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PUBLISH

SHORT FORM ORDER

INDEX No. 11-26540

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

***PRESENT:***

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 11-14-11
ADJ. DATE 8-6-12
Mot. Seq. # 002 - MotD

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ATLANTIC CAPITAL REALTY,

Plaintiff,

- against -

CAYUGA CAPITAL MANAGEMENT, LLC, CCM STRATEGIC DEVELOPMENT, LLC, JACOB L. SACKS, JSIGNAL LLC and JTMERC LLC,

Defendants.

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Upon the following papers numbered 1 to 13 read on this motion for change of venue and to dismiss ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 5 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 7 - 9 ; Replying Affidavits and supporting papers 10 - 13 ; Other defendant's memorandum of law - 6 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that the branch of the motion for a change of venue pursuant to CPLR 510(3) is denied; and it is further

***ORDERED*** that the branch of the motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7) is granted to the extent of severing and dismissing the fourth cause of action in the complaint for failure to state a cause of action.

Plaintiff Atlantic Capital Realty seeks to recover a brokerage commission purportedly earned for introducing the defendants to Anglo Irish Bank Corporation, Ltd. (the "Bank") for the purpose of purchasing the Bank's nonperforming loan secured by a mortgage on the property located at 76 North 4th Street in Brooklyn, New York (the "Property"). Atlantic Capital Realty has its principal place of business in Suffolk County, New York. Kevin Frain, a licensed real estate broker in the State of New York, is the sole proprietor of, and conducts business under the name Atlantic Capital Realty ("AC Realty").

In the complaint it is alleged that in July 2010, at the request of defendants Cayuga Capital Management, LLC, CCM Strategic Development, LLC and Jacob L. Sacks (hereinafter the "Defendants" when referred to collectively), AC Realty set in motion efforts to procure the nonperforming loan by sending the Bank a Letter of Intent and an offer to purchase the Property. In August 2010, at the request of the Defendants, AC Realty allegedly supplemented the offer with documentation requested by the Bank. It is further alleged the Defendants agreed to pay AC Realty four percent (4%) of the purchase amount for its efforts in finding the available nonperforming loan and negotiating the transaction with the Bank. In October 2010, defendant JTMERC, LLC ("JTMERC") purchased the nonperforming loan and was assigned the mortgage securing the note. Additionally, it alleged that the Defendants, or affiliates thereof, are members of JTMERC, and worked together so that JTMERC could purchase the loan from the Bank to avoid paying AC Realty's commission. According to the allegations in the complaint, but for the actions of AC Realty, the Defendants and JTMERC would not have known about the availability of the Bank's nonperforming loan.

AC Realty commenced this action against the Defendants for breach of an implied brokerage commission (first cause of action) and quantum meruit (second causes of action), and against the Defendants and JTMERC for unjust enrichment (third cause of action) and for conspiracy to defraud AC Realty of a commission (fourth cause of action), and seeks damages in the amount of $695,033.00, with interest from October 2010. Defendants and JTMERC (hereinafter the "Moving Defendants" when referred to collectively) now move for a change of venue to New York County for the convenience of the witnesses (CPLR 510[3]). Alternatively, the Moving Defendants seek a dismissal of the complaint both for failure to state a cause of action (CPLR 3211[a][7]), and on the ground of a defense founded on documentary evidence (CPLR 3211[a][1]).

Upon a motion pursuant to CPLR 510(3), the movant bears the burden of demonstrating that the convenience of material witnesses would be better served by the change of venue (*see* ***Walsh v Mystic Tank Lines Corp.***, 51 AD3d 908, 859 NYS2d 223 [2d Dept 2008]; ***Charles v New York City Tr. Auth.***, 227 AD2d 194, 715 NYS2d 871 [2d Dept 2000]). This showing must include (1) the identity of the proposed witnesses, (2) the manner in which they will be inconvenienced by a trial in the county in which the action was commenced, (3) that the witnesses have been contacted and are available and willing to testify for the movant, (4) the nature of the anticipated testimony, and (5) the manner in which the anticipated testimony is material to the issues raised in the case (***Weisemannv Davison***, 162 AD2d 448, 556 NYS2d 392 [2d Dept 1990]; *see also* ***Walsh v Mystic Tank Lines Corp.***, *supra*). The convenience of the parties to the action is not considered in making the determination (*see* ***Ithaca Peripherals, Inc. v Sequoia Pacific Sys. Corp.***, 141 AD2d 909, 539 NYS2d 47 [3d Dept 1988]).

Here, the Moving Defendants identify one non-party witness who purportedly would be inconvenienced, David Berger, a member of Fifth Square Partners, the obligee on the underlying nonperforming note and former owner of the Property. Berger lives and works in New York County, and according to the Moving Defendants, is prepared to testify that he was not introduced to the Defendants by AC Realty, and AC Realty was not instrumental in negotiating and ultimately procuring the nonperforming note. However, the Moving Defendants have not indicated how Berger's anticipated testimony is material as to whether AC Realty introduced the Defendants to the Bank, the holder of the nonperforming loan. Moreover, the alleged inconvenience of one non-party witness, is insufficient to

persuade this court to change venue to New York County. The Moving Defendants' allegation that the cause of action arose in New York County, standing on its own, is insufficient to justify a change of venue (*see* ***Cardona v Aggressive Heating Inc.***, 180 AD2d 572, 580 NYS2d 285 [1st Dept 1992]). Therefore, in the exercise of this court's discretion, the Moving Defendants' request for a change of venue pursuant to CPLR 510(3) is denied.

