SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DEBRA A. JAMES** **PART 59**

Justice

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SUITEY, INC. d/b/a TRIPLEMINT,

Plaintiff,

- v -

CHRIS DAISH and DEVIN KOGEL,

Defendants.

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INDEX NO.	651422/2018
MOTION DATE	05/01/2024
MOTION SEQ. NO.	002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 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, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87

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

ORDER

Upon the foregoing documents, it is

ORDERED that to the extent that it seeks dismissal of defendants' second counterclaim to exercise stock options, the motion, pursuant to CPLR § 3212, of plaintiff Suitey, Inc. d/b/a Triplemint Services, for summary judgment is granted, and such second counterclaim is hereby dismissed; and it is further

ORDERED that to the extent that it seeks summary judgment award monetary damages on its complaint, the motion, pursuant to CPLR § 3212, of plaintiff, is denied; and it is further

ORDERED that to the extent that it seeks summary judgment on their first counterclaim for breach of agreement and violation of New York Labor Law § 191-c.1, the cross motion,

pursuant to CPLR § 3212, of defendants Chris Daish and Devin Kogel for summary judgment is granted; and it is further

ORDERED that the Clerk shall enter judgment in favor of defendants and against plaintiff in the sum of $14,320.34, with interest from March 20, 2018 until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs.

DECISION

In this breach of contract action, plaintiff real estate brokerage Suitey, Inc. d/b/a Triplemint Services ("Triplemint") moves for summary judgment, pursuant to CPLR §3212, against two of its former sales agents, Chris Daish and Devin Kogel, to recover $37,549.02 in referral fees and commissions. Defendants oppose and cross-move for summary judgment seeking unpaid commissions of $14,320.94.

The Agreements

Defendants joined Triplemint as independent contractors in 2013 (NYSCEF Doc. No. 70 [Plaintiff's Statement of Material Facts] ["SOMF"] ¶ 1). Defendants signed identical independent contractor agreements dated September 28 and September 30, 2016, respectively (NYSCEF Doc. Nos. 53 and 54) ("The Agreements"). Under the Agreements, defendants were authorized to solicit

clients for real estate sales and rentals (Agreements, ¶¶ 1, 11).

The Agreements contain a clause which authorizes Triplemint to retain ownership of property and clients it generates, identified as "prospecting" or "inbound" leads, but also permits Triplemint to allow terminated agents to continue working with inbound and prospecting leads for a referral fee of 25% of the gross commission (id., ¶¶ 6, 9, 10). In addition, the Agreements permit defendants to "draw" against their anticipated commissions (id., ¶ 3). Lastly, the Agreements contain a provision which reduces commissions on deals pending at the time of termination from 50% to 40% (id., ¶¶ 1, 6).

Prospecting Lead David Kaiser & Defendants' Draw

In or about May 2016, Triplemint generated a prospecting lead, David Kaiser, and gave the lead to defendants (SOMF, ¶ 10). By email dated May 25, 2017, Kaiser terminated his agreement with Triplemint via email due to an unfavorable commission provision (NYSCEF Doc No. 80). Shortly thereafter, on June 7, 2017, defendants terminated their employment with Triplemint and joined Corcoran, a competitor real estate brokerage (SOMF ¶ 13). At the time of defendants' termination, Daish had a draw balance of $2,443.50 and Kogel had $7,693.50, for a total of $10,137.00 (id., ¶ 15).

Plaintiff alleges it agreed to release its exclusive arrangement with client David Kaiser to defendants and that defendants acknowledged their obligation to pay the 25% referral fee upon Kaiser closing on a purchase (id., ¶¶16, 17). Conversely, defendants allege that since Kaiser terminated his association with Triplemint in May 2017, Triplemint did not retain any interest in the listing or with Kaiser (NYSCEF Doc No. 73 [Daish Affirmation] ¶ 13).

