Buyer is contained in an email discussing the union contract sent by plaintiff to Andy Wrublin and Danny Wrublin dated June 24, 2013, which stated that, "As I told you when we met at the building, buyer pays my fee of 1% of the purchase price." affidavit of Anand Melwani, dated November 23, 2015, exhibit C at 2 (unless otherwise noted, the Melwani affidavit cited refers to the affidavit submitted by Melwani in connection with the motion sequence no. being discussed).

real estate conference in May 2013, that Melwani indicated that he might have commercial listings of interest to him, and that Wrublin invited Melwani to send him information, which he did, in May 2013.

It is undisputed by the Buyer defendants and plaintiff that when Wrublin learned that the building employees were employed subject to a union contract, he offered to pay $29,500,000.00, if the Buyer would not be bound by the union contract. Because the Seller indicated that the Buyer would be bound by that contract, the Buyer made the lower offer of $26,500,000.00. That offer was memorialized in the LOI which contained the provisions that the Buyer would pay the brokerage commission and that the letter did not constitute a binding agreement, or even an agreement to enter into a binding agreement. *See* LOI, Verified complaint, exhibit B at 1-2.

It is also undisputed that the Seller rejected the offer made by the Buyer on June 28, 2013, and indicated that he had two other offers of $30,000,000 and that he was "looking to get north of 30." Melwani aff, dated November 23, 2015, exhibit B at 1. In an additional email, the Seller indicated that "[r]ecently there has been lot of interest for the bldg. Hence I am trying to get the best deal for the partners." *Id.; see also* email from Melwani to Andy and Danny Wrublin dated June 24, 2013 referring to other offers for the Premises ("Even though he keeps telling me he wants $30MM net, I don't think he is getting it and from what he has told me, anyone that has given that to him can't provide proof of funds"). *Id.*, exhibit C at 2. It is undisputed that the Buyer defendants did not respond to the Seller's counter proposal.

Wrublin does not contest that plaintiff spent approximately one month trying unsuccessfully to negotiate a deal between the Buyer and the Seller but states that after Buyer's offer to purchase the Premises for $26.5 million was rejected by the Seller, communication between plaintiff and the Buyer defendants concerning the Premises completely broke off, "as did any further representation by Plaintiff on behalf of [the Buyer] defendants." Affidavit of Daniel Wrublin, dated November 16, 2015, ¶ 6.

Breach of Contract (first cause of action)

As previously noted, to be entitled to a brokerage commission, the broker must establish: "(1) that he or she is duly licensed, (2) that he or she had a contract, express or implied, with the party to be charged with paying the commission, and (3) that he or she was the procuring cause

of the sale." *Cusumano Assoc., Inc. v Politoski*, 118 AD3d at 937.

The Buyer defendants contend that the only commission agreement between the Buyer and plaintiff was limited to the terms set forth in the LOI, which stated that the Buyer "shall pay all real estate brokerage commissions associated with this transaction," (*see* Verified complaint, exhibit B at 1) and that "this transaction" was dependent on the sale being accomplished based upon the terms discussed in the LOI, not the least of which was a sale price of $26.5 million. Those terms were, of course, rejected by the Seller with its counter offer. As the Buyer argues, a counter offer constitutes the rejection of the original offer, and extinguishes the original offer. *Jericho Group, Ltd. v Midtown Dev., L.P.*, 32 AD3d 294, 299 (1st Dept 2006). According to the Buyer, when its June 2015 offer was rejected, the transaction, and, therefore, the commission agreement, were terminated.

Citing *Rachmani Corp. v 9 E. 96th St. Apt. Corp.* (211 AD2d 262, 267 [1st Dept 1995]) the Buyer defendants recognize that where there is an exclusive right to sell agreement, the broker may be entitled to receive a commission even if he or she is not involved in the ultimate sale. Wrublin states, however, that plaintiff never had an exclusive brokerage agreement with Buyer defendants, whereby they agreed to pay plaintiff a brokerage agreement regardless of plaintiff's involvement, and plaintiff fails to demonstrate, or even raise a question of fact suggesting that such an exclusive arrangement existed.

