

**Zuckerman v CB Richard Ellis Real Estate Servs.,
LLC**

2013 NY Slip Op 30997(U)

May 3, 2013

Supreme Court, New York County

Docket Number: 653232/11

Judge: Barbara R. Kapnick

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

BARBARA R. KAPNICK

PRESENT: Justice

PART 39

Index Number : 653232/2011
ZUCKERMAN, JON
vs.
CB RICHARD ELLIS REAL ESTATE
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).
Answering Affidavits — Exhibits No(s).
Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION

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

Dated: 5/3/12

[Signature] J.S.C.
BARBARA R. KAPNICK

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39**

-----x

JON ZUCKERMAN,

Plaintiff,

-against-

CB RICHARD ELLIS REAL ESTATE SERVICES,
LLC and KEITH CAGGIANO,

Defendants.

-----x

BARBARA R. KAPNICK, J.:

DECISION/ORDER

Index No. 653232/11
Motion Seq. No. 001

In this action, plaintiff Jon Zuckerman ("Zuckerman") seeks damages of up to \$24 million for lost real estate brokerage commissions and business opportunities. The 10-Count Complaint asserts causes of action for constructive discharge against defendant CB Richard Ellis Real Estate Services, LLC ("CBRE") (Count 1); tortious interference with business relationships against both defendants CBRE and Keith Caggiano ("Caggiano") (Count 2); breach of fiduciary duty against Caggiano (Count 3); aiding and abetting breach of fiduciary duty against CBRE (Count 4); breach of the 575 Fifth Contract against CBRE (Count 5); breach of employment contract against CBRE (Count 6); breach of the partnership agreement against Caggiano (Count 7); unjust enrichment against both defendants (Count 8); breach of the implied covenant of good faith and fair dealing against CBRE (Count 9); and an accounting against CBRE (Count 10). Defendants CBRE and Caggiano now move to dismiss the Complaint, pursuant to CPLR 3211 (a) (1), (3), (5), and

(7). Alternatively, defendants move to compel arbitration, pursuant to CPLR 7503 (a).

Background

The facts stated herein are taken from the Complaint, unless otherwise specified. In or around 2000, Zuckerman was employed at Jones Lang LaSalle, a financial and professional services firm specializing in real estate services. At the time, Zuckerman had over twenty years of experience in the real estate industry.

In or around mid-2000, Zuckerman (then 46 years old) hired Caggiano (then 23 years old) to work primarily for him at Jones Lang LaSalle. This was Caggiano's first job in the real estate industry.

In or around late-2000, Zuckerman was recruited to work for Shoreinstein, one of the nation's oldest real estate organizations, for the express purpose of developing and maintaining a relationship with MetLife and helping Shoreinstein retain its representation of MetLife's building located at 200 Park Avenue ("200 Park").

Over the next six months, Zuckerman negotiated a deal for approximately 300,000 square feet of space within 200 Park that

initiated a positive repositioning and revaluation of 200 Park, thereby cementing his and Shorenstein's relationship with MetLife.

Due to his success, Zuckerman was permitted to hire people for his team at Shorenstein and he hired Caggiano from Jones Lang LaSalle.

Three weeks after September 11, 2001, Shorenstein announced that it was exiting the third-party real estate business in New York City and would, therefore, cease to represent MetLife and 200 Park.

Soon thereafter, MetLife told Zuckerman that it would follow him to any other real estate brokerage firm at which he became employed if it was one of the few firms that met MetLife's stringent national requirements.

Zuckerman interviewed numerous firms and eventually signed a contract (the "Employment Contract") to become a real estate broker at Insignia. Zuckerman began his employment at Insignia on or about January 2, 2002. The Employment Contract provided that Zuckerman would be MetLife's broker at Insignia and granted Zuckerman the right to a sliding-scale percentage of all MetLife derived revenues received by Insignia.

Zuckerman made Caggiano his junior partner on or about January 1, 2002, and Insignia hired Caggiano at Zuckerman's request. Zuckerman and Caggiano memorialized their business arrangement (the "Partnership Agreement"), which provided that Zuckerman would receive the first \$40,000 of any revenue received from business done by him or Caggiano and the remainder was split 60% to Zuckerman and 40% to Caggiano.

In or about February 2003, Insignia was acquired by CBRE. As part of the acquisition, Stephen Siegel ("Siegel"), who was the chairman of Insignia's commercial real estate division and represented Insignia in negotiating the Employment Contract with Zuckerman, became the Chairman of Global Brokerage at CBRE. CBRE replaced Insignia with respect to the Employment Contract and Partnership Agreement without material changes to the terms of these contracts.

Zuckerman continued to manage 200 Park for MetLife until in or about 2005, when MetLife sold the building. Before then, starting in or around February 2004, Zuckerman spent a significant amount of his time solving a complex insurance issue for MetLife related to 200 Park's status as a potential terrorism target. Zuckerman was not compensated for his efforts, which further cemented and expanded his relationship with MetLife and MetLife's relationship

with CBRE. To further solidify his relationship with MetLife, Zuckerman promised not to represent any other clients who owned commercial real estate in New York in order to avoid potential conflicts of interest. Zuckerman claims that his "commitment to greater-than-industry standard ethics formed the core of [his] relationship with MetLife and was well known at CBRE." Complaint, ¶ 34.

Based on Zuckerman's performance leasing 200 Park Avenue, in or about 2004, Siegel offered Zuckerman the opportunity to be the lead agent for 9 West 57th Street, one of the City's highest-end buildings commanding the market's highest rents. Zuckerman told Siegel that he had to turn down the offer because of his promise to MetLife to remain exclusive. Siegel told Zuckerman that he thought turning down this potentially lucrative assignment was a mistake because he did not believe 9 West 57th Street conflicted with 200 Park. Zuckerman, however, maintained his position and refused the assignment. Between 2005 and 2007, Zuckerman pursued representation of other MetLife buildings in Manhattan, including 85 Broad Street and 575 Fifth Avenue. CBRE was not awarded the 85 Broad Street assignment because the "downtown brokers" were overly conflicted. In 2007, however, MetLife executives called Zuckerman and awarded him the 575 Fifth Avenue assignment without a competitive pitch because he was allegedly the best "midtown

broker" in New York City. A contract governing Zuckerman's and CBRE's representation of 575 Fifth Avenue (the "575 Fifth Contract") named Zuckerman as the "exclusive broker" and provided that Zuckerman could not be terminated without MetLife's consent. Pursuant to the Partnership Agreement, Zuckerman ensured that Caggiano was mentioned in the 575 Fifth Contract.

In or around late 2008, Caggiano co-brokered a tenant-representation deal with Wells Fargo with respect to a building located at 100 Park Avenue in Manhattan ("100 Park Avenue"). The Wells Fargo business was referred to Zuckerman by a broker in Los Angeles, and Zuckerman introduced the Los Angeles broker to Caggiano. Zuckerman repeatedly asked Caggiano how the Wells Fargo deal was proceeding because, under the terms of the Partnership Agreement, Zuckerman was entitled to a 60% share in the commission from any deal in which Caggiano was involved. Caggiano repeatedly told Zuckerman that the Wells Fargo deal was not going to happen. Zuckerman later discovered that the 100 Park Avenue deal had, in fact, closed in or around late 2008 and Caggiano had breached the Partnership Agreement by not sharing the commission. As a result, Zuckerman demanded that Matthew Van Buren ("Van Buren"), CBRE's then Executive Managing Director, dissolve his partnership with Caggiano.

In or about January 2009, after hearing from both Zuckerman and Caggiano as part of an internal-dispute resolution proceeding, CBRE (through Van Buren) rendered a decision specifically articulating Zuckerman's and Caggiano's respective entitlement to commissions (the "Decision"). CBRE formalized the Decision as CBRE policy. The Decision divided the accounts Zuckerman and Caggiano had worked on and assigned all of them - with the exception of MetLife - to a single broker. The broker who would not be working on the account going forward was entitled to specifically determine compensation for commissions already earned.