On September 25, 2017, Kaiser, through an LLC, purchased a premises known as 77 Prospect Place, Brooklyn, New York (the "Prospect Premises") for $6.6 million. A commission of $164,500 was paid to Corcoran (SOMF ¶ 18). Triplemint alleges that 25%, or $41,125.00, is due and owing to them as the referral fee pursuant to the Agreements (id.) Defendants contend that nothing is owed to Triplemint, and to the extent that the Court might find the referral fee enforceable, defendants allege that Triplemint is limited to 25% of what defendants received (Daish Aff. ¶ 16). Defendants allege that they did not receive the entire $164,500 Prospect Premises commission, but rather only 70% or $115,500, thus limiting plaintiff to $28,875.00 (id.).

On October 30, 2017, plaintiff emailed defendants regarding the fee and the parties met in person on November 16, 2017, at which time plaintiff alleges that defendants acknowledged and admitted that a referral fee was due and owing and assured

plaintiff that they would be in touch regarding payment (SOMF ¶ 19). Plaintiff sent defendants a follow-up email on November 21, 2017, regarding payment of the referral fee, to which defendants responded by stating that they had a "difference of opinion" and directed all further correspondence to their attorney (id., ¶ 20).

Schermerhorn Commission

On March 13, 2018, Triplemint received a check in the amount of $34,594.95 from defendants' counsel representing the full commission of a sale of a property located on Schermerhorn Street (the "Schermerhorn Commission") by defendants while they were still employed by Triplemint (id., 21). Defendants maintain that they are entitled to a 50% commission split with Triplemint pursuant to their Agreements, thus entitling them to $17,297.47 (Daish Aff. ¶ 11). Plaintiff, however, alleges that defendants are only entitled to 40% of the commission, or $13,837.98, pursuant to provisions in the Agreements that reduce commissions that are paid out post-termination (SOMF ¶ 22).

Defendants' attorney requested that Triplemint update its records to reflect the impact of the check on defendants' outstanding draw balances (SOMF ¶ 21). On March 22, 2018, Triplemint sent defendants a letter stating that after applying the Schermerhorn Commission to defendants combined outstanding draw balance of $10,137.00 and then applying the remaining

$3,700.98 to the alleged referral fee balance of $41,125.00, defendants remaining balance was $37,549.02 (SOMF ¶ 22).[1]

Defendants' counterclaim alleges that the provision in the Agreements that reduces defendant's commissions by 10% if the commissions are earned after termination (the "rollback" provision) is a penalty and unenforceable (Daish Aff. ¶ 10). Similarly, defendants argue that plaintiff's failure to pay commission to defendants within 5 days of it becoming due violated New York Labor Law § 191-c (id.). Defendants allege they are owed 50% of Schermerhorn commission, or $17,297.47 and after paying back their draw balance of $10,137.00, are still owed $7,160.47 (id., ¶ 11). Defendants seek double damages and attorney's fees in the amount of $14,320.94 (id., ¶ 16).

Discussion

The party moving for summary judgment bears the burden of proof, by competent, admissible evidence, that no material and triable issues of fact exist (see e.g., Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985); Sokolow, Dunaud, Mercadier & Carreras v Lacher, 299 AD2d 64, 70 [1st Dept 2002]). Once that showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues

[1] The Court notes that there appears to be a slight arithmetical error, in that the actual balance due would be $125 less.

of fact which require a trial of the action (see e.g., Zuckerman v City of New York, 49 NY2d 557, 562 (1980); Pemberton v New York City Tr. Auth., 304 AD2d 340, 342 [1st Dept 2003]). To successfully prosecute a cause of action for breach of contract, the party making the claim is required to establish (1) the existence of a contract, (2) the party's performance under the contract; (3) the opposing party's breach of the contract, and (4) resulting damages (see Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445, 445-446 [1st Dept 2016]; Harris v Seward Park Hous. Corp., 79 AD3d 425, 426 [1st Dept 2010]).

