Mandel v CBRE, Inc.
2020 NY Slip Op 31286(U)
April 13, 2020
Supreme Court, New York County
Docket Number: 650568/2019
Judge: Jennifer G. Schecter

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JENNIFER G. SCHECTER** **PART** **IAS MOTION 54EFM**

Justice

----------X

JORDAN MANDEL,

Plaintiff,

- v -

CBRE, INC., FC EIGHTH AVENUE LLC, CUSHMAN & WAKEFIELD AS SUCCESSORS IN INTEREST TO EQUIS, INC.,

Defendants.

----------X

INDEX NO. 650568/2019

MOTION DATE

MOTION SEQ. NO. 001

DECISION & ORDER ON MOTION & X-MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10-18, 21-31, 33 were read on this motion to DISMISS and cross motion to amend.

Defendants CBRE, Inc. (CBRE) and FC Eighth Avenue, LLC (FC Eighth, with CBRE, defendants) move pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss the complaint of plaintiff Jordan Mandel in its entirety. Plaintiff opposes and cross-moves for leave to amend the complaint. The motion to dismiss is granted and the cross-motion is denied as futile.

Background

As this is a motion to dismiss, the facts below are taken from the complaint (Dkt. 1) and the proposed amended complaint (Dkt. 22), [1] which was verified by Mandel.

This case arises from a co-brokerage agreement dated May 10, 2007, between defendant CBRE and plaintiff's former employer, Equis, Inc. (Equis) to share tenant's broker commissions from efforts to secure office space for JAMS (Dkt. 24 [2007 Agreement]). On July 5, 2007,

[1] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF). Page numbers refer to the e-filed PDF.

defendant FC Eighth and JAMS entered into a ten-year commercial lease (Dkt. 25 [2007 Lease]) for premises located at 620 Eighth Avenue in Manhattan (the New York Times Building).

In October 2013, Mandel emailed Rob Edwards, a facilities director at JAMS, and Kenneth Rapp, a vice chairman at CBRE, to notify them of extension and expansion option provisions contained in the 2007 Lease (Dkt. 26-27 [October 2013 emails]). Edwards indicated that he would consult JAMS' counsel regarding those provisions (*id.*). By letters dated October 21, 2013 and December 2, 2013, JAMS notified FC Eighth of its intent to exercise its options (Dkt. 28 [12/2/2013 letter]). Continued discussions between Mandel, Rapp and Edwards took place through 2015, and Edwards declared that Mandel was an "equal partner" with Rapp on the lease extension efforts (Dkt. 29 [August 2015 emails]). Mandel, however, was cut out of any further discussions by CBRE. In 2017, negotiations between JAMS and FC Eighth, brokered by CBRE, resulted in JAMS and FC Eighth entering an extension of the lease, which expanded JAMS' leased premises at a newly negotiated rate (2017 Lease). CBRE received a commission as a result of the 2017 Lease. Mandel received nothing.

The 2007 Agreement, which was drafted on CBRE letterhead to Mandel's attention and is governed by New York law, provides:

> [Equis'] signature and return of the enclosed copy of this letter will confirm your agreement to act together with [CBRE] as co-brokers for [JAMS] in acquiring office space; and that, regardless of which brokerage firm finds the space or negotiates the deal, we will share all commissions thereon as follows: fifty (50%) percent to CBRE; and fifty (50%) percent to Equis (Dkt. 24 [2007 Agreement] at 2).

It further specified that the agreement

> (i) shall commence on the above date ***and expire on April 30, 2008***;
>
> (ii) expresses the parties' entire agreement on the matters covered hereinabove;

> [(iii)] supersedes all prior understandings between them on such matters, oral or written; …
>
> (v) shall be binding on their lawful representatives, successors, designees, and assigns;
>
> (vi) shall not be altered, or terminated except in a writing signed by each (*id.* at 3 [emphasis added]).