The Decision also provided that Zuckerman and Caggiano would continue to share the MetLife account and split commissions 60% to Zuckerman and 40% to Caggiano. Thus, although Caggiano's and Zuckerman's partnership was dissolved with respect to other accounts, the partnership was ongoing with respect to the MetLife account.

Zuckerman alleges that CBRE refused to dissolve the partnership with respect to MetLife because CBRE did not want to further consolidate Zuckerman's control over the account. He further claims that CBRE knew that the Decision would force Zuckerman to work with someone who had betrayed this trust, and ultimately, put Zuckerman in an untenable professional position.

The Decision assigned the Wells Fargo account to Caggiano, despite Caggiano's prior bad faith dealings with Zuckerman in relation to that account. In addition, Wells Fargo was the only account with commission earned but not paid on which the broker who would not have contact with the client going forward was not entitled to a share of those commissions. Therefore, Zuckerman alleges that the Decision was harmful to him and treated Caggiano more favorably.

Zuckerman further claims that in January 2010, he discovered that he had not received payments that were due to him the previous year. After making inquiries with CBRE's accounting department, Zuckerman discovered that, on at least four transactions, Caggiano had diverted commissions to himself that should have been shared with Zuckerman. These allegedly diverted commissions totaled \$98,251.66. Zuckerman claims that he notified Siegel about the diverted funds, and after an internal investigation, Caggiano was allegedly required to repay the diverted commissions, which Zuckerman admits he received.

Zuckerman claims that Caggiano's conduct constituted ethical violations and breaches of fiduciary duties, yet Caggiano was neither fired nor suspended. Zuckerman requested that Siegel and

Van Buren remove Caggiano from the MetLife account, but they refused, instead moving Caggiano into a larger office that was closer to Zuckerman's office, which escalated Zuckerman's feeling that CBRE was protecting Caggiano and condoning his behavior. Zuckerman repeatedly requested an explanation from CBRE as to how his funds had been diverted. Zuckerman also requested assurances that the diversion of his commissions could not happen again. CBRE denied or refused to respond to his requests.

Zuckerman claims that Caggiano's betrayal provided CBRE an opportunity to realize its long-held ambition of transferring the MetLife account to Caggiano and making it a corporate account of CBRE, rather than Zuckerman's account as an exclusive broker. Ultimately, CBRE told Zuckerman that MetLife could choose between working with Zuckerman or Caggiano, and that the other would be removed from the account. Zuckerman agreed, but only if CBRE informed MetLife of Caggiano's "theft and dishonest dealings." Complaint, ¶ 87. Zuckerman maintains that he could satisfy his ethical and fiduciary obligations to MetLife only by removing Caggiano from the account, or by disclosing Caggiano's conduct. CBRE refused to disclose Caggiano's conduct, and instructed Zuckerman to hide Caggiano's conduct from MetLife.

CBRE's alleged efforts to marginalize Zuckerman continued on March 24, 2010, when Van Buren directed Zuckerman to "'refrain from any direct conversations with the client [MetLife] relating to the staffing of the 575 Agency as I will speak for the firm.'" *Id.*, ¶ 90. On or about April 27, 2010, Siegel referred to Caggiano's purported theft as "'nothing other than an accounting error.'" *Id.*, ¶ 91. Later, on or about June 2, 2010, CBRE's general counsel informed Zuckerman's counsel that "'CBRE took appropriate corrective actions'" concerning Caggiano's alleged theft, including "'disciplinary action'" and "'effecting internal accounting controls to prevent similar future errors from occurring.'" *Id.*, ¶ 92.

Zuckerman claims that CBRE's conduct forced him to resign, and that MetLife cannot follow him to his new employer because it is not on MetLife's list of approved real estate brokerage firms. Zuckerman contends that, as a result, CBRE will receive all future commissions from the MetLife account under the 575 Fifth Avenue assignment, including a lease renewal of the building's largest tenant, L'Oreal. The commission on this renewal alone will allegedly be over \$18 million, of which Zuckerman would have been entitled to \$9 million had he not been forced to resign. Zuckerman claims that he would have participated in several additional transactions had he not been forced to resign from CBRE.

