Inbar Group, Inc. v St. Mark's World, Inc.
2022 NY Slip Op 34343(U)
December 21, 2022
Supreme Court, New York County
Docket Number: Index No. 653565/2016
Judge: David B. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID B. COHEN** **PART 58**

Justice

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INBAR GROUP, INC.,

Plaintiff,

- v -

ST. MARK'S WORLD, INC., ST. MARK'S WORLD ACQUISITION LLC, MICHAEL MORGAN, FLEX EMPLOYEE SERVICES, LLC, and SCOTT HARTMAN,

Defendants.

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INDEX NO. 653565/2016

MOTION SEQ. NO. 010 011

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 010) 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 265, 266, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 351, 352

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 011) 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff Inbar Group, Inc. (IGI), a business broker, commenced this action to recover sums it is allegedly owed pursuant to two agreements. The first is a Listing Agreement that it entered into with defendants St. Mark's World, Inc. (SMW) and its principal, Michael Morgan (Morgan, and together with SMW, the Morgan defendants) for the sale of SMW's medical business and/or SMW itself. The second is a Non-Disclosure Agreement (the NDA) that it entered into with prospective purchasers of SMW, defendants Scott Hartman (Hartman) and Flex Employee Services, LLC (Flex), who ended up purchasing 80% of Morgan's share in SMW through defendant St. Mark's World Acquisition, LLC (SMWA, and together with Hartman and Flex, the Flex defendants).

Motion sequence nos. 010 and 011 are consolidated for disposition. In motion sequence no. 010, the Morgan defendants move for summary judgment dismissing the complaint as against them.

In motion sequence no. 011, IGI moves for summary judgment: (1) jointly and severally, as against the Morgan defendants on the amended complaint in the principal amount of $162,508.85, the award of attorneys' fees and costs, and prejudgment interest at 9% from April 25, 2016 through the entry of judgment; and (2) jointly and severally, as against the Flex defendants on the amended complaint in the principal amount of $162,508.85, the award of attorneys' fees and costs, and prejudgment interest at 9% from April 25, 2016 through the entry of judgment. Both motions are denied, as there are multiple issues of disputed material facts.

FACTUAL AND PROCEDURAL BACKGROUND

Familiarity with the facts is presumed. The following is a brief recitation of the facts relevant to this motion.

The Listing Agreement

On March 19, 2014, IGI entered into the Listing Agreement with the Morgan defendants for the sale of SMW's medical business and/or SMW itself (amended complaint [NYSCEF Doc No. 20], ¶ 18). Under the terms of the Listing Agreement (NYSCEF Doc No. 260), the Morgan defendants granted IGI the exclusive right to sell the business, including its stock for a period of six months (Listing Agreement ¶ 1). The Listing Agreement provides that the Morgan defendants would pay to IGI "at closing" 8% of the purchase price, which was defined to include "all cash or non-cash consideration, received by the Seller," including any "non-compete, employment and consulting agreements" (*id.*, ¶ 2). If SMW made a sale without IGI's permission, a commission would be immediately due and payable to IGI (*id.*, ¶ 4). Paragraph 5 of the Listing Agreement

provides that "[i]n any case where the deposit and/or down payment have been forfeited, this amount shall be split 50% to Seller and 50% to Broker" (*id.*, ¶ 5). Pursuant to ¶ 7 of the Listing Agreement, the Morgan defendants agreed "to pay Broker's full commission no later than closing" (*id.*, ¶ 7).

The agreement was signed by Jay Inbar (Inbar) for IGI as broker, and SMW as seller, with Morgan signing as principal (9/14/21 Inbar aff [NYSCEF Doc No. 296], ¶ 7). The Listing Agreement originally had a six-month duration but was extended through December 10, 2015 (*id.*, ¶ 8).

IGI's Performance Under the Listing Agreement

IGI alleges that it performed substantial services for the benefit of the Morgan defendants pursuant to the Listing Agreement (*id.*, ¶ 31). IGI further alleges that, on July 10, 2014, it procured Habib Noor (Noor), a principal of GHG Staffing, LLC (GHG) as a prospective buyer of SMW, and that, although Noor put down a $100,000 deposit, that deal fell through (*id.*, ¶¶ 32-35).

