SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARTHUR F. ENGORON **PART** 37
Justice

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BERKO & ASSOCIATES LLC,

Plaintiff,

- v -

B. JAFFE REAL ESTATE JV LLC, PPG TRIBECA, LLC, RM TRIBECA MANHATTAN AC LP, RM TRIBECA MANHATTAN LP, 6R TRIBECA OWNER 2021 LLC,

Defendants.

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INDEX NO. 161030/2024

MOTION DATE 01/21/2025

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56,

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, and for the reasons stated hereinbelow, the motion by plaintiff for summary judgment is granted as to plaintiff's first cause of action and is denied as to plaintiff's second cause of action; and plaintiff's request to dismiss defendants' affirmative defenses is granted. Additionally, defendants' cross-motion for summary judgment on its counterclaims is denied.

Background

In 2019, defendants PPG Tribeca, LLC, RM Tribeca Manhattan AC LP, and RM Tribeca Manhattan LP agreed to develop certain property located at 70-74 Warren St and 80 West Broadway, New York, NY (the "Project"). NYSCEF Doc. No. 1. On December 3, 2019, said defendants and non-parties Astor Tribeca Common Equity LLC and Astor Tribeca Preferred Equity LLC entered into an LLC agreement, in part, to form defendant B. Jaffe Real Estate JV LLC and subsidiary 6R Tribeca Owner 2021 LLC (the "Agreement"). NYSCEF Doc. No. 6. Plaintiff, Berko & Associates LLC, "was brought in to assist, as broker" in the development of the Project. NYSCEF Doc. No. 24.

Plaintiff alleges that it is a third-party beneficiary of the Agreement. NYSCEF Doc. No. 1. Plaintiff is defined in the Agreement as "a New York limited liability company that is also licensed in New York as a real estate brokerage. Berko & Associates is an Affiliate of Astor Common Member and Astor Pref Member." NYSCEF Doc. No. 6. Section 4.9 of the Agreement addresses approved fees, and states that plaintiff is an "affiliate" and will receive fees for each of its services. Section 4.9(b)(i) includes a $720,000 "Acquisition Fee" to be paid to

plaintiff, with the initial 50% of the fee ($360,000) to be paid at "Closing"[1] and the balance to be paid over the course of 48 months. Section 4.9(b)(i) notes that "[s]hould the [P]roject recapitalize or sell, any remaining [A]cquisition [F]ee balance will be paid at such time." Id. Defendants have only partially paid the Acquisition Fee, and that $172,500 remains outstanding.

Plaintiff sent various invoices to defendants, including one on December 21, 2022, for the outstanding $172,500. NYSCEF Doc. No. 7. On December 26, 2023, plaintiff's attorney sent a collection letter to defendants for the $172,500. NYSCEF Doc. No. 8. On November 8, 2024, upon learning of an upcoming sale of 80 West Broadway, plaintiff's attorney served a demand letter for payment of the outstanding $172,500. NYSCEF Doc. No. 9. Plaintiff alleges that defendants informed plaintiff that they would not pay the outstanding Acquisition Fee at the closing, which was to be held, and apparently was, on December 4, 2024. NYSCEF Doc. No. 1.

On November 25, 2024, plaintiff, Berko & Associates LLC, filed a verified complaint against defendants, asserting two causes of action: (1) breach of contract; and (2) quantum meruit. Id.

On December 2, 2024, this Court declined to sign plaintiff's TRO application, as the requested relief was monetary only and there remained issues of fact precluding such relief. NYSCEF Doc. No. 20.

On December 20, 2024, defendants filed a verified answer consisting of, inter alia, a general denial and the following five affirmative defenses: (1) that plaintiff's claims are barred by the doctrines of estoppel, res judicata, laches, waiver, and/or unclean hands; (2) that plaintiff lacks standing to sue for breach of contract because it is neither a signatory to the contract nor an intended third-party beneficiary of the contract; (3) that plaintiff was paid all amounts due and owing; (4) that plaintiff's claims are based on an improper valuation of the subject property; and (5) that documentary evidence bars plaintiff's claims. NYSCEF Doc. No. 21.

