

Picken v Schwartz
2018 NY Slip Op 31739(U)
July 20, 2018
Supreme Court, New York County
Docket Number: 653313/2014
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Andrea Masley
Justice

PART 48

Alexander Picken and Picken Real Estate, Inc.,
Plaintiffs,

Index No.: 65313/2014

Mot. Seq. No. 004

-against-

Neal R. Schwartz, RN Realty LLC, WC 28 Realty LLC,
Centaur Properties LLC, and Harlan Berger,
Defendants.

Defendant RN Realty LLC (the Owner) moves, pursuant to CPLR 3101, for protective order barring plaintiffs Alexander Picken and Picken Real Estate, Inc. (collectively, the Brokers) from making any further discovery demands or proceeding to litigate any claims arising out of the failed Bauhouse¹ transaction (the Bauhouse Transaction) and limiting production of the closing statement for the sale of 526-530 West 28th Street, New York, New York (the Premises) to a few selected pages. Plaintiffs cross-move, pursuant to CPLR 3024, to compel the Owner to produce all requested documents including the entire closing statement.

This is an action for a broker's commission arising from an implied broker's agreement to sell the Premises. According to Picken, in early 2011, he advertised the commercial space located at the Premises, on behalf of the commercial tenant which held a triple net lease (Picken Aff, December 23, 2015, ¶4). At the same time, Neal R.

¹ Plaintiffs spell the name of this entity Bauhouse. The Owner spells it Bauhaus.

Schwartz, the other owner of the Premises, expressed interest in selling the property as the market value was increasing² (*id.*). For the next year, Picken referred a number of interested buyers to the Owner, including WC28, the ultimate purchaser (Picken Aff, December 23, 2015, ¶ 5). WC28 offered \$25 million (*id.*). Picken provided the Owner and WC28 with respective contact information and cautioned them not circumvent him (*id.*). When that WC28 deal appeared to stall, Picken introduced the Owner to other interested parties including nonparty Bauhouse, another buyer which was allegedly ready willing and able to purchase the property (Picken Aff, December 23, 2015, ¶ 6). Bauhouse offered \$44 million including a joint venture provision allowing the Owner to participate in the development (*id.*). Picken provided Schwartz's attorney with Bauhouse's attorney contact information (Picken Aff, December 23, 2015, ¶ 8). The ultimate sale of the Premises to WC28 closed on July 12, 2013 without Picken. Picken insists that he introduced the Owner to the principals of WC28 who circumvented him to avoid a broker's commission.

The Brokers initiated this action on October 29, 2014. Defendants' motions to dismiss were decided on the record on July 23, 2015. Following the court's direction, the Brokers amended their complaint on October 6, 2015, asserting the following causes of action: (1) breach of implied brokerage contract against the Owner; (2) breach of covenant of good faith and fair dealing against the Owner; (3) unjust enrichment against the Owner; (4) fraudulent misrepresentation against the Owner; and (5) tortious interference with contract against WC 28 Realty LLC (WC28), Centaur

²The court takes judicial notice of the proximity of the premises to the High Line.

Properties LLC, and Harlan Berger.

On August 30, 2016, Justice Oing decided defendants' motion to dismiss the amended complaint. In his decision, Justice Oing dismissed the complaint against defendants Neil Schwartz, WC28, Centaur Properties LLC, and Harlan Berger in its entirety and dismissed all claims against the Owner except for breach of an implied brokerage contract and unjust enrichment.

The Brokers, in their first cause of action for breach of implied brokerage contract, allege that they brought Bauhouse to the Owner and were the "proximate link in the chain" that lead to WC28's ultimate purchase of the Premises. The Brokers further allege that the Owner, as a result of accepting the Brokers' services, created an implied broker's contract. During oral argument on this motion and cross motion, it became clear to the court that the parties had two different interpretations of Justice Oing's decisions on defendants' motions to dismiss. Those decisions are relevant to the motions currently before this court.

The Owner argues that Justice Oing dismissed all claims involving the Bauhouse Transaction, and thus, the Brokers must be precluded from seeking any further discovery or proceeding with litigation involving those claims. This court disagrees. While Justice Oing clearly dismissed the tort claims arising out of the Bauhouse Transaction, he did not explicitly or implicitly, dismiss the breach of implied contract claims arising out of this Transaction. The Owners argument that the alleged broker's agreement involving this Transaction was never reduced to writing and cannot be a contract is not appropriate to raise on this discovery motion. The Brokers' first cause of action arising out of the Bauhouse Transaction and the WC28 transaction was not

dismissed and proceeds accordingly. Thus, the Owner is to produce the entire closing statement upon the execution of a confidentiality agreement as this claim arises from the sale of the Premises (see May 15, 2018 tr. at 19).

The Owner's motion to preclude the Brokers from seeking any further discovery or proceeding with litigation involving the Bauhouse Transaction is denied, as Justice Oing previously held that plaintiffs have sufficiently stated a cause of action for breach of implied contract arising out of the Bauhouse Transaction and the WC28 transaction.

The court notes that the caption in this action has not been amended to reflect the dismissal of defendants Neil Schwartz, WC28, Centaur Properties LLC, and Harlan Berger. Therefore, the court will order amendment of the caption to reflect this change.

Accordingly it is

ORDERED that defendant RN Realty LLC's motion for a protective order barring plaintiffs Alexander Picken and Picken Real Estate, Inc. from making any further discovery demands or proceeding to litigate their Bauhaus claim and limiting production of the closing statement for the sale of 526-530 West 28th Street, New York, New York (the Premises) to a few selected pages is denied; and it is further

ORDERED that Plaintiffs' cross motion to compel RN Realty LLC to produce the entire closing statement is granted and defendant is directed to produce the entire closing statement within five days of this order with notice of entry; and it is further

ORDERED that this action is severed and continued against defendant RN Realty LLC; and it is further

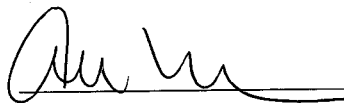
ORDERED that the caption be amended to reflect the prior dismissal, by decision and order dated August 30, 2016, of defendants Neil Schwartz, WC 28 Realty

LLC, Centaur Properties LLC, and Harlan Berger and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for plaintiffs shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-filing page on www.nycourts.gov/supctmanh).

Dated: 7/20/18



Hon. Andrea Masley, J.S.C.