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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LUCY BILLINGS J.S.C. PART 46

Justice

Index Number : 103018/2010

VANDENBERG, INC.

VS.

TOWNHOUSE 84, LLC

SEQUENCE NUMBER : 004

DEFAULT JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

Th

motion to/for a default judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2, 3
Answering Affidavits — Exhibits	4
Replying Affidavits	5

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, It is ordered ~~that this motion~~ and adjudged that :

The court denies plaintiff's motion for a default judgment against defendant 45 West 84th Street, LLC, and the Patel defendants, but grants the cross-motion by defendants Townhouse 84, LLC, Shaoul, and Tendler to dismiss the action against them, C.P.L.R. §§ 3211(a)(7), 3215(f), pursuant to the accompanying decision.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 9/7/12

Lucy Billings

LUCY BILLINGS J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
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VANDENBERG INC., Index No. 103018/2010

Plaintiff

- against - DECISION AND ORDER

TOWNHOUSE 84, LLC, 45 WEST 84th STREET, LLC, AARON PATEL a/k/a CHIRAYU PATEL, KIRAN PATEL, CHECKSPRING BANK, BEN SHAOUL and ZAK TENDLE d/b/a MAGNUM REAL ESTATE GROUP, and PATTERSON BELKNAP WEBB & TYLER, LLP,

Defendants

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff sues to recover an unpaid real estate brokerage fee and moves for a default judgment against defendant 45 West 84th Street, LLC, and its principals, defendants Aaron Patel and Kiran Patel. C.P.L.R. § 3215(e). Defendants Townhouse 84, LLC, Shaoul, and Tendle cross-move to dismiss or for summary judgment dismissing the complaint against them. C.P.L.R. §§ 3211(a)(7), 3212(b) and (e). For the reasons explained below, the court denies plaintiff's motion, but grants the three defendants' cross-motion.

II. DEFAULT JUDGMENT

The brokerage agreement is in a letter dated December 18, 2008, retaining plaintiff to find a buyer to purchase the real property at 45 West 84th Street, New York County, for $6.5 million. Only defendant Aaron Patel signed the brokerage

agreement, which does not indicate that Aaron Patel was signing on behalf of Kiran Patel or 45 West 84th Street, LLC, or even mention these other defendants. Since plaintiff has not demonstrated facts constituting its claim against defendants Kiran Patel and 45 West 84th Street, LLC, C.P.L.R. § 3215(f), plaintiff provides no basis for a default judgment against these two defendants. Manhattan Telecom. Corp. v. H & A Locksmith, Inc., 82 A.D.3d 674 (1st Dep't 2011); Giordano v. Berisha, 45 A.D.3d 416, 417 (1st Dep't 2007); Feffer v. Malpeso, 210 A.D.2d 60, 61 (1st Dep't 1994).

While Aaron Patel remains a party to and subject to the obligations under the agreement, the evidence plaintiff presents fails to establish his liability. First, the unsworn emails plaintiff relies on, which Dexter Guerrieri, plaintiff's president, fails to incorporate in his affidavit, and for which he fails to lay a foundation for admissibility as business records or another exception to the rule against hearsay, are thus inadmissible hearsay. E.g., C.P.L.R. § 4518(a); Advanced Global Tech, LLC v. Sirius Satellite Radio, Inc., 44 A.D.3d 317, 318 (1st Dep't 2007); Gryphon Dom. VI, LLC v. APP Intl. Fin. Co., B.V., 18 A.D.3d 286, 287 (1st Dep't 2005); People v. Johnson, 14 A.D.3d 434, 435 (1st Dep't 2005); Kane v. Triborough Bridge & Tunnel Auth., 8 A.D.3d 239, 241 (2d Dep't 2004). See Acevedo v. York Intl. Corp., 31 A.D.3d 255, 258 (1st Dep't 2006); Waiters v. Northern Trust Co. of N.Y., 29 A.D.3d 325, 327 (1st Dep't 2006). Even if the court considers this inadmissible evidence, however,

it fails to demonstrate plaintiff's claim against Aaron Patel.