Defendants' answer also asserts two counterclaims: (1) tortious interference with contractual relations; and (2) tortious interference with prospective business relations. Id. Defendants allege that plaintiff intended to interfere with the December 4, 2024, closing of defendants' sale of 80 West Broadway, by, prior to the closing, filing its complaint and an application for Order to Show Cause requesting a preliminary injunction restraining proceeds from the sale. Id. Defendants further allege that plaintiff's claims constitute fraud, as plaintiff had actual knowledge that its claims were meritless and without basis, and that plaintiff's alleged fraud and misrepresentations were "undertaken with the wrongful and exclusive purpose of causing injury to [d]efendants' existing business relationships and prospective contractual relationships by involving [d]efendants' and the Project in frivolous and costly litigation." Id.

On January 21, 2025, plaintiff moved to: (1) dismiss defendants' affirmative defenses, pursuant to CPLR 3211(b); (2) dismiss defendants' counterclaims, pursuant to CPLR 3211(a); and (3) for

[1] Closing is defined in the Agreement as "[t]he consummation on or as of the Effective Date of the transactions contemplated by this Agreement, including the closings of the Ground Lease and the Initial Loan."

summary judgment on its unpaid fees of $172,500.00, plus interest from December 21, 2022, pursuant to CPLR 3212. NYSCEF Doc. No. 23.

In support of its motion, plaintiff argues, inter alia, that defendants' five affirmative defenses consist of conclusory statements and are devoid of facts. NYSCEF Doc. No. 32. Plaintiff further argues that the documentary evidence "clearly demonstrates [the] lack of merit and propriety of the dismissal of the affirmative defenses." Id. As to the first affirmative defense, claiming application of the "doctrines of estoppel, res judicata, laches, waiver, and/or unclean hands[,]" plaintiff notes that no details are provided for the basis or foundation of the equitable defenses. Id.

As to the second affirmative defense, that plaintiff is not an intended third-party beneficiary of the Agreement, plaintiff contends this is contrary to long held caselaw. Id. Plaintiff cites Goodman-Marks Assoc., Inc. v Westbury Post Assoc., 70 AD2d 145, 148 (2d Dept 1979), for the proposition that where "performance is to be rendered directly to a third party under the terms of an agreement, the third party is deemed an intended beneficiary of the covenant and is entitled to sue for its breach." Id.

As to the third and fourth affirmative defenses addressing the valuation of the fees, plaintiff states that these defenses are without basis because the amount of the Acquisition Fee was acknowledged in writing in the Agreement, and it is undisputed that payment had been made towards the Acquisition Fee, with $172,500 remaining unpaid. Id. As to the fifth affirmative defense, that documentary evidence bars plaintiff's claims, plaintiff argues that defendants fail to identify the alleged documentary evidence upon which they rely. Id.

Plaintiff argues as that, pursuant to CPLR 3211(a), defendants' counterclaims must fail as a matter of law. Id. Plaintiff cites Arnon Ltd (IOM) v Beierwaltes, 125 AD3d 453 (1st Dept 2015) (filing of commercial dispute between parties cannot form basis for counterclaim of tortious interference if no third parties or business associates of defendants were named), for the proposition that the mere filing of a complaint and an order to show cause application cannot serve as a basis for a claim of tortious interference with business relations. Id. Plaintiff asserts that here, defendants are precluded from asserting counterclaims for tortious interference with business based upon the filing of the instant action, as no current or prospective business associate or client were served or named in the pleadings. Id.

Plaintiff argues that, pursuant to CPLR 3212, it has demonstrated via documentary evidence and as a matter of law that it is a third-party beneficiary of the Agreement, "where in the parties identified that it is entitled to fees for services rendered as well as the amount of those fees." Id.

