Picken v RN Realty, LLC
2020 NY Slip Op 33370(U)
October 13, 2020
Supreme Court, New York County
Docket Number: 653313/2014
Judge: Andrea Masley

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 48EFM

----------X

ALEXANDER PICKEN and PICKEN REAL ESTATE INC.

Plaintiffs,

- v -

RN REALTY, LLC,

Defendant.

----------X

INDEX NO. 653313/2014

MOTION DATE N/A

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER.

In motion sequence number 006, defendant RN Realty, LLC (RN) moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs Alexander Picken and Picken Real Estate Inc.'s remaining claims for breach of implied brokerage contract and unjust enrichment.

Background

Defendant RN is the former owner of the property at 530 West 28th Street (the premises); Neal Schwartz is the owner and managing member of RN (NYSCEF Doc. No. [NYSCEF] 214, Schwartz depo. tr. at 8:5-13, 10:16-19, 11:8-19). Plaintiff Alexander Picken,

an officer of plaintiff Picken Real Estate Inc., is a licensed real estate broker and was the broker for RN's prior commercial tenant at the premises (NYSCEF 225, Picken aff ¶¶ 1, 4).

Beginning in January 2002, the premises were rented to a single occupancy tenant under a twenty-year lease (NYSCEF 190, Schwartz aff ¶ 2). However, in October 2010, RN and tenant were engaged in litigation over nonpayment of rent and assigning the lease (*id.*). In January 2011, with this litigation still pending, Schwartz was approached by Larry Greenberg of Centaur Properties LLC (Centaur), who informed Schwartz that Harlan Berger, the principal of Centaur, wanted to meet with Schwartz (*id.* ¶ 4; NYSCEF 182, Schwartz depo. tr. at 46:14-47:3; *see also* NYSCEF 216, Berger depo. tr. at 10:6-18). Berger also contacted Picken regarding the premises and asked Picken to set up a "joint venture meeting" between the parties (NYSCEF 216, Berger depo. tr. at 12:10-17, 13:19-14:13).

In February 2011, Picken set up a meeting between himself, Schwartz, Berger, Michael York, from Picken's company, and Larry Voluck[1], Schwartz's real estate broker/advisor (NYSCEF 190, Schwartz aff ¶ 5; NYSCEF 227, Picken aff ¶¶ 9, 25). On March 9, 2011, the parties met for a second time with Robert Gans, the owner of the building next to the premises (NYSCEF 190, Schwartz aff ¶ 6). Schwartz was not present at the second meeting (*id.*). At these two meetings, the parties discussed the potential use of the premises, the tenant, the value of the premises, a potential joint venture, and the general real estate market, including other properties (tape recordings[2]). At the March 9th meeting, there was discussion of a potential offer for $30,500,000 (*id.*). However, Schwartz

[1] There is a dispute as to whether Voluck was at the February 2011 meeting. Picken contends that Voluck was not present (NYSCEF 227, Picken aff, ¶ 25).

[2] Plaintiffs submit recordings of the meetings in opposition to this motion. Defendant does not dispute the authenticity of these records.

insists that, at the time of both meetings, the premise was not for sale; rather, Schwartz was just curious for information (NYSCEF 190, Schwartz aff ¶ 5).

On March 14, 2011, Picken sent an e-mail to Voluck, expressing Berger and Gans' interest in purchasing the premises and providing the contact information of Berger and Gans (NYSCEF 229, Picken 3/14/11 E-mail). The e-mail mentioned that Berger and Gans needed to address the tenant's desire to be bought out and that Berger would be "crafting an offer" that week for the tenant to review (*id.*). The e-mail ends with a disclaimer that reads, "[p]lease make note, by us providing this information, we are not granting the right to circumvent us in regard to exchange of information and/or communications. This, by no means, should be construed as a waiver of our right as brokers in respect to earning a commission in regard to the individuals named herein" (*id.*).

On May 19, 2011, Picken sent an e-mail to Henry Hay of Centaur discussing details of the premises and offering to send a floor plan (NYSCEF 235, 5/19/11 E-mail). On June 13, 2011, Picken sent a follow-up e-mail to Hay, with a cc to Berger, inquiring if Picken would be receiving an offer (*id.*, 6/13/11 E-mail).

