

**Tower Brokerage, Inc. v East 16th St. Realty LLC**

2022 NY Slip Op 30778(U)

March 9, 2022

Supreme Court, New York County

Docket Number: Index No. 158683/2018

Judge: Melissa Crane

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. MELISSA CRANE PART 60M**

*Justice*

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**INDEX NO. 158683/2018**

TOWER BROKERAGE, INC.,  
  
Plaintiff,

**MOTION DATE 12/14/2021**

**MOTION SEQ. NO. 004**

- v -

EAST 16TH ST. REALTY LLC, SMITH AFFILIATES MGMT.  
CORP., ADAM SMITH, MILSMITH LLC, JOSHUA SMITH,  
PAOLO ITALIA, CRIS ITALIA, LORI KIMOWITZ, 239  
ENTERTAINMENT LLC D/B/A THE STAND NYC, ROBERT  
K. FUTTERMAN & ASSOCIATES LLC

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 103, 104, 105, 106, 107, 108, 109, 110, 111, 129, 130, 131, 132, 133, 134, 135, 137, 139, 140, 141, 142, 143, 145

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

Plaintiff Tower Brokerage seeks to recover a commission for procuring an agreement for an entity The Stand NYC (the Stand) to rent commercial space near Union Square from defendant East 16<sup>th</sup> Street Realty. Plaintiff has sued, among others, a competitor, Robert K Futterman & Associates, LLC (RFK). This is RFK’s motion to dismiss the second amended complaint. It is also the third motion to dismiss that RFK has had to interpose in this lawsuit.

Plaintiff alleges a scheme by which defendant RFK successfully wrested plaintiff’s client, the Stand, away from plaintiff. Plaintiff contends that it made an offer to the landlord from The Stand for the commercial space on February 16, 2018 (SAC [EDOC 95] ¶ 21) and again in writing on February 28, 2018 for \$37,000 a month (id. ¶ 23). However, the landlord replied that it was expecting to sign a lease with a different tenant, Pergola, whom RFK represented (id. ¶ 24). That transaction with Pergola subsequently closed (id. ¶ 25).

However, Pergola never moved into the premises. Instead, Pergola, through RKF, assigned its lease to plaintiff's client the Stand. Plaintiff alleges RKF took advantage of its position as the broker for the failed tenant, Pergola, in immediately knowing that the Landlords were still looking for a tenant (id. ¶ 31). RKF then misrepresented to the landlord that it was The Stand's broker, cut plaintiff out of the deal, and had the Landlord make the brokerage payment to RKF (id.). Plaintiff has alleged two causes of action against RKF: tortious interference with contract and conversion.

The court dismisses the cause of action for tortious interference with contract. The contract plaintiff alleges that RKF induced the breach of is a contract between the landlord and plaintiff. (see SAC ¶ 67 ["The Landlord breached its agreement with Tower Brokerage in failing to pay the commission earned by Tower Brokerage as a result of services provided resulting in the tenancy of 239 Entertainment at the Premises."]). However, as plaintiff's own allegations reveal, there never was a contract between the landlord and plaintiff. Rather, the landlord rejected plaintiff's offer (see SAC ¶¶ 24-25). There is perhaps a claim that RKF interfered with plaintiff's relationship or contract **with its client the Stand** through dishonesty, but that is not what plaintiff has alleged. Accordingly, the court dismisses plaintiff's claim for tortious interference with contract against RKF.

The conversion claim is dismissed because plaintiff has done nothing in its memorandum of law to counter defendant's legal argument that a business opportunity cannot be converted (see *City of New York v Shellbank Rest Corp.*, 169 AD3d 581, 583 (1<sup>st</sup> Dep't 2019), see also *Sun Gold Corp v Stillman*, 95 AD3d 668, 670 [1<sup>st</sup> Dep't 2012 [conversion of future business interests not actionable]).

Plaintiff's claims for punitive damages, to the extent not already dismissed on prior motions, are dismissed with prejudice. "Here, the complaint fails to show that plaintiff is entitled to punitive damages, as it does not allege that defendants' actions were aimed at the public or "evinc[ed] a high degree of moral turpitude and demonstrat[ed] such wanton dishonesty as to imply a criminal indifference to civil obligations" (*Linkable Networks, Inc. v MasterCard Inc et al*, 184 AD3d 418, 419 [1<sup>st</sup> Dep't 2020]).

Plaintiff asks again for leave to replead for what would be its fourth attempt to state a claim against RFK. Because the allegations as to RFK's actions are troubling, the court will allow plaintiff one last attempt. However, should plaintiff again fail to articulate a proper claim, the court may award RFK its attorney's fees on a subsequent motion to dismiss.

The court renders this warning in the context of plaintiff's overall behavior. Throughout this litigation, plaintiff has demonstrated disregard for the court's and its adversary's time, as well as a disrespect for standards and goals under the Chief Judge's Excellence Initiative. This case is four years old. On January 1, 2022, plaintiff's counsel moved to withdraw. This slowed down the case, as it turns out, for no reason. To the surprise of the court, the night before oral argument on the motion to withdraw, plaintiff's counsel withdrew its motion to withdraw, ostensibly because part of the case was settling. That settlement has not materialized. In addition, the night before oral argument on this motion, plaintiff's counsel advised the court he could not appear because of jury duty, a circumstance he assuredly knew about earlier. Finally, this is plaintiff's third attempt at stating a claim. However, plaintiff's papers evinced a lack of legal research and any real attempt to consider the actual elements of the causes of action plaintiff put forth. Plaintiff can have ten business days from the efiled date of this decision to interpose another amended complaint.

Accordingly, it is

ORDERED that RFK's motion to dismiss is granted.

  
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3/9/2022  
DATE

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MELISSA CRANE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE