Bracha NY, LLC v Moncler USA Retail LLC
2017 NY Slip Op 30996(U)
May 8, 2017
Supreme Court, New York County
Docket Number: 653374/15
Judge: Saliann Scarpulla
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

----------X

BRACHA NY, LLC d/b/a KELLER WILLIAMS NYC,

Plaintiffs,

-against- Index No. 653374/15

MONCLER USA RETAIL LLC, MONCLER USA, INC., MONCLER S.p.A. formerly known as MONCLER S.r.L, CROWN ACQUISITIONS, INC., CROWN ACQUISITIONS LLC, CROWN RETAIL SERVICES LLC, CROWN RETAIL SERVICES LLC, CROWN RETAIL DEVELOPERS, LLC, and 650 MADISON OWNER LLC,

Defendants.

----------X

SALIANN SCARPULLA, J.:

In this action to recover damages for, inter alia, breach of contract, defendants Moncler USA Retail LLC, Moncler S.P.A., formerly known as Moncler S.r.l., ("Moncler SPA"), Moncler USA, Inc. (collectively, the "Moncler Defendants"), Crown Acquisitions, Inc., Crown Retail Services LLC ("Crown Retail" and collectively, the "Crown Defendants")[1] and 650 Madison Owner LLC (the "New Owner") move for dismissal of the amended verified complaint (the "Complaint") pursuant to CPLR 3211 (a) (1) and (7).

[1] By stipulation dated December 9, 2015, the parties agreed that defendants Crown Acquisitions, LLC and Crown Retail Developers LLC were incorrectly identified and were deemed deleted from the action.

In 2011, Richard Tayar ("Tayar"), a licensed broker employed by plaintiff Bracha NY, LLC d/b/a Keller Williams NYC ("Keller Williams"), contacted the Moncler Defendants[2] to determine if Moncler had any interest in expanding its retail presence in New York City. On October 6, 2011, Moncler SPA[3] entered into an Exclusive Lessee's Agency Agreement with Keller Williams (the "Agency Agreement"), with Tayar acting as Keller Williams' representative.

The Agency Agreement authorized Keller Williams to act as Moncler SPA's agent to locate and/or negotiate the lease of a real property in New York City. The Agency Agreement states, among other things:

> A. DURATION: This agreement begins immediately upon signing and expires upon closing by [Moncler s.r.l.] on real property leased pursuant to this Agreement.
>
> C. CLIENT'S OBLIGATIONS: [Moncler s.r.l.] will
> (1) Direct all of [Moncler s.r.l.'s] attempts to lease real property through [Keller Williams] and limited only to property located in Manhattan…presented in writing (including email) by [Keller Williams] to [Moncler s.r.l.] prior to any other broker.
> (3) In the event that (a) [Keller Williams] is not acting as the exclusive agent on a specific property and (b) the agreement is terminated because [Keller Williams] failed to respect his obligations, [Moncler s.r.l.] will be entitled to cooperate with the exclusive broker(s) of such properties.

---

[2] The Complaint fails to identify a specific Moncler entity that Tayar contacted but the Agency Agreement states that it is between Moncler s.r.l. and Keller Williams.

[3] Moncler SPA, based in Milan, Italy is the ultimate parent company of United States companies Moncler USA Retail, LLC and Moncler USA, Inc.

The Agency Agreement did not provide for the payment of any fees or commissions by Moncler SPA. In fact, the Agency Agreement contained no financial terms whatsoever.

Keller Williams alleges that Tayar presented various commercial spaces to the Moncler Defendants, including space located at 650 Madison Avenue in New York City (the "Premises"). On December 6, 2011, Tayar, Haim Chera ("Chera") and Jordan Barker of Crown Retail, and Silvia Bertulli ("Bertulli"), General Counsel of Moncler SPA, inspected the Premises. At this time, the Crown Defendants acted as the exclusive broker for the Premises, which was owned by CRP/AAC 650 Madison Owner LLC (the "Prior Owner").