Morgan claims that, when IGI received the $100,000 deposit from GHG in October 2014 and failed to provide 50% to Morgan when GHG backed out of the deal, IGI "was in default immediately [under paragraph 5 of the Listing Agreement] by not returning the funds to me" (8/25/20 Morgan dep [NYSCEF Doc No. 346], at 265). Morgan further claims that, when IGI failed to "pay back" the $50,000 to him, IGI "breached" the [Listing] Agreement with him" (5/4/20 Morgan dep [NYSCEF Doc No. 345, at 61). Although Morgan also contends that he verbally terminated the Leasing Agreement, he admitted that he was unable to state with any certainty that he actually terminated the Listing Agreement with IGI (5/4/20 Morgan dep at 65 [Q. Is it your testimony, sir, that you terminated the [Listing] agreement? Yes or no? A. I don't know. I don't know the answer to that question"]).

GHG sued Inbar and IGI for the return of the $100,000 in March 2015, leading to a dispute that lasted until the trial date in November 2019, when, Inbar alleges, he made a business decision to settle the case and return the full $100,000 to GHG (9/14/21 Inbar aff, ¶ 44).

The Sale to SMWA

Inbar alleges that, after the GHG deal fell through, IGI continued its efforts to market and sell the business so that IGI could earn its agreed upon commission (*id.*, ¶ 48). While doing so, Inbar was introduced to Hartman and Flex (*id.*, ¶ 49). Inbar contends that, as a result of IGI's diligence as the broker, it procured a ready, willing and able buyer for the business which ended up being SMWA (which was formed by Hartman and Flex), and that IGI helped to structure the deal (*id.*, ¶ 98; *see also* amended complaint, ¶ 31). The deal was structured so that it was anticipated that Morgan would be paid up to $4.5 million for the sale of what turned out to be eighty percent (80%) of his interest in SMW, as well as payments to be made to him under the terms of a separate Services Agreement with SMW entered into in anticipation of the sale (9/14/21 Inbar aff, ¶ 99).

In April 2016, SMWA entered into a Stock Purchase Agreement (the SPA) with Morgan under which SMWA agreed to purchase 80% of SMW's common stock from Morgan, for an initial cash consideration of $1 million, plus additional payments (amended complaint, ¶¶ 32-33). In connection with the closing, Morgan entered into a separate Services Agreement, pursuant to which Morgan was to receive a yearly fee of $300,000, payable at the rate of $25,000 per month, plus 10% of the gross margin on any new business that Morgan brought to SMW (*id.*, ¶36).

Inbar alleges that neither the Morgan defendants nor the Flex defendants notified IGI that the parties, who had been introduced to one another by IGI in June 2015, were entering into the SPA (9/14/21 Inbar aff, ¶ 107).

IGI contends that, pursuant to the Listing Agreement, it is entitled to 8% of the purchase price paid under the SPA, as well as 8% of all sums received by Morgan under the Services Agreement (amended complaint, ¶¶ 35, 38), but that to date, the Morgan defendants have breached their obligation under the Listing Agreement by failing to pay any commissions to it (*id.*, ¶ 40; *see also* 9/14/21 Inbar aff, ¶ 123 ["In violation of the Listing Agreement, no payment was made by Morgan or SMW at the Closing or at any time thereafter"]).

The NDA

On June 2, 2015, Hartman, the president of Flex, individually signed the NDA with IGI (NYSCEF Doc No. 298) with respect to the potential sale of SMW (9/14/21 Inbar aff, ¶ 21). Under the terms of the NDA, Hartman and Flex acknowledged and agreed with IGI that:

> "the undersigned buyer(s) has been advised that IGI is an agent for the seller(s) in this transaction. I agree that should I buy, lease or come into possession of the Business during the listing term or within Two years from the date below [June 2, 2015], I will protect IGI's right to a fee under IGI's agreement with the seller(s). I agree not to acquire any of the introduced business, whether directly or indirectly, by purchase, lease, lease assumption, stock transfer, license, assignment, or any other means, unless IGI received the agreed upon commission from the seller and a copy of the contract of sale. I understand that if I interfere in any way with IGI's contractual right to fees from the seller(s), I may be personally liable for payment of that fee"

(*id.*, ¶ 23; *see* NDA).

IGI alleges that, although Hartman had agreed under the NDA not to acquire any of the introduced businesses, whether directly or indirectly, by purchase, stock transfer or any other means, unless IGI received its agreed upon commission from the seller, and a copy of the contract of sale, Hartman, through SMWA, went ahead with the deal even though IGI had neither received its commission nor had Hartman provided IGI with a copy of the contract of sale (*id.*, ¶ 108).