Discussion

On this motion, defendants move, in the alternative, to compel arbitration, based upon an arbitration clause contained in the Employment Agreement. Zuckerman counters that the arbitration clause does not cover his tort claims; that a substantial basis for his claims stems from the 575 Fifth Ave Agreement, which does not contain an arbitration clause; and that Caggiano cannot invoke the arbitration clause.

Although defendants' motion to compel arbitration is presented as alternative relief, once the Court has determined the threshold issues of the existence of a valid agreement to arbitrate, whether arbitration has been complied with, and whether the claim sought to be arbitrated would be time-barred were it asserted in state court, the remaining issues are for the arbitrator. CPLR 7503 (a), 7502 (b); *Matter of Smith Barney, Harris Upham & Co. v Luckie*, 85 NY2d 193, 201-202 (1995); *Board of Educ. of Patchogue-Medford Union Free School Dist. v Patchogue-Medford Congress of Teachers*, 48 NY2d 812, 813 (1979) (once it has been determined that the claim sought to be arbitrated is properly before the arbitrator and that the arbitration of the dispute is not against the public policy of this State, any "further judicial inquiry is foreclosed"). This is consistent with New York's "strong public policy favoring arbitration . . . as a means of conserving the time and resources

of the courts and the contracting parties," and "interfer[ing] as little as possible with the freedom of consenting parties to submit disputes to arbitration." *Stark v Molod Spitz DeSantis & Stark, P.C.*, 9 NY3d 59, 66 (2007) (internal quotation marks and citations omitted).

Paragraph 11(c) (**Arbitration Clause**) of the Employment Agreement specifically provides that:

[a]ny dispute arising out of or relating to this Agreement, the employment of Broker by the Company, or the termination of such employment, including, but not limited to, claims involving laws against discrimination brought under federal and/or state law, and/or claims involving co-employees (but excluding worker's compensation claims), which has not been resolved by a non-binding procedure as provided herein within 90 days of the Notice, except as provided in Section 3(b)(ii)(D), shall be resolved by binding arbitration in New York, New York (or such other location as may be mutually agreed upon) in accordance with the rules of J-A-M-S/Endispute applicable to employment arbitration (the "Rules") as then in effect. Other than with respect to equitable relief (which may be sought in aid of arbitration by either party), neither party shall be entitled to commence or maintain any action in a court of law with respect to any matter in dispute or relief required until such matter or request for relief shall have been submitted to and decided by the chosen arbitrator and then only for the enforcement of the award of such arbitrator. The decision of the arbitrator shall be final and binding upon the parties and all persons claiming under and through them.

Section 3 (b) (ii) (D) of the Employment Agreement provides that commission disputes between brokers "shall be determined as between the affected employee(s) by binding arbitration in accordance with the then current Company policies and procedures governing internal arbitration between and among its commissioned brokers and salespersons." Under this section, this "binding" internal company arbitration "survive[s] termination" of the Employment Agreement.

Here, all of Zuckerman's claims "aris[e] out of or relat[e] to" the Employment Agreement, Zuckerman's employment at CBRE, and/or the termination of his employment. Employment Agreement, § 11 (c). Indeed, the focal point of all of Zuckerman's claims is the payment of brokerage commissions, which is central to the Employment Agreement and Zuckerman's employment with CBRE.