Bertulli terminated the Agency Agreement by email dated February 28, 2012 stating that "[b]ecause of various considerations… unfortunately we have to abandon the project. I would be grateful if you could send me a line attesting to the termination of the contract signed at the time." Tayar, in an email dated March 16, 2012, responded,

> As regards our agreement, there are no problems in dissolving it, provided that if Moncler should decide to proceed with the lease of one of the shops we visited together and for which I've arranged the appointments, you will have to go through me. These are the addresses in question… 650 Madison Avenue (currently Crate & Barrel).

Nothing further is alleged to have occurred until May 22, 2012 when Tayar presented a written offer on behalf of Moncler SPA for a portion of the space in the Premises and entered into negotiations with the landlord and Crown Defendants.

Although not discussed in the complaint, Bertulli states in his affidavit that a May 2012 proposal (the "May 2012 Proposal") specifically provided that the Moncler Defendants would have no obligation to pay any brokerage commission. The May 2012 Proposal states that brokerage fees were "[t]o be paid by Landlord."

In June 2012, the Moncler Defendants advised Keller Williams that they would deal directly with the Prior Owner. By July 2012, the Moncler Defendants informed Keller Williams, via email from Andrea Tieghi, that there was no progress and that the project had been "abandoned" because the parties could not agree on essential terms and/or cost.

Keller Williams alleges that, in November 2012, Bertulli told Tayar that "someone from the Crown Defendants" had contacted her to "re-propose… that same space on Madison" and she asked Tayar to contact the Crown Defendants. An email dated November 30, 2012 from Bertulli to Tayar requests that the latter "reiterate to [Crown] that if the conditions don't improve, it's useless to continue discussing it!" Keller Williams does not claim to have done anything more with respect to the Moncler Defendants or 650 Madison Avenue after June 2012, other than the reference to its receipt of the November 2012 email.

According to the Complaint, the Premises was sold on or about September 2013 to New Owner – 650 Madison Owner LLC – more than one year after Keller Williams' last involvement with the Premises. In March, 2015, Tayar allegedly learned of Moncler's Lease with the New Owner.

Keller Williams commenced this action in October, 2015, seeking a "brokerage commission in the amount of at least $500,000. In the complaint, Keller Williams alleges that it was the "procuring cause" of the Lease because it "created the initial spark that generated a chain of events which directly and proximately lead to the eventual lease of the Premises." Keller Williams pleads claims against the Moncler Defendants for breach of express/implied contract and breach of the obligation of good faith and fair dealing, claims against the Crown Defendants and the New Owner for tortious interference with contractual relations and a claim for tortious interference with economic relations against the Crown Defendants. Further, Keller Williams pleads claims against all Defendants for unjust enrichment and quantum meruit.

Defendants move to dismiss the Complaint based on documentary evidence and for failure to state a claim.

Discussion

On a motion to dismiss a complaint pursuant to CPLR 3211, "the pleading is to be afforded a liberal construction," and "the facts as alleged in the complaint [are accepted] as true." *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994); *see also Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633 (1976); *Mark Hampton, Inc. v. Bergreen*, 173 A.D.2d 220, 220 (1st Dept. 1991) (citation omitted) ("'allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration.'" In addition, to succeed on a motion to dismiss pursuant to CPLR 3211 (a) (1), the documentary evidence relied upon by the

defendant must "'conclusively establish [] a defense to the asserted claims as a matter of law.'" *David v. Hack*, 97 A.D.3d 437, 438 (1st Dept. 2012) (citation omitted).

Breach of Express/Implied Contract Against the Moncler Defendants

To state a claim for a brokerage commission, a plaintiff must plead the following three elements: (1) that it is a duly licensed broker, (2) the existence of a contract, express or implied, "with the party to be charged with paying the commission", and (3) that it was the "procuring cause" of the transaction. *Zere Real Estate Servs., Inc. v. Parr Gen. Contr. Co.*, 102 A.D.3d 770, 773 (2d Dept. 2013).

