

<b>RHWH LLC v Torati</b>
2018 NY Slip Op 32384(U)
September 20, 2018
Supreme Court, New York County
Docket Number: 157302/2016
Judge: Robert R. Reed
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 43

-----X  
RHWL LLC d/b/a CPA REALTY,

Plaintiff,

-against-

Index No. 157302/2016

HEZI TORATI, SKYGATE 010 LLC,  
ERROL WALTERS,

Defendants.

-----X  
**ROBERT R. REED, J.**

Motion sequence numbers 004 and 005 are consolidated herein for disposition.

In motion sequence number 004, plaintiff RHWL LLC d/b/a CPA Realty (CPA Realty) moves, pursuant to CPLR 3025 (b), for an order granting leave to amend the complaint by omitting defendant Errol Walters (Walters) from the caption, by discontinuing all claims asserted against him, and by adding claims for fraud and unjust enrichment<sup>1</sup> against the remaining defendants. In motion sequence number 005, CPA Realty moves, pursuant to CPLR 3124 and 3126, for an order compelling Walters to appear for oral deposition and to provide document disclosure.

In the complaint, CPA Realty, a real estate broker, alleges that defendants breached a Listing Agreement for Commercial/Industrial (broker's agreement) regarding

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<sup>1</sup>That branch of the motion in which plaintiff seeks to compel defendants to respond to plaintiff's discovery demands dated September 7, 2017 was held moot by this court's prior compliance conference order dated January 25, 2018.

the apartment building (property) owned by Walters and located at 551 West 161<sup>st</sup> Street in Manhattan, by failing to pay CPA Realty a commission, following the sale of that property.

On January 23, 2015, CPA Realty and Walters executed the broker's agreement. In that agreement, Walters granted CPA Realty the sole and exclusive right for 12 months to sell the property, and agreed to pay it a commission equal to 6% of the selling price, upon the sale or transfer of the property.

CPA Realty alleges that, within three months after execution of the broker's agreement, it entered into sale negotiations with defendants Hezi Torati (Torati) and Skygate 010 LLC (Skygate). CPA Realty alleges that Torati is Skygate's owner and president.

CPA Realty alleges that, subsequently, Torati induced Walters to grant him a power of attorney, authorizing Torati to act as his agent and attorney-in-fact at the short sale closing. CPA Realty further alleges that Torati wanted to be the sole representative for both the buyer and seller so that he would be able to retain the commission due CPA Realty.

On July 21, 2016, a short sale closing was held at which Skygate purchased the property for \$1,125,000. CPA Realty alleges that none of the defendants has paid it a commission, as a result of the sale.

In the complaint, CPA Realty seeks to recover a broker's commission, together

with attorney's fees, on claims for breach of contract, tortious interference with contract, conversion, and breach of fiduciary duty asserted against Torati, Skygate, and Walters.

In the answer, Torati and Skygate deny all allegations of misconduct and assert 27 affirmative defenses based on a variety of theories, including fraudulent inducement, unconscionability, waiver, unclean hands, documentary evidence, breach of contract, lack of privity, and CPA Realty's failure to earn the disputed commission.

Subsequently, by order dated March 17, 2017, this court denied that branch of CPA Realty's motion for a default judgment against Walters and granted that branch to compel Walters to arbitrate the underlying dispute, in accordance with the terms of the broker's agreement.

Walters has not appeared nor served an answer in this action.

*Motion Sequence 004:*

CPA Realty now seeks to amend the complaint to omit Walters from the caption, to discontinue all claims asserted against him in the complaint, and to add claims for fraud and unjust enrichment against Torati and Skygate.

In partial opposition, defendants contend that the proposed fraud and unjust enrichment claims are not legally viable.

Leave to amend is denied in part and granted in part. "[L]eave to amend a pleading is freely given absent prejudice or surprise resulting directly from the delay" (*Anoun v City of New York*, 85 AD3d 694, 694 [1<sup>st</sup> Dept 2011] [internal quotation marks

and citations omitted]; *see* CPLR 3025 [b]), unless "the proposed amendment is 'palpably insufficient' to state a cause of action or defense, or is patently devoid of merit" (*Lucido v Mancuso*, 49 AD3d 220, 229 [2d Dept 2008]; *see* CPLR 3025 [b]). Resolution on the merits of claims sought to be added is not appropriate on a motion to amend (*see Curiale v Weicholz & Co.*, 192 AD2d 339, 339 [1<sup>st</sup> Dept 1993]).

Leave to amend the complaint to assert a fraud claim against Torati and Skygate is denied. To state a legally viable claim for fraud, a plaintiff must allege a representation of a material existing fact, falsity, scienter, deception and injury (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]; *Nicosia v Board of Mgrs. of the Weber House Condominium*, 77 AD3d 455, 456 [1<sup>st</sup> Dept 2010]). Furthermore, a contract action may not be converted into one for fraud by the mere additional allegation that the contracting party did not intend to honor its contractual promise (*Bronx Store Equip. Co. v Westbury Brooklyn Assocs.*, 280 AD2d 352, 352 [1<sup>st</sup> Dept 2001]).

In the proposed amended complaint, CPA Realty alleges that Torati and Skygate, as Walters' agents and attorneys-in-fact, refused to pay it a broker's commission in breach of the broker's agreement executed by Walters, and fraudulently represented that they would pay it compensation, in exchange for its broker's services, with the intention of never making such a payment (*see* proposed amended complaint ¶¶ 72-80).

