Highcap Group LLC v Jam Equities, LLC
2022 NY Slip Op 30933(U)
March 21, 2022
Supreme Court, New York County
Docket Number: Index No. 655120/2017
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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HIGHCAP GROUP LLC and CORE GROUP MARKETING, LLC,

Plaintiffs,

- v -

JAM EQUITIES, LLC, JAVIER MARTINEZ, 636-640 WEST 158 HOLDINGS LLC, and 638 WEST 158 HOLDINGS LLC,

Defendants.

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INDEX NO. 655120/2017

MOTION DATE

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 89, 90, 91, 92, 94

were read on this motion to/for AMEND CAPTION/PLEADINGS.

In motion sequence number 002, plaintiffs Highcap Group LLC (Highcap) and CORE Group Marketing LLC (CORE) request leave to file and serve an amended and supplemental complaint on defendants JAM Equities, LLC (JAM), Javier Martinez, 636-640 West 158 Holdings LLC (636-640 Holdings), and 638 West 158 Holdings LLC (638 Holdings) (collectively, Original Defendants). Plaintiffs also seek leave to (i) add Seth Weissman, Urban Standard Development LLC (Urban Standard), 636 West 158 Street Opportunity, LLC (636 Opportunity), 640 West 158 Street Opportunity, LLC (640 Opportunity), XYZ Corporation and John Doe, fictitious and unknown to plaintiffs, the entities that purchased 638 West 158 Street (XYZ Corp./John Doe) (collectively, Proposed Defendants) and (ii) assert claims for a declaratory judgment (alter ego liability), anticipatory breach of the May 2016 Commission Agreement, breach of the March 2016 Commission Agreement, quantum merit, unjust enrichment, breach of covenant of good faith and fair dealing, and attorneys' fees against the Original and

Proposed Defendants. Plaintiffs' motion initially sought leave to add E Squared LLC; however, they withdrew this request. (NYSCEF Doc. No. [NYSCEF] 92, Plaintiffs' Reply Brief at n 2.)

Background

This dispute stems from the nonpayment of a commission fee allegedly owed to plaintiffs in the amount of $500,000 pursuant to a brokerage agreement entered into by plaintiff Highcap and defendant Martinez. (*See* NYSCEF 52, Proposed Amended Complaint [PAC] ¶ 38.) The original February 2016 brokerage agreement concerned defendants' purchase of three contiguous off-market properties, 636 West 158th Street (636 Property), 638 West 158th Street (638 Property), and 640 West 158th Street (640 Property) (collectively, Properties). (*Id.* ¶¶ 28, 38.) The 636 and 640 Properties were owned by the estate of Beverly Carter and the 638 Property was owned by the Keelings family. (NYSCEF 63, Residential Contract for Sale; NYSCEF 52, PAC ¶¶ 41-42.)

In 2015, plaintiffs' real estate broker, nonparty Guy Vardi, identified the opportunity to acquire the Properties and reached out to CORE's real estate broker, nonparty Limor Nesher. (NYSCEF 52, PAC ¶¶ 28, 30.) At that time, nonparties Eugene Zlatopolsky and Elliot Bogod, through the nonparty entity 636 & 640 West 158th Street, LLC, were in contract to purchase the Properties with the plan of "flipping [them] to a developer." (*Id.* ¶ 29; NYSCEF 64, Operating Agreement for 636 & 640 West 158th Street, LLC.)

In January 2016, plaintiffs presented Martinez with the opportunity to purchase the Properties through a reassignment of 636 & 640 West 158th Street, LLC's sales contract by assigning 100% of 636 & 640 West 158th Street, LLC's membership interest to 636-640 Holdings. (*See* NYSCEF 52, PAC ¶ 31; NYSCEF 65, Assignment

Agreement.) Martinez, the owner of defendants JAM, 636-640 Holdings, and 638 Holdings expressed interested in acquiring the Properties. (NYSCEF 52, PAC ¶¶ 9, 11, 13, 32, 34.) Plaintiffs allege that, "as disclosed agents for the original seller (i.e., Zlatopolsky) and purchaser (i.e. Martinez/Weissman)[,] [plaintiffs] worked for the next year on behalf of Martinez/Weissman toward the acquisition of the Properties . . . with title to be taken by or through an entity they created." (*Id.* ¶ 34.) In connection with the acquisition of the Properties, plaintiffs negotiated a commission fee in the amount of $500,000 (Commission Fee) for their brokerage services, which was memorialized on February 2, 2016 (Commission Agreement). (*Id.* ¶¶ 36, 38.)

In late February 2016, Zlatopolsky's sales contract for the 638 Property fell through; plaintiffs immediately contacted the owners of the 638 Property on behalf of Martinez to reengage negotiations for its direct sale to Martinez. (*Id.* ¶¶ 39-41.) Accordingly, in March 2016, Martinez and Highcap amended their Commission Agreement to reflect this change (March 2016 Commission Agreement) "to incorporate the fact that reassignment of the contracts of sale for the Properties now only related to the [636 and 640 Properties], as the Plaintiffs were negotiating directly with the Keelings for Martinez/Weissman's direct purchase of the 638 Property." (*Id.* ¶ 43.) The March 2016 Commission Agreement provides:

> "[i]n connection with the proposed reassignment, you agree to pay us, and we agree to accept, as compensation for our services as brokers or otherwise, Five hundred thousand ($500,000), if a contract of sale, upon terms and conditions acceptable to both parties, has been executed by you, 'JAM Equities LLC' and/or its affiliates and assigns as the buyer and Eugene Zlatopolsky and/or his affiliates and assigns as the seller. This commission will be split on a 50/50 basis with CORE Marketing."

(NYSCEF 75, March 2016 Commission Agreement.)

Additionally, pursuant to the March 2016 Commission Agreement, (i) defendants must notify Highcap of the date, time and place of closing forty-eight hours prior to closing; (ii) the Commission Fee is not due if the transaction failed to close, except by Martinez's willful default; and (iii) attorneys' fees will be awarded to the prevailing party in the event of a dispute. (*Id.*) The March 2016 Commission Agreement was executed by Martinez and Christen Portelli, Highcap's Managing Principal, on behalf of Highcap.

Martinez allegedly expressed concerns regarding the March 2016 Commission Agreement; "specifically that the Properties, now having different owners, would not close together," so his counsel sent plaintiffs a draft of a third commission agreement. (NYSCEF 52, PAC ¶ 48; *see also* NYSCEF 78, May 2016 Draft Commission Agreement.) This draft (May 2016 Draft Commission Agreement) states that

> "the Commission [Fee] due to Plaintiffs was to be remitted, not upon reassignment of the contract for the [636 and 640 Properties] but upon the 'acquisition, either directly or indirectly, of the Properties', with such payment to be made 'at the time of the closing on the later of the two properties to close.'"

(NYSCEF 78, May 2016 Draft Commission Agreement; *see also* NYSCEF 52, PAC ¶ 49.)

As in the March 2016 Commission Agreement, (i) defendants must notify Highcap of the date, time and place of closing forty-eight hours prior to closing; (ii) the Commission Fee is not due if the transaction failed to close, except by Martinez's willful default; and (iii) attorneys' fees will be awarded to the prevailing parties in the event of a dispute. (NYSCEF 78, May 2016 Draft Commission Agreement; NYSCEF 52, PAC ¶¶ 50-52.) Portelli, on behalf of Highcap, signed the May 2016 Draft Commission Agreement and sent it back to Martinez. (NYSCEF 78, May 2016 Draft Commission Agreement; NYSCEF 52, PAC ¶ 53.)

On May 17, 2016, 638 Holdings entered into a sales contract for the 638 Property. (NYSCEF 52, PAC ¶ 54; NYSCEF 67, Residential Contract of Sale.) However, there was a question of fee ownership as to the 636 and 640 Properties, which not only delayed the closings of those properties, but also the 638 Property, as "Martinez/Weissman indicated to [p]laintiffs that they did not want to close on the [638 Property] without closing on the [636 and 640 Properties], in order to preserve the assemblage." (NYSCEF 52, PAC ¶¶ 55-56.) Plaintiffs allege that Martinez was aware of the issue with the owner of the two properties from the outset. (*Id.* ¶ 55.) According to plaintiffs, in late 2016, "it became clear that the sale of the [636 and 640 Properties] . . . would no longer transpire." (*Id.* ¶ 58.) Even then, plaintiffs allege, they "continued to act in good faith . . . even arranging a walkthrough of the [638 Property] in August 2017." (*Id.* ¶ 59.) However, Martinez and proposed defendant Weissman halted all communications with plaintiffs in August 2017. (*Id.* ¶ 60.)

On August 1, 2017, plaintiffs filed their summons and complaint. Plaintiffs' first cause of action against 636-640 Holdings and 638 Holdings sought a declaration "adjudging and declaring that upon the closing of the sale of [the Properties], [636-640 Holdings and 638 Holdings] owe, jointly and severally, the sum of $500,000 to [plaintiffs]" on the basis that 636-640 Holdings and 638 Holdings "have anticipatorily repudiated their obligation to pay [plaintiffs] a $500,000 brokerage commission at closing pursuant to the terms of the [May 2016 Draft] Commission Agreement." (NYSCEF 51, Complaint ¶¶ 22, 24.)

Plaintiffs' second cause of action, against all Original Defendants, sought a declaration that "upon confirmation of any [of the Original D]efendant's right to purchase [the Properties], [Original Defendants], jointly and severally, owe a brokerage

commission to [plaintiffs], based on an implied contract, in an amount to be determined but at least $500,000," "because these brokers were the procuring cause of the sale and were working for all [Original D]efendants." (*Id.* ¶¶ 28, 32.)

Plaintiff's third cause of action, against all Original Defendants, sought a declaration "that upon confirmation of any defendant's right to purchase [the Properties], [Original D]efendants, jointly and severally, owe compensation to [plaintiffs], based on unjust enrichment, in an amount to be determined, but at least $500,000", if there is no "explicit or implied contract to pay a commission." (*Id.* ¶¶ 37, 39.)

The Original Defendants filed their answer with counterclaims in October 2017. (NYSCEF 11, Answer.) The parties continued to engage in discovery. (*See, e.g.*, NYSCEF 41, 42, 44, 45, 46, Stipulations.) Plaintiffs allege that during discovery, they uncovered additional parties, not parties to the commission agreements nor known at the time of negotiations, which necessitated amending their complaint. (NYSCEF 50, Halligan aff ¶ 4; *see also* NYSCEF 54, Defendants' Responses to Interrogatories.) Moreover, the 636 and 640 Properties closed on October 9, 2019 (NYSCEF 52, PAC ¶ 63), which plaintiffs assert necessitated new causes of action. To plaintiffs' knowledge, the 638 Property is in contract with another entity that plaintiffs cannot identify. (*Id.* ¶ 64.)

Plaintiffs allege that, while this action was pending and discovery ensuing, Martinez/Weissman created new entities, namely proposed defendants 636 Opportunity and 640 Opportunity, to "surreptitiously consummate the assemblage transaction [p]laintiffs' presented to them over three years ago." (*Id.* ¶ 61.) The 636 and 640 Properties were purchased by 636 and 640 Opportunity, respectively. (*See* NYSCEF 76, Executor's Deeds.)

On May 27, 2020, the parties agreed that the plaintiffs would move to amend the complaint by June 9, 2020. (NYSCEF 48, Compliance Conference Order.) Accordingly, plaintiffs filed their motion for leave to amend. The PAC

> "assert[s] the followings causes of action against [Original D]efendants and the Proposed Defendants: (1) declaratory judgment (alter ego liability) (First Cause of Action); (2) anticipatory breach of contract - May [2016 Draft] Commission Agreement (Second Cause of Action); (3) breach of contract - March [2016] Commission Agreement (Third Cause of Action); (4) quantum meruit (Fourth Cause of Action); (5) unjust enrichment (procuring cause) (Fifth Cause of Action); (6) breach of covenant of good faith and fair dealing (Sixth Cause of Action); and (7) attorneys' fees (Seventh Cause of Action)."

(NYSCEF 50, Halligan aff ¶ 20; *see also* NYSCEF 52, PAC at 12-19, ¶¶ 1-41[1].)

Legal Standard

Pursuant to CPLR 3025(b), "[a] party may amend his or her pleading or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties." Generally, leave to amend a pleading is freely granted absent prejudice or surprise resulting from any delay in asserting the proffered claim. (*Fahey v Ontario County*, 44 NY2d 934, 935 [1978].) The party opposing a motion to amend a pleading must show how it would be significantly prejudiced or unfairly surprised in the "preparation of its case or prevented from taking some measure to support its position." (*Spitzer v Schussel,* 48 AD3d 233, 233 [1st Dept 2008], citing *Loomis v Vietta Corinno Constr. Corp.*, 54 NY2d 18, 24 [1981].)

However, leave to amend a complaint should be denied if the proposed complaint could not survive a motion to dismiss. "A proposed amended complaint that would be subject to dismissal *as a matter of law* is, by definition, 'palpably insufficient or

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[1] In the PAC, when pleading the specific causes of action, plaintiffs enumerate the paragraphs starting at 1 again. Thus, the court includes the page number to avoid confusion.

clearly devoid of merit' and thus should not be permitted under CPLR 3025." (*Olam Corp. v Thayer*, 2021 NY Slip Op 30345[U], *3-4 [Sup Ct, NY County 2021] [citation omitted].) "This approach is consistent with the statutory mandate that leave to amend 'shall be freely given upon such terms as may be just ...' (CPLR 3025). The point of the statute is that factual allegations and claims are not locked in stone and may change as the case progresses. It does not, however, sanction the addition of causes of action that fail to state viable claims for relief as a matter of law." (*Id.* at n 2.)

Discussion

Defendants oppose plaintiffs' motion on the grounds that (i) it would require defendants to re-depose plaintiffs, resulting in delay and undue prejudice; (ii) plaintiffs fail to supply an affidavit from someone with personal knowledge of the facts of the dispute; and (iii) plaintiffs fail to state claims for alter ego liability, anticipatory repudiation, breach of contract, quasi-contract, breach of good faith and fair dealing.

<u>Failure to Supply an Affidavit from Someone with Personal Knowledge</u>

Defendants contend that plaintiffs' motion to amend should be denied because this motion relies solely on CORE's counsel's affirmation. (*See* NYSCEF 50, Halligan aff.) The PAC is based on facts exposed during discovery, a process in which counsel actively participated. Counsel's affirmation is sufficient to support the motion to amend as the facts detailed in her affidavit were based on her personal knowledge.

Nevertheless, "a [p]laintiff's failure to submit an affidavit of merit in support of its motion to amend is not fatal to the motion." (*Delta Dallas Alpha Corp. v S. St. Seaport LP*, 127 AD3d 419, 420 [1st Dept 2015], citing *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010] ["Contrary to the corporate defendant's argument, the proposed amendment was supported by a sufficient showing of merit through the

submission of an affirmation by counsel, along with a transcript of relevant deposition testimony."].) On a motion for leave to amend a pleading, the moving party need not support its allegations with evidence or an affidavit of merit, and for that reason, defendants' arguments fail. (*St. Nicholas W. 126 L.P. v Republic Inv. Co.,* 193 AD3d 488, 488-489 [1st Dept 2021] [citations omitted] ["At this stage, plaintiff was not required to support its allegations with evidence or an affidavit of merit."].)

Although defendants cite to numerous First Department cases requiring an affidavit of merits by a person having personal knowledge of the facts (*see, e.g.*, *Beekman v Sylvan Lawrence, Inc*., 111 AD2d 658, 659 [1st Dept 1985]), the law has evolved over the years. In *St. Nicholas*, 193 AD3d 488, the First Department cited a variety of more recent cases which dispensed of a required affidavit of merit. In particular, in *Hickey v Steven E. Kaufman, P.C.*, the First Department noted that "[g]iven the Legislature's 2005 amendment of CPLR 3211(e), plaintiff was not required to support his motion to amend the complaint with an affidavit of merit." (156 AD3d 436, 436 [1st Dept 2017] [citations omitted].) This change makes sense given that "leave to amend a complaint should be denied if the proposed complaint could not survive a motion to dismiss . . . . A proposed amended complaint that would be subject to dismissal *as a matter of law* is, by definition, 'palpably insufficient or clearly devoid of merit' and thus should not be permitted under CPLR 3025." (*Olam*, 2021 NY Slip Op 30345[U], *3-4 [citation omitted].)

Undue Prejudice

Significant prejudice exists when the opposing party has been "hindered in the preparation of his case or prevented from taking some measure in support of [its] position." (*Jacobson v McNeil Consumer & Specialty Pharms.*, 68 AD3d 652, 654 [1st

Dept 2009] [internal quotation marks and citation omitted].) "[M]ere lateness . . . is not a barrier to amendment. Lateness must be coupled with significant prejudice to [the non-moving party]." (*Seda v New York City Hous. Auth.*, 181 AD2d 469, 470 [1st Dept 1992] [citation omitted], *lv denied* 80 NY2d 759 [1992].)