IGI further alleges that, in breach of the NDA, Hartman, through Acquisition, indirectly acquired 80% of the SMW's stock from Morgan without making sure that IGI received its commission or a copy of the SPA (*id.*, ¶ 124).

Procedural History

On July 6, 2018, IGI commenced this action for breach of contract (first cause of action), breach of the implied covenant of good faith and fair dealing (second cause of action), unjust enrichment/quantum meruit (third cause of action), promissory estoppel/detrimental reliance (fourth cause of action), specific performance (fifth cause of action), and fees, costs and expenses (sixth cause of action) (NYSCEF Doc No. 1). On December 16, 2016, IGI filed an amended complaint by stipulation to amend the caption.

On November 14, 2018, following the exchange of some, but not all discovery, IGI moved for partial summary judgment on count one of the amended complaint for breach of the Listing Agreement arising from the Morgan defendants' failure to make payment to IGI of the 8% commission in connection with the SPA and the related Services Agreement, and count three of the complaint for unjust enrichment/quantum meruit based upon the reasonable value of IGI's services as broker with respect to the foregoing transactions (NYSCEF Doc No. 65).

On January 2, 2019, Morgan and SMW cross-moved for an order dismissing the complaint as to Morgan, on the ground that the Listing Agreement was only between IGI and SMW, and allowing defendants to amend their answer to the amended complaint (NYSCEF Doc No. 104).

By order and decision dated December 5, 2019 (NYSCEF Doc No. 182), this Court granted summary judgment on liability as against Morgan, and denied Morgan's cross motion to dismiss the amended complaint as against him personally, on the ground that "Morgan is a seller that sold to someone covered by the listing agreement" (12/5/19 decision, at 4). This Court further stated

that "Morgan's claim of not being paid the whole amount and that there is a dispute as to the value of the services agreement entered into in connection with sale of the SMW stock to SMWA, precludes a grant of summary judgment beyond a finding of liability against Morgan" (*id.*).

This Court denied summary judgment as to SMW on the ground that "as summary judgment is based upon a finding that there is no genuine dispute that Morgan was the seller, summary judgment would be inappropriate against SMW or on the unjust enrichment claim against Morgan and SMW" (*id.*).

Finally, this Court granted defendants' cross motion to amend their answer to include a counterclaim for $50,000 of the forfeited security deposit pursuant to paragraph 5 of the Listing Agreement (*id.* at 5).

On November 19, 2020, the Appellate Division, First Department modified the 12/5/19 decision to deny partial summary judgment as to Morgan (*Inbar Group, Inc. v St. Mark's World, Inc.*, 188 AD3d 587 [1st Dept 2020]). The Appellate Division stated that "[a]s Morgan signed the parties' original agreement in his corporate capacity on behalf of [SMA], he would ordinarily not be personally liable under that agreement," but that "[h]owever, Morgan's signature without reference to his corporate capacity in the 'extension' of the original agreement, and other surrounding circumstances, create a fact issue as to the capacity in which he signed each agreement" (*id.* at 588). It further determined that "[g]iven that there is a fact issue as to the capacity in which Morgan signed the agreement, there is also a fact issue as to whether the corporate defendant is liable under the agreements" (*id.*). Finally, the Appellate Division found that "because there are issues of fact about the amounts paid and owing to Morgan that might be subject to commission, as well as fact issues as to liability, summary judgment as to damages was properly denied" (*id.*).

LEGAL CONCLUSIONS

"'[T]he proponent of a summary judgment motion 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'" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993] [citation omitted]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden is a heavy one: the facts must be viewed in the light most favorable to the non-moving party and every available inference must be drawn in the non-moving party's favor (*Sherman v New York State Thruway Auth.*, 27 NY3d 1019, 1021 [2016]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d at 853; *see also Lesocovich v 180 Madison Ave. Corp.*, 81 NY2d 982 [1993]).

The party opposing summary judgment has the burden of presenting evidentiary facts sufficient to raise triable issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *CitiFinancial Co. [DE] v McKinney*, 27 AD3d 224, 226 [1st Dept 2006]). This Court is required to examine the evidence in a light most favorable to the party opposing the motion (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]). The "function of the court on a motion for summary judgment is issue finding and not issue determination" (*Rowan v Brady*, 98 AD2d 638, 638 [1st Dept 1983]). "If a genuine issue of fact is found to exist, summary judgment must be denied" (*id.* at 638-39 [citation omitted]). Accordingly, "[s]ummary judgment is inappropriate in any case where there are material issues of fact in dispute or where more than one conclusion may be drawn from the established facts" (*Friends of Thayer Lake, LLC v Brown*, 27 NY3d 1039, 1043 [2016]; *see also Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *Tronlone v Lac d'Amiante Du Quebec*, 297 AD2d 528, 528-529 [1st Dept 2002], *affd* 99 NY2d 647 [2003]).

