SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

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NOMAD GROUP LLC

Plaintiff,

- v -

99-105 THIRD AVENUE REALTY, LLC,

Defendant.

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INDEX NO. 650149/2023

MOTION DATE 01/17/2025

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76

were read on this motion to/for SUMMARY JUDGMENT.

Defendant's motion for summary judgment is granted and plaintiff's cross-motion for summary judgment is denied.

Background

Defendant owns a commercial building. Plaintiff, a brokerage firm, contends that it entered into a contract with defendant to help lease a unit in the building. After plaintiff secured a tenant for the ground floor commercial space unit, plaintiff argues that it never received the final payment (defendant allegedly paid the first two of three installments). Plaintiff eventually obtained a default judgment against defendant for the final installment, which was later vacated. The merits are now addressed.

Defendant insists that it entered into an agreement with non-party Meridian to serve as a broker to lease the commercial space in its building but argues that it never directly hired plaintiff to be a broker. It contends that it paid Meridian the relevant commissions under the

terms of the agreement between it and Meridian and that, to the extent that plaintiff claims it is owed more, plaintiff should seek recovery against Meridian.

Defendant now moves for summary judgment. It includes an affidavit (NYSCEF Doc. No. 48) from a managing member, Steven Croman, who admits that defendant signed a contract with Meridian to serve as a broker and suggests that Meridian hired defendant to assist. Mr. Croman asserts there is no privity of contract between plaintiff and defendant. He also points out that in defendant's agreement with Meridian, a broker's commission was to be paid on condition that the tenant remained in good status. Mr. Croman insists that the tenant who entered into the relevant lease defaulted and so defendant had no obligation to pay the final (and third) installment.

In opposition and in support of its cross-motion for summary judgment, plaintiff claims it is entitled to the final installment (amounting to $10,347.01). It claims that Mr. Croman is only speculating that there was some type of co-broker agreement. Plaintiff attaches the affidavit (NYSCEF Doc. No. 69) of Matthew DeRose, a managing executive, who admits that defendant hired Meridian to list the premises. Mr. DeRose contends that it was plaintiff who procured a tenant for defendant and points to a lease for the premises which identifies that plaintiff was the broker for the transaction.

He insists that the commission fee was to be $31,041.03 "with the first installment of $10,347.01 to be paid by Defendant on signing of the Lease, the second installment of $10,347.01 to be paid by Defendant on or before August of 2024 [sic], and the third installment of $10,347.01 to be paid on or before December 24, 2021" (NYSCEF Doc. No. 69, ¶ 6). Mr. DeRose contends that although plaintiff communicated with Meridian regarding the transaction, Meridian was acting as an agent and authorized representative for defendant.

In reply, defendant emphasizes that plaintiff has not produced any written agreement between itself and defendant. It contends that plaintiff only offers conclusory arguments in support of its assertion that defendant owes it a commission. Defendant observes that although plaintiff claims that Meridian was defendant's agent, it did not include any agreement between plaintiff and Meridian to justify this contention.

Discussion

As an initial matter, there is no question that plaintiff and defendant never entered into any written agreement for a real estate commission. However, case law provides that a real estate brokerage agreement does not necessarily have to be in writing; it may be oral (*Sholom & Zuckerbrot Realty Corp. v Citibank, N.A.*, 205 AD2d 336, 338, 613 NYS2d 588 [1st Dept 1994]; *see also* General Obligations Law § 5-1701[10]).

However, that observation is not dispositive. The initial question this Court must consider is whether plaintiff and defendant ever entered into any agreement and, if so, the terms of that agreement. Plaintiff appears to admit that it never spoke directly with defendant (*see* NYSCEF Doc. No. 69, ¶ 6 ["Although Plaintiff communicated with Meridian regarding the transaction…"]).[1] Instead, plaintiff argues that it communicated with Meridian and that Meridian served as defendant's agent. But plaintiff did not include any communications with Meridian concerning the terms of an agreement.

Moreover, Mr. DeRose argues that "plaintiff agreed to accept a proposal from Defendant to pay a total commission payment of $31,041.03" (NYSCEF Doc. No. 69, ¶ 6). But, again, no communications between plaintiff and defendant (or plaintiff and Meridian) were included to

[1] However, Mr. DeRose curiously asserts at one point in his affidavit that "Defendant performed under the arrangement negotiated with plaintiff" by paying the first installment (NYSCEF Doc. No. 69, ¶ 7). No supporting documentation was included concerning the nature of these negotiations between plaintiff and defendant. And, of course, Mr. DeRose admits in another position of the affidavit that plaintiff only spoke with Meridian (*id.* ¶ 6).

support this contention or explain how the parties arrived at this amount. Instead, Mr. DeRose includes a footnote explaining that this amount was calculated by halving the total fee to be paid by defendant for the lease which included a rate of 5% for the first year, 4% for years two and three, 3.5% for years four and five and 3% for years six through ten of the lease (*id*. n 1).

This commission calculation tracks the payment formula in the agreement between defendant and Meridian (NYSCEF Doc. No. 52, exh A). And yet plaintiff nevertheless argues that it is not bound by the other provisions of the listing agreement, including the provision that conditions payment on the tenant timely paying rent. The relevant provision provides that:

> "Each and all of the above payment installment dates are subject to the tenant not being in monetary default of their lease. If tenant is in monetary default of its obligations to pay rent under the Lease, then such commission installment(s) shall be withheld until such default is cured. In the event of a co-broke scenario, Owner shall not be responsible for paying any outside broker pursuant to a separate agreement unless otherwise agreed to in writing by Owner" (*id*. exh A ¶ 1).