At some point, Picken put up signs on the premises that indicated he was the exclusive broker for the premises (NYSCEF 211, Picken depo. tr. at 10:4-11:4). Picken admits that he did not have permission to be called an "exclusive broker", and it was a mistake (*id.* at 11:2-4; NYSCEF 227, Picken aff ¶ 29). After Schwartz learned of the signs, on July 5, 2011, he e-mailed Picken stating, "THE BUILDING IS NOT FOR SALE. YOU ARE NOT MY BROKER- YOU ARE MY TENANTS BROKER" (NYSCEF 206[3], Schwartz 7/5/11 E-mail). That same day, Picken responded, "I'd like to think foremost I am your friend...You are only my client if I assist in bringing about a transaction for you (which you

[3] The document is actually found at NYSCEF 7; NYSCEF 206 is a placeholder.

find desirable). I know I am not your exclusive broker but, I know you recognize me as a broker who is extremely knowledgeable in relation to the property and its location. I only wish to provide you with a small handful of opportunities as the smoke (hopefully) clears in regard to your internal litigation. If at some point in time you wish to proceed with an opportunity I have presented to you, then I can become your broker of record" (NYSCEF 207[4], Picken 7/5/11 E-mail).

On November 30, 2011, Berger e-mailed Voluck directly and offered $23.5 million for the premises (NYSCEF 233, Berger 11/30/11 E-mail). On December 8, 2011, Voluck responded, suggesting that Berger should offer $25 million (*id.*, Voluck 12/8/11 E-mail). On December 9, 2011 Berger e-mailed Voluck a summary of proposed terms informing Voluck he was willing to pay $25 million (*id.*, Berger 12/9/11 E-mail). Berger's December 9th e-mail also states, "[a]dditionally, in regards to commissions for the sale of the property, [Schwartz] is responsible for paying you, and we will be responsible for Pickens, if it is determined he is owed anything" (*id.*).

On December 15, 2011, Berger sent a formal letter of intent offering to purchase the premises for $25 million (NYSCEF 234, Letter of Intent). This letter states, "[b]uyer will be responsible to any commissions due to Alex Picken (if it is determined that Pickens is owed anything)" (*id.*). Berger testified that Picken was not involved in the creation of the letter of intent (NYSCEF 216, Berger depo. tr. at 49:6-12). Berger further testified that the property was not for sale at that time, Berger did not purchase the premises for that price, and that deal never happened (*id.* at 47:3-15; 50:18-22).

In December 2012, the tenant vacated the premises and Schwartz subsequently received numerous offers for development of the premises directly, through word of mouth and from brokers (NYSCEF 190, Schwartz aff ¶¶ 13-14). One such offer was from The

[4] The document is actually found at NYSCEF 8; NYSCEF 207 is a placeholder.

Bauhouse Group (Bauhouse), which Schwartz admits was brought to him by the plaintiffs and another broker, Stan Putko (*id.*, ¶ 17).

On December 28, 2012, Joseph Beninati wrote to Schwartz "on behalf of Bauhouse Group" and "in conjunction with Stan Putko" offering to purchase the premises for $44 million (NYSCEF 230, Bauhouse Offer Letter). The Bauhouse deal never came to fruition (NYSCEF 190, Schwartz aff ¶ 17).

In mid-February 2013, the negotiations with Centaur "progressed", and Berger requested a standstill agreement to be put in place in order to keep negotiating (NYSCEF 190, Schwartz aff ¶ 18; NYSCEF 216, Berger depo. tr. at 59:9-16). On February 14, 2013, Centaur entered into a thirty-day standstill agreement with RN which prevented RN from having further discussions with other potential purchasers (NYSCEF 216, Berger depo. tr. at 86:25-87:7; NYSCEF 214, Schwartz depo. tr. at 76:5-23). On February 19, 2013, Robert Markfield informed Beninati that Schwartz had entered into a standstill agreement and thanked Beninati for his interest in the property (NYSCEF 217[5], Markfield 2/19/13 E-mail).