The branch of the motion to dismiss is decided as follows. On a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is liberally construed, the facts alleged in the complaint accepted as true, and the plaintiff accorded the benefit of every possible favorable inference (***AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.***, 5 NY3d 582, 808 NYS2d 573 [2005]; ***London v Kroll Lab. Specialists, Inc.***, 91 AD3d 79, 934 NYS2d 183 [2d Dept 2011]). The merits of the cause of action or whether the plaintiff can ultimately establish its allegations are not part of the determination and affidavits submitted on the motion are not examined for the purpose of ascertaining whether there is evidentiary support for the pleading (*see* ***Rovello v Orofino Realty Co., Inc.***, 40 NY2d 633, 389 NYS2d 314 [1976]; ***London v Kroll Lab. Specialists, Inc.***, *supra*). To prevail on a motion to dismiss based upon documentary evidence pursuant to CPLR 3211(a)(1), the movant must demonstrate that the documents conclusively refute the plaintiff's claims (***AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.***, *supra*).

AC Realty's cause of action to recover a brokerage commission is sufficient to withstand dismissal. To state a claim for a commission, a broker must allege that it is duly licensed, had a contract, express or implied, with the party to be charged with paying the commission, and that it was the procuring cause of the sale (*see* ***Greene v Hellman***, 51 NY2d 197, 433 NYS2d 75[1980]; ***Sutton & Edwards, Inc. v 68-60 Austin Realty Corp.***, 70 AD3d 810 [2d Dept 2010]). It is alleged that AC Realty is licensed, had an implied contract with the Defendants to obtain and negotiate the purchase of the nonperforming loan secured by the Property and that the Defendants were introduced to the Bank for that purpose. Moreover, entitlement to a commission or a finder's fee is not affected by the fact that the broker did not participate in the actual negotiations if it is shown that the broker generated a chain of circumstances which proximately led to consummation of the transaction *(see* ***Greene v Hellmann***, *supra*; ***Buck v Cimino***, 243 AD2d 681, 663 NYS2d 635 [2d Dept 1997], *lv denied* 91 NY2d 807, 669 NYS2d 260 [1998]).

As to the documents relied upon by the Moving Defendants, the emails and affidavits are insufficient to qualify as documentary evidence to sustain a dismissal under CPLR 3211(a)(1) (*see* ***Weil Gotshal & Manges LLP v Fashion Boutigue of Short Hills, Inc.***, 10 AD3d 267 [1st Dept 2004]; *see also* ***Fontanetta v John Doe 1***, 73 AD3d 78, 898 NYS2d 569 [2d Dept 2010]). In any event the emails are insufficient to resolve all the factual issues as a matter of law and conclusively dispose of the complaint.

Additionally, unpersuasive is the Moving Defendants' argument that AC Realty is attempting to enforce a contract for brokerage commissions or fees that is void and unenforceable under New York policy and Section 29(b) of the Securities Exchange Act of 1934. To this end, the Moving Defendants argue that AC Realty is not a licensed security broker and that the subject transaction involved a security, i.e., the nonperforming note. However, according the complaint the benefit of every possible favorable

inference, the court finds that the facts fit within the theory that AC Realty is a real estate broker involved in a deal where the transfer of the Property was the fundamental nature of the transaction. Under such a cognizable theory, AC Realty could be entitled to a fee based on an implied contract (*see* ***Kopelowitz & Co., Inc. v Mann***, 83 AD3d 793, 921 NYS2d 108 [2d Dept 2011]). Therefore, dismissal of the first cause of action is denied.

The causes of action under the quasi-contractual theories of quantum meruit and unjust enrichment, at this point, are also sufficient to withstand dismissal. "The 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, 521 NYS2d 653 [1987]). However, where there is a dispute as to the existence of a contract, a plaintiff may proceed upon a quasi contract theory (*see* ***Sforza v Health Ins. Plan of Greater New York, Inc.***, 210 AD2d 214, 619 NYS2d 734 [2d Dept 1994]).

Here, AC Realty has alleged, as required on a claim for quantum meruit, that services were performed for and at the behest of the Defendants in good faith, that the Defendants accepted the services, an expectation of compensation arose, and the reasonable value of the services rendered (*see* ***Monex Fin. Servs. Ltd. v Dynamic Currency Conversion, Inc.***, 62 AD3d 675, 878 NYS2d 432 [2d Dept 2009]; ***AHA Sales, Inc. v Creative Bath Prods. Inc.***, 58 AD3d 6, 867 NYS2d 169 [2d Dept 2008]). AC Realty has also adequately plead a claim for unjust enrichment, i.e., "(1) the other party was enriched, (2) at the party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (***Old Republic Nat. Title Ins. Co. v Luft***, 52 AD3d 491, 491-492 [2d Dept 2008]). Therefore, dismissal of the second and third causes of action is denied.

However, dismissal of the fourth cause of action is warranted. This cause of action is based upon the theory of a conspiracy to defraud AC Realty and deprive it of a commission. It is well established that there is no tort of conspiracy, and one party to an agreement does not have a cause of action for conspiracy to breach the contract against the other party to the agreement (*see* ***Kestenbaum v Suroff***, 268 AD2d 560, 704 NYS2d 260 [2d Dept 2000]; *see also* ***DeRaffele v 210-220-230 Owners Corp.***, 33 AD3d 752, 823 NYS2d 202 [2d Dept 2006]). Here, the wrongful acts that were purportedly committed in furtherance of the alleged conspiracy do not constitute independent torts, but instead depend upon the existence and breach of an agreement between AC Realty and the Defendants. Consequently, the fourth cause of action cannot be sustained.

Accordingly, the motion is granted to the extent of severing and dismissing for failure to state a claim, the fourth cause of action in the complaint. The motion is otherwise denied and the remainder of the action shall continue in Suffolk County.

Dated: 12/3/12

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**