Both motions for summary judgment are denied, as there are numerous disputed issues of material fact mandating denial of the motions.

The Morgan Defendants' Motion for Summary Judgment (Motion Sequence No. 010)

The Morgan defendants move for summary judgment seeking to dismiss the amended complaint by "reason of [IGI's] violation of its fiduciary obligation and its markedly unclean hands" (8/28/20 Morgan aff [NYSCEF Doc No. 253], ¶ 1). The premise of the motion is that IGI, a business broker which had entered into the Listing Agreement with the Morgan defendants in March 2014 to sell SMW on a commission basis, was "a paid agent of GHG," a prospective purchaser of SMW, and "had a very close relationship with [GHG]" (*id.*, ¶ 4). Morgan claims to have been in "absolute shock" to learn that "my broker [IGI] was paid by GHG for the excellent efforts he exerted on its behalf in advising and encouraging me to accept a substantially lesser amount," and that "[h]ad I been aware of such flagrant perfidy, I never would have considered extending the sales agreement with Inbar (*id.*, ¶ 7 [emphasis in original]). However, these core contentions upon which the Morgan defendants seek to dismiss the amended complaint are sharply contested by IGI, and, accordingly, the Morgan defendants' motion for summary judgment must be denied.

First, contrary to Morgan's allegations, Inbar asserts that "IGI was never a paid agent of GHG. Nor was I personally. Neither GHG nor I have ever been paid a single cent by GHG as its agent, or otherwise. Period" (7/7/21 Inbar aff [NYSCEF Doc No. 269], ¶ 47 [emphasis in original]). Additionally, in direct contradiction to Morgan's allegation, Inbar alleges that "neither IGI nor I ever had a 'very close relationship with' GHG. In fact, contrary to Morgan's unfounded contentions, GHG sued both IGI and me in March, 2015 for the return of its $100,000 deposit money" (*id.*, ¶ 49). Inbar further alleges that, "[i]n my view, litigating for more than four years

with GHG is certainly not the hallmark of having a very close relationship with it. In fact, it is directly the opposite of a 'very close relationship'" (*id*. at 51).

Although Morgan also claims that "as a fiduciary [IGI] had an obligation to inform me fully and without reservation of its relationship with GHG," but instead of doing so, IGI was "utterly mute" (8/28/20 Morgan aff, ¶ 10), Inbar refutes this claim, asserting that in "fact, nothing was said by IGI to Morgan about IGI's relationship with GHG because IGI had no hidden relationship with GHG to disclose to Morgan. There was simply nothing to disclose to the Morgan Defendants. IGI's only relationship with GHG was to present offers from GHG as a prospective purchaser to the Morgan Defendants as prospective sellers. This is precisely what IGI did" (7/7/21 Inbar aff, ¶ 76).

Noor himself testified to this, making it clear that he was not IGI's client, but, rather, Morgan and SMW were IGI's clients. As noted by Noor in his deposition testimony, "SMW was always" IGI's client, while Noor "was just a buyer" (7/9/21 Noor dep [NYSCEF Doc No. 279], at 134-137).

Finally, Morgan alleges that Inbar, the principal of IGI, is a "licensed broker" (8/28/20 Morgan aff, ¶ 11). However, Inbar alleges that this claim is "untrue (7/7/21 Inbar aff, ¶ 9), and asserts that, during his October 21, 2020 deposition (NYCEF Doc No. 278), when asked whether he was a licensed broker, he testified "no" (*id*. at 10; *see* 10/21/20 Inbar dep at 63). Inbar further alleges that he "stands by the truthfulness of [his] testimony" (*id*.).

The parties' sharply conflicting versions of the relevant facts underlying the core issue presented by Morgan's summary judgment motion – whether IGI was a paid agent of GHG in violation of its fiduciary duty – present issues of credibility that must be resolved by the factfinder, thus precluding summary judgment (*see Melendez v Alliance Hous. Assocs., L.P.*, 201 AD3d 437,

438 [1st Dept 2022]; *Sanyang v Davis*, 198 AD3d 522, 522 [1st Dept 2021]; *Dunn v New Lounge 4324, LLC*, 180 AD3d 510, 510 [1st Dept 2020]). Accordingly, the Morgan defendants' motion for summary judgment is denied.