These factual allegations are duplicative of the allegations upon which the claim for breach of the broker's agreement is based. Leave to add a fraud claim, where that

claim is duplicative of a claim for breach of an express oral or written contract, will be denied (*see Hylan Elec. Contr., Inc. v MasTec N. Am., Inc.*, 74 AD3d 1148, 1149 [2d Dept 2010]; *Spitzer v Schussel*, 48 AD3d 233, 234 [1<sup>st</sup> Dept 2008]).

Leave to amend the complaint to assert an unjust enrichment claim against Torati and Skygate is denied. To assert a legally cognizable claim of unjust enrichment, a plaintiff must allege that the plaintiff bestowed a benefit upon the defendant, that the benefit remains with the defendant, and that the defendant has not adequately compensated the plaintiff for that benefit (*see Wiener v Lazard Freres & Co.*, 241 AD2d 114, 120-121 [1<sup>st</sup> Dept 1998]). "The existence of an express agreement, whether oral or written, governing a particular subject matter precludes recovery in quasi contract for events arising out of the same subject matter" (*Morales v Grand Cru Assoc.*, 305 AD2d 647, 647 [2d Dept 2003], citing *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]).

In support of the proposed unjust enrichment claim, CPA Realty alleges that Torati and Skygate were unjustly enriched at its expense by receiving and retaining the benefit of its real estate broker services and by the successful completion of the short sale transaction, without having paid CPA Realty a commission (*see* proposed amended complaint ¶¶ 81-88). Thus, the unjust enrichment claim arises out of the same facts as asserted in support of the contract claim, and, therefore, is palpably without merit.

That branch of the motion to discontinue plaintiff's claims asserted against Walters

is granted without opposition.

*Motion Sequence 005:*

CPA Realty's motion to compel Walters to appear for deposition as a nonparty and to produce certain documents is granted without opposition and upon review of the supporting documentation. Pursuant to CPLR 3124, a person failing to respond to or comply with any request, notice, interrogatory, demand, or order served under CPLR article 31 may be compelled to comply or respond. CPA Realty's attorney attests that Walters has expressly refused to appear for deposition (*see* Stanislav Gomberg May 27, 2018 affirmation ¶ 14).

The December 19, 2017 subpoena duces tecum with notice of deposition served on Walters satisfies the statutory notice requirement (*see Matter of Kapon v Koch*, 23 NY3d 32, 39 [2014]; *Velez v Hunts Point Multi-Serv. Ctr., Inc.*, 29 AD3d 104, 111 [1<sup>st</sup> Dept 2006]; CPLR 3101 [a] [4], 3120). In that subpoena, CPA Realty adequately notified Walters that his testimony was sought in connection with the sale of the premises located at 551 West 161<sup>st</sup> Street in Manhattan, and clearly identified the requested disclosure, including documents generated or executed at the closing, and checks for payment of broker's services rendered in connection with the sale of the property. The subpoena also clearly specified the date, time, and location of the scheduled deposition.

The affidavit of service demonstrates that CPA Realty properly effectuated personal service on Walters, pursuant to CPLR 308 (2), on December 26, 2017, by

delivering the subpoena to a person of suitable age and discretion at Walters' usual place of abode and by timely mailing a copy to Walters at that address.

CPA Realty has demonstrated that Walters' testimony is relevant and necessary. To obtain nonparty discovery, a party must show that the nonparty discovery is material, necessary, and that it is unavailable by means other than the nonparty (*see Kondratick v Orthodox Church in Am.*, 73 AD3d 708, 708 [2d Dept 2010]). Walters is the former owner and seller of the property, and a signatory of the broker's agreement and power-of-attorney agreement. Therefore, he is in a unique position to testify regarding the negotiation and execution of the those documents and CPA Realty's claims regarding breach of the broker's agreement.

Accordingly, it is

ORDERED that motion sequence number 004 by plaintiff to amend the complaint is granted to the extent that all claims asserted in the complaint against Errol Walters are discontinued, and is otherwise denied; and it is further

ORDERED that plaintiff shall serve the complaint amended in accordance with this decision and order upon defendants within 30 days from service of a copy of this order with notice of entry; and it is further

ORDERED that defendants shall serve an answer to the amended complaint or otherwise respond thereto within 20 days of said service; and it is further

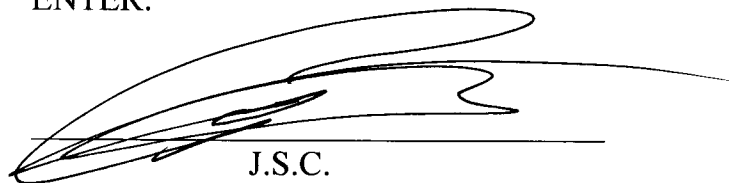
ORDERED that motion sequence number 005 by plaintiff against non-party Errol

Walters for the issuance of a Judicial Subpoena Duces Tecum directed to said non-party to appear for deposition and to produce certain document disclosure is granted; and it is further

ORDERED the counsel are directed to appear for a status conference in room 581 at 111 Centre Street on October 18, 2018, at 2:30 pm.

Dated: September 20, 2018

ENTER:

A handwritten signature in black ink, consisting of several overlapping, fluid strokes that form a cursive-like shape. The signature is positioned above a horizontal line.

J.S.C.