The original agreement provided that plaintiff was to find a buyer willing to purchase the property for no less than $6.5 million. A letter dated June 26, 2009, from Dexter Guerrieri to Aaron Patel, extended the contract term six months and adjusted the required purchase price to no less than $4,999,000. In an email dated December 6, 2009, to Aaron Patel, Dexter Guerrieri confirmed an offer of $4.4 million. In an email dated December 9, 2009, Aaron Patel advised Guerrieri that Patel would not accept a purchase price less than $4.5 million. Since plaintiff found a buyer ready, willing, and able to purchase the property for only $4.4 million, this evidence does not show that plaintiff satisfied the contractual requirement for a minimum price, even under the modified agreement, to trigger Aaron Patel's obligation to pay the brokerage fee. See Manhattan Telecom. Corp. v. H & A Locksmith, Inc., 82 A.D.3d 674; Giordano v. Berisha, 45 A.D.3d at 417; National Union Fire Ins. Co. of Pittsburgh, Pa. v. Sullivan, 269 A.D.2d 149 (1st Dep't 2000).

An unsworn, unauthenticated summary that Guerrieri again neither incorporates in his affidavit, nor lays a foundation for, indicates that the property was sold December 18, 2009, for $4.4 million to a buyer that plaintiff introduced to the property. People v. Mertz, 68 N.Y.2d 136, 147 (1986); Zuluaga v. P.P.C. Constr., LLC, 45 A.D.3d 479, 480 (1st Dep't 2007); Holliday v. Hudson Armored Car & Courier Serv., 301 A.D.2d 392, 396 (1st Dep't 2003). See IRB-Brasil Resseguros S.A. v. Portobello Intl.

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Ltd., 84 A.D.3d 637, 638 (1st Dep't 2011); Babikian v. Nikki Midtown, LLC, 60 A.D.3d 470, 471-72 (1st Dep't 2009). This summary also refers to an attached hearsay report showing an unspecified purchase date and price, which as described also would be inadmissible, and an attached deed to unspecified property dated December 18, 2009, and signed by Shaoul, but neither document is attached or presented elsewhere by plaintiff. Giordano v. Berisha, 45 A.D.3d at 417. Thus plaintiff's only evidence that even suggests its satisfaction of the contractual requirement to find a buyer that would purchase the property for a price acceptable to defendant seller is the unsworn, unauthenticated, hearsay summary, which is inadmissible and therefore hardly a basis for a default judgment. C.P.L.R. § 3215(f); Utak v. Commerce Bank, 88 A.D.3d 522, 523 (1st Dep't 2011); Mejia-Ortiz v. Inoa, 71 A.D.3d 517 (1st Dep't 2010); Giordano v. Berisha, 45 A.D.3d at 417; Beltre v. Babu, 32 A.D.3d 722, 723 (1st Dep't 2006). See Wilson v. Galicia Contr. & Restoration Corp., 10 N.Y.3d 827, 830 (2008); Woodson v. Mendon Leasing Corp., 100 N.Y.2d 62, 70-71 (2003); Al Fayed v. Barak, 39 A.D.3d 371, 372 (1st Dep't 2007).

III. DISMISSAL

A. The Substantive Legal Claims Against Townhouse 84, LLC, Shaoul, and Tendle

Defendants Townhouse 84, LLC, Shaoul, and Tendle cross-move for dismissal of plaintiff's claims against these defendants. Plaintiff's first claim for breach of contract does not allege any conduct by Townhouse 84, LLC, Shaoul, or Tendle. Plaintiff's

second claim for tortious interference with a contract, however, alleges that Magnum Real Estate, a name under which Shaoul and Tendle conducted business, maintained a controlling or management interest in Townhouse 84, LLC, and caused the breach of the agreement to pay a brokerage fee to plaintiff. The complaint also alleges that Shaoul and Tendle maintained a controlling or membership interest in Magnum Real Estate.