Nor, according to the Buyer defendants, was plaintiff the procuring cause of the sale. "It has long been recognized that a broker, save when he enjoys the benefit of a special agreement to the contrary, does not automatically and without more make out a case for commissions simply because he initially called the property to the attention of the ultimate purchaser." *Lanstar Intl. Realty v New York News*, 206 AD2d 411, 412 (2d Dept 1994)(internal quotation marks and citation omitted). Rather there must be a "direct and proximate link, as distinguished from one that is indirect and remote" between the Buyer and the broker. *Greene v Hellman*, 51 NY2d 197, 206 (1980). Plaintiff has failed to demonstrate or even raise a question of fact as to whether such a direct and proximate link to the sale that occurred 1½ years after the Buyer's initial offer was rejected by the Seller.

Plaintiff contends, however, that here, "extenuating circumstances existed because I

introduced the Buyer to the Premises, which was not being publicly marketed, and only I knew the Premises was available for sale." Melwani aff, dated December 15, 2015, ¶ 11. That assertion, however, is contradicted by the very emails that Melwani attaches to his affidavit that indicate that as early as May 30, 2013, the Seller told him that he had two other potential buyers offering more than Dalan, information which Melwani passed on to Wrublin. *See id.*, exhibit 3; *see also* exhibit 10, June 28, 2013 email ("Recently there has been a lot of interest for the bldg from various buyers. Hence I am trying to get the best deal for the partners.")

In its effort to argue that it was the procuring cause of the sale, plaintiff contends in its brief opposing Buyer's motion for summary judgment that, after the Seller's unresponded-to counter proposal in late June 2014, plaintiff stayed in contact with both sides. With respect to contacts regarding the Premises, however, Melwani's affidavit refers to only a single email to the Seller, dated September 13, 2013, asking whether the Premises had been purchased, and a response from the Seller indicating that it had been "[t]aken off the market." Melwani aff, dated December 15, 2015, ¶ 34. There is no indication of any communication to the Buyer. There is solely one final email exchange between Melwani and the Seller more than one year later, in December 2014, in which Melwani asked the Seller whether the Premises had been sold and was told that it had been.

Contrary to Melwani's unsupported and conclusory assertion that, after June 2013, he remained in contact with both sides, Wrublin states that after the Seller made his counter proposal, plaintiff had no contact with the Buyer concerning the Premises. Wrublin does state that, over the next few months, plaintiff periodically sent emails to the Buyer defendants regarding other potentially available properties. As Wrublin states, however, those emails do not identify to whom they are sent, and would appear to be part of an email blast to more than one recipient, and do not indicate that plaintiff was representing the Buyer in connection with any of those properties. *See* Wrublin aff, exhibit 9.

According to Wrublin, on September 2014, approximately 13 months after the Buyer's offer was rejected by Seller, he received a call from a different broker, defendant Shafran of Citicore, asking if he had any interest in purchasing the Premises. Wrublin states that, in September 2014, unlike in June 2013, when he made his $26.5 million offer, the Buyer

defendants were in the process of selling three buildings for $16,000,000.00, and, therefore, would have millions of dollars available for a 1031 Exchange.[3] Furthermore, according to Wrublin, by September 2014, the real estate market, including the leasing market, which governed the amount they could get in rents per unit, had substantially improved since the Buyer's initial offer. Wrublin states that he relied on economic data provided by Citicore in making his assessment of the value of the Premises, because the data provided by plaintiff in the spring of 2013 was by then out of date and no longer accurate.

As a result, the Buyer defendants were prepared to proceed with a substantially higher offer, and on October 9, 2014, a contract was entered into between the Buyer and Seller for $36 million. As part of that contract, the Seller agreed to pay the brokerage commission of the brokers involved in negotiating that transaction. The sale was completed in January 2015, approximately 1½ years after the Buyer's initial offer was rejected.

While plaintiff is correct that, under some circumstances, whether the broker was the procuring cause of the sale constitutes a question of fact that defeats a motion for summary judgment (*Gregory v Universal Certificate Group LLC*, 32 AD3d 777 [1st Dept 2006]), here plaintiff fails to raise such a question of fact in response to the evidence submitted by the Buyer. Thus, as in *Helmsely-Spear, Inc. v 150 Broadway N.Y. Assoc.* (251 AD2d 185 [1st Dept 1998]), where a year passed between the initial work done by the plaintiff broker and the lease negotiated with a different set of brokers, plaintiff fails to establish a proximate link between its work and the ultimate contract and fails to even raise a question of fact as to whether it was the procuring cause of the sale. The Buyer's motion for summary judgment dismissing the first cause of action for breach of contract is, therefore, granted.