On July 12, 2013, RN sold the premises to WC Realty 28 LLC (WC 28), an entity created by Centaur Properties for the purposes of acquiring the premises (NYSCEF 190, Schwartz aff ¶ 21, NYSCEF 214, Schwartz depo. tr. at 19:21-21:8).

Discussion

Pursuant to CPLR 3212 (b), "[t]o obtain summary judgment, the movant 'must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, 607 [1st Dept 2012], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "A [movant] cannot satisfy its burden merely by pointing out gaps in the [opponent's] case" (*Sabalza v Salgado*, 85 AD3d 436, 437-438 [1st Dept

[5] The Document is actually found at NYSCEF 48. NYSCEF 217 is a placeholder.

2011]) or by relying on "[a] conclusory affidavit or an affidavit by an individual without personal knowledge of the facts" (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384 [2005] [citations omitted]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez,* 68 NY2d at 324). Once the movant satisfies its burden, the opposing party must "produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*id.*).

Breach of Implied Contract

> "To prevail on a cause of action to recover a commission, the broker must establish (1) that it is duly licensed, (2) that it had a contract, express or implied, with the party to be charged with paying the commission, and (3) that it was the procuring cause of the sale. [T]he duty assumed by the broker is to bring the minds of the buyer and seller to an agreement for a sale, and the price and terms on which it is to be made, and until that is done his right to commissions does not accrue To establish that a broker was the procuring cause of a transaction, the broker must establish that there was a direct and proximate link, as distinguished from one that is indirect and remote, between the bare introduction and the consummation"

(*Douglas Elliman, LLC v Silver*, 136 AD3d 658, 660 [2nd Dept 2016] [internal quotation marks and citation omitted]).

"A real estate broker who acts as the procuring cause on a commercial lease, and whose labors and expectation of compensation are expressly acknowledged by the parties to the lease, may recover its commission from either the lessor or lessee under the theory of implied contract of employment" (*Joseph P. Day Realty Corp. v Chera*, 308 AD2d 148, 149 [1st Dept 2003]). Here, plaintiffs' claims rest on a theory of implied contract.

Bauhouse

Plaintiffs argue that RN is required to pay Picken a commission because they brought RN a buyer, Bauhouse, ready, willing, and able to purchase the premises on terms acceptable to RN. Plaintiffs further assert that Picken is entitled to a commission because the essential terms of the deal with Bauhouse were agreed upon, including the purchase

price and a joint venture agreement. RN argues that plaintiffs did not have an implied brokerage contract with RN, and plaintiffs were not the procuring cause of the sale because the transaction with Bauhouse did not close. RN asserts that there was no meeting of the minds on all terms, no contract, and no closing which obligates RN to pay Picken a commission.

"Once a broker has procured a buyer ready, willing and able to purchase on the seller's terms, the broker has earned its commission, and the seller who frustrates the consummation of the transaction is liable nonetheless to the broker" (*E. Consol. Props. v Lucas*, 285 AD2d 421, 422 [1st Dept 2001] [citations omitted]). Thus, there is no requirement that the sale must close in order to earn a commission. Rather, "the general rule is that no broker's commission is earned until the buyer and seller have reached a meeting of the minds with respect to the essential terms of the sale. The exception to this rule ... is that the seller may not avoid payment of the commission when the transaction is terminated by his failure to perform a condition, express or implied, necessary for completion" (*Trylon Realty Corp. v Di Martini*, 34 NY2d 899, 900 [1974] [citations omitted]). A seller frustrating the transaction does not have to be "born of bad faith" (*id.*). However, there must be evidence that plaintiff's efforts were "plainly and evidently approaching success" (*Rosenhaus Real Estate, LLC v S.A.C. Capital Mgt., Inc.*, 121 AD3d 409, 410 [1st Dept 2014] [citations omitted]).

There is no dispute that plaintiffs procured Bauhouse to purchase the premises, and that Bauhouse made an offer, in writing. However, a "[m]ere agreement as to price on a proposed sale of real property does not constitute a meeting of the minds of vendor and vendee so as to entitle the real estate broker to commissions" (*Norma Reynolds Realty, Inc. v Miral*, 301 AD2d 364, 364 [1st Dept 2003] [internal quotation marks and citation]).