Thus, defendants must show that the amendments would hinder their preparation of the case or pursuit of their position, which defendants have utterly failed to do. Defendants argue that the proposed amendments would require them to depose plaintiffs again and request additional documents relating to the new causes of actions. Need for additional discovery does not constitute undue prejudice to deny a motion for leave to amend. (*Jacobson*, 68 AD3d at 654 [citation omitted].) Defendants also attempt to establish prejudice by arguing that the proposed amendments would create more delay of this three-year litigation.[2] In any event, absent prejudice, "additional discovery, extended litigation, and increased liability exposure does not result in prejudice warranting denial of plaintiff's motion." (*St. Nicholas*, 193 AD3d at 488-489, citing *Jacobson*, 68 AD3d at 655.)

<u>Amendments</u>

As stated above, the party moving for leave to amend must establish that the amendments are "not palpably insufficient or clearly devoid of merit." (*Olam Corp. v Thayer*, 2021 NY Slip Op 30345[U], *3, citing *MBIA Ins. Corp.*, 74 AD3d at 500.) Failure to state a cause of action warrants denial of the motion to amend. (*David & Davis, P.C.*

[2] Between the commencement of this action and the plaintiffs' filing of this motion, the parties engaged in discovery and motion practice. This is not a situation where there was no movement by plaintiffs. In fact, Halligan attests that the delay in bringing the motion can be attributed to defendants dragging out document production. (NYSCEF 50, Halligan aff ¶ 6.) Regardless, defendants cannot show prejudice to warrant denial of plaintiffs' motion on this reason.

v Morson, 286 AD2d 584, 585 [1st Dept 2001] [citations omitted].) In other words, “[w]hen the non-moving party opposes amendment…, the moving party should be prepared in its reply brief to defend the proposed pleading as it were opposing a motion to dismiss.” (*Olam*, 2021 NY Slip Op 30345[U], *4.)

Declaratory Judgment (Alter Ego Liability)

> “The concept of piercing the corporate veil is a limitation on the accepted principles that a corporation exists independently of its owners, as a separate legal entity, that the owners are normally not liable for the debts of the corporation, and that it is perfectly legal to incorporate for the express purpose of limiting the liability of the corporate owners. The doctrine of piercing the corporate veil is typically employed by a third party seeking to go behind the corporate existence in order to circumvent the limited liability of the owners and to hold them liable for some underlying corporate obligation. The concept is equitable in nature and assumes that the corporation itself is liable for the obligation sought to be imposed. Thus, an attempt of a third party to pierce the corporate veil does not constitute a cause of action independent of that against the corporation; rather it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners.”

(*Morris v State Dept. of Taxation & Fin.*, 82 NY2d 135, 140-141 [1993] [citations omitted].)

Under New York law, there are several theories that “justify piercing the veil, including whether the corporation was operated as a ‘sham’ for the personal activities of the shareholder, whether one corporation acted as the ‘agent’ of another, or . . . a corporation was the alter ego of its shareholder.” (Stephen B. Presser, *Piercing the Corporate Veil*, *New York - Introduction* § 2:33 at 610-615 [2019].) To pierce the corporate veil, plaintiff must plead “that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury.” (*Sheridan Broadcasting Corp. v Small*, 19 AD3d 331, 332 [1st Dept 2005] [citation omitted].) Plaintiff’s burden is heavy and “mere conclusory alter ego allegations

are insufficient to survive a motion to dismiss." (*226 Fifth Ave. LLC v SBF Intl., Inc.*, 2012 NY Slip Op 33491[U], *11-12 [Sup Ct, NY County 2012] [citations omitted].) The question of control is highly fact-dependent and in determining that question,

> "courts have considered factors such as the disregard of corporate formalities; inadequate capitalization; intermingling of funds; overlap in ownership, officers, directors and personnel; common office space or telephone numbers; the degree of discretion demonstrated by the alleged dominated corporation; whether the corporations are treated as independent profit centers; and the payment or guarantee of the corporation's debts by the dominating entity. . . [n]o one factor is dispositive."

(*Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 174 [1st Dept 2013]), citing *TNS Holdings v MKL Sec. Corp.*, 243 AD2d 297, 300, *revd on other grounds*, 92 NY2D 891 [1998].)

Here, plaintiffs seek leave to add a declaratory judgment claim declaring that "all Defendants[3] shall bear joint and several liability for the claims alleged against them", (NYSCEF 52, PAC at 13, ¶ 5) because "the Entity Defendants[4] were the alter egos of Martinez and/or Weissman," "operate out of the same corporate offices and do not observe the requisite corporate formalities so as to preserve the individual identities of each of the Entity Defendants," and "are inadequately capitalized to satisfy the Plaintiffs' claims against any one of them alone." (*Id.* at 13, ¶¶ 2-4.) In the PAC, plaintiffs repeatedly allege that they are owed a commission pursuant to the Commission Agreement(s). They allege that Martinez and Weissman created the Entity Defendants in an attempt to thwart plaintiffs' recovery of the Commission Fee.

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[3] The term "all Defendants," as used here, constitutes the Original Defendants (Martinez, JAM, 636-640 Holdings, and 638 Holdings) and the Proposed Defendants (Weissman, Urban Standard, 636 Opportunity, 640 Opportunity XYZ Corp./John Doe). (NYSCEF 50, Halligan aff ¶ 20.)