IGI's Motion for Summary Judgment (Motion Sequence No. 011)

IGI moves for summary judgment against both the Morgan defendants and the Flex defendants, arguing that both the Listing Agreement and the NDA have been breached.

1. Breach of the Listing Agreement

In support of its motion for summary judgment, IGI contends that the Morgan defendants breached the Listing Agreement by failing to pay IGI's commission, entitling it to the entry of summary judgment in the amount of $162,508.85. However, in making this motion, IGI ignores the fact that it has already made a summary judgment motion against the Morgan defendants for breach of the Listing Agreement.

IGI's second motion for summary judgment is denied, as "New York law has a 'strong policy against allowing successive motions for summary judgment'" (*Ferolito v Vultaggio*, 36 Misc 3d 1227[A], 2012 NY Slip Op 51523[U], * 4-5 [Sup Ct, NY County 2012] [citation omitted]). "This is particularly true where the motion is based on legal grounds and factual assertions that were or could have been raised in an earlier motion" (*id.* at *5; *see also Phoenix Four v Albertini*, 245 AD2d 166, 167 [1st Dept 1997]; *Levitz v Robbins Music Corp.*, 17 AD2d 801 [1st Dept 1962]). Accordingly, "[s]uccessive motions for summary judgment should not be entertained in the absence of good cause, such as a showing of newly discovered evidence" (*Deutsche Bank Natl. Tr. Co. v Elshiekh*, 179 AD3d 1017, 1020 [2d Dept 2020]; *see also Jones v 636 Holding Corp.*, 73 AD3d 409, 409 [1st Dept 2010]). Indeed, "[a] party seeking summary judgment should anticipate having to lay bare its proof and should not expect that it will readily be granted a second or third

chance," because "[s]uccessive motions for the same relief burden the courts and contribute to the delay and cost of litigation" (*Deutsche Bank Natl. Tr. Co.*, 179 AD3d at 1020).

With respect to SMW, the corporate defendant, IGI's second motion for summary judgment for breach of the Listing Agreement is the exact same motion that was previously denied by this court, and affirmed by the First Department, which specifically found a "fact issue as to whether the corporate defendant is liable under the agreements" (*Inbar Group, Inc.*, 188 AD3d at 588).

In its current summary judgment motion against the corporate defendant, IGI fails to submit any newly discovered evidence that SMW breached the Listing Agreement, or any other evidence to resolve the outstanding factual issues, such as whether IGI itself breached the Listing Agreement by not giving Morgan 50% of the GHG deposit when it backed out of the deal to buy SMW. Therefore, this second motion for summary judgment is denied (*see Demble v Acton Carting Environmental Servs., Inc.*, ___ AD3d ___, 2022 NY Slip Op 07029, * 1 [1st Dept 2022] ["Supreme Court correctly held that the successive summary judgment motions were improper"]; *Matter of CUCS HDFC v Aymes*, 191 AD3d 522, 523 [1st Dept 2021] ["the court properly denied as improper successive summary judgment motions respondent's motions in sequence 5 and 6 for summary judgment on his counterclaim based on his contention that petitioners' building violates the Zoning Resolution of the City of New York, since respondent had previously sought summary judgment on his claim that petitioners' building violates the Zoning Resolution"]; *Landau, P.C. v Goldstein*, 76 Misc 3d 138[A], 2022 NY Slip Op 51002[U], ** 1 [App Term, 1st Dept] ["defendant's motion violated the rule against successive summary judgment motions, since he previously sought summary judgment . . . on the same grounds without 'showing . . . newly discovered evidence or other sufficient justification'"] [citation omitted]).

With respect to Morgan, IGI contends that, despite the First Department decision, Morgan is personally liable for breach of the Listing Agreement in the amount of $162,508.85. The First Department reversed this Court's grant of partial summary judgment as to Morgan, finding that there was a "fact issue as to the capacity in which he signed each agreement" (*Inbar Group, Inc.*, 188 AD3d at 588). The Appellate Division further found that "because there are issues of fact about the amounts paid and owing to Morgan that might be subject to commission, as well as fact issues as to liability, summary judgment as to damages was properly denied" (*id.*).