Second Cause of Action (Unjust Enrichment)

"The theory of unjust enrichment lies as a quasi-contract claim. It is an obligation

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[3] A 1031 Exchange is "a 'like-kind exchange' under Internal Revenue Code (26 USC) § 1031, which permits taxes on gains from the sale of real property to be deferred if the seller purchases another property of like kind, within certain parameters (see 26 USC § 1031 [a])." *Wo Yee Hing Realty Corp. v Stern*, 99 AD3d 58, 60 (1st Dept 2012).

> imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned. Where the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded."

IDT Corp. v Morgan Stanley Dean Witter & Co., 12 NY3d 132, 142 (2009)(internal quotation marks and citations omitted). Where the cause of action based upon quasi-contract relates to the same subject matter as the contract, it is properly dismissed as duplicative. *Clark–Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 (1987). This is true even where, as here, the cause of action for breach of contract fails and has been dismissed. *Sebastian Holdings, Inc. v Deutsche Bank, AG.*, 108 AD3d 433 (1st Dept 2013).

Plaintiff's second cause of action is therefore dismissed.

Third Cause of Action (Fraud)

In its cause of action for fraud, plaintiff alleges that "Dalan never intended to adhere to the terms of the Commission Agreement and entered into the contract to purchase the Premises with the intent to circumvent ARM and avoid paying the one percent (1%) commission fee it owed to ARM." Verified complaint, ¶ 63.

However, "[a] complaint alleging fraud based on a statement of future intention must allege facts sufficient to show that the promisor, at the time the representation was made, never intended to honor the promise." *Pope v New York Prop. Ins. Underwriting Assn.*, 66 NY2d 857, 859 (1985); *Stuart Lipsky, P.C. v Price*, 215 AD2d 102, 103 (1st Dept 1995). Plaintiff has failed to allege such facts and has merely made a conclusory allegation to that effect.

Though on a motion to dismiss, facts alleged will be treated as true and will be accorded every favorable inference, "allegations consisting of bare legal conclusions as well as factual claims either inherently or flatly contradicted by the documentary evidence are not entitled to such consideration."

Stuart Lipsky, P.C. v Price, 215 AD2d at 103. In any case, this is a motion for summary judgment, and the Buyer has submitted affidavits explaining in detail why the initial real estate

transaction was not consummated, as well as the changes in both the real estate market and in the Buyer's economic situation that occurred over the ensuing year which both justified and enabled it to purchase the Premises approximately 1½ years later at a substantially higher price than it offered in June 2013. Plaintiff has failed to raise any triable questions of fact that overcome the Buyer's submissions or the Buyer defendants' motion for summary judgment.

Nor is plaintiff saved by its belated attempt to raise an unpleaded cause of action for fraudulent concealment. As plaintiff argues, "[a] cause of action for fraudulent concealment requires, in addition to the four foregoing elements [establishing fraudulent misrepresentation], an allegation that the defendant had a duty to disclose material information and that it failed to do so." *P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 (1st Dept 2003). Though "a real estate broker is a fiduciary with a duty of loyalty and an obligation to act in the best interests of the principal" (*Dubbs v Stribling & Assoc.*, 96 NY2d 337, 340 [2001]), plaintiff has failed to cite any cases which establish such a comparable fiduciary duty of a client to the real estate broker which would have required the Buyer to notify plaintiff that the Premises were once again on the market and to seek the plaintiff's assistance in negotiating the purchase. Therefore, even assuming the purported cause of action for fraudulent concealment met the specificity requirements, it would fail.

Fourth Cause of Action (Negligent Misrepresentation)

As the court has discussed in connection with motion sequence no. 001, a cause of action for negligent misrepresentation is governed by the specificity requirements of CPLR 3016 (b). *Colasacco v Robert E. Lawrence Real Estate*, 68 AD3d at 708. Here, plaintiff's allegations are purely conclusory and must be dismissed.

Fifth Cause of Action (Constructive Trust)

In order to establish a basis for a constructive trust, the plaintiff must show the following: "(1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment." *Sharp v Kosmalski*, 40 NY2d at 121. As discussed above, though, as a broker, plaintiff may have had a fiduciary duty to the Buyer, no such reciprocal duty has been established by plaintiff. Furthermore, as the court concluded with respect to the breach of contract cause of action, the promise by the Buyer to pay a brokerage commission to plaintiff

required that the sale was completed on the terms contained in the LOI, which it plainly was not. Nor has plaintiff alleged a transfer made between the plaintiff and the Buyer in reliance on that promise, and finally, no unjust enrichment has been established by plaintiff. The cause of action for a constructive trust is dismissed.