[4] For clarity, plaintiffs have defined the Entity Defendants as JAM, 636-640 Holdings, 638 Holdings, Urban Standard, 636 Opportunity, 640 Opportunity, and XYZ Corp./John Doe. (NYSCEF 52, PAC ¶ 25.)

When a party seeks to pierce the corporate veil, typically, it seeks to hold a corporation's shareholders or owners personally liable for the corporation's liabilities when a wrongdoing was committed by the corporation as a result of the dominate control of the corporation by the shareholders/owners. (*See Morris*, 82 NY2d at 140-141.) Simply, the shareholders/owners must use their domination of the corporation to commit a wrong injuring the plaintiff. (*Id.*) There is no corporate liability to pay the agreed to Commission Fee as Martinez, in his individual capacity, signed the March 2016 Commission Agreement. This is clear from the face of the Agreement.

The March 2016 Commission Agreement, entered into between Martinez and Portelli, on behalf of Highcap, governs the payment of the Commission Fee, as discussed in more detail below. This contractual agreement does not support plaintiffs' request that "all Defendants bear joint and several liability for the claims alleged against them" under an alter ego theory as pled in the PAC. (NYSCEF 52, PAC at 13, ¶¶ 2, 5.) The March 2016 Commission Agreement provides:

> "[i]n connection with the proposed reassignment, you agree to pay us, and we agree to accept, as compensation for our services as brokers or otherwise, Five hundred thousand ($500,000), if a contract of sale, upon terms and conditions acceptable to both parties, has been executed by you, 'JAM Equities LLC' and/or its affiliates and assigns as the buyer and Eugene Zlatopolsky and/or his affiliates and assigns as the seller. This commission will be split on a 50/50 basis with CORE Marketing".

(NYSCEF 75, March 2016 Commission Agreement.)

Despite plaintiffs' counsel asserting the contrary,[5] it cannot be any clearer that Martinez, individually, executed this Agreement, and he is not a corporation for which

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[5] In her attorney affirmation, Halligan states that "Martinez entered into a series of commission agreements concerning the Property with Plaintiffs in February, March and May 2016, on behalf of himself and/or the defendant JAM Equities, LLC ("JAM") and/or the Holdings Defendants." (NYSCEF 50, Halligan aff ¶ 11.) There is no evidence to support this conclusory statement.

the alter ego theory of liability can apply based on the allegations contained in the PAC. The March 2016 Commission Agreement addresses Martinez directly—it bears the greeting "Dear Javier" and the signature line below Martinez's signature bears only his name. (*Id.*) Martinez alone agreed to the March 2016 Commission Agreement if certain conditions were met; nowhere does this Agreement bind any other entity or person to the obligation. Thus, Martinez, individually, owes the obligation to pay the Commission Fee to Highcap under terms the agreement.[6]

Although unclear, plaintiffs appear to attempt to plead a theory of "reverse-piercing" to reach the assets of the Entity Defendants. (*In re Platinum-Beechwood Litigation*, 427 F Supp 3d 395, 445 [SD NY 2019] [citation omitted] [stating that New York state law recognizes reverse piercing, which seeks to hold a corporation accountable for actions of its shareholders].) In other words, plaintiffs are seeking to extend Martinez's liability under the March 2016 Commission Agreement to the Entity Defendants. However, the court cannot conclude that from plaintiffs' PAC which inadequately pleads a "reverse-piercing" or from their briefs, which fail to provide the court with applicable law supporting this theory.[7]

Finally, even if the alter theory was properly asserted by plaintiffs, the allegations to support this claim are conclusory. Merely alleging that the Entity Defendants "operate out of the same corporate offices and do not observe the requisite corporate formalities so as to preserve the individual identities of each of the Entity Defendants," and "are inadequately capitalized to satisfy the Plaintiffs' claims against any one of them

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[6] Plaintiffs concede this point in their PAC as well. (NYSCEF 52, PAC ¶ 47 ["Highcap and Martinez executed the revised Commission Agreement on or about March 10, 2016."]; *see also id.* ¶ 44 ["'if a contract of sale, upon terms and conditions acceptable to both parties, has been executed by you [Martinez],'"].)

alone." (NYSCEF 52, PAC at 13, ¶¶ 2-4) alone is not sufficient. (*226 Fifth Ave. LLC,* 2012 NY Slip Op 33491[U], *11-12 ["mere conclusory alter ego allegations are insufficient to survive a motion to dismiss."].)

For all the reasons stated above, plaintiffs fail to state a viable claim of alter ego liability. Plaintiffs' motion to amend to assert a proposed declaratory judgment claim against Original and Proposed Defendants is denied.

Anticipatory Breach of May 2016 Draft Commission Agreement

Plaintiffs seek leave of court to add a claim for anticipatory breach of contract for the May 2016 Draft Commission Agreement. Plaintiffs argue that they fully performed under the May 2016 Draft Commission Agreement after they coordinated and successfully consummated the sale of the Properties to defendants. Plaintiffs allege that, pursuant to the May 2016 Draft Commission Agreement, the Commission Fee was due at "the closing on the later of the two properties to close." (NYSCEF 53, PAC ¶ 10.) According to plaintiffs, the defendants anticipatorily breached their obligation to pay plaintiffs their Commission Fee when defendants "shut out the plaintiffs in connection with the closing." (*Id.* ¶ 12.)

To state a breach of contract claim, plaintiff must show the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of the contract, and damages. (*Harris v Seward Park Housing Corp.*, 79 AD3d 425, 426 [1st Dept 2010].) Typically, a contract is not breached until the time set for performance has expired. (*Rachmani Corp. v 9 E. 96th St. Apt. Corp.*, 211 AD2d 262, 265 [1st Dept 1995].) However, under the doctrine of anticipatory breach, "[w]here there has been an anticipatory breach of a contract by one party, the other party may treat the entire contract as broken and may sue immediately for the breach." (*Id.* at 266.) The purpose

of the doctrine, "[o]nce a party has indicated an unequivocal intent to forego performance of his obligations under a contract," is to allow the nonbreaching party to commence litigation before actual breach. (*Id.* at 266-267.) However, there is no anticipatory breach of contract where no contract is in existence.