Nonetheless, Zuckerman argues that "[i]t is well settled that a party cannot be compelled to submit to arbitration unless the agreement to arbitrate expressly and unequivocally encompasses the subject matter of the particular dispute." *Gerling Global Reins. Corp. v Home Ins. Co.*, 302 AD2d 118, 123 (1st Dept 2002), *lv den.* 99 NY2d 511 (2003) (internal quotation marks and citations omitted). However, Zuckerman's tort claims are directly related to his alleged lost commissions and his employment dispute with CBRE, thereby establishing a "reasonable relationship" between the tort

claims and the underlying contract dispute. *Matter of Nationwide Gen. Ins. Co. v Investors Ins. Co. of Am.*, 37 NY2d 91, 96 (1975) (“[o]nce it appears that there is, or is not a reasonable relationship between the subject matter of the dispute and the general subject matter of the underlying contract, the court’s inquiry is ended”); see also *Brandle Meadows, LLC v Bette*, 84 AD3d 1579, 1581 (3d Dept 2011) (compelling arbitration of tort claims of tortious interference and defamation, where there was a reasonable relationship to the underlying contract).

In support of his argument that the 575 Fifth Ave Agreement does not contain an arbitration clause, Zuckerman cites to the case of *Home Ins. Co. v Tokyo Mar. & Fire Co.*, 221 AD2d 592 (2d Dept 1995) which involved a dispute between a distributor and a manufacturer of a photocopier machine. The distribution agreement at issue contained an arbitration clause and an indemnification provision, whereby the distributor agreed to indemnify the manufacturer under certain warranty related circumstances. Under the manufacturer’s separate insurance policy, however, the distributor was named as an additional insured. The distributor’s insurance carrier thus commenced a declaratory judgment action against the manufacturer’s insurance company on the issue of indemnification. The trial court directed the parties to proceed to arbitration under the distribution agreement. The Second

Department reversed, holding that the manufacturer's insurance policy naming the distributor as an additional insured "was separate and distinct from the indemnification clause contained in the [distribution] agreement . . . , and, thus, not encompassed by the arbitration clause in the agreement." *Id.* at 593.

The *Home Ins. Co.* case involved two distinct contracts, a distribution agreement and an insurance policy, and the parties' separate indemnification rights under those agreements, while here, to the extent Zuckerman's claims relate to the 575 Fifth Ave Agreement, they all harken back to the scope of his brokerage arrangement with CBRE, his purported lost commissions, and his employment dispute with CBRE. None of Zuckerman's allegations concerning the 575 Fifth Ave Agreement fall outside the scope of the Employment Agreement or Zuckerman's termination. Therefore, *Home Ins. Co.* is distinguishable on its facts.

Zuckerman's next argument that Caggiano cannot invoke arbitration is based upon Zuckerman's assertion that, under the Employment Agreement, CBRE's internal "binding arbitration" applies only to disagreements concerning "each employee's percentage of the gross commission," which is not the subject of this lawsuit. Plaintiff's Opp. Brief, at 25, citing Employment Agreement, § 3 (b)

(ii) (D). Zuckerman also claims that Caggiano is not a third-party beneficiary of the Employment Agreement.

"Under New York law, the right to compel arbitration does not extend to a party that has not signed the agreement pursuant to which arbitration is sought unless the right of the nonsignatory is expressly provided for in the agreement." *Greater N.Y. Mut. Ins. Co. v Rankin*, 298 AD2d 263, 263 (1st Dept 2002). Here, the Employment Agreement provides that "[a]ll disputes arising out of or relating to this Agreement, the employment of Broker by the Company or the termination of such employment, *including . . . claims involving co-employees*" are to be resolved by arbitration, "except where this Agreement otherwise provides for internal Company arbitration as in Section 3 (b) (ii) (D)." Employment Agreement, § 11 (emphasis added). Zuckerman's assertion that his claims do not seek to invoke CBRE's "internal arbitration" procedure under section 3 (b) (ii) (D), necessarily renders his dispute with Caggiano, a "co-employee," subject to arbitration under section 11 (c) of the Employment Agreement.

