

Benny Blanco, Inc. v Invest Hospitality, LLC
2019 NY Slip Op 30714(U)
March 21, 2019
Supreme Court, New York County
Docket Number: 650667/2017
Judge: Anthony Cannataro
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 41EFM

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BENNY BLANCO, INC.,	INDEX NO.	<u>650667/2017</u>
Plaintiff,		
- v -	MOTION DATE	<u>12/09/2018,</u> <u>12/09/2018</u>
INVEST HOSPITALITY, LLC, TRIUMPH HOSPITALITY, LLC	MOTION SEQ. NO.	<u>001 002</u>
Defendant.		

DECISION AND ORDER

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HON. ANTHONY CANNATARO:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 82, 83, 84, 85, 88, 90, 91, 94

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 86, 87, 89, 92, 93

were read on this motion to/for DISMISS.

In this action to recover allegedly unpaid brokerage commissions, defendants Triumph Hospitality, LLC (“Triumph”) and Invest Hospitality, LLC (“Invest”) move to dismiss on the grounds that plaintiff lacks standing; that neither defendant is a proper party; and that plaintiff fails to set forth a cause of action upon which relief may be granted. Plaintiff cross-moves for leave to serve and file an amended summons and complaint adding Nesbit Hotel, LLC (“Nesbit”) and Leonelli Restaurants, LLC (“Leonelli”) as defendants.

In December 2012, Nesbit acquired an interest in a lease for space in the then Gershwin, now Evelyn, Hotel located at 7 East 27th Street (“the premises”) and

proceeded to develop a concept for opening a restaurant therein. Nesbit engaged a third party to help develop this concept, who arranged for Jonathan Benno ("Benno"), an established chef and restaurateur, to view the premises. Benno expressed interest, but ultimately the deal fell through due, at least in part, to Benno's then investor and equity partner.

Thereafter, as no tenant had been found, the managers of Nesbit and the principals of Triumph, through a third party, brought the premises to the attention of various persons, including Alexandra Turboff ("Turboff"), a real estate agent affiliated with plaintiff, Benny Blanco, Inc. On July 7, 2014, Turboff contacted Benno about the potential availability of the premises. Turboff then arranged a site visit attended by Benno, who plaintiff asserts was acting as a representative of Invest; Benno's new investor; as well as an employee representative of both Nesbit and Triumph. Turboff remained in contact with Invest, forwarding copies of floor plans and following up numerous times about their interest in the premises. In response, defendants allegedly assured plaintiff that there was no intention to strike a deal behind plaintiff's back.

It is alleged that during this period, Nesbit, Invest, and Benno continued to have discussions about leasing the premises. Several years later, in early 2017, plaintiff became aware that Benno opened a restaurant in the premises. Upon learning this, plaintiff contacted Benno about paying brokerage commissions. When those efforts failed, plaintiff commenced this action. Plaintiff obtained a copy of the lease for the first time during discovery where it came to light that the terms of the deal had changed and had resulted in a lease dated March 31, 2017 between Nesbit and Leonelli.

In support of their motion to dismiss here, defendants assert that plaintiff does not have standing to bring this action. Defendants assert that plaintiff has failed to demonstrate both that Benny Blanco, Inc. was a duly licensed real estate broker and that Turboff was a duly licensed representative of Benny Blanco, Inc. at the time they allegedly

provided brokerage services to defendants. Defendants maintain that Turboff held herself out as acting on behalf of a company under the unregistered and unlicensed assumed name "BCD."

Defendants further argue that plaintiff has failed to allege the existence of an agreement between the parties. Defendant Triumph points to the fact that plaintiff alleges only that it was the broker for Invest and, as such, no relationship existed between plaintiff and Triumph. For its part, defendant Invest asserts that plaintiff misunderstands the relationship between Benno and Invest, maintaining that Invest cannot be held responsible for any actions of Benno as a non-member.

Defendants further argue that plaintiff cannot maintain a cause of action based either in contract or equity as plaintiff was not the "procuring cause" of the lease agreement ultimately reached. Defendants take the position that arranging a meet and greet, providing floor plans, and then taking no action for three years does not entitle plaintiff to commissions. Finally, defendants assert that the cross-motion to amend should be denied as it lacks merit and that the parties it seeks to add, namely Nesbit and Leonelli, have no relationship with plaintiff.

Plaintiff opposes arguing that it has shown that both Benny Blanco, Inc. and Turboff were duly licensed real estate brokers for the entire period for which plaintiff seeks commissions. Plaintiff further asserts it was properly licensed, even if Turboff was acting on behalf of "BCD," since "BCD" is an assumed name for plaintiff, a licensed real estate broker. Plaintiff also argues that the existence of a contract with the defendants can be implied by the circumstances and, even if no contract is found to exist, plaintiff has pleaded viable claims sounding in *quantum meruit* and unjust enrichment.