In opposition, defendants cross-move for a default judgment against plaintiff and/or summary judgment on their counterclaims. NYSCEF Doc. No. 39.

In support of their cross-motion and in opposition of plaintiff's motion, defendants note, inter alia, that their answer with counterclaims was filed on December 20, 2024, and, thus, plaintiff's motion, filed on January 21, 2025, was eleven days late. Defendants argue that, accordingly, plaintiff is in default on the counterclaims. NYSCEF Doc. No. 50.

Defendants further argue that, if this Court considers plaintiff's motion to dismiss on the merits, plaintiff fails to "provide any legitimate basis for the dismissal of [d]efendants' affirmative defenses and counterclaims." Id. Defendants contend that they have adequately pled their counterclaims, including the allegation that plaintiff engaged in conduct intending to interfere with defendants' current contractual relationships by "filing the instant action and a frivolous TRO to disrupt the sale of 80 West Broadway[.]" Id.

Additionally, defendants contend that the Agreement "clearly and unambiguously states that Plaintiff is entitled to a fee only on the sale of the Project." Id. Defendants argue that Section 4.9 was "not triggered by the sale of 80 West Broadway, as it constitutes only a portion of the Project, not the entire Project." NYSCEF Doc. No. 40.

Defendants further contend that the $720,000 Acquisition Fee was based on an anticipated $59,000,000 value of the Project pursuant to a 1.22% broker's fee and that the actual value of the Project ended up being $36,000,000. NYSCEF Doc. No. 40. Defendants argue that they should have paid plaintiff only $439,200, rather than the $540,000 they paid, and that defendants are entitled to have $108,000 returned. NYSCEF Doc. No. 52.

Defendants also argue that "[p]laintiff cannot enforce the terms of the Agreement, as it is not an intended third-party beneficiary." NYSCEF Doc. No. 40. Defendants cite § 13.14 of the Agreement:

> Rights of Creditors and Third Parties.
> This Agreement is entered into by and among the Members for the exclusive benefit of the Company, its Members, and their successors and assigns. This Agreement is expressly not intended for the benefit of any creditor of the Company or any other Person, except as provided in the following paragraph. Except and only to the extent provided by the Act [the Limited Liability Company Act of Delaware] or other applicable statute, no such creditor or third party shall have any rights under this Agreement or any agreement between the Company and any Member with respect to any Capital Contribution or otherwise.

Defendants note that plaintiff is not a "signatory" of the Agreement. NYSCEF Doc. No. 50.

Defendants additionally argue that each defense is adequately pled. Although plaintiff argues that defendants' first affirmative defense is conclusory, defendants, in turn, argue that plaintiff fails to meet its burden of proving that the defense lacks merit. NYSCEF Doc. No. 50. In support of their second affirmative defense, defendants contend that plaintiff is not a third-party beneficiary of the Agreement. Id.

In support of defendants third and fourth affirmative defenses, which assert that plaintiff was paid and that its claims rely on an incorrect valuation of the Project, defendants argue that the value of the Project is in dispute. Id. As to defendants' fifth affirmative defense, defendants argue that the Agreement conclusively establishes that: plaintiff is not a party to the Agreement;

the fee is only triggered if the Project is sold; third-party beneficiary claims are prohibited; and plaintiff was overpaid for its services. Id.

Additionally, defendants argue that they have demonstrated each element of their tortious interference counterclaims, as plaintiff "knew about the sale of 80 West Broadway and attempted to interfere by filing a frivolous TRO"; and that this came after defendant paid plaintiff $540,000 for its services "despite having no right to such a fee." Id.

In opposition to defendants' cross-motion and in further support of its own motion, plaintiff argues, inter alia, that defendants fail to raise triable issues of fact as to the fees owed to plaintiff. NYSCEF Doc. No. 53. Plaintiff further argues that the Agreement, signed by defendants, serves as documentary evidence expressly acknowledging the fees owed to it. Id.