Plaintiff propounds the relevance of an earlier agreement between CBRE, FC Lion LLC (Owner) and Ascot Brokerage Ltd. (Ascot)[2] and dated February 2003 (Dkt. 23 [2003 Agreement]). Pursuant to the 2003 Agreement, Owner retained CBRE as broker for premises located in the New York Times Building, then under development. The agreement specified CBRE's per-lease commissions, capped according to a specified formula. As to "Outside Brokers," defined as "any real estate broker or any person or entity with whom [CBRE] and/or Ascot and/or [FC] has dealt, claiming any commission, fee or compensation with respect to the Lease in question, other than [CBRE]" (Dkt. 23 at 3), the 2003 Agreement provided as follows:

> [2](f) In the event a Tenant … [is] represented by an Outside Broker, … Ascot or Owner shall ***contract directly*** with such Outside Broker with respect to the commission to be paid to such Outside Broker ("***Outside Broker Commission***") … .
>
> [3](c) In the event that any Outside Broker shall be entitled to any Commission under this Agreement, then the Commission payable to [CBRE] shall be equal to thirty percent (30%) of the Full Commission Amount (the "CBRE Override"). ***Ascot shall pay the Outside Broker Commission directly to any such Outside Broker*** and the CBRE Override to [CBRE].
>
> (d) [CBRE] agrees not to offer any portion of the Premises to Outside Brokers, or to enter into any commission agreements or arrangements with them, that is inconsistent with the terms of this Agreement ***or that increases the Commission payable by Ascot under this Agreement*** (*id.* at 6 [emphasis added]).

[2] Owner and Ascot are affiliates of FC Eighth. For purposes of this motion, the court assumes that FC Eighth is responsible for the obligations of Owner and Ascot under the 2003 Agreement.

The 2003 Agreement also afforded special treatment to certain renewal or expansion options set forth in any lease:

> [3](g) If a Lease contains ***express provisions*** regarding the expansion or renewal … as to the space leased or as to additional space in the Premises ***at a fixed rental rate and other terms specified in the Lease without change or modification*** (each such express provision, an "Option") and if any such Option shall be exercised without material change or modification to the original terms of the lease, ***Ascot shall pay [CBRE] a Commission with respect to the Option (whether or not the Expiration Date has occurred)*** [according to a specific formula] ….
>
> ***If*** an Outside Broker shall be entitled to a Commission or fee with respect to a Lease and ***such Outside Broker is entitled to a commission or fee upon the exercise of Option*** set forth in such Lease, the provisions of Paragraph 3(c) above shall apply to any Commission payable in connection with such Option. …
>
> The obligation of this section 3(g) shall survive the expiration or termination of this Agreement (*id.* at 6-7 [emphasis added]).

The 2003 Agreement did not specify for the "Outside Broker Commission" or for the "commission or fee upon the exercise of Option" to which the "Outside Broker" was to be entitled.

On January 29, 2019, Mandel filed suit against CBRE and FC Eighth.[3] The complaint asserts the following causes of action, numbered here as in the complaint: (1) breach of implied contract; (2) unjust enrichment; and (3) breach of express contract. Defendants moved to dismiss the complaint. Mandel opposed and cross-moved for leave to amend.

Discussion

Legal Standard - Motion to Dismiss

On a motion to dismiss, the facts alleged in the complaint are accepted as true, as are all reasonable inferences in non-movant's favor that may be gleaned from them (*see Amaro v Gani*

[3] Cushman & Wakefield as successor in interest to Equis, who was Mandel's employer in 2007, was also named as a defendant, but no causes of action were asserted against them.

Realty Corp., 60 AD3d 491, 492 [1st Dept 2009]; *Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003]). "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration" (*Skillgames*, 1 AD3d at 250). Dismissal must be denied if the complaint sets forth a viable cause of action (*see id.*). Deficiencies in the complaint, moreover, may be remedied by proper affidavits (*see Amaro*, 60 AD3d at 492; *see also Leon v Martinez*, 84 NY2d 83, 88 [1994]). If the defendant seeks dismissal of the complaint based upon documentary evidence, the motion will succeed only if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

Breach of Co-Brokerage Contract (Third Cause of Action)

There are three written contracts: (1) the 2003 Agreement, (2) the 2007 Agreement, and (3) the 2007 Lease. Mandel cannot recover under any of them.

