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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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JTRE, LLC,

Plaintiff,

-against-

BREAD & BUTTER, TERENCE PARK, and RICHARD CHIEFFO,

Defendants.

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Index No.: 161295/2013

Motion Seq. No. 001

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action to recover a real estate brokerage fee, defendant Richard Chieffo ("Chieffo") moves pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7) to dismiss the complaint.

*Factual Background*[1]

Defendant Bread and Butter ("B&B") is a restaurant chain, and its managing partner is defendant Terence Park ("Park"). Plaintiff JTRE, LLC ("JTRE") is a commercial real estate brokerage firm. Chieffo manages a building located at 303 Fifth Avenue in Manhattan, and is Vice-President of 303 Fifth Avenue, Inc. (the "Company"), an entity which represents the building's owners (Surrey Investors, Inc. and a trust), as their local agent.

On December 11, 2012, Maurice Sasson ("Sasson"), a registered and licensed salesperson at JTRE, spoke to Park to find a new location for B&B. Sasson pitched 303 Fifth Avenue's street-level unit (the "Property"), to which Park was receptive. The following day, Sasson emailed Park information regarding the Property, and the two communicated regarding rent,

[1] The following factual background is derived from the allegations contained in plaintiff's complaint.

division of the Property, and other pertinent information.

Sasson, Park, and an unnamed partner of Park toured the Property the next day. Thereafter, Sasson, Park and Park's partner met with Chieffo. During the meeting, the parties discussed lease terms, rent, and other issues regarding the Property. At the conclusion of the meeting, Chieffo suggested that JTRE send a letter of intent and a marketing package of B&B's concept so that he could present same to the Property's owners, who reside overseas. After the meeting, Sasson emailed Park and asked how Park wanted to draft the letter of intent and whether he wanted to use B&B's or JTRE's letterhead.

One week later, Park sent Sasson a reply, which included his offer for the Property. In his note, Park stated that he was "100% ready to begin the deal," but that he would first need to talk to Sasson about B&B's "real estate arm," which would be involved to complete the transaction. Park explained B&B's "real estate arm" as an in-house employee who held a broker license and would collect half of the broker fee.

Sasson then emailed Park to advise that JTRE would not split the broker fee and would submit the offer under JTRE's letterhead. Also, Sasson asked for Park's approval regarding JTRE's offer on the Property. However, Park advised Sasson that the offer could not be submitted to Chieffo because JTRE refused to split the fee with B&B's real estate arm.

Sasson then updated Chieffo, explaining that JTRE was working out an issue with B&B's real estate team, and that he would "hopefully submit an offer shortly."

Soon thereafter, contact between JTRE and defendants dissipated. Approximately one-to-two months later, Sasson observed that the Property's previous tenant had vacated, and called

Chieffo to inquire as to who had leased the Property. Chieffo denied that he knew or had met Sasson, despite Sasson's explanation that he was the broker who introduced B&B and Park to Chieffo.

One week later, Sasson observed Park exiting the Property. Sasson believed that this meant B&B had secretly leased the Property and circumvented JTRE to complete a deal directly with Chieffo and the Property's owners.

The complaint brings four causes of action against all defendants for (1) breach of contract; (2) fraudulent inducement; (3) unjust enrichment; (4) *quantum meruit,* and a claim for tortious interference with prospective business relations claim directed solely at Chieffo.

As to the breach of contract claim, JTRE alleges that the parties agreed through emails and verbal communication that JTRE would help B&B obtain a lease for the Property. JTRE fully performed its obligations under this agreement in good faith, by negotiating the deal's terms, fielding communications between Chieffo and B&B, and drafting the letter of intent. In return, it was entitled to a commission. Defendants breached the agreement by circumventing JTRE's role as broker by procuring a lease directly from the Property's building manager Chieffo, and breached the implied covenant of good faith.

As to the remaining claims, JTRE alleges, *inter alia*, that defendants knew that they would be seeking half of the brokerage commission fee for B&B's real estate arm, yet failed to disclose this to JTRE when entering into its agreement to use it as broker. To JTRE, defendants' actions improperly diverted JTRE's commission to themselves. Defendants requested and accepted JTRE's services, and were enriched by JTRE's efforts.

With respect to the tortious interference claim, JTRE alleges that Chieffo knew of the agreement between it and B&B/Park, yet he intentionally interfered with such business relations by failing to work with JTRE to execute a lease, and instead circumventing JTRE and dealing directly with B&B and Park.

*Arguments*

In the moving papers, Chieffo notes that no listing agreement or writing was executed by and between him and JTRE, whether individually, or in his capacity as manager of the Company. As evidenced by his Affidavit, Chieffo is only an employee of the Company, and does not have any proprietary interest therein or in the entities which own the Property, or with B&B and Park.