Moreover, a nonsignatory to an arbitration agreement may be bound under theories of, among others, estoppel and agency. Specifically, a signatory to an arbitration agreement can be compelled to arbitrate claims with a nonsignatory "where a careful

review of the relationship among the parties, the contracts they signed . . . , and the issues that had arisen among them discloses that the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed." *Merrill Lynch Intl. Fin., Inc. v Donaldson*, 27 Misc 3d 391, 396 (Sup Ct, NY Co 2010) (internal quotation marks omitted), citing *Denney v BDO Seidman, LLP*, 412 F3d 58, 70 (2005); *JLM Indus. v Stolt-Nielsen SA*, 387 F3d 163, 177 (2d Cir 2004). Here, the claims against Caggiano are intertwined with the issues raised in Zuckerman's employment dispute with CBRE, and the Employment Agreement itself requires arbitration of claims involving co-employees. Furthermore, given the intertwined "employment-related nature of the claims," Caggiano, as an agent of CBRE, "is entitled to demand arbitration of the claims against him no less than [CBRE] is entitled to demand arbitration of the claims against it." *DiBello v Salkowitz*, 4 AD3d 230, 232 (1st Dept 2004).

The Court is cognizant of defendants' argument that they are entitled to test the sufficiency of the Complaint "prior to invoking, and without waiver of, their right to arbitrate this matter." Defendants' Opening Brief, at 25. In essence, defendants initially seek dismissal of each cause of action, and then seek to compel arbitration of any surviving claims. The cases cited by defendants in support of this argument hold that, by moving to

dismiss, a defendant does not necessarily waive the right to arbitrate. This is consistent with the legal principle that the right to arbitrate, like any other contractual right, "may be modified, waived, or abandoned." *Sherrill v Grayco Bldrs.*, 64 NY2d 261, 272 (1985). However, the cases cited by defendants focus on whether a party waived the right to arbitrate by engaging in litigation to such an extent as to "manifest[] a preference 'clearly inconsistent with [that party's] later claim that the parties were obligated to settle their differences by arbitration' . . . , and thereby elected to litigate rather than arbitrate." *Id.* These cases focus on protective procedural measures - answers, affirmative defenses, counterclaims, motions to dismiss - that would be deemed waived if not raised by the defendants, and, therefore, the courts permit such measures without waiving arbitration rights.

For example, in *Singer v Seavey*, 83 AD3d 481 (1st Dept 2011), the trial court denied the defendants' motion to dismiss and their motion to compel arbitration. The First Department reversed, granting the motion to compel arbitration and otherwise staying the proceedings pending arbitration. The Court held that the "[d]efendants did not waive their right to arbitrate by moving to dismiss the complaint and appealing from the partial denial of the motion." *Id.* at 482. In *Singer v Jeffries & Co.*, 78 NY2d 76, 85-

86 1991), the Court of Appeals held that the "defendants timely asserted their right to arbitrate and that their preliminary and minimal resort to court for relief should not be viewed as an abandonment of their right to enforce the arbitration agreement." See also *Matter of Haupt v Rose*, 265 NY 108 (1934); *MCC Dev. Corp. v Perla*, 23 Misc 3d 1126(A), (Sup Ct, NY Co 2009), *affd* 81 AD3d 474 (1st Dept 2011), *lv den.* 17 NY3d 715 (2011). None of these cases expressly endorse the practice of litigating the case in Court, with a result of partial dismissal, and then sending any surviving claims to arbitration. Therefore, to the extent defendants request that the Court rule first on that portion of the motion which seeks a dismissal of the Complaint pursuant to various sections of CPLR 3211, that request is denied.

Under CPLR 7502 (b) and 7503 (a), however, the Court may rule on the statute of limitations, as a threshold issue, prior to determining the parties' right to compel arbitration. Moreover, as a prior arbitration award is "complete, final and binding . . . even if the prior award was never judicially confirmed" (*Motor Veh. Acc. Indem. Corp. v Travelers Ins. Co.*, 246 AD2d 420, 422 [1st Dept 1998] [internal quotation marks and citations omitted]), res judicata is also a threshold issue that must be resolved by the Court. *Matter of Cine-Source, Inc. v Burrows*, 180 AD2d 592, 593 (1st Dept 1992).

Here, defendants seek dismissal of Zuckerman's allegations that CBRE failed to pay commissions under the Employment Agreement (Complaint, ¶ 142), and that Caggiano breached his commission-sharing agreement with Zuckerman by hiding the transaction with Wells Fargo, stealing commissions, undermining Zuckerman at MetLife, and conspiring with CBRE to replace Zuckerman as MetLife's exclusive broker. *Id.*, ¶ 147. Defendants argue that these allegations were resolved by CBRE's internal dispute resolution procedures, referred to in the Employment Agreement as "binding arbitration." Employment Agreement, § 3 (b) (ii) (D). Defendants also argue that, pursuant to CPLR 7510 and 215 (5), Zuckerman failed to bring a confirmation proceeding or an enforcement action within the required one year statute of limitations. *See also* CPLR 7511 (a) ("[a]n application to vacate or modify an award may be made by a party within ninety days",..)"

However, Zuckerman's allegations herein include conduct that occurred after CBRE issued its internal arbitration decision in January 2009. For instance, the Complaint alleges that in January 2010, Zuckerman discovered that he had not received payments that were due to him in 2009 "with respect to at least four deals," including One Beacon Insurance, MS Foundation for Women, El Diario, and American International Realty, which the Complaint refers to as the "One Metro Tech" account. Complaint, ¶¶ 61-63. None of these

transactions are mentioned in CBRE's internal arbitration decision, or in Zuckerman's pre-arbitration list of "accounts/relationships" in which he and Caggiano had a common interest. Kasowitz Aff., Exs. G and H. According to Zuckerman, these four payments were diverted by CBRE and Caggiano. Complaint, ¶¶ 62, 66-68. Zuckerman concedes that he "eventually received the funds stolen by Caggiano" (*id.*, ¶ 71), presumably on the four transactions identified above, but Zuckerman claims that he was harmed by the late payment of these funds, and the pleading suggests that additional funds may have been diverted, which can be verified only by an accounting.

Thus, it appears that the misconduct now alleged by Zuckerman occurred *after* the internal CBRE arbitration, and falls outside the scope of CBRE's arbitration decision. Therefore, these allegations would not be time-barred based upon Zuckerman's failure to bring a confirmation proceeding or an enforcement action within one year of CBRE's internal arbitration. *Matter of Cine-Source, Inc.*, 180 AD2d at 594 ("[a]lthough respondent's claims arise under the same contract, the act comprising a breach . . . had not yet occurred at the time of the hearing and, therefore, no cause of action for its breach had accrued"). Nor would these allegations be barred by *res judicata*, because "[p]arties to an arbitration proceeding are barred by the doctrine of *res judicata* from relitigating only those matters which were actually contested and therefore determined by

the award.” *Id.* (where parties “seek to litigate an issue not determined by the arbitrator, the award is not a bar to subsequent proceedings”). *Id.* at 595.

In any event, to the extent that factual issues exist with respect to defendants’ alleged misconduct that occurred *after* the internal CBRE arbitration, the timing of that conduct, and the extent to which it was incorporated into CBRE’s internal arbitration decision of January 2009, if at all, these issues are reserved for the arbitrators, “who may, in their sole discretion, apply or not apply the bar.” CPLR 7502 (b); *see also Lucas Aerospace v Advanced Exec. Aircraft*, 292 AD2d 201, 201 (1st Dept 2002) (“res judicata and the applicable statutory time limitations were properly referred to the arbitrators, in light of the parties’ broad arbitration clause”).

Accordingly, it is hereby

ORDERED that the defendants’ motion to compel arbitration is granted, and the motion is otherwise denied; and it is further

ORDERED that plaintiff Jon Zuckerman shall arbitrate his claims against defendants CB Richard Ellis Real Estate Services, LLC and Keith Caggiano in accordance with the Employment Contract at issue herein; and it is further

ORDERED that all proceedings in this action are hereby stayed pending the determination of the arbitration, except for an application to vacate or modify said stay; and it is further

ORDERED that either party may make an application by Order to Show Cause to vacate or modify this stay upon the final determination of the arbitration.

This constitutes the decision and order of this Court.

Date: May 3, 2013



Barbara R. Kapnick
J.S.C.

BARBARA H. KAPNICK
J.S.C.