Here, RN has made a prima facie showing that there was no meeting of the minds of RN and Bauhouse. There was no document memorializing a meeting of the minds on terms and no written contract. Thus, the burden shifts to plaintiffs to raise an issue of fact.

In opposition, plaintiffs assert that the parties agreed upon the essential terms of the deal including price, down payment, development, joint venture, and Schwartz' right to an apartment. However, the February 21, 2013 e-mail correspondence between Putko and Schwartz, does not support plaintiffs' assertion. In fact, it is clear from this correspondence that there was not a meeting of the minds between the parties as to a joint venture with Schwartz. Specifically, Putko's email states, in relevant part, "I got what you want and I would pursue a similar formula if I were in your position. Having said that what [Beninati] presented ... included an option to be part of a life project ... an option to have a retail condo and penthouse ... . Again for reasons I don't understand but must respect I am not focused on this point. Please understand that and allow me the opportunity as you requested to sit down with [Markfield] for a short meeting" (NYSCEF 244, Putko 2/21/13 E-mail). Schwartz responded, in relevant part, "[t]his is not just about the highest and best offer. If that were the case I would have pushed everyone for that. I really want a piece of [life] project on the [tail] end" (*id.*, Schwartz 2/21/13 E-mail). This evidence contradicts any self-serving statements by Picken that there was a meeting of the minds. It is clear from this communication that being part of a "life project" was an important term for Schwartz and there was no agreement on this term.

As stated above, there is an exception to the meeting of the minds rule when the seller "frustrates the consummation of the transaction" (*E. Consol. Props.*, 285 AD2d at 422) and plaintiff's efforts were "plainly and evidently approaching success" (*Rosenhaus Real Estate, LLC*, 121 AD3d at 410). For example, in *Prime City Real Estate Co., Inc. v Hardy*, 256 AD2d 80, 81 [1st Dept 1998] a "defendants' subsequent receipt of an offer of a higher

price did not entitle them to avoid paying plaintiff's commission by refusing to negotiate the remaining details of the sale to [the real estate broker], thereby thwarting that transaction's natural progress."

Here, an issue of fact exists as whether plaintiffs' efforts were approaching success. Picken insists that "[t]he parties met at Markfield's office to review plans and discuss specifics of the development of the Premises and the joint venture. After that Stan Putko and I met with Markfield to discuss the amount of my commission. It was at this meeting that Markfield stated that we have a deal" (NYSCEF 227, Picken aff ¶35). Putko corroborates the meeting with Markfield on February 3, 2013 and its circumstances, to discuss the commission, at which Markfield allegedly said "We have a deal." (NYSCEF 237, Putko aff ¶13). Markfield admitted at his deposition saying to Picken "[w]e're going to have a deal," but challenges the circumstances; he insists that he was excited to see the model during Bauhouse's presentation resulting in an excited utterance, not a deal since he denies there were terms (NYSCEF 224, Markfield depo tr at 102:19-25). It is clear from the evidence presented that plaintiffs spent time negotiating this deal; what is not clear is how close plaintiffs were to successfully completing it. This is an issue for the fact finder (See *Prime City Real Estate Co., Inc.*, 256 AD2d 80 [after trial].)

WC 28/Centuar

RN asserts that plaintiffs were not the procuring cause of the transaction with WC 28, and thus, Picken is not entitled to a commission.

A "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] [citation omitted]). "This standard requires something beyond a broker's mere creation of an 'amicable atmosphere' or an

'amicable frame of mind' that might have led to the ultimate transaction. At the same time, a broker need not negotiate the transaction's final terms or be present at the closing" (*id.* at 99 [citation omitted]).

It is undisputed that Picken was involved in the early meetings in 2011 between RN and Centuar. It is also undisputed that negotiations between RN and Centuar resulted in Centuar submitting a letter of intent to purchase the premises in December 2011 (NYSCEF 234, Letter of Intent). It is also undisputed that this offer did not result in a sale at that time on the terms presented. Rather, the evidence shows that RN entertained other offers such as the one from Bauhouse. It is also undisputed that about one and half years after the submission of this letter of intent, in July 2013, WC 28, an entity created by Centuar, purchased the premises (*see* NYSCEF 190, Schwartz aff ¶ 21, NYSCEF 214, Schwartz depo. tr. at 19:21-21:8). Thus, the question is whether there is a direct and proximate link between Picken's involvement with the Centuar negotiations and the ultimate sale of the premises to WC 28.