First, Mandel cannot recover under the 2003 Agreement. As an initial matter, neither Mandel nor Equis were parties to the 2003 Agreement. Even assuming that Mandel or Equis were intended albeit, unknown third-party beneficiaries of section 3(c), which stated that "Ascot shall pay the Outside Broker Commission directly to any such Outside Broker," the 2003 Agreement failed to ***independently*** obligate such payment. Section 2(f) of the 2003 Agreement states that "Ascot or Owner shall contract directly with such Outside Broker with respect to the commission to be paid to such Outside Broker ('Outside Broker Commission')" (Dkt. 23 at 6). As to renewal leases, section 3(g) states that "***[i]f*** an Outside Broker shall be entitled to a Commission or fee with respect to a Lease and ***such Outside Broker is entitled to a commission or fee upon the exercise of Option set forth in such Lease***, the provisions of Paragraph 3(c) above shall apply to any

Commission payable in connection with such Option" (*id.* at 7). Read together, these provisions require a ***separate*** legal basis to permit Mandel, Equis or any "Outside Broker" to recover any "Outside Broker Commission" from Ascot, Owner or CBRE. Mandel has thus failed to allege facts to support his claim that the 2003 Agreement was intended to benefit him, as a third-party, in the absence of any "clear [contractual] language" to that effect (*U.S. Bank Nat. Assn v GreenPoint Mortg. Funding, Inc.*, 105 AD3d 639, 640 [1st Dept 2013]).[4]

Nor can Mandel recover under the express terms of the 2007 Agreement, which contained a merger clause and stated that it "shall not be altered … except in a writing signed by each." None of 2007 Agreement's provisions expressly survived its expiration on April 30, 2008.

Finally, the 2007 Lease is not alleged to contain any provision for commissions to be paid to Mandel.[5] The third cause of action for breach of written contract is therefore dismissed.

Implied Contract (First Cause of Action)

Mandel asserts two theories for recovery on an implied contract: (1) that there was an implied agreement between Mandel and defendants, based on the 2003 and 2007 Agreements, to pay Mandel a commission for his assistance in JAMS' exercise of options contained in the 2007 Lease, and (2) that Mandel was a procuring cause of the 2017 Lease by procuring JAMS' exercise

[4] Not even CBRE could recover its commission for the 2017 Lease under the 2003 Agreement, because the 2007 Lease did not include an "Option" for a "fixed rental rate," but instead required the parties to negotiate a new "fair market rental value" (*see* Dkt. 25 § 39.04B) While not dispositive, defendants note that they entered a new brokerage agreement in connection with the 2017 Lease because in their view, the 2017 Lease fell outside the scope of the "Option" described in the 2003 Agreement.

[5] Like the 2003 Agreement, the 2007 Lease alludes to independent agreements with CBRE and Ascot but does not, by itself, obligate anyone to pay them (*see* Dkt. 25 at 130 ["Landlord shall be responsible for the payment of any commission or other fee earned by the Broker ***pursuant to separate agreement between them*** in connection with this Lease" (emphasis added)]).

of its options under the 2007 Lease to extend and expand its prior leasehold. Neither of these theories is supported by alleged facts.

No agreement was implied by Mandel's alleged dealings with defendants. As discussed above, the 2003 Agreement created no independent obligations to an "Outside Broker." Nor can Mandel add unstated obligations to the 2007 Agreement, which contained a merger clause. While every contract includes an implied covenant of good faith and fair dealing (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]), CBRE had no implied duties under the 2007 Agreement following its 2008 expiration (*see Douglas Elliman LLC v Corcoran Group Mktg.*, 93 AD3d 539, 539-40 [1st Dept 2012]). Moreover, there are no facts alleged of ***mutual*** assent to an implied continuation of those agreements (*see New York Tel. Co. v Jamestown Tel. Corp.*, 282 NY 365, 371 [1940]; *North Am. Hyperbaric Ctr. v City of New York*, 198 AD2d 148, 149 [1st Dept 1993]). Mandel's 2013 and 2015 efforts were not alleged to be reciprocated by CBRE or by any other party to the 2003 or 2007 Agreements.

