SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **IAS MOTION 42EFM**

Justice

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METROPOLITAN PROPERTY GROUP, INC.,

Plaintiff,

- v -

COMMERCIAL SPACES GROUP, LLC, CBRE, INC., ELENA SAMASIUK, RAZVAN NICULESCU

Defendant.

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INDEX NO. 654569/2018

MOTION DATE 04/03/2019

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22

were read on this motion to/for DISMISSAL.

In this action to recover a brokerage commission, the defendants move, pre-answer, to dismiss the complaint pursuant to CPLR 3211(a)(1) and 3211(a)(7). The plaintiff opposes the motion. The motion is granted in part.

The plaintiff, a real estate brokerage firm, seeks to recover a brokerage commission to which it alleges it is entitled in connection with a successful commercial lease transaction closed by defendant brokerage firm, Commercial Spaces Group, LLC, (CSG) and the individual defendants, broker/agents Elena Samasiuk and Razvan Niculescu. The complaint includes four causes of action – breach of an implied contract (against defendant CBRE, Inc.), unjust enrichment (against all defendants), tortious interference with a contract (against CSG) and piercing the corporate veil (against Samasiuk and Niculescu). In the complaint, the plaintiff alleges that, while working for the plaintiff, broker Robert Conz made efforts to bring about a lease between a client of the plaintiff, The Cliffs Climbing + Fitness (The Cliffs), and Fabrics Save-A-Thon Manhattan, Inc. (the landlord). The landlord's exclusive broker was CBRE, Inc. (CBRE). The plaintiff alleges that in the midst of negotiations, Conz left the plaintiff and joined CSG, a competing firm. After his departure, Conz submitted a written letter of intent to the landlord on behalf of The Cliffs. It is undisputed that no lease was executed by The Cliffs and the landlord upon the terms of that letter of intent. However, several months later, the plaintiff

learned that The Cliffs had ultimately entered into a lease with the landlord for space within the subject building, albeit not the identical space. The related brokerage commission was paid to CSG. The plaintiff contends that, through its affiliation with Conz, it was the procuring cause of the lease and was, thus, entitled to the brokerage commission paid to CSG.

Dismissal under CPLR 3211(a)(1) is warranted only when the documentary evidence submitted "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" Fortis Financial Services, LLC v Fimat Futures USA, 290 AD2d 383, 383 (1st Dept. 2002); see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d 431 (1st Dept. 2014); Fontanetta v John Doe 1, 73 AD3d 78 (2nd Dept. 2010). That is not the case here. The movants rely in part on the affidavit of defendant Elena Samsiuk. It is well settled that affidavits do not constitute documentary evidence for purposes of CPLR 3211(a)(1). See Amsterdam Hosp. Group, LLC v Marshall-Alan Assocs., Inc. ,120 AD3d 431 (1st Dept. 2014); Kappa Dev. Corp. v Queens College Point Holdings, LLC, 95 AD3d 1178 (2nd Dept. 2012) Nor do the emails and letter of intent conclusively dispose of the plaintiff's claim. Contrary to the defendants' contention, they do not conclusively establish that the plaintiff was not a procuring cause of the lease and that there was no meeting of the minds between The Cliffs and the landlord with respect to the terms of the lease.

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-152 (2002). To determine whether a claim adequately states a cause of action, the court must "liberally construe" it, accept the facts alleged in it as true, accord it "the benefit of every possible favorable inference" (id. at 152; see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 [2013]; Simkin v Blank, 19 NY3d 46 [2012]), and determine only whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994); Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc., 10 AD3d 267 (1st Dept. 2004); CPLR 3026. "The motion must be denied if from the pleading's four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." 511 W. 232nd Owners Corp. v Jennifer Realty Co., supra, at 152 (internal quotation marks omitted); see Leon v Martinez, supra; Guggenheimer v Ginzburg, 43 NY2d 268 (1977). Applying these principles here, the court concludes that the complaint, sufficiently alleges, *inter alia*, a cause of action for unjust enrichment.

The theory of unjust enrichment lies as a quasi-contract claim" (Goldman v. Metro. Life Ins. Co., 5 NY3d 561, 572 [2005]) and is "rooted 'in the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another' (Miller v Schloss, 218 N.Y. 400, 497)." Georgia Malone & Company, Inc. v Rieder, 19 NY3d 511, 516 (2012). Thus, to establish this claim, a plaintiff must show that (1) the other party was enriched, (2) at that party's expense, and (3) that 'it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered." (Citibank, N.A. v Walker, 12 AD3d 480, 481 [2nd Dept. 2004]; Baron v Pfizer, Inc., 42 AD3d 627, 629-630 [3rd Dept. 2007])." Mandarin Trading Ltd. v. Wildenstein, 16 NY3d 173, 182 (2011); see Paramount Film Distrib. Corp. v. State of New York, 30 NY2d 415 (1972). The complaint meets that standard.

However, the fourth cause of action, against Samasiuk and Niculescu "to Pierce the Corporate Veil" is dismissed as that is not an independent cause of action. See PK Restaurant LLC v Lifshutz, 138 AD3d 434 (1st Dept. 2016); Ferro Fabricators, Inc. v 1807-1811 Park Ave. Dev. Corp., 127 AD3d 479 (1st Dept. 2015). In any event, the allegations proffered in support of that cause of action are "entirely conclusory and hence insufficient." PK Restaurant LLC v Lifshutz, supra at 436. While the plaintiff's success on the remaining causes of action is not certain, they are not subject to dismissal at this juncture.

Accordingly, it is

ORDERED that the defendant's motion to dismiss the complaint is granted to the extent that the fourth cause of action, alleging Piercing the Corporate Veil as against defendants Elena Samasiuk and Razvan Niculescu is granted and that cause of action is dismissed, and the motion is otherwise denied,

ORDERED that the Clerk shall mark the file accordingly, and it is further,

ORDERED that the defendants shall file and serve an answer to the complaint within 30 days, and it is further

ORDERED that the parties shall appear for a preliminary/settlement conference on October 31, 2019, at 2:30 p.m.

This constitutes the Decision and Order of the court.

8/20/2019
DATE

NANCY M. BANNON, J.S.C.

HON. NANCY M. BANNON

CHECK ONE:

- [ ] CASE DISPOSED
- [ ] GRANTED
- [ ] DENIED
- [X] NON-FINAL DISPOSITION
- [X] GRANTED IN PART
- [ ] OTHER