Sixth Cause of Action (Promissory Estoppel)

"The elements of a claim for promissory estoppel are: (1) a promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance." *MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 841-42 (1st Dept 2011).

Plaintiff alleges that "the Commission Agreement" constitutes an unambiguous promise by the Buyer defendants to pay the brokerage commission to plaintiff. In discussing the first cause of action for breach of contract, however, the court has concluded that the promise to pay the brokerage commission was contingent on the transaction outlined in the LOI being successfully completed. That did not happen; therefore, plaintiff could not reasonably rely on the commission being paid by the Buyer. For that reason, the cause of action is dismissed.

Seventh Cause of Action (Conspiracy)

For the reasons set forth in the discussion of the seventh cause of action in the context of motion sequence nos. 001 and 002, the cause of action for conspiracy must be dismissed.

MOTION SEQUENCE NO. 004

In motion sequence no. 004, defendants Shafran and Citicore move, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the second, third, forth, fifth, seventh, and eighth causes of action against them as barred by documentary evidence and for failure to state a cause of action against them.

According to Shafran, he is a duly licensed real estate broker and the managing member of Citicore. He states that, until he received a letter from plaintiff's lawyer in March 2015 demanding $360,000 from Citicore in connection with the sale of the Premises, he had never heard of plaintiff. He further states that he was one of the two brokers of record in connection with the sale of the Premises, that the Premises were first brought to his attention by Uttam, who had the listing, that Citicore was the co-broker for the property, and that he found Dalan as the

purchaser. Affidavit of Timour Shafran, dated November 25, 2015, ¶¶ 2-4.

Second Cause of Action (Unjust Enrichment)

The second cause of action alleges that Shafran and Citicore received a commission that plaintiff was entitled to receive and, therefore, that they were unjustly enriched.

The requirements for an unjust enrichment cause of action are set forth more fully in the discussion of motion sequence nos. 001 and 002. "[A]lthough privity is not required for an unjust enrichment claim, a claim will not be supported unless there is a connection or relationship between the parties that could have caused reliance or inducement on the plaintiff's part." *Georgia Malone & Co. v Rieder*, 86 AD3d at 408.

Here, no direct relationship existed between plaintiff and Shafran and Citicore. Plaintiff contends that an indirect relationship existed because it is connected to the Citicore defendants through the Seller, that Buyer and Seller actively deceived plaintiff through Eddie Datwani's personal relationship with plaintiff's managing member, Melwani. Even assuming that Buyer and Seller had deceived Melwani, as alleged by plaintiff, Shafran and Citicore are one step removed from that alleged deception and, thus, their relationship to Melwani is too attenuated to form a basis for recovery based upon unjust enrichment. *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d at 182. Plaintiff seeks to rely on *Murphy v 317-319 Second Realty LLC* (95 AD3d 443 [1st Dept 2012]) for the principle that a claim for unjust enrichment will lie even where there is no relationship with the claimant, but there the benefit gained by the defendant from the plaintiff was much clearer. The plaintiff in *Murphy* had allegedly been a rent stabilized tenant and building superintendent living in the basement apartment of a building purchased by the defendant. The plaintiff contended that, in an agreement with the prior owner, he had done the equivalent of $100,000 renovation and rehabilitation work on his severely fire-damaged apartment in exchange for a substantial rent credit. He further alleged that when the defendant purchased the building his position as superintendent was terminated by the prior owner at the defendant's request and that the defendant sought to remove him from the building, contending that his right to occupy the apartment ended when his position as superintendent ended. In addition to challenging the new owner's effort to end his tenancy, plaintiff sought, by means of an unjust enrichment claim, to recover for the renovation and rehabilitation work he had done on