Plaintiffs fail to show the existence of valid and binding May 2016 Draft Commission Agreement, and instead, allege in a conclusory fashion that the "May Commission Agreement constitutes a valid and binding contract between [p]laintiffs and [d]efendants." (NYSCEF 53, PAC at 14, ¶ 7.) Plaintiffs rely on *Kolchins v Evolution Markets, Inc.,* 128 AD3d 47 (1st Dept 2015), for the proposition that an agreement is "binding even if a party had a change of heart between the time of agreeing to its terms and the time those terms were reduced to writing." (NYSCEF 92, Plaintiffs' Reply Brief at 19.)

In *Kolchins*, there was a dispute as to whether the parties' emails and other correspondence constituted a binding offer and acceptance of an extension of plaintiff's employment agreement such that, in the absence of a formal written contract, the parties created a legally enforceable contract. (128 AD3d at 49-50.) The First Department held that there was an enforceable agreement as the parties' communications demonstrated an offer by the party against whom enforcement was sought with all material terms of the contract stated, a valid acceptance by the plaintiff, and no evidence that the parties would not be bound until the employment agreement had been reduced to writing. (*See id.* at 59-61 [finding that "all of the terms essential to the agreement were specified in the June 15, 2012 email intended to be an offer, and which plaintiff accepted].) In addition to offer and acceptance, the court stated that

there also must be mutual assent and an intent to be bound. (*Id.* at 59.) "That meeting of the minds must include agreement on all essential terms." (*Id.*)

The May 2016 Draft Commission Agreement states that it is a "Commission Agreement regarding the acquisition of 636 & 640 West 168 Street, New York NY and 638 West 158 Street. New York. NY (the 'Properties')." (NYSCEF 78, May 2016 Draft Commission Agreement.) It goes on to state that "[i]n connection with the proposed acquisitions, you agree to pay us, and we agree to accept, as compensation for our services as brokers or otherwise, Five hundred thousand ($500,000), upon the closing of both Properties." (*Id.*) Thus, on its face, the Draft Agreement provides for a commission when both 636 & 640 West 158 Street, New York, NY and 638 West 158 Street, New York, NY close. The May 2016 Draft Agreement, however, was only signed by Portelli, on behalf of Highcap. The email correspondence between Portelli, Vardi, and Lisa Gabler, Esq. (real estate counsel for Martinez and his affiliates, including JAM), (NYSCEF 77, Gabler aff ¶ 1) does not show email consent to plaintiffs' proposal. Rather, unlike in *Kolchins*, there was never a meeting of the minds expressed in the emails that the parties agreed to treat the properties separately and not as an assemblage. (*See* NYSCEF 78-81, Emails.)

On May 11, 2016 [9:42AM], Vardi sent a "revised" Commission Agreement to Gabler executed by Portelli, on behalf of Highcap. (NYSCEF 78, Email with May 2016 Commission Agreement.) At 9:50AM, Gabler responded "please send me an e-mail stating that you understand that the commission is only due and payable on the assemblage. Meaning if we only close one but not the other so long as it wasn't due to our own willful misconduct." (NYSCEF 79, Gabler Email [May 11, 2016 9:50AM].) At 10:37AM, Vardi replied "no commission will be due if there is no closing on 636-640

West 158th Street baring willful default by Purchaser." (NYSCEF 80, Vardi Email [May 11, 2016 10:37AM].) At 12:17PM, Portelli responded "[t]he commission has been discussed with all parties and confirmed that the deals shall be treated separately as far as commission, not as an assemblage. Please see attached Commission Agreement executed in March which states the $500,000 payment relates to 636 & 640 West 158th Street (Keeling's piece excluded)." (NYSCEF 81, Portelli Email [May 11, 2016 12:17PM].) This alleged agreement regarding a separate commission for both 636 & 640 West 158 Street and 638 West 158 Street is not what the May 2016 Draft Commission Agreement provides for. Thus, the May 2016 Draft Agreement is not binding on defendants who did not execute the agreement nor agree via email.

Further, as the documentary evidence shows, 636 & 640 West 158 Street were sold to 636 and 640 Opportunity. (NYSCEF 83, Deeds; NYSCEF 52, PAC ¶ 63.) Thus, even if the court found the May 2016 Draft Commission Agreement binding, there would be an actual breach, not an anticipatory breach.

In light of the foregoing, the court denies plaintiffs' motion for leave to amend to add a claim for anticipatory breach of the May 2016 Commission Agreement.

Breach of March 2016 Commission Agreement

In the alternative, should plaintiffs' claim of anticipatory breach be denied, plaintiffs assert a claim for breach of the March 2016 Commission Agreement against the Original and Proposed Defendants. The March 2016 Commission Agreement provides:

> "[i]n connection with the proposed reassignment, you agree to pay us, and we agree to accept, as compensation for our services as brokers or otherwise, Five hundred thousand ($500,000), *if a contract of sale, upon terms and conditions acceptable to both parties, has been executed by you, 'JAM Equities LLC' and/or its affiliates and assigns as the buyer and Eugene Zlatopolsky and/or his affiliates*

> *and assigns as the seller*. This commission will be split on a 50/50 basis with CORE Marketing".

(NYSCEF 75, March 2016 Commission Agreement [emphasis added].)