The complaint concedes Chieffo's role as an employee in the action by alleging that Chieffo is the Property's "Building Manager" and is an "agent" to the Property's owners. By alleging that JTRE was aware that the letter of intent and marketing package would have to be sent to the Property's overseas owners, plaintiff acknowledges that Chieffo had no authority to act independently. Also, JTRE alleges that Park declined to have an offer submitted to the Property's owners, because they did not reach a fee-splitting agreement. The complaint also confirms that any contact between JTRE and defendants dissipated.

The above shows that JTRE acknowledges that anything that transpired between JTRE and the Property was dead, and case law does not support JTRE's suggestion that it had a right to a commission regardless of how or when the Property was leased. JTRE's attempt to create a relationship with Chieffo is improper considering that Sasson never met Chieffo and that any leasing activity with Park was months after any alleged tour of the property in December 2012.

Dismissal against Chieffo is further warranted because the Property's deeds, and Chieffo's affidavit and business card establish that he is not, and has never been, an owner of the Property, the Company, or B&B, and does not have any proprietary interest with Park. The building owner would be liable for a brokerage commission, not an employee who maintains the property.

In any event, case law provides that generalized conduct by an employee of a corporation acting within the scope of his employment precludes a finding of personal liability.

And, JTRE does not plead facts sufficient to establish personal liability against Chieffo for *prima facie* tort. JTRE alleges no special damages resulting from the purported fraudulent, contractual, or tortious conduct by Chieffo.

JTRE seeks a commission for allegedly having introduced a tenant to an agent of the Property's owners. However, neither the owner of the Property, nor the corporate managing agent, have been named in this action. Thus, the action is also subject to dismissal for failure to name the proper parties who are indispensable to its disposition.

Chieffo also asserts that as to the breach of contract claim, JTRE fails to allege an offer and acceptance. JTRE claims that it "agreed" to introduce Park to the Property, set up a meeting with the Property's manager, and negotiate the terms of the deal. However, whatever deal was made was not on the basis of anything that JTRE negotiated, as JTRE concedes that the contact between it and defendants dissipated after JTRE expected to "hopefully submit an offer shortly," which speaks of future performance that did not in fact occur. Thus, by JTRE's own allegations, whatever performance by it took place was incomplete and never finalized.

The fraudulent inducement claim fails because fraud is alleged with specificity as required by CPLR 3016(b). No details and representations are pleaded.

The unjust enrichment and *quantum meruit* claims fail because JTRE did not ever submit an offer to anyone, and thus did not finalize any deal for a lease by the Property's owners with B&B/Park. Facilitating the execution of a lease, which was based on an offer months after JTRE admittedly had no communication with any defendant, reflects an incomplete performance and an incomplete transaction.

The tortious interference claim must be dismissed for the same reasons. Moreover, because JTRE admits that its contact with defendants dissipated after one to two months, there is no genuine basis for it to claim that Chieffo knew of any "agreement" between JTRE and the other defendants. Further, Chieffo could not have known of any such agreement if he had no contact with JTRE after the alleged December 2012 tour.

In opposition, JTRE argues that Chieffo knew it was involved in business relations with B&B/Park; JTRE procured potential property for B&B/Park to lease; JTRE introduced Chieffo to B&B/Park for that purpose; and JTRE was to receive a commission for the signing of a lease at the Property. Despite this knowledge, Chieffo intercepted these business relations and B&B/Park entered into a lease with Chieffo directly, and all defendants surreptitiously cut JTRE out of the deal so that it would not receive its commission due.

Further, there are issues of fact as to the amount of money Chieffo caused to be diverted from JTRE, how much power he had in entering into a lease with B&B/Park, and the deal all defendants made among each other to avoid JTRE's involvement in the signing of a lease.

Also, an issue of fact exists as to whether Chieffo was self-interested in the transaction between B&B/Park and the building, and what the terms of the transaction might have been. JTRE contends that Chieffo had a personal and financial self-interest in the transaction, as there was clearly a reason dealt directly with B&B/Park rather than to have JTRE involved.

The allegations in the complaint indicate that further discovery will reveal material facts to defeat Chieffo's self-serving claims that he acted solely as an employee of 303 Fifth Avenue, LLC. Moreover, Chieffo does not attest that he did not conspire with others to divert JTRE's profits and/or commissions.

Lastly, JTRE contends that in the alternative, should the court determine that JTRE's direct and derivative claims must be restated, or that JTRE failed to adequately plead that a pre-suit demand to prosecute would be futile, leave should be granted to permit JTRE to amend the complaint to replead such allegations with more particularity.

In reply, Chieffo reiterates that JTRE named the wrong parties to this action. Chieffo is merely an officer/employee of the Property's owners and has no monetary, proprietary or other interests in the Property or Company. Chieffo has no individual interest, directorship, or ownership interests with the Property's owners, and acted solely in his corporate capacity.

Moreover, the complaint confirms that there was no agreement of any kind between Chieffo/303 Fifth Avenue, Inc./the Property's owners and JTRE. The complaint also demonstrates that an offer was to be submitted, and that the contact between JTRE and defendants dissipated. The complaint thus confirms that there was no meeting of the minds between JTRE and Chieffo, and that there was no signed agreement between Chieffo, JTRE or

the co-defendants.

