

**By Design, LLC v Millennium Realty Group, LLC**

2017 NY Slip Op 30417(U)

March 1, 2017

Supreme Court, New York County

Docket Number: 151521/2014

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 55

-----X  
BY DESIGN, LLC,

Plaintiff,

-against-

MILLENNIUM REALTY GROUP, LLC,

Defendant.

-----X  
HON. CYNTHIA KERN, J.:

**DECISION/ORDER**  
**Index No. 151521/2014**

Plaintiff commenced the instant action seeking recovery for breach of a contract between it and defendant. Plaintiff now moves for an Order pursuant to CPLR § 3212 granting it summary judgment on its complaint and dismissing defendant’s counterclaim. Defendant separately moves for an Order pursuant to CPLR § 3212 granting it summary judgment dismissing plaintiff’s complaint. The motions are consolidated for the purpose of disposition. For the reasons set forth below, the portions of plaintiff’s motion for summary judgment on its cause of action for breach of contract and dismissing defendant’s counterclaim are granted but the portion of plaintiff’s motion for summary judgment on its cause of action for unjust enrichment is denied. Defendant’s motion for summary judgment dismissing plaintiff’s complaint is granted as to plaintiff’s cause of action for unjust enrichment but is otherwise denied.

The relevant facts are as follows. In or around October 2012, plaintiff entered into a lease as tenant for the premises located at 1441 Broadway, New York, New York (the “lease”). Defendant was the real estate broker for the transaction. To induce plaintiff to use its brokerage services exclusively, defendant had promised plaintiff that it could obtain rent credits from the landlord unlike any other real estate broker. However, defendant was unable to obtain rent credits. Thereafter, to induce plaintiff to enter the lease, defendant entered into an agreement with plaintiff on or about October 3, 2012 providing that defendant would pay plaintiff a sum equal to twenty percent of its commission from the landlord immediately upon receipt of the commission (the “contract”). Defendant received a commission of \$196,364.35 in two

installments paid on October 18, 2012 and December 4, 2012 but failed to pay plaintiff the sum due pursuant to the contract.

Plaintiff's motion for summary judgment on its cause of action for breach of contract is granted and defendant's motion for summary judgment dismissing plaintiff's cause of action for breach of contract is denied. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.* To establish a *prima facie* right to summary judgment on a claim for breach of contract, a plaintiff must show: (1) the existence of a contract; (2) the plaintiff's performance under the contract; (3) the defendant's breach of the contract; and (4) damages as a result of the breach. *See Noise in Attic Prod., Inc. v. London Records*, 10 A.D.3d 303, 306-07 (1st Dept 2004).

In the present case, plaintiff has established its *prima facie* right to summary judgment on its cause of action for breach of contract against defendant. Plaintiff has shown the existence of the contract, that plaintiff performed under the contract by entering into the lease, that defendant breached the contract by failing to pay plaintiff a sum equal to twenty percent of its commission and that it sustained damages in the amount of \$39,272.87, equal to twenty percent of defendant's commission, as a result of defendant's breach.

In opposition to plaintiff's motion and in support of its motion for summary judgment dismissing plaintiff's complaint, defendant argues that the contract is an unenforceable agreement to split a brokerage fee pursuant to Real Property Law ("RPL") § 442. However, this argument is without merit.

Pursuant to RPL § 442(2),

[N]o real estate broker shall pay or agree to pay any part of a fee, commission, or other compensation received by the broker, or due, or to become due to the broker to any person, firm or corporation who or which is or is to be a party to the transaction in which such fee, commission or other compensation shall be or become due to the broker; provided, however, that nothing in this section shall prohibit a real estate broker from offering any part of a fee,

commission, or other compensation received by the broker to the seller, buyer, landlord or tenant who is buying, selling, exchanging, leasing, renting or negotiating a loan upon any real estate including the resale of a condominium or cooperative apartment. Such fee, commission, or other compensation must not be made to the seller, buyer, landlord or tenant for performing any activity requiring a license under this article.

Thus, RPL § 442(2) expressly allows a real estate broker to offer part of its commission to a tenant renting real estate as long as the tenant did not perform brokerage services with regard to the transaction. In the present case, RPL § 442(2) does not render the contract unenforceable as it is undisputed that plaintiff is a tenant renting real estate and did not perform brokerage services with regard to the transaction. Therefore, plaintiff's motion for summary judgment on its cause of action for breach of contract is granted and defendant's motion for summary judgment dismissing plaintiff's cause of action for breach of contract is denied.

However, the court finds that plaintiff's cause of action for unjust enrichment must be dismissed on the ground that plaintiff's cause of action for unjust enrichment is duplicative of its cause of action for breach of contract. "The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 388 (1987). In the present case, plaintiff's cause of action for unjust enrichment is duplicative of its cause of action for breach of contract as plaintiff's cause of action for unjust enrichment is based upon defendant's failure to pay plaintiff twenty percent of its commission as required by the contract.

Plaintiff's motion for summary judgment dismissing defendant's counterclaim for attorneys' fees on the ground that neither the contract nor any statute allows defendant to recover attorneys' fees is granted without opposition.

Accordingly, the portion of plaintiff's motion for summary judgment on its cause of action for breach of contract and dismissing defendant's counterclaim is granted but the portion of plaintiff's motion for summary judgment on its cause of action for unjust enrichment is denied. Defendant's motion for summary judgment dismissing plaintiff's complaint is granted as to plaintiff's cause of action for unjust enrichment but is otherwise denied. The Clerk is hereby directed to enter judgment in favor of plaintiff and

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against defendant in the amount of \$39,272.87, with interest thereon at the statutory rate from October 18, 2012, together with costs and disbursements. This constitutes the decision and order of the court.

DATE: 3/1/17

CK  
KERN, CYNTHIA S., JSC  
HON. CYNTHIA S. KERN  
J.S.C.