The March 2016 Commission Agreement also provides that "[i]f, after execution and delivery of a contract the transaction shall fail to close for any reason whatsoever, except by your willful default, no compensation shall due or payable to us." Plaintiffs allege they have fulfilled their obligations, namely that they provided brokerage services in introducing and facilitating the sale of 636 and 640 Properties to defendants, and defendants have breached their obligation to pay the Commission Fee. (NYSCEF 52, PAC ¶¶ 18, 21.)

Generally, a real estate broker is "entitled to a commission when it produces a buyer who is ready, willing and able to purchase on the seller's terms," however "the broker's right to a commission may be varied by agreement." (*Liggett Realtors, Inc v Gresham*, 38 AD3d 214, 214 [1st Dept 2007] [internal quotations and citation omitted].) "Parties to a brokerage agreement are free to add whatever conditions they may wish to their agreement, including a condition that the contract of sale actually be consummated before the broker is deemed to have earned his commission." (*B.P. Vance Real Estate, Inc. v Tamir*, 42 AD3d 343, 344 [1st Dept 2007] [internal quotations and citation omitted].) "No action for breach of contract lies where the party seeking to enforce the contract has failed to perform a specified condition precedent." (*Phoenix Signal and Elec. Corp. v New York State Thruway Auth.*, 90 AD3d 1394, 1396-1397 [3rd Dept 2011] [internal quotations and citations omitted].)

Here, the March 2016 Commission Agreement expressly conditioned the Commission Fee payable if a contract of sale was executed by and between Martinez, JAM, and/or its affiliates and assigns as the buyer and Zlatopolsky and/or his affiliates

and assigns as the seller. (*See* NYSCEF 75, March 2016 Commission Agreement.) There are no allegations in the PAC that the condition precedent was met—i.e., a sales contract was executed between the specified parties—pursuant to the March 2016 Commission Agreement in order to state a claim that Martinez breached his obligation to remit the Commission Fee. Even so, the documentary evidence shows that, on October 9, 2019, 636 Opportunity and 640 Opportunity purchased the 636 Property and 640 Property, respectively—not Martinez, JAM and or their affiliates or assigns. (NYSCEF 76, Executor's Deed at 2; NYSCEF 83, Deeds.) Moreover, plaintiffs do not allege that 636 Opportunity and 640 Opportunity are affiliates and assigns of JAMS.

Plaintiffs assert that they were the procuring cause of the Properties' sale to 636 Opportunity and 640 Opportunity, entities allegedly owned and controlled by Martinez, and thus, they are entitled to the Commission Fee due upon closing of those Properties. (NYSCEF 52, PAC ¶¶ 18-19.) However, plaintiffs' contentions are without merit because, as explained above, Martinez and Highcap agreed to payment of the Commission Fee upon the execution of a sales contract between the specified parties. Again, there was no sale of the 636 and 640 Properties by the Estate to Zlatopolsky, and thus in turn, from Zlatopolsky to JAMS, its affiliates, or assigns.

Further, the additional provision stating that "[i]f, after execution and delivery of a contract the transaction shall fail to close for any reason whatsoever, except by your willful default, no compensation shall due or payable to us" also does not advance plaintiffs' claim. There are no allegations that the transaction between Zlatopolsky and JAMS failed as a result of Martinez' willful default. In fact, the transaction between the Estate and Zlatopolsky failed making performance under the March 2016 Commission

Agreement impossible. Therefore, plaintiffs' motion to amend to add a claim for breach of the March 2016 Commission Agreement is denied.

Breach of Covenant of Good Faith and Fair Dealing

Plaintiffs assert that defendants breached the implied duty of good faith and faith dealing under the March 2016 Commission Agreement and the May 2016 Draft Commission Agreement.[8] Defendants argue that there was no breach of the covenant because the Commission Fee was contingent upon closing title of the Properties and those underlying agreements to purchase the Properties fell apart through no fault of the defendants.

Implicit in every contract is a promise of good faith and fair dealing, specifically that "neither party will do anything that has the effect of destroying or injuring the right of the other party to receive the fruits of the contract." (*Dalton v Educational Testing*, 87 NY2d 384, 389 [1995] [internal quotation marks and citation omitted].) The covenant is breached when "a party acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement." (*Skillgames, LLC v Brody*, 1 AD3d 247, 252 [1st Dept 2003] [citation omitted].) However, "[a] claim for breach of the implied covenant of good faith and fair dealing cannot substitute for an unsustainable breach of contract claim." (*Id.* at 252, citing *Triton Partners v Prudential Sec. Inc.*, 301 AD2d 411 [1st Dept 2003].) Here, because plaintiffs' motion for leave to add a claim of breach of the March 2016 Commission Agreement is denied, the motion to amend to add a claim for breach of the covenant of good faith and fair dealing in that contract is likewise denied.

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[8] As discussed above, there is no May 2016 Commission Agreement, and therefore, the following analysis pertains only to the March 2016 Commission Agreement.

Quantum Meruit & Unjust Enrichment

Plaintiffs assert two quasi-contract claims: quantum meruit and unjust enrichment based on the allegations that they were the procuring cause of defendants' acquisition of the Properties. (NYSCEF 52, PAC ¶¶ 24-33.) Defendants contend that both claims must fail as the parties were operating under an express, written brokerage agreement, the March 2016 Commission Agreement, precluding claims based on implied contract.