Also, Mandel was not a procuring cause of the 2017 Lease. Absent an express agreement to pay a commission for a lease renewal, recovery of a commission hinges on the same standards for determining the "procuring cause" for an original lease, which requires a "direct and proximate link" between a broker's efforts and the ultimate deal (*see Rosenhaus Real Estate, LLC v S.A.C. Capital Mgt., Inc.*, 121 AD3d 409, 409 [1st Dept 2014]; *see also Greene v Hellman*, 51 NY2d 197, 206 [1980]; *PRE Realty, Ltd. v Dienst*, 119 AD3d 93, 99 [1st Dept 2014]). Mandel's prompting of JAMS to consult counsel in connection with the contractual options on which the 2017 Lease was allegedly based is akin to the "creation of an amicable atmosphere" leading to negotiations, which has been held "insufficient to demonstrate that plaintiff was the procuring cause of the deal" (*see Rosenhaus,* 121 AD3d at 409). Mandel is not alleged to have participated in negotiations with FC

Eighth for the 2017 Lease (*see Corcoran*, 93 AD3d at 539-40) nor to have been, at the time Mandel was booted from the deal in 2015, "plainly and evidently approaching success" (*see Rosenhaus,* 121 AD3d at 410). The first cause of action is therefore dismissed.

Unjust Enrichment (Second Cause of Action)

Mandel cannot recover on an equitable theory against CBRE or FC Eighth. "To establish unjust enrichment, 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'" (*Kramer v Greene*, 142 AD3d 438, 442 [1st Dept 2016], quoting *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]). Perhaps Mandel may have rendered a service to JAMS (*see Elhanani v Kuzinez*, 172 AD3d 590, 592 [1st Dept 2019] ["plaintiffs provided services and value outside their role as broker and … it is against equity and good conscience to allow defendants to retain the value of those services"]*; see also Eastern Consol. Props., Inc. v Waterbridge Capital LLC*, 149 AD3d 444, 444 [1st Dept 2017]). It is ***not*** alleged, however, that CBRE ever received a commission for ***Mandel's*** services. Instead, CBRE is alleged to have received a commission because it negotiated the 2017 Lease. Mandel cannot claim CBRE's commission because he did not do that work (*see Norcast S.ar.l. v Castle Harlan, Inc.*, 147 AD3d 666, 668 [1st Dept 2017] [plaintiff's claim to defendant's fee for services rendered to a third party was too speculative to support unjust enrichment claim]).

Although CBRE allegedly cut out Mandel from the 2017 Lease negotiations, denying him the opportunity to become a procuring cause, Mandel had no right to participate (*see Corcoran*, 93 AD3d at 539-40 [no duty to include co-broker in subsequent negotiations after expiration of co-brokerage agreement]; *Rosenhaus,* 121 AD3d at 410 [no liability for firing non-exclusive broker who was not on the verge of success]). FC Eighth, as landlord, cannot be held liable for

unjust enrichment given its attenuated relationship with tenant-side broker Mandel (*see Mandarin*, 16 NY3d at 182 [no unjust enrichment in the absence of a relationship that could give rise to reliance or inducement]).The second cause of action is therefore dismissed.

Plaintiff's Cross Motion for Leave to Amend

Leave to amend is denied because the proposed amendment is "patently devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 499-500 [1st Dept 2010]). As discussed above, plaintiff has no cause of action, even assuming the truth of the facts in the proposed amended complaint that he verified. As the complaint is not being dismissed on RPAPL § 442-a grounds, addition or substitution of Vanguard as plaintiff would also be futile. Accordingly, it is

ORDERED that defendants' motion to dismiss is granted, plaintiff's cross-motion for leave to amend is denied, and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

4/13/2020
DATE

JENNIFER G. SCHECTER, J.S.C.

CHECK ONE: [X] **CASE DISPOSED** [ ] **NON-FINAL DISPOSITION**

[X] **GRANTED** [ ] **DENIED** [ ] **GRANTED IN PART** [ ] **OTHER**