Plaintiff argues that showing the premises, attending the site visit, sending plans, regularly communicating with the defendants and inquiring as to the status of negotiations are legally sufficient allegations upon which a finding could be made that

plaintiff was the procuring cause of the lease. Finally, plaintiff maintains that it should be granted leave to amend the summons and complaint to add Nesbit and Leonelli as they are related entities to the named defendants and are operating in the premises that plaintiff helped to procure.

On a motion to dismiss pursuant to CPLR 3211 courts afford pleadings a “liberal construction” and “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). “[N]evertheless, 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” (*Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]).

“In order to recover a real estate brokerage commission, a broker must establish that he or she (1) is duly licensed, (2) had a contract, express or implied, with the party to be charged with paying the commission, and (3) was the procuring cause of the sale” (*Burton v Lucido*, 135 AD3d 885, 886 [2d Dept 2016]).

Under Real Property Law § 442-d an action to recover commissions is barred “except upon allegation and proof that the person was a duly licensed real estate broker on the date the cause of action accrued” (*NFS Services, Inc. v W. 73rd St. Assoc.*, 102 AD2d 388, 391 [1st Dept 1984], *affd.* 64 NY2d 919 [1985]). In addition, Real Property Law § 440-a requires that the individual brokers associated with or working for a corporate broker must be licensed (*Coldwell Banker Mid Plaza Real Estate Inc. v Guindi*, 23 Misc 3d 1132[A] [Sup Ct 2009]). Here, plaintiff alleges that both Benny Blanco, Inc. and Turboff were duly licensed real estate brokers during the time plaintiff purportedly earned commissions. Plaintiff further provides affidavits in which it is averred that Benny Blanco, Inc. was duly licensed as a real estate brokerage represented by Andrew Moger

from August 9, 2013 through August 8, 2017, and that Turboff was a duly licensed real estate broker affiliated with Benny Blanco, Inc. from August 26, 2012 through August 25, 2018.¹

A licensed real estate broker may conduct its real estate brokerage business under an assumed name if it properly applied for a license to do so and properly registered with the New York State Department of State (*see Atlas New York Ltd. Liab. Co. v Eisenberg*, 150 AD3d 602 [1st Dept 2017]). Failure to file a certificate of doing business under an assumed name prevents an entity from maintaining an action except in its own name (*see Am. Exp. Travel Related Services Co., Inc. v Assih*, 26 Misc 3d 1016, 1020 [Civ Ct 2009]). Here, a certificate for the use of the assumed name “Branded Concept Development” was filed on behalf of plaintiff Benny Blanco, Inc. In addition, a certificate for the use of the assumed name “BCD” was filed on behalf of “Branded Concept Development, Inc.”

Plaintiff’s argument that these filings permit Benny Blanco, Inc. to operate under the assumed name “BCD” fails here because “Branded Concept Development” and “Branded Concept Development, Inc.” are simply not the same corporate entities. That being the case, plaintiff Benny Blanco, Inc. cannot seek commissions arising out of services performed on behalf of BCD. However, to the extent that any services were performed by Turboff as a licensed real estate broker affiliated with Benny Blanco, Inc., Benny Blanco, Inc. is a proper plaintiff and the causes of action brought on its behalf may continue.

A party seeking to recover unpaid brokerage commission must plead and prove, *inter alia*, that he or she entered into a contract, express or implied, with the party to be charged with paying the commission (*Burton* at 886). A cause of action for breach

¹ Andrew Moger is the principal of the corporate plaintiff, Benny Blanco, Inc. Benny Blanco, Inc. is duly licensed to transact business as a real estate broker and to be represented by Andrew Moger. Turboff is a duly licensed associate real estate broker affiliated with and acting on behalf of Benny Blanco, Inc.

of contract must be dismissed as vague and indefinite where the complaint fails to allege in nonconclusory language the essential terms of the parties' purported contract, including the specific provisions of the contract upon which liability is predicated, whether the alleged agreement was written or oral, the amount at issue, and the length of time during which the contractual obligation remains (*see Sud* at 424). Here, plaintiff essentially concedes that there were no terms of an agreement understood to exist between the parties. Thus, any claim based in contract must be dismissed.

Plaintiff asserts that even if the Court concludes that no express or implied contract exists, it is nevertheless entitled to recovery under equitable principles. A cause of action to recover in *quantum meruit* is valid if plaintiff alleges performance of services in good faith, acceptance of such services by the person to whom they are rendered, an expectation of compensation therefor, and the reasonable value of the services rendered (*see E. Consol. Properties, Inc. v Waterbridge Capital LLC*, 149 AD3d 444, 444 [1st Dept 2017]; *see also Soumayah v Minneli*, 41 AD3d 390, 391 [1st Dept 2007]). To plead a cause of action under a theory of unjust enrichment, plaintiff must allege that defendant was enriched, at plaintiff's expense, and that equity and good conscience require plaintiff to recover (*see Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]). In the area of brokerage fees, unless the plaintiff was the "procuring cause" of the transaction and its efforts were successful, claims based on *quantum meruit* and unjust enrichment must fail (*RMB Properties, LLC v Am. Realty Capital III, LLC*, 55 Misc 3d 1202[A] [Sup Ct 2016], *affd sub nom. RMB Properties v Am. Realty Capital III, LLC*, 148 AD3d 585 [1st Dept 2017]).

In order for a real estate broker to earn a commission, "the broker must be the 'procuring cause' of the transaction, meaning that 'there must be a direct and proximate link, as distinguished 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 AD3d 93, 98 [1st Dept 2014], quoting *Greene v Hellman*, 51 NY2d 197, 205

[1980]). The broker does not need to have been “the dominant force in the conduct of the ensuing negotiations or in the completion of the sale” (*Greene* at 206). However, some causal link must exist.

Whether plaintiff’s efforts here were sufficient to make it a “procuring cause” is ultimately a factual question, making dismissal at the pleading stage inappropriate. The Appellate Department found in *Good Life Realty, Inc. v Massey Knakal Realty of Manhattan, LLC* that simply making the buyer aware of the property but not introducing them to the seller, viewing or showing the premises, maintaining contact with the buyer, negotiating the price or attending the closing is not enough to earn a commission (93 AD3d 490 [1st Dept 2012]). In *SPRE* the Appellate Division found that a broker who introduced the buyer and developer, brought the buyer to the building several times, reviewed floor plans, negotiated terms, prepared a deal sheet with a preliminary offer, and drafted a contract of sale was entitled to commissions (119 AD3d 93). Here, giving the plaintiff the benefit of every favorable inference, it cannot be said that plaintiff has failed to sufficiently plead its status as a “procuring cause” of the lease as a matter of law.

“Leave to amend a pleading is freely granted within the court’s discretion (CPLR 3025 [b]) in the absence of prejudice or surprise” (*Mezzacappa Bros., Inc. v City of New York*, 29 AD3d 494 [1st Dept 2006]). However, “[l]eave to amend should be denied where the claim is palpably insufficient” and “the party seeking the amendment has the burden of establishing its merit” (*Manhattan Real Estate Equities Group LLC v Pine Equity NY, Inc.*, 27 AD3d 323 [1st Dept 2006]). Plaintiff seeks to add additional parties, allegedly related to the defendants named in the original complaint, whose identities plaintiff was unaware of until a copy of the lease agreement was provided in discovery. Given the interrelatedness of the defendants, any claim of prejudice or surprise is unavailing. Further, to the extent that the additional defendants may ultimately be responsible for

any commissions owed to plaintiff if they were, in fact, the same parties or controlled by the same principals and managers, plaintiff has sufficiently alleged a claim against them. However, to the extent that the proposed amended complaint seeks to add a cause of action based in contract against Nesbit and Leonelli, any such claim would be palpably insufficient since it has already been held that the allegation of the existence of an agreement has no basis. Nonetheless, leave to amend to assert causes of action based on theories of *quantum meruit* and unjust enrichment against the additional parties should be granted. Accordingly, it is

ORDERED that the motion by defendant to dismiss is granted in part, and the first cause of action sounding in breach of contract is dismissed in its entirety; and it is further

ORDERED that the plaintiff's motion for leave to amend the complaint is granted, in part, as follows: leave is granted to add Nesbit Hotel, LLC and Leonelli Restaurants, LLC as parties to this action for purposes of plaintiff's second cause of action sounding in *quantum meruit* and the third cause of action for unjust enrichment as against all parties; and it is further

ORDERED that a supplemental summons and amended complaint, including the surviving causes of action, shall be served, in accordance with the Civil Practice Law and Rules, upon the existing and additional parties in this action within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the action shall bear the following caption:

BENNY BLANCO, INC.,

Plaintiff,

- v -

INVEST HOSPITALITY, LLC, TRIUMPH
HOSPITALITY, LLC, LEONELLI RESTAURANTS, LLC
and NESBIT HOTEL, LLC,

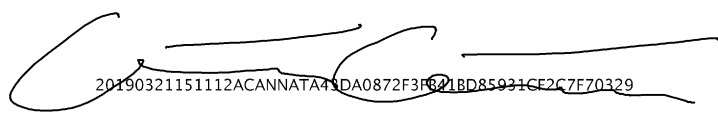
Defendants.

And it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), 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* (at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 490, 111 Centre Street, on April 24, 2019, at 2:15PM.



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3/21/2019

DATE

ANTHONY CANNATARO, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
			<input type="checkbox"/>	DENIED	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					<input type="checkbox"/>
					REFERENCE