Defendant included a tenant ledger (NYSCEF Doc. No. 53) justifying its position that the tenant defaulted and so it did not have to pay the final installment and plaintiff did not contest this assertion. Rather, plaintiff appears to assert that it is entitled to the commission in spite of this agreement. But as noted above, plaintiff did not adequately define the terms of the agreement or even with which party (defendant or Meridian) it entered into an agreement.

Moreover, the listing contract between defendant and Meridian provided that:

> "Owner hereby expressly agrees that Broker may cooperate with other brokers (each, a "Co- Broker"), and divide fees for services in any manner satisfactory to Broker and Co-Broker, subject to a separate agreement. The Broker shall handle all negotiations and lease arrangements with the Co-Broker and the Owner. Owner shall not be bound by nor liable for any promises, arrangements or agreements made between Broker and any other party. With respect to Brokers efforts to lease the Premises, the Owner shall only be liable to Broker for the terms and conditions outlined in this agreement" (NYSCEF Doc. No. 52, ¶ 6).

This provision suggests that defendant expressly contracted that Meridian could hire another broker, but that defendant was not liable for any promises made between defendant and Meridian. It also suggests that Meridian was required to enter into a separate agreement which plaintiff has not included here.

To the extent that plaintiff claims that Meridian was serving as defendant's agent and thereby bound defendant to some sort of agreement with plaintiff, that argument does not compel the Court to grant plaintiff's cross-motion or deny defendant's motion. "Actual authority granted to an agent to bind his principal is created by direct manifestations from the principal to the agent, and the extent of the agent's actual authority is interpreted in the light of all the circumstances attending these manifestations, including the customs of business, the subject matter, any formal agreement between the parties, and the facts of which both parties are aware. In the absence of actual authority, words or conduct by the principal that are communicated to a third party may create the apparent authority of the agent to act on behalf of the principal" (*New York Community Bank v Woodhaven Assoc., LLC*, 137 AD3d 1231, 1233, 29 NYS3d 377 [2d Dept 2016]).

Obviously, defendant never granted Meridian actual authority to bind it to an agreement whereby defendant was supposed to pay plaintiff regardless of the other terms in the listing agreement (i.e., the provision that payment was predicated upon the tenant's payment of rent). And plaintiff failed to include any communications to suggest that there was apparent authority; plaintiff merely asserts in conclusory fashion that defendant agreed to pay while also insisting it only communicated with Meridian (although those communications were also not included). Therefore, the Court finds that defendant is not bound to some sort of oral agreement that

Meridian may have entered into with plaintiff, the terms of which remain unclear, under these circumstances.

Summary

In this action, defendant simply seeks to abide by the terms of the only agreement it signed. That agreement required it to pay a commission to Meridian (not plaintiff) in installments, conditioned on the tenant remaining in good standing. Plaintiff demands the full commission from defendant despite the fact that it did not enter into a written agreement with either defendant or Meridian. Instead, plaintiff appears to claim there was an oral agreement although plaintiff did not directly communicate with defendant and only negotiated with Meridian. For some reason, plaintiff did not attach any communications detailing its discussions with Meridian.

Defendant showed that it paid what it thought was due to Meridian, i.e., two of the three installments (*see* NYSCEF Doc. No. 75 [an invoice from Meridian showing two of the three payments made]). The amount paid by defendant appears to correspond with the entirety of the amount it claims it owed pursuant to the defendant/Meridian agreement. That is, this invoice says that defendant paid two installments of $20,694.03 to Meridian. It therefore follows that half of that amount is the commission plaintiff says it was owed for each installment. This document suggests that plaintiff received its cut (half of the broker's fee) and did not receive the last commission because the tenant defaulted, a contention that plaintiff does not deny.

The Court observes that plaintiff did not include any payment evidence. It did not directly address whether or not it received the first two commission installments from Meridian nor did it include a check from Meridian (or from defendant).

Plaintiff's insistence that it need not elect a theory of recovery at this stage of the case (breach of contract versus quasi contract theories) may be true in the abstract. But, in the context of this motion, it makes it exceedingly difficult to ascertain the basis for plaintiff's arguments. Plaintiff's claim for breach of contract is belied by the fact that it admits there was no written agreement with defendant. And plaintiff did not include sufficient details in the DeRose affidavit to establish the terms of its oral agreement, such how the amount was decided – nor does plaintiff even claim that it negotiated with defendant; plaintiff asserts that it only dealt with Meridian. Plaintiff simply concludes it is entitled to the full amount of the commission because it helped find a tenant and is listed on the lease as one of the brokers.

Of course, the presence of an oral agreement would foreclose plaintiff's ability to recover on its quasi-contract theories (plaintiff brings claims for unjust enrichment and quantum meruit). But those claims fail because plaintiff did not establish (or raise an issue of fact) that defendant wrongfully acquired a benefit at plaintiff's expense. Rather, defendant simply complied with the terms of the agreement it admits it signed with Meridian. Nor can defendant be bound under an account stated cause of action where there was never an underlying agreement between plaintiff and defendant.

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment dismissing the complaint is granted and the Clerk is directed to enter judgment accordingly in favor of defendant and against plaintiff along with costs and disbursements upon presentation of proper papers therefor; and it is further

ORDERED that plaintiff's cross-motion is denied.

1/27/2025
DATE

ARLENE P. BLUTH, J.S.C.

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