"It is a well-settled rule in this State that in the absence of an agreement to the contrary, a real estate broker will be deemed to have earned his commission fee when he produces a buyer who is ready, willing, and able to purchase at the terms set by the seller." (*Lane—Real Estate Dept Store, Inc. v Lawlet Corp*., 28 NY2d 36, 42 [1971] [citations omitted]; *Capin & Associates, Inc. v Herskovtiz*, 194 AD3d 565, 565 [1st Dept 2021] ["To be entitled to a commission under an implied contract theory, the broker must be a 'procuring cause' of the ultimate transaction."].) That is, however, not the end of the inquiry. The general rule is that a valid and enforceable contract governing a particular subject matter precludes recovery in quasi-contract for events arising out of the same subject matter. (*Parker Realty Group, Inc. v Petigny*, 68 AD3d 571, 572 [1st Dept 2009].) However, there is an exception that a claim for "quantum meruit recovery is proper where the defendant wrongfully has prevented plaintiff's performance of a written agreement." (*Curtis Props. Corp. v Greif Cos.*, 236 AD2d 237, 239 [1st Dept 1997] [citation omitted].)

Plaintiffs allege that, by creating 636 Opportunity and 640 Opportunity, Martinez and Weissman "surreptitiously consummated the assemblage transaction [p]laintiffs presented to them over three years ago" and "cut [p]laintiffs out of the negotiations, and directly engaged the owners of the [636 and 640 Properties] and the [638 Properties]."

(NYSCEF 52, PAC at 12, ¶¶ 61-62.) Plaintiffs also allege that they were the "procuring cause of the Defendants' acquisition of the [Properties]," (*see id.* at 19, ¶ 27) and that they "reasonably expected compensation for bringing to Defendants the previously, unknown, confidential, off-market opportunity to purchase the Properties." (*Id.* at 19, ¶ 26.) However, plaintiffs fail to sufficiently allege how defendants wrongfully prevented performance of the March 2016 Commission Agreement. Again, the Commission Fee could only be earned when there was a sale between Zlatopolsky and JAMS or their affiliates or assigns which could only happen if the Estate sold the 636 and 640 Properties to Zlatopolsky. There is no allegation that Martinez or any defendant wrongfully prevented that sale which in turn would prevent performance.

Therefore, plaintiffs' motion to amend to add a claim for quantum meruit is denied.

Unjust enrichment "contemplates an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties." (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012] [citations omitted].) A party claiming unjust enrichment must show that (1) another party was enriched (2) at the aggrieved party's expense, and (3) it is against equity and good conscience to permit the enriched party to retain what is sought to be recovered. (*See Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [citation omitted].) The court must examine whether a "benefit has been conferred on the defendant under mistake of fact or law, if the benefit still remains with the defendant, if there has been otherwise a change of position by the defendant, and whether the defendant's conduct was tortious or fraudulent." (*Paramount Film Distrib. Corp. v State*, 30 NY2d 415, 421 [1974], *rearg denied* 31 NY2d 709 [1972], *cert denied* 414 US 829 [1973].)

Plaintiffs sufficiently allege that the defendants' conduct was tortious or fraudulent, specifically that "Martinez/Weissman created new entities . . . to surreptitiously consummate the assemblage transaction" to avoid the Commission Fee. (NYSCEF 52, PAC ¶¶ 61, 25.) Further, plaintiffs sufficiently allege that Martinez and proposed defendants 636 Opportunity and 640 Opportunity were enriched when plaintiffs presented Martinez with the off-market Properties, 636 Opportunity and 640 Opportunity purchased the Properties at 636 and 640 W. 158th Street, "with[eld] the Commission from [p]laintiffs," and are "unfairly benefitting from the efforts of [p]laintiffs without providing just compensation." (NYSCEF 52, PAC ¶ 53.) Therefore, despite the existence of the March 2016 Commission Agreement governing the subject matter of the parties' purchase of the Properties, plaintiffs' motion for leave to add an unjust enrichment claim against Martinez, 636 Opportunity and 640 Opportunity is granted as the alleged wrongful conduct not covered by any agreement. (*See Avilon Automotive Grp. v Leontiev*, 194 AD3d 537, 538-539 [1st Dept 2021].)

Attorneys' Fees

Defendants do not argue that this claim is palpably insufficient or devoid of merit, and the March 2016 Agreement provides for attorney's fees to the prevailing party in any dispute relating to the commission agreement. (*Devlin v 645 First Ave. Manhattan Co.*, 229 AD2d 343, 344 [1st Dept 1996] [citation omitted] ["[A]ttorney's fees are not recoverable absent specific statutory or contractual authority."]; NYSCEF 75, March 2016 Commission Agreement.) Therefore, plaintiff's motion to amend the complaint to recover attorneys' fees is granted.

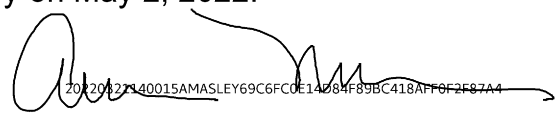
Accordingly, it is

ORDERED that the plaintiff's motion for leave to amend the complaint is granted, in part, as follows: leave is granted to as to the fifth cause of action for unjust enrichment against Javier Martinez, 636 West 158 Street Opportunity, LLC, and 640 West 158 Street Opportunity, LLC and as to the seventh cause of action for attorneys' fees against Javier Martinez to the extent the proposed amended complaint in the form annexed to the moving papers shall be deemed served upon Martinez upon service of a copy of this order with notice of entry and served in accordance with the CPLR on 636 West 158 Street Opportunity, LLC and 640 West 158 Street Opportunity, LLC; and it is further

ORDERED that leave to amend the complaint is denied with respect to the proposed first, second, third, fourth, and sixth causes of action and those causes of action are stricken; and it is further

ORDERED that the defendants shall answer the amended complaint within 20 days from the date of said service; and it is further

ORDERED that counsel are directed to update the court by e-mail (SFC-Part48@nycourts.gov) as to the status of discovery on May 2, 2022.



3/21/2022			
DATE		**ANDREA MASLEY, 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**