A claim of tortious interference with a contract requires (1) a valid contract to which plaintiff was a party, (2) an actual breach of that contract by another party to it, (3) defendants' knowledge of the contract, (4) their intentional procurement of the breach, and (5) damages to plaintiff from that interference. White Plains Coat & Apron Co., Inc. v. Cintas Corp., 8 N.Y.3d 422, 426 (2007); Lama Holding Co. v. Smith Barney, 88 N.Y.2d 413, 424 (1996); Foster v. Churchill, 87 N.Y.2d 744, 749-50 (1996); Burrowes v. Combs, 25 A.D.3d 370, 373 (1st Dep't 2006). The moving defendants do not dispute that the complaint alleges the elements of a contract and its breach by other defendants. The moving defendants' defense focusses on the complaint's failure to allege any facts indicating these defendants' knowledge of plaintiff's contract with Aaron Patel or any other defendant. Mautner Glick Corp. v. Edward Lee Cave, Inc., 157 A.D.2d 594 (1st Dep't 1990). See Preamble Props. v. Woodard Antigues Corp., 293 A.D.2d 330, 331 (1st Dep't 2002); Bogoni v. Friedlander, 197 A.D.2d 281, 288 (1st Dep't 1994). Even if plaintiff's claim that Townhouse 84, LLC, and Magnum Real

Estate "were aware that plaintiff was acting as the broker on behalf of the owners and landlords of the premises" allowed a reasonable inference that the moving defendants knew of the contract, however, plaintiff fails to allege that they procured the breach. Aff. of Rex Whitehorn Ex. A ¶ 26.

The only facts the complaint alleges regarding this element are that the moving defendants "refused to inform plaintiff of the status of the purchase of the premises or the completion of the purchase of the premises," id. ¶ 29, and "acknowledge that Magnum or entities controlled and operated by them had purchased the premises." Id. ¶ 30. These omissions "were intended to deprive plaintiff of commissions due and owing to it." Id. ¶ 31. Plaintiff's failure to allege any duty of Townhouse 84, LLC, Shaoul, Tendle, or Magnum Real Estate to inform plaintiff regarding the purchase, however, renders irrelevant their alleged refusal to advise plaintiff.

The allegation that Magnum Real Estate and Townhouse 84, LLC, "interfered with plaintiff's agreement with Aaron and Kiran and the seller," id. ¶ 32, without facts showing how Magnum Real Estate or Townhouse 84, LLC, interfered, except by their silence about the purchase, and without a basis for their obligation to advise plaintiff about the purchase, amounts to no more than a legal conclusion. Delran v. Prada USA Corp., 23 A.D.3d 308 (1st Dep't 2005); HT Capital Advisors v. Optical Resources Group, 276 A.D.2d 420 (1st Dep't 2000); Beattie v. Brown & Wood, 243 A.D.2d 395 (1st Dep't 1997). A bare legal conclusion is not entitled to

the favorable inferences ordinarily accorded a pleading upon a motion to dismiss pursuant to C.P.L.R. § 3211(a)(7), Leder v. Spiegel, 31 A.D.3d 266, 267 (1st Dep't 2006), aff'd, 9 N.Y.3d 836 (2007); Delran v. Prada USA Corp., 23 A.D.3d 308; Skillgames, LLC v. Brody, 1 A.D.3d 247, 250 (1st Dep't 2003), and contributes nothing toward withstanding dismissal. HT Capital Advisors v. Optical Resources Group, 276 A.D.2d 420. In sum, the conclusory allegation of interference with plaintiff's brokerage agreement, by itself, fails to allege what actions the moving defendants took that procured defendant seller's breach of the agreement and thus is insufficient to plead the tortious interference claim. Lama Holding v. Smith Barney, 88 N.Y.2d at 424-25. See Nicosia v. Board of Mgrs. of the Weber House Condominium, 77 A.D.3d 455, 456 (1st Dep't 2010).