Plaintiff's Motion

In support of its contract claim, plaintiff relies upon, inter alia, the Agreements, various emails between the parties, defendants' deposition transcripts, an attorney affirmation, and an affirmation of Philip Lang, the former Chief Operating Officer of Triplemint. Plaintiff primarily argues that because defendants acknowledge that the prospecting leads remain property of Triplemint, the Agreements require defendants to pay Triplemint 25% of the gross commission of the transaction. However, plaintiff ignores the fact that Kaiser terminated his agreement with plaintiff, and plaintiff has not demonstrated that it had an exclusive relationship with Kaiser post-termination. Even assuming it did, however, the referral

provision in the Agreements cannot be enforced against Corcoran, the entity that actually received the gross commission from the sale, because it is not a party to the Agreements (see FPG Maiden Lane, LLC v Bank Leumi USA, 226 AD3d 406, 408 [1st Dept 2024]). Therefore, plaintiff has not met its burden with respect to its breach of contract claim entitling it to a commission from the sale of its Prospect Premises. Plaintiff's claim for unjust enrichment must be dismissed because plaintiff is seeking to recover under a valid express agreement (see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382 (1987); *Hagman v Swenson*, 149 AD3d 1 [1st Dept 2017]; JDF Realty, Inc. v Sartiano, 93 AD3d 410 [1st Dept 2012]).

Defendant's Opposition and Cross-Motion

In opposition to plaintiff's motion and in support of its cross-motion, defendants argue that the Agreements are in part unconscionable and should not be enforced, especially the rollback provision. "A determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable when made—i.e., some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party" (Gillman v Chase Manhattan Bank, N.A., 73 NY2d 1, 10 [1988] (internal quotation marks and citation omitted). Furthermore, "[t]he procedural

element of unconscionability requires an examination of the contract formation process and the alleged lack of meaningful choice. The focus is on such matters as the size and commercial setting of the transaction . . . whether deceptive or high-pressured tactics were employed, the use of fine print in the contract, the experience and education of the party claiming unconscionability, and whether there was disparity in bargaining power" (id., 10-11)

Here, defendants worked for Triplemint for three years before signing their Agreements to be licensed real estate salespersons. The Court notes that the Agreements are only eight pages each in length and do not contain any fine print. Defendants do not allege that they did not understand any of the Agreements' terms, nor do they allege that they were deceived or that plaintiff used high-pressure tactics. As defendants fail to demonstrate the existence of a genuine issue of material fact that a transaction was procedurally unconscionable, "a court need not consider whether the challenged contract provision was substantively unconscionable" (Kaufman v Relx Inc., 211 AD3d 580, 582 [1st Dept 2022] (internal citations omitted). Therefore, the Agreements are not unconscionable.

With respect to the rollback provision, defendants argue that it is "akin to a liquidated damages clause" and is an unenforceable penalty. "Liquidated damages constitute the

compensation which, the parties have agreed, should be paid in order to satisfy any loss or injury flowing from a breach of their contract" (Truck Rent-A-Ctr., Inc. v Puritan Farms 2nd, Inc., 41 NY2d 420, 423-24 [1977]). "A contractual provision fixing damages in the event of breach will be sustained if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation" (id. at 425) (internal citations omitted). "If, however, the amount fixed is plainly or grossly disproportionate to the probable loss, the provision calls for a penalty and will not be enforced" (id.) (internal citations omitted). Furthermore, "[a]lthough the party challenging the liquidated damages provision has the burden to prove that the liquidated damages are, in fact, an unenforceable penalty (see JMD Holding Corp. v Congress Fin. Corp., 4 NY3d 373, 380, [2005]; Parker v Parker, 163 AD3d 405, 406 [1st Dept 2018]), the party seeking to enforce the provision must necessarily have been damaged in order for the provision to apply" (Rubin v Napoli Bern Ripka Shkolnik, *LLP*, 179 AD3d 495, 496 [1st Dept 2020] [internal citations omitted]). "Whether a liquidated damages provision is an unenforceable penalty is a question of law for the court" (Seymour v Hovnanian, 211 AD3d 549, 553 [1st Dept 2022], citing JMD Holding Corp., 4 NY3d 373, 379).