Plaintiff contends that defendants' argument (that plaintiff is precluded from relying upon the Agreement as a third-party under § 13.4) "ignores the fact that Berko is expressly identified as an 'Affiliate' and expressly authorized to enforce the Agreement." Id. Plaintiff notes § 13.9 of the Agreement, which provides for a bench trial:

> WITH RESPECT TO ANY DISPUTE AMONG THE MEMBERS OR THEIR AFFILIATES OR AMONG ONE OR MORE MEMBERS (OR ITS OR THEIR AFFILIATES) AND THE COMPANY CONCERNING THIS AGREEMENT, THE COMPANY, ANY SUBSIDIARY, THE PROPERTY OR THE PROJECT.

Plaintiff further contends that defendants cannot modify plaintiff's fees. NYSCEF Doc. No. 53. Plaintiff notes, pursuant to the Agreement's Recitals and § 4.9(b)(i), that the Acquisition Fee arose from the initial ground lease of the properties at issue. Id. In response to defendants' assertion that the fee should be reduced since the eventual purchase price was reduced, plaintiff cites the general proposition that "a broker's entitlement to compensation is not dependent on consummation of the sale." E. Consol. Properties, Inc. v Adelaide Realty Corp., 261 AD2d 225, 228 (1st Dept 1999).

In reply, defendants argue that, inter alia, the Agreement is "clear and unambiguous" that plaintiff would be entitled to an Acquisition Fee of $720,000 only upon the sale of the Project. NYSCEF Doc. No. 56. Defendants note that it is undisputed that they sold only one of the three buildings, 80 West Broadway, comprising the Project. Id. Defendants state that plaintiff had "no contractual right" to the $540,000 fee that defendants already paid plaintiff. Id. Defendants assert that the Agreement is silent as to any amount owed for a partial sale of the Project and that, as such, plaintiff is only entitled to the 1.22% brokerage rate "that is typical under these circumstances." Id.

Discussion

Although plaintiff's motion to dismiss was filed eleven days late, plaintiff provided a reasonable excuse and plaintiff's delay did not prejudice defendants. Therefore, this Court will deem the

motion timely filed nunc pro tunc. CPLR 2001. Accordingly, defendants' request for a default judgment against plaintiff must be denied.

"On a motion to dismiss affirmative defenses pursuant to CPLR 3211(b), the plaintiff bears the burden of demonstrating that the defenses are without merit as a matter of law." 534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick, 90 AD3d 541, 541 (1st Dept 2011). "The allegations set forth in the answer must be viewed in the light most favorable to the defendant, and the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed. Further, the court should not dismiss a defense where there remain questions of fact requiring a trial." Granite State Ins. Co. v Transatlantic Reins. Co., 132 AD3d 479, 481 (1st Dept 2015) (internal citations and quotation marks omitted).

Pursuant to CPLR 3211(a), "[i]t is well settled that on a motion to dismiss a complaint for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true. The sole criterion on a motion to dismiss is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail." Allianz Underwriters Ins. Co. v Landmark Ins. Co., 13 AD3d 172, 174 (1st Dept 2004) (internal citations and quotation marks omitted).

"Parties asserting third-party beneficiary rights under a contract must establish (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [their] benefit and (3) that the benefit to [them] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [them] if the benefit is lost." Mendel v Henry Phipps Plaza W., Inc., 6 NY3d 783, 786 (2006) (internal citations and quotation marks omitted). Additionally, "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." Clark-Fitzpatrick, Inc. v Long Is. R. Co., 70 NY2d 382, 388 (1987).

"In the absence of an agreement providing to the contrary, the broker's right to compensation is not dependent upon the performance of the realty contract or the receipt by the seller of the selling price." Blackman De Stefano Real Estate, Inc. v Smith, 157 AD2d 932, 934 (3d Dept 1990).