JTRE's counsel provides no documentation to support its inaccurate statement that B&B/Park entered into a lease for the Property. Additionally, the cases cited by counsel inaccurately list Chieffo as a director of the Company. Chieffo already stated he is neither a director, nor a shareholder, and in no way associated with the Property's owners other than as a Company Vice-President. Since the Company is not a party to the action, the cases cited by counsel are inapplicable and irrelevant to the issues on this motion.

And, as this action is not supported by any documents, Chieffo should be awarded costs.

*Discussion*

Pursuant to CPLR 3211(a)(1), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that "a defense is founded upon documentary evidence." A motion to dismiss on the basis of a defense founded upon documentary evidence may be granted "only where the documentary evidence utterly refutes [the complaint's] factual allegations, conclusively establishing a defense as a matter of law" (*see DKR Soundshore Oasis Holding Fund Ltd. v. Merrill Lynch Intern.*, 80 A.D.3d 448, 914 N.Y.S.2d 145 [1st Dept 2011] *citing Goshen v Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858 [2002]; *VisionChina Media Inc. v Shareholder Representative VisionChina Media Inc. v Shareholder Representative Services, LLC*, 109 A.D.3d 49, 967 N.Y.S.2d 338 [1st Dept 2013] ("Dismissal pursuant to CPLR 3211(a)(1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law")).

To be considered "documentary," evidence must be unambiguous and of undisputed

authenticity (*Fontanetta v Doe*, 73 A.D.3d 78, 898 N.Y.S.2d 569 [2d Dept 2010] *citing* Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3211:10, at 21–22; *Raske v Next Management, LLC*, 40 Misc 3d 1240(A), Slip Copy, 2013 WL 5033149 (Table) [Sup Ct New York Cty 2013]; *Philips South Beach, LLC v ZC Specialty Ins. Co.*, 55 AD3d 493, 867 NYS2d 386 [1st Dept 2008] (documentary evidence "apparently aims at paper whose content is essentially undeniable and which assuming the verity of its contents and the validity of its execution will itself support the ground on which the motion is based")).

Here, Cheiffo's affidavit does not constitute documentary evidence for purposes of CPLR 3211(a)(1) *(Correa v. Orient-Express Hotels, Inc.*, 84 A.D.3d 651, 924 N.Y.S.2d 336 [1st Dept 2011] ("Neither the affidavit nor the deposition testimony defendant offered constitutes the type of documentary evidence that may be considered on a motion pursuant to CPLR 3211(a)(1)")). Further, the references to Chieffo in the complaint as an "agent" and "Building Manager," do not conclusively establish that Chieffo was acting solely as an employee of the Property's owner, as further explanation is necessary to determine their meanings (*see Kenny v. Fuller*, 87 A.D.2d 183, 190–191, 450 N.Y.S.2d 551 ["The words 'representative' and 'agent' have been deemed synonymous and interchangeable"]; *see also* Black's Law Dictionary at 64 [7th ed 1999] [agent defined as "[o]ne who is authorized to act for or in place of another; a representative"]). Nor does the absence of Cheiffo's name in the deeds establish that he acted solely in his capacity an employee with no interest in the Property or Company in regard to the subject transaction. Therefore, dismissal based on documentary evidence is unwarranted.

As to dismissal pursuant to CPLR 3211(a)(7) for failure to state a cause of action, when considering such a motion, the pleadings must be liberally construed (*see*, CPLR 3026; *Siegmund*

*Strauss, supra*) and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs "the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund Strauss, supra; Nonnon v. City of New York*, 9 N.Y.3d 825 [2007]; *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 [1994]). The Court must determine "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" (*African Diaspora Maritime Corp. v. Golden Gate Yacht Club*, 109 A.D.3d 204, 211, 968 N.Y.S.2d 459 [1st Dept 2013]; *Siegmund Strauss, Inc. v. East 149th Realty Corp.*, 104 A.D.3d 401, 960 N.Y.S.2d 404 [1st Dept 2013]). The standard on such a motion is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v. Thom Rock Realty Co.*, 163 A.D.2d 46, 558 N.Y.S.2d 917 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v. Blumberg*, 242 A.D.2d 205, 660 N.Y.S.2d 726 [1st Dept 1997]).

*Breach of Contract*

The elements of a breach of contract claim include the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages (*see Harris v. Seward Park Housing Corp.*, 79 A.D.3d 425, 913 N.Y.S.2d 161 [1st Dept 2010]; *Morris v. 702 E. Fifth St. HDFC*, 46 A.D.3d 478, 850 N.Y.S.2d 6 [1st Dept 2007]).

For a real estate broker to be entitled to a commission, it must plead and prove the existence of either an express or implied contract for employment with the defendant. Paragraphs 47 and 49 of the Complaint indicate that the alleged agreement concerned only JTRE,

B&B and/or Park:

> "Plaintiff and Defendant B&B and Park agreed through emails and verbal communications that Plaintiff would help Defendant B&B acquire the