The rollback provision states that "All commissions for transactions originating prior to the Exhibit A termination Date shall be paid at the rate outlined in Exhibit A less 10 percentage points" (Agreements, ¶ 6). Although moving defendants bear the burden of proving the provision is a penalty, such provision only applies if Triplemint suffered damages. Here, plaintiff failed to make any such showing of actual damages. In fact, pursuant to the Agreements, Triplemint's commission increased by 10% because defendants terminated their Agreements before being paid a commission. In other words, Triplemint did not receive any less commission after defendants terminated their Agreements than it would have if defendants remained with Triplemint. Such provision does not bear reasonable proportion to the probable loss because Triplemint suffered no loss as a result of defendants' termination. Therefore, the Court finds that the provision is an unenforceable penalty and that defendants are owed 50% commission in the amount of $17,297.47. As defendants' attorney requested that the outstanding draw amounts be paid from the commission, the amount due and owing to defendants is $7,160.47.

As to defendants first counterclaim for the unlawful retention of the Schermerhorn Commission pursuant to New York Labor Law 191-c, the statute provides that, "[w]hen a contract between a principal and a sales representative is terminated,

all earned commissions shall be paid within five business days after termination or within five business days after they become due in the case of earned commissions not due when the contract is terminated" (Labor Law § 191-c). "Sales representative" as defined in § 191-a [d] is a "person or entity who solicits orders in New York state" and is not covered by other provisions of labor law" (Labor Law § 191-a). "The statutory definition of sales representative is clearly limited to independent contractors, as opposed to salaried or commissioned employees" (Deutschman v First Mfg. Co., Inc., 7 AD3d 363, 364 [1st Dept 2004] [internal citations omitted]). New York Labor Law 191-c further provides that "[a] principal who fails to comply with the provisions of this section concerning timely payment of all earned commissions shall be liable to the sales representative in a civil action for double damages. The prevailing party in any such action shall be entitled to an award of reasonable attorney's fees, court costs, and disbursements" (Labor Law § 191-c).

Here, the Agreements specifically identify defendants as "independent contractors". None of the parties dispute that defendants solicit properties and clients in New York and are independent contractors as opposed to employees of Triplemint (NYSCEF Doc No. 52 [Lang Affirmation], ¶ 8; Daish Aff. ¶ 5). As such, Triplemint was obligated to pay defendants the

Schermerhorn commission within five business days after they became due. Triplemint received the Schermerhorn commission check on March 13, 2018, thus making defendants' payments due by the fifth business day thereafter, March 20, 2018. As defendants did not receive the Schermerhorn commission of $7,160.47 from Triplemint by March 20, 2018, defendants are entitled to double damages in the amount of $14,320.34.

Defendants' second counterclaim seeks relief relating to stock options. Plaintiff argues that the counterclaim is meritless, as defendants never exercised the stock options in accordance with the terms of the Option Notice (NYSCEF Doc No. 85 [Borg Affirmation] ¶ 30). In support, plaintiff offers emails between Lang and Daish from August 2017, approximately two months after defendants terminated their Agreements with Triplemint, in which Lang informs Daish on how and when to exercise the stock options and that "technically it should be within 3 months of you leaving" (NYSCEF Doc. No. 60). Defendants fail to submit any support or even mention the stock options in their cross moving papers. They have thus failed to raise an issue of fact with respect to Triplemint's defense against the second counterclaim, which counterclaim must be dismissed.

Finally, with respect to the timeliness of defendants' papers the Court finds the delay non-prejudicial. Although the cross-motion was not made within 120 days of the filing of the

note of issue limit as required by CPLR 3212(a), the Court may consider it because the relief sought was identical to that sought in plaintiff's timely-filed motion (see Kershaw v Hospital for Special Surgery (114 AD3d 75, 87-88 [1st Dept 2013]).

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1/27/2025
DATE

DEBRA A. JAMES, J.S.C.

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