In support of its current motion for summary judgment against Morgan, IGI contends that, since the First Department reversed in November, 2020, Morgan's affidavit in support of the Morgan defendants' motion for summary judgment (NYSCEF Doc No. 253) demonstrates that he is personally liable under the terms of the Listing Agreement, because Morgan uses "first person pronouns "I" or "me" to describe his business relationship with IGI" (IGI memorandum of law [NYSCEF Doc No. 348], at 9). However, this Court finds that, given that Morgan was the sole shareholder of SMW, this affidavit does not resolve the factual issue of whether he signed the Listing Agreement in his personal or corporate capacity. Moreover, in opposition to the motion, Morgan submits an affidavit (NYSCEF Doc No. 359) in which he specifically alleges that "I also desired to protect myself and made it significantly and unequivocally understood that I was signing on behalf of the Corporation. I did not wish to have personal exposure long after the completion of the sale" (11/12/21 Morgan affidavit, ¶ 4). Accordingly, IGI's second motion for summary judgment against Morgan personally is also denied.

2. Breach of the NDA

In its motion for summary judgment for breach of the NDA, IGI contends that, although Hartman had agreed under the NDA not to acquire any business introduced by IGI, whether

directly or indirectly, by purchase, stock transfer or any other means, unless IGI received its commission from the seller, and a copy of the contract of sale, Hartman, through SMWA, went ahead with the deal even though IGI had neither received its commission, nor had Hartman provided IGI with a copy of the contract of sale. IGI contends that the Flex defendants breached the NDA when they acquired 80% of SMW's stock from Morgan without making sure that IGI received its commission or a copy of the SPA. Basically, by arguing that the Flex defendants had a duty to "ensure that IGI received its commission from Morgan" (IGI memorandum of law [NYSCEF Doc No. 348], at 20), IGI is attempting to hold the Flex defendants financially responsible for the Morgan defendants' failure to pay IGI a commission under the terms of the Listing Agreement.

In making this argument, IGI fails to identify any language in the NDA establishing that the Flex defendants had an obligation to ensure that Morgan would fulfill his obligations to IGI under the Listing Agreement, a separate agreement to which the Flex defendants were not a party, or that the Flex defendants would be liable for any amount if they failed to ensure Morgan's contractual duty to IGI. Indeed, the NDA itself specifies that IGI was to receive the commission directly from the seller. The only language in the NDA cited by IGI that even hints at the Flex defendants' potential liability expressly states that the Flex defendants will only be liable if they "interfere in any way with IGI's contractual right to fees from the seller(s)". Thus, in order to prevail on its motion against the Flex defendants, IGI must unambiguously establish that the Flex defendants interfered with IGI's right to payment from the seller.

However, IGI fails to present any evidence on this motion that the Flex defendants actually interfered with its right to receive payment from the seller, or that the Flex defendants had any knowledge of the Morgan defendants' intention to not pay IGI its commission. Indeed, the Flex

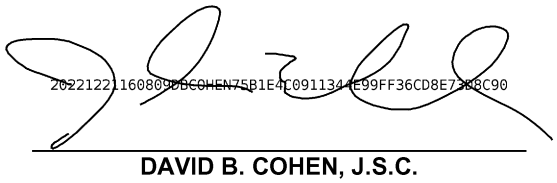
defendants present evidence in opposition to the motion that raise issues of fact as to whether they interfered in IGI's right to the commission under the Listing Agreement. During his deposition, Hartman stated that the Flex defendants had no intention to "cut [IGI] out" of the Purchase agreement (2/18/20 Hartman dep at 39). Hartman further testified that the Flex defendants included IGI on "emails and/or calls" regarding the transaction and that IGI even attended a "couple of meetings" with the parties (*id*. at 40). Finally, Hartman testified that he "can't speak as to why [the seller] didn't include [IGI] in" certain conversations regarding closing (*id*. at 64). This evidence raises material issues of disputed fact as to whether the Flex defendants interfered with IGI's right to a commission under the Listing Agreement and thus, IGI's motion for summary judgment for breach of the NDA is denied.

This Court has considered the parties' remaining arguments and finds them to be either without merit or unnecessary to address given the foregoing conclusions.

Accordingly, it is hereby:

ORDERED that the motion for summary judgment by defendants St. Mark's World, Inc. and Michael Morgan (mot. seq. 010) is denied; and it is further

ORDERED that the motion for summary judgment by plaintiff Inbar Group, Inc. for summary judgment (mot. seq. 011) is denied.



12/21/2022
DATE

DAVID B. COHEN, J.S.C.

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