

**Wharton-Bickley v Mayell Real Estate**

2023 NY Slip Op 31843(U)

May 31, 2023

Supreme Court, New York County

Docket Number: Index No. 652889/2022

Judge: Gerald Lebovits

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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. GERALD LEBOVITS PART 07**

*Justice*

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**INDEX NO. 652889/2022**

ANDREW WHARTON-BICKLEY,

**MOTION SEQ. NO. 001 002**

Plaintiff,

- v -

**DECISION + ORDER ON  
MOTION**

MAYELL REAL ESTATE and BENJAMIN MAYELL,

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 11 were read on this motion for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 9, 10, 12 were read on this motion for DISMISSAL.

*Oddo & Babat, P.C.*, New York, NY (Darren Seilback of counsel), for plaintiff.  
*Aragon Partners LLP*, New York, NY (Antonio M. Ocasio of counsel), for defendants.

Gerald Lebovits, J.:

This is an action by a real estate broker, plaintiff Andrew Wharton-Bickley, to recover a commission of \$65,675.00 allegedly owed for his efforts in procuring the sale of an apartment. Defendants Mayell Real Estate (MRE) and Benjamin Mayell now separately move to dismiss for failure to state a claim (CPLR 3211[a][7]).

**BACKGROUND**

The following facts are taken from the complaint (NYSCEF Doc. No. 1) and accepted as true for the purposes of this motion. Wharton-Bickley is a licensed real estate broker who was employed as an agent for MRE for approximately 10 months. Mayell is a licensed real estate broker and the principal of MRE. Plaintiff alleges that “[i]t was understood that the plaintiff would be paid a commission for clients that he generated, worked with and deals that eventually closed” (Complaint ¶¶ 3, 7-8).

On April 22, 2022, the parties memorialized a fee sharing agreement providing that MRE would pay plaintiff 70% of its commissions. That month, plaintiff introduced defendants to potential clients looking to purchase an apartment. Ultimately, one of them agreed to buy a unit on Greene Street in New York City for \$3,750,000, with a closing date of June 24, 2022 (Complaint ¶¶ 9, 11-12).

MRE's commission on that transaction was 2.5%, or \$93,750. Pursuant to the parties' agreement, plaintiff's 70% share would have been \$65,750. In multiple text messages after the closing, Benjamin Mayell admitted that plaintiff was due a commission, but tried to re-negotiate plaintiff's share down to 60%. Despite demand, defendants refused to pay plaintiff the share of the commission to which he was entitled (Complaint ¶¶ 13, 74, 19).

The complaint sets forth four causes of action, each asserted against both defendants: (1) breach of contract; (2) breach of the covenant of good faith and fair dealing; (3) breach of fiduciary duty; and (4) unjust enrichment. On motion sequence 001, MRE moves under CPLR 3211 (a) (7) to dismiss the claims against it. On motion sequence 002, Mayell moves under CPLR 3211 (a) (7) to dismiss the claims against him. The motions are consolidated here for disposition. MRE's motion to dismiss is denied with respect to plaintiff's breach-of-contract claim, and granted with respect to plaintiff's unjust-enrichment, breach-of-covenant, and fiduciary-duty claims. Mayell's motion to dismiss is granted in its entirety.

## DISCUSSION

### I. MRE's Motion to Dismiss (Mot Seq 001)

The branch of MRE's motion seeking to dismiss plaintiff's contract claim as against MRE is denied: The complaint states a cause of action on that claim.

The elements of a breach-of-contract claim are "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Lebedev v Blavatnik*, 193 AD3d 175, 182-183 [1st Dept 2021], quoting *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Here, the plaintiff has adequately pled the existence of a brokerage commission sharing agreement, performance by the plaintiff in introducing the buyer, defendant's failure to pay the commission, and damages of \$65,750 (see *Eastern. Consol. Properties, Inc. v Lucas*, 285 AD2d 421, 421–22 [1st Dept 2001]; *Lewis & Murphy Realty, Inc. v Colletti*, 187 AD3d 731, 733 [2d Dept 2020]).

In opposition, defendant MRE argues that plaintiff has failed to allege a breach because there are no allegations that the closing ever occurred, or that MRE ever received a commission. However, as noted, the complaint references communications "after the closing" and recounts MRE's attempts to renegotiate the amount of the commission after admitting it was due (Compl. ¶ 19). To the extent that MRE is attempting to dispute that the closing occurred or that it received a commission, it is precluded from doing so at this pre-answer stage of the litigation (*Eastern. Consol. Properties*, 285 AD2d 421, 421–22).

The remaining claims against MRE are dismissed. "A party may not assert a claim in unjust enrichment where a valid contract between the parties covers the same subject matter" (citing *Cox v NAP Constr. Co., Inc.*, 10 NY3d 592, 607-608 [2008]). The same rule applies to the claim for breach of the covenant of good faith and fair dealing (*Delucca v Hayfin Cap. Holdings Ltd.*, 202 AD3d 591, 592 [1st Dept 2022]). Although a plaintiff may plead inconsistent, quasi-contractual claims in the alternative where there is a bona fide dispute over the existence of the

alleged express contract (*Eastern Consol. Properties, Inc. v Waterbridge Cap. LLC*, 149 AD3d 444, 445 [1st Dept 2017]; *Winick Realty Group LLC v Austin & Assoc.*, 51 AD3d 408 [1st Dept 2008]), that option is not available where, as this court has held, the defendant has acknowledged the contract by moving to dismiss the quasi-contractual claims as duplicative (*Hassan v Armouth Intern. Inc.*, 2020 WL 13077309, \*2 [Sup Ct., NY County July 21, 2020]).

Finally, as plaintiff does not defend or even mention the claim for breach of fiduciary duty in his opposition papers, it is dismissed as abandoned (*see Bridgers v W. 82nd St. Owners Corp.*, 114 AD3d 606, 607 [1st Dept 2014]).

## II. Mayell's Motion to Dismiss (Mot Seq 002)

Defendant Mayell's motion to dismiss is granted. "In order for a plaintiff to state a viable claim against a shareholder of a corporation in his or her individual capacity for actions purportedly taken on behalf of the corporation, plaintiff must allege facts that, if proved, indicate that the shareholder exercised complete domination and control over the corporation and 'abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice'" (*East Hampton Union Free Sch. Dist. v Sandpebble Builders, Inc.*, 16 NY3d 775, 776 [2011], quoting *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 142 [1993]). Thus, "a plaintiff must do more than merely allege that the individual engaged in improper acts or acted in 'bad faith' while representing the corporation" (*id.*). The instant complaint alleges only that MRE, not Mayell, was obligated to pay the commission, and does not suggest any basis for Mayell's personal liability other than his mere participation in the transaction as a corporate officer and owner.

Accordingly, it is

ORDERED, that the branch of MRE's motion (mot seq 001) seeking dismissal of plaintiff's breach-of-contract claim is denied; and it is further

ORDERED that the branches of MRE's motion (mot seq 001) seeking dismissal of plaintiff's unjust-enrichment, breach-of-covenant, and fiduciary-duty claims are granted; and it is further

ORDERED that MRE's breach-of-contract claim is severed and shall continue; and it is further

ORDERED that MRE shall serve and file an answer to the complaint (as limited to the breach-of-contract claim) within 20 days from service of a copy of this order with notice of its entry; and it is further

ORDERED that Mayell's motion to dismiss (mot seq 002) is granted, and the claims against Mayell are dismissed, with costs and disbursements to be taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of its entry on all parties and on the office of the County Clerk, which shall enter judgment accordingly.

5/31/2023

DATE

  
**HON. GERALD LEBOVITZ**  
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