Thus, to demonstrate its entitlement to a commission in this action, Keller Williams must first plead the existence of an express or implied contract. *Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dept. 2010); *JTRE, LLC v. Bread & Butter*, 2014 WL 2571647, at *6 (Sup Ct, NY County June 6, 2014). Moreover, the contract must be sufficiently definite as to all of its material terms. *Cooper Sq. Realty, Inc. v. A.R.S. Mgt.*, 181 A.D.2d 551, 551-552 (1st Dept. 1992). If an express contract lacks an essential term, such as the commission amount or an objective formula for determining the commission, then such a contract is merely an agreement to agree. *Id.* (holding that because the agreement in question did not provide a price for the commission fee it was "merely an agreement to agree and was unenforceable."); *see Parkway Group. v. Modell's Sporting Goods*, 254 A.D.2d 338, 339 (2d Dept. 1998) (finding that "even if the agreement had created an exclusive agency, the broker would not be entitled to a commission" because the agreement lacked an essential term as to the

amount of the commission and thereby "constituted an unenforceable agreement to agree.").

Here, the Agency Agreement neither references any brokerage commission nor contains any payment terms at all.[4] It therefore lacks an essential term and is unenforceable. *See Hirschfeld Props. v. Juliano*, 3 A.D.3d 399, 399 (1st Dept. 2004) (the parties' writing "does not contemplate payment of plaintiff's commission by defendants, and thus is not a valid real estate brokerage agreement between the parties").

Keller Williams also failed sufficiently to plead that it was the procuring cause of the Lease. A broker is not entitled to a commission by merely bringing the property to the buyer's attention. *SPRE Realty Ltd. v. Dienst*, 119 A.D.3d 93, 97 (1st Dept. 2014); see also *JTRE, LLC*, 2014 WL 2571647 at *6 ("'[i]t is not enough to simply open negotiations between parties; unless the broker can produce a purchaser who is ready, willing and able to buy, under the terms as specified by the seller, he has done nothing to induce a purchase, and will not be entitled to a commission even if that prospect ultimately purchases the property.'") (citation omitted). To be the "procuring cause" of the transaction, a broker must establish a "'direct and proximate link, as distinguished

[4] In its Opposition Memorandum of Law Keller Williams acknowledges that the Agency Agreement did not obligate the Moncler Defendants to pay commission, but claims, without evidentiary support, that "it was both parties understanding that Plaintiff would be compensated with a commission by the prospective landlord." Further, the only proposal made by Moncler SPA during Keller Williams' tenure – the May 2012 Proposal – expressly provided that Moncler SPA would have no liability to pay any brokerage commission. Only the Prior Owner, assuming it accepted the May 2012 Proposal, which it did not, would be liable for such commission.

from one that is indirect and remote,' between the introduction by the broker and the consummation of the transaction." *SPRE Realty Ltd. v. Dienst*, 119 A.D.3d at 98 (citation omitted).

The Complaint is replete with information that undermines Keller Williams' claim that it was the procuring cause of the lease. For example, Keller Williams pleads that: 1) nothing of substance occurred between Moncler SPA and Keller Williams after 2012; 2) the New Owner, with whom Keller Williams never dealt, purchased 650 Madison Avenue in September 2013; 3) Keller Williams did not participate in the lengthy negotiations that ultimately resulted in a lease with the New Owner; and 4) the Lease covers different space and is on different terms than those set forth in the May 2012 Proposal. S*ee Helmsley-Spear, Inc. v. 150 Broadway N.Y. Assoc.*, 251 A.D.2d 185, 185-186 (1st Dept. 1998) (broker not "procuring cause" where essential terms of the lease were not discussed until after the landlord retained a different broker, and long after the first broker stopped any substantive efforts); *see also Garrick-Aug Assoc. Store Leasing v. Hirschfeld Realty Club Corp.*, 3 A.D.3d 406, 406 (1st Dept. 2004) (finding that "plaintiff was not entitled to recover a commission, even though landlord and new tenant were introduced as result of its efforts since transaction that plaintiff attempted to bring about was abandoned, transaction subsequently concluded was fundamentally different from that which was originally contemplated, and plaintiff did not play significant role in subsequent transaction and was not procuring cause thereof.").