"[W]here negotiations are unproductive and the parties in good faith withdraw, a subsequent renewal of negotiations does not entitle the broker to a commission as the broker was not the procuring cause of the transaction" (*RMB Props., LLC v Am. Realty Capital III, LLC*, 55 Misc 3d 1202[A], 2016 NY Slip Op 51874[U], *6-7 [Sup Ct, NY County 2016] [citations omitted], *affd sub nom RMB Properties v Am. Realty Capital III, LLC*, 148 AD3d 585 [1st Dept 2017]).

Here, the Centuar deal that plaintiffs were working on was terminated when RN did not accept Centuar's offer of $25 million. Plaintiffs was not involved and played no role in the 2013 negotiations between WC 28 and RN. In fact, Picken's own testimony supports that he had no role in the transaction as he learned about the sale in an industry paper (NYSCEF 212, Picken depo. tr. at 44:9-13; *see Jagarnauth v Massey Knakal Realty Servs.,*

Inc., 104 AD3d 564, 565 [1st Dept 2013]). There is no evidence that Picken was "the catalyst that brought about the final transaction" between these parties (*RMB Props., LLC*, 2016 NY Slip Op 51874[U], *7).

Further, there is no evidence that RN's rejection of the 2011 offer was in bad faith to deprive plaintiffs of a commission, especially in light of the fact that the premises sold for more than the original offer of $25 million (NYSCEF 216, Berger depo. tr. at 68:11-69:22; *see generally* NYSCEF 226, Picken Expert Report [basing commission analysis on sales price of $45 million). Thus, as a matter of law, RN is entitled to summary judgment on the breach of implied contract claim as it related to the WC 28 sale.

Unjust Enrichment

Picken claims that defendant was unjustly enriched at the expense of Picken, who is entitled to a broker's commission, and therefore, seeks $1,800,000, the amount of commission Picken should have been paid.

To adequately plead a claim for unjust enrichment, "the plaintiff must allege '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'" (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012] [citation omitted]).

In *Retail Advisors Inc. v SLG 625 Lessee LLC*, the plaintiff broker was not entitled to recover a brokerage commission under a theory of unjust enrichment because "its efforts were not successful at the time negotiations ceased" and because building owner and tenant "did not begin to speak again until one year after those negotiations reached an impasse" (138 AD3d 425, 425 [2016]). As stated above, plaintiffs' efforts in regard to the Centuar transaction were unsuccessful, and therefore, this claim fails. As to the Bauhouse transaction, this claim is duplicative of the breach of implied contract (*Panattoni Dev. Co.,*

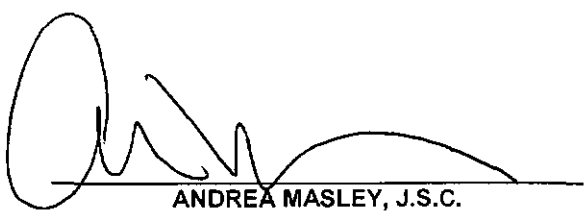
Inc. v Scout Fund 1-A, LP, 154 AD3d 555, 558 [1st Dept 2017] ["where plaintiff is essentially seeking enforcement of the bargain, the action should proceed under a contract theory").

All remaining arguments have been considered and do yield an alternative result.

Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted, in part, to the extent that plaintiff's claim for unjust enrichment is dismissed in its entirety and plaintiff's claim for breach of implied contract is dismissed to the extent that it involves the WC 28/Centuar transaction; and it is further

ORDERED that the parties are directed to discuss settlement and appear for a virtual pre-trial conference on October 21, 2020 at 3:30 p.m. via TEAMS at which time they will report to the court on the progress of their settlement discussions.



10/13/2020
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	☐ DENIED	X	GRANTED IN PART	☐	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT	☐	REFERENCE