Allegations demonstrating that defendant seller's breach of the brokerage agreement would not have occurred but for actions by Magnum Real Estate or Townhouse 84, LLC, might fill the void left by the above omissions in facts supporting procurement of the breach. Madison Third Bldg. Cos., LLC v. Berkey, 30 A.D.3d 1146 (1st Dep't 2006). Plaintiff does not attempt to contrive such allegations, however, as it would be difficult to do so. Burrowes v. Combs, 25 A.D.3d at 373; Cantor Fitzgerald Assoc. v. Tradition N. Am., 299 A.D.2d 204 (1st Dep't 2002). If the sale closed, plaintiff broker still would be entitled to its commission, even if plaintiff was not notified of the closing and therefore failed to attend. Although in this instance plaintiff

is relegated to collecting its commission later, rather than from the sale proceeds distributed at the closing, plaintiff does not point to this disadvantage as the source of plaintiff's injury. For all these reasons, the complaint fails to establish the moving defendants' intentional procurement of the breach. See Kralic v. Helmsley, 294 A.D.2d 234, 235 (1st Dep't 2002); William Kaufman Org. v. Graham & James, 269 A.D.2d 171, 174 (1st Dep't 2000).

B. Townhouse 84 LLC's Identity and Relationship to the Purchase

Plaintiff also claims that Townhouse 84 LLC, the buyer, and 45 West 84th Street LLC, the seller, are the same entity, but again relies on inadmissible evidence to support this claim. Again, even were the court to consider this inadmissible evidence, a Receipt for Service on the New York State Department of State, the document indicates only that Townhouse 84, LLC, was served according to New York Limited Liability Company Law § 303. See Household Fin. Realty Corp. of N.Y. v. Emmanuel, 2 A.D.3d 192, 193 (1st Dep't 2003). Plaintiff's own affidavit attesting to service of the summons and complaint on Townhouse 84, LLC, sued herein as 45 West 84th Street, LLC, does not establish that these limited liability companies (LLCs) are identical. See Amarosa v. City of New York, 51 A.D.3d 596, 597 (1st Dep't 2008).

In reply, the moving defendants offer a deed that shows the purchaser as Townhouse 84, LLC, and the seller as 45 West 84th Street, LLC, and New York State Department of State documents indicating that Townhouse 84, LLC, originally was named 45 W

84th, LLC, a name distinct from 45 West 84th Street, LLC. Of this evidence that Townhouse 84, LLC, is an LLC separate from 45 West 84th Street, LLC, at least the latter documents, from an official government web site, are admissible. LaSonde v. Seabrook, 89 A.D.3d 132, 137 n.8 (1st Dep't 2011); L&Q Realty Corp. v. Assessor, 71 A.D.3d 1025, 1026 (2d Dep't 2010); Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co., 61 A.D.3d 13, 20 (2d Dep't 2009). Even insofar as this evidence is not in admissible form, however, the inadmissibility is of no consequence, since plaintiff, which bears the burden of rebuttal, has not presented evidence, let alone admissible evidence, in the first instance that the buyer LLC is also the seller LLC. See NYC Med. & Neurodiagnostic v. Republic W. Ins. Co., 8 Misc. 3d 33, 38 (App. Term 2d Dep't 2004). Moreover, even if the two LLCs were identical, plaintiff has not presented evidence that the seller LLC is obligated to plaintiff under any brokerage agreement. Nor does the fact that the two LLCs may be identical establish the elements of plaintiff's tortious interference claim.

IV. CONCLUSION

For each of the reasons set forth above, the court denies plaintiff's motion for a default judgment, but grants the cross-motion by defendants Townhouse 84, LLC, Shaoul, and Tendle for dismissal of the complaint against them based on its failure to state a claim against them. C.P.L.R. §§ 3211(a)(7), 3215(f). This decision constitutes the court's order and judgment

dismissing the action against defendants Townhouse 84, LLC, Shaoul, and Tendle.

DATED: September 7, 2012

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.