Keller Williams' role was limited to introducing the Moncler Defendants to the Premises and unsuccessfully attempting to facilitate a lease with the Prior Owner over a period of several months in 2011 and 2012. The documentary evidence shows that the Lease was later negotiated over the course of nearly one year, involved many substantive changes, and that Keller Williams had no role in any of the negotiations.[5] Keller Williams has therefore not pled sufficient facts to show either that the Moncler Defendants agreed to pay it a commission or that it was the procuring cause of the Lease. I thus dismiss Keller Williams' cause of action for breach of express and/or implied contract.

Breach of the Implied Covenant of Good Faith and Fair Dealing Against the Moncler Defendants

A claim for breach of the implied covenant of good faith and fair dealing "'may not be used as a substitute for a nonviable claim of breach of contract.'" *Smile Train, Inc. v. Ferris Consulting Corp.*, 117 A.D.3d 629, 630 (1st Dept. 2014) (citation omitted). The law is clear that "no obligation can be implied that 'would be inconsistent with other terms of the contractual relationship.'" *Dalton v. Educational Serv.*, 87 N.Y.2d 384, 389 (1995) (citation omitted). Significantly, the Agency Agreement does not obligate the Moncler Defendants to pay any commission. Additionally, the breach of implied

[5] The documents attached to the affidavit of Andrea Tieghi, Moncler's senior director of retail and business development, are three proposals made by Moncler to the New Owner through D&A Real Estate – dated September 2, 2013, February 14, 2014, and February 19, 2014 – and the Lease of September 5, 2014. These documents show that the terms of the Lease and the amount of space were very different from the May 2012 Proposal.

covenant of good faith and fair dealing cause of action is entirely duplicative of the breach of contract claim. *Netologic, Inc. v. Goldman Sachs Group, Inc.*, 110 A.D.3d 433, 433-34 (1st Dept. 2013). As a result, the claim for breach of the covenant of good faith and fair dealing must also be dismissed.

Tortious Interference with Contractual Relations
Against the Crown Defendants and the New Owner

Keller Williams alleges that the Crown Defendants and the New Owner tortiously interfered with the Agency Agreement in that they knew about the agreement and conspired in bad faith with the Moncler Defendants to deprive Keller Williams of a commission including by intentionally structuring the Lease's timing for this purpose.

The elements for tortious interference with a contract are: (1) the existence of a valid contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) the defendant's intentional obtainment of the contract's breach; and (4) resultant damages. *Kronos, Inc. v. AVX Corp.*, 81 N.Y.2d 90, 94 (1993).

Keller Williams' allegations fail to satisfy the requirements of a tortious interference claim. Keller Williams' allegation that it would have procured a lease but for the alleged interference ignores the undisputed fact that, long before any alleged interference occurred, the Moncler Defendants terminated the Agency Agreement. Moreover, Keller Williams fails sufficiently to allege that the Agency Agreement was even breached (*see Helmsley-Spear, Inc.*, 251 A.D.2d at 186 (cause of action for tortious interference with contractual relations with the landlord dismissed as there was no

evidence that the landlord breached any contract it had with the plaintiff). Keller Williams allegations that the parties' manipulated the timing of the Lease are meritless because it is undisputed that the New Owner became involved more than one year after Keller Williams' involvement with the Moncler Defendants had ended. For the foregoing reasons, I dismiss the tortious interference cause of action against the Crown Defendants and the New Owner.

Tortious Interference with Business/Economic Relations Against the Crown Defendants

Keller Williams also alleges a cause of action for tortious interference with business/economic relations against the Crown Defendants. The requirements of this claim are: (1) the plaintiff had a business relationship with an identified third party; (2) the defendants knew of the relationship and intentionally interfered with it; (3) the defendants acted solely out of malice or used improper or illegal means that amounted to a crime or an independent tort; and (4) the defendant's interference caused injury to the relationship with the third party. *Amaranth LLC v J.P. Morgan Chase & Co.*, 71 A.D.3d 40, 47 (1st Dept. 2009).

There are no allegations in the Complaint that the Crown Defendants acted with malice or by improper means. To the contrary, as Keller Williams admits, Crown Retail was the owner's exclusive broker and was entitled to deal directly with the Moncler Defendants. Moreover, Keller Williams' relationship with the Moncler Defendants

ended long before there was any alleged interference. Hence, this cause of action must be dismissed for failure to state a claim.