The elements of tortious interference with a contract are: (1) the existence of a valid contract between plaintiff and a third-party; (2) defendants' knowledge of that contract; (3) defendants' intentional procuring of the breach of that contract; and (4) damages to plaintiff. Burrowes v Combs, 25 AD3d 370, 373 (1st Dept 2006). "The claim requires a showing that the interference was accomplished by wrongful means or with malicious intent." Arnon Ltd v Beierwaltes, 125 AD3d 453 (1st Dept 2015). 'Wrongful means' includes civil suits and "[w]here the interfering conduct is a civil suit, it must be shown that the suit was frivolous." Id. (internal citations and quotation marks omitted). "Tortious interference should be actionable only when directed at the third party in plaintiff's business relationship." Carvel Corp. v Noonan, 3 NY3d 182, 185 (2004). "Motive should not be relevant on a claim for tortious interference with prospective

economic relations where defendant's actions are intended to advance its own economic interests." Id.

Pursuant to CPLR 3212, "[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 eliminate any material issues of fact from the case." Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). Once that burden is met, the opponent must tender evidence in admissible form "sufficient to require a trial of material questions of fact on which he rests his claim …mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." Zuckerman v City of New York, 49 NY2d 447, 562 (1980).

Contrary to defendants' argument, plaintiff has demonstrated that it is an intended third-party beneficiary of the Agreement. Additionally, here, there is not an agreement expressly providing that plaintiff's right to compensation is dependent upon the performance of the realty contract or the receipt by the seller of the selling price. This Court finds that defendants' opposition fails to raise any triable issues of material fact. It is undisputed that the relationship between the parties was defined by the Agreement, specifically providing for a $720,000 Acquisition Fee to paid to plaintiff. Defendants' contentions that: (1) the Acquisition Fee can be reduced; and (2) the Acquisition Fee has not been triggered, are not supported by the plain language of the Agreement.

Plaintiff has made a prima facie showing of its entitlement to summary judgment as to its first cause of action, breach of contract, by submitting, inter alia: the summons and verified complaint (NYSCEF Doc. No. 25); the Agreement (NYSCEF Doc. No. 27); invoices and collection letters sent to defendant from 2022 to 2024 (NYSCEF Doc. Nos. 28, 29, 30); and an affirmation from plaintiff's principal, Joseph Berko, in support of the motion, attesting to the facts of the instant action, including defendant's failure to pay the outstanding $172,500 of the Acquisition Fee, in breach of the Agreement (NYSCEF Doc. No. 24). Therefore, plaintiff's request for summary judgment on its first cause of action must be granted. Plaintiff's second cause of action, for quantum meruit, must be dismissed, as there is a contract governing the parties relationship.

Accordingly, plaintiff's request to dismiss defendants' five affirmative defenses is granted, pursuant to the above. Additionally, plaintiff is entitled to summary judgment dismissing defendants' counterclaims, as the instant action is not frivolous and is not directed at a third party in defendants' business relationship. Therefore, defendants' cross-motion for summary judgment must be denied.

This Court has considered defendants' various remaining arguments and finds them to be unavailing and/or non-dispositive.

Conclusion

Thus, the motion by plaintiff, Berko & Associates LLC, for summary judgment on its two causes of action and to dismiss defendants' affirmative defenses is hereby granted in part and denied in part as follows: (1) granted as to plaintiff's breach of contract cause of action; (2) denied as to plaintiff's quantum meruit cause of action; and (3) granted as to dismissing defendants affirmative defenses; and accordingly the Clerk is hereby directed to enter judgment in favor of

plaintiff and against all defendants, PPG Tribeca, LLC, RM Tribeca Manhattan AC LP, RM Tribeca Manhattan LP, 6R Tribeca Owner 2021 LLC, and B. Jaffe Real Estate JV LLC, jointly and severally, in the amount of $172,500.00, plus statutory interest from December 21, 2022.

HON. ARTHUR F. ENGORON

7/9/2025
DATE

ARTHUR F. ENGORON, 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