the apartment. Although the defendant claimed that the work was done for the prior owner, the court specifically found that "it is the current owner who would benefit from the improvements." *Id.* at 445. Melwani submits numerous emails between himself and the Buyer and Seller to show that he did substantial work to bring the parties together and, therefore, is entitled to the brokerage fee. With the exception of two emails in September 2013, however, those emails all occur during the month of June 2013, when plaintiff introduced the Buyer to the Premises, and the Buyer made an offer to purchase the Premises, which was rejected by the Seller. In the September 2013 emails, Melwani asked Datwani about the status of the Premises and Datwani replied that it had been taken off the market. Although Melwani contends in his affidavit that he periodically inquired as to the status of the potential sale, in contrast with his many June 2013 emails, he provides no documentation whatever to substantiate that statement, other than one further exchange of emails in December 2014, after he learned that the Premises was in contract for sale. Over one year passed between Melwani's efforts and the contract that was entered into between Buyer and Seller with no help from Melwani, and at a vastly different price than that originally offered by Buyer ($36 million in contrast with the original $26.5 million offered by Buyer in June 2013). Moreover, in connection with motion sequence no. 003, the founding principal of the Buyer states under oath that he relied on the work of the Citicore defendants, not that of Melwani, in formulating his new offer. Thus, Melwani has certainly not shown the kind of concrete work after the Buyer's offer was rejected, or any direct benefits to these defendants as was alleged in *Murphy*. The court, therefore, concludes that plaintiff's relationship to Shafran and Citicore is far too attenuated to sustain a cause of action for unjust enrichment.

Third Cause of Action (Fraud)

As the court noted in its discussion of the fraud cause of action in connection with motion sequence no. 001, CPLR 3016 (b) requires that a cause of action for fraud must be alleged with specificity. *See Lanzi v Brooks*, 54 AD2d at 1058. Here, as discussed above, although plaintiff generally states that "defendants made misrepresentations of material facts to ARM relating to the payment of commissions" (Verified complaint ¶ 62), the only misrepresentations mentioned in the third cause of action were allegedly made by the Buyer. There are no allegations whatever about any representations made by Shafran and/or Citicore, beyond the allegation that all of the

defendants "knew or should have known that ARM would rely upon those misrepresentations." *Id.*, ¶ 66. Plaintiff has failed to do so.

Plaintiff again argues that, although the complaint asserted a cause of action for fraud, plaintiff is actually asserting a claim for fraudulent concealment, i.e., that the defendant concealed material information it had a duty to disclose; that the misrepresentations were made intentionally to defraud the plaintiff; that the plaintiff reasonably relied on the misrepresentations and that plaintiff suffered damage as a result.
Plaintiff's memorandum in opposition at 16. This is not, however, the cause of action alleged by plaintiff. Furthermore, the case relied on by plaintiff, *P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.* (301 AD2d 373), states that, in order to adequately allege a claim for fraudulent concealment, in addition to alleging that the defendant had a duty to disclose and failed to do so, it must allege a legally cognizable claim for fraudulent misrepresentation. *Id.* at 376. To do so, the complaint must allege, in detail, "that the defendant made a material misrepresentation of fact; that the misrepresentation was made intentionally in order to defraud or mislead the plaintiff; that the plaintiff reasonably relied on the misrepresentation; and that the plaintiff suffered damage as a result of its reliance on the defendant's misrepresentation." *Id.*

Plaintiff also argues that Citicore and Shafran had an affirmative duty as licensed real estate brokers to determine whether there was a valid exclusive agreement to provide the type of real estate services that they were providing. Such allegations, however, are simply not included in the complaint, and they cannot now be created in plaintiff's memorandum of law. Moreover, as the court concluded in connection with motion sequence no. 003, plaintiff has failed to allege a basis for suggesting that such an exclusive agreement between plaintiff and the Buyer existed.

Finally, plaintiff argues that the specificity requirement may be relaxed where the plaintiff may not know the details or they are peculiarly within defendants' knowledge (*see P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d at 377, but "the misconduct complained of [must] be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of." *Id.* Here plaintiff does not merely fail to allege details of the alleged misrepresentations, it fails to indicate *any* misrepresentations that were made by Shafran and Citicore, as opposed to Dalan, regarding the commission agreement or how plaintiff relied

on those purported misrepresentations.

Plaintiff's third cause of action therefore fails.

Fourth Cause of Action (Negligent Misrepresentation)

In its fourth cause of action, plaintiff alleges that "[d]efendants represented to ARM that they would honor their obligations owed to ARM" (Verified complaint, ¶ 72). Plaintiff does not, however, state what obligations Shafran and Citicore owed to plaintiff that they failed to honor. A claim for negligent misrepresentation, like one for fraud, must comply with the specificity requirements of CPLR 3016 (b). *See e.g. Colasacco v Robert E. Lawrence Real Estate*, 68 AD3d at 708. Here, again, there is no mention of *any* misrepresentation by the moving defendants, let alone, allegations that meet specificity requirements.

Fifth Cause of Action (Constructive Trust)

As discussed in connection with motion sequence no. 001, none of the four requirements for a constructive trust even begin to be met. *See Manufacturers & Traders Trust Co. v Berthole*, 130 AD3d at 882. There was no relationship between plaintiff and Shafran and Citicore, let alone a confidential or fiduciary relationship, nor was there a promise or a transfer in reliance thereon. The cause of action therefore fails.

Seventh Cause of Action (Conspiracy)

As discussed in connection with motion sequence nos. 001 and 002, New York State does not recognize an independent cause of action for conspiracy. *Thome v Alexander & Louisa Calder Found.*, 70 AD3d at 110. Although, as plaintiff again argues, there may be a cause of action for conspiracy when a "primary tort" can be established, plaintiff has failed to adequately allege tort causes of action against Shafran and Citicore, thus, the cause of action for conspiracy fails as well.

Eighth Cause of Action (Tortious Interference With Business Relations)

The requirements for a cause of action are set forth above in the discussion of motion sequence no. 002. Once again, as with the allegations against the Uttam defendants, plaintiff alleges the first, second and fourth elements but failed to satisfy the third element, "that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime

or independent tort." *Amaranth LLC*, 71 AD3d at 47.

In its brief, plaintiff again asserts that it has satisfied the pleading standard by merely alleging that Shafran and Citicore "improperly and intentionally" interfered with plaintiff's business relationship with the buyer, but, as with motion sequence no. 002, such general allegations do not satisfy the standard set forth above.

Once again, having failed to satisfy the pleading requirements for tortious interference with business relations, though nowhere alleged in its complaint, plaintiff contends that it has satisfied the lesser standards for tortious interference with a contract. For the same reasons set forth in the discussion of the eighth cause of action in motion sequence no. 002, this cause of action fails.

Additionally, defendant Shafran contends that all claims against him should be dismissed because he was acting solely in his official capacity as an agent for a disclosed principal and therefore cannot be held personally liable. *See News Am. Mktg., Inc. v Lepage Bakeries, Inc.*, 16 AD3d 146, 147 (1st Dept 2005)
("[A]n agent for a disclosed principal will not be personally bound unless there is clear and explicit evidence of the agent's intention to substitute or superadd his personal liability for, or to, that of his principal" [internal quotation marks and citation omitted]); *see also* Limited Liability Co. Law §§ 609 & 610).

Plaintiff counters that, under New York law, "a member of a limited liability company may be held personally liable if that member participates in the commission of a tort in furtherance of the company's business." *Howard Borress Enters. Inc. v CSJ, LLC*, 2005 WL 6229790, 2005 NY Misc LEXIS 3530 *6, 2005 NY Slip Op 30365(U) (Sup Ct, NY County 2005), *affd* 30 AD3d 322 (1st Dept 2006).

Because the court has concluded that Shafran and Citicore are entitled to summary judgment dismissing all of the causes of action against them, the court need not reach Shafran's argument based upon agency theory.

Finally, because all of the causes of action have been dismissed against all defendants, the court need not reach plaintiff's claims for punitive damages or attorneys' fees.

Accordingly, it is hereby

ORDERED in Motion Sequence No. 001, that the motion of defendants Adee 12 Associates, Adee Associates, and Datwani Holdings, LLC to dismiss the second, third, fourth, fifth, sixth, and seventh causes of action is granted and the complaint is dismissed as to them with costs and disbursements to these defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED in Motion Sequence No. 002, that the motion of defendants Pavan M. Uttam and Up Real Estate Advisors LLC to dismiss the second, seventh and eighth causes of action is granted, and the complaint is dismissed as to them with costs and disbursements to these defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further ORDERED in Motion Sequence No. 003, that the motion of defendants Dalan Management, 33rd Street Owner LLC, ADW 33rd Street LLC, Flourine Broadway LLC and Payourent Broadway LLC for summary judgment dismissing the complaint is granted and the complaint is dismissed as to them with costs and disbursements to these defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED in Motion Sequence No. 004 that the motion of defendants Timour F. Shafran and Citicore LLC to dismiss the complaint is granted and the complaint is dismissed as to them with costs and disbursements to these defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: June 8, 2016

ENTER:

GEOFFREY D. WRIGHT
AJSC

J.S.C.