Unjust Enrichment Against All Defendants

Keller Williams alleges that all defendants "have been unjustly enriched for receiving services that they have not paid for." To recover for unjust enrichment, a plaintiff must show that the other party enriched itself at the plaintiff's expense and that "'it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered.'" *Georgia Malone & Co., Inc. v. Rieder*, 86 A.D.3d 406, 408 (1st Dept. 2011), aff'd 19 N.Y.3d 511 (2012) (citation omitted). And, it is well settled law that where an express contract governs the subject matter of the plaintiff's claims, it bars a separate cause of action based on unjust enrichment. *Vitale v. Steinberg*, 307 A.D.2d 107, 111 (1st Dept. 2003); *see also Corsello v. Verizon N.Y., Inc.*, 18 N.Y.3d 777, 790 (2012); *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 142 (2009); *Goldman v. Metropolitan Life Ins. Co.*, 5 N.Y.3d 561, 572 (2005).

Although unjust enrichment claims do not require privity, "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*, 86 A.D. 3d at 408. A cause of action for unjust enrichment "can only be sustained if the services were performed at the defendant's behest." *Id.*

Here, the existence of an agreement between Keller Williams and the Moncler Defendants precludes Keller Williams' claim for unjust enrichment against the Moncler

Defendants. *See Vitale*, 307 A.D.2d at 111. Keller Williams' claim for unjust enrichment against the New Owner also fails as Keller Williams never dealt with the New Owner. Finally, the claim of unjust enrichment against the Crown Defendants is not sufficiently pled because Keller Williams does not plead that it rendered any services to the Crown Defendants for which the Crown Defendants failed to pay. I therefore dismiss the unjust enrichment claims against all defendants.

Quantum Meruit

A party asserting a quantum meruit claim must plead: "(1) the performance of services in good faith; (2) the acceptance of the services by the person to whom they are rendered; (3) an expectation of compensation therefor; and (4) the reasonable value of the services." *Soumayah v. Minnelli*, 41 A.D.3d 390, 391 (1st Dept. 2007).

The existence of the Agency Agreement bars a claim for quantum meruit against the Moncler Defendants. *See Parker Realty Group, Inc. v. Petigny*, 14 N.Y.3d 864, 865-866 (2010). However, Keller Williams, in its Opposition Memo, suggests another basis for its quantum meruit claim against the Moncler Defendants -- that a June 13, 2012 email from Bertulli to Keller Williams, stating that "in the case of a positive conclusion of the deal, if your fee is not paid directly by the owner, we would consider partially contributing to the same," evidenced the acceptance of an obligation to pay for Keller Williams "services" if the "deal" went through. Even if I construed this email most favorably to Keller Williams, the "deal" discussed in that email was never consummated.

The Lease entered into more than two years later was not the "deal" (*i.e.* the May 2012 Proposal) addressed in Bertulli's email.

Keller Williams bases its quantum meruit claim against the Crown Defendants on the fact that the latter were "aware of plaintiff's role in this transaction." Whether or not the Crown Defendants knew that Keller Williams initially introduced the Moncler Defendants to the Premises is irrelevant because the deal for which Keller Williams seeks compensation was not the same deal that it worked on with the Moncler Defendants. Keller Williams also asserts that New Owner accepted its services despite the fact that Keller Williams never dealt with the New Owner nor rendered any services in connection with the Lease. On account of its non-involvement with either the New Owner or the Lease negotiations, Keller Williams cannot establish an expectation of compensation as against the New Owner. Because Keller Williams does not satisfy the requirements for pleading a quantum meruit claim against any of the defendants, this claim is dismissed in its entirety.[6]

In accordance with the foregoing, it is hereby

---

[6] **Error! Main Document Only.**I have also considered Keller Williams' remaining arguments, and find them to be without merit.

ORDERED that defendants' motion to dismiss the complaint is granted, and the complaint is dismissed in its entirety, with costs and disbursements to defendants as taxed by the Clerk of the Court and the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of this Court.

Dated: May 8, 2017

ENTER:

J.S.C.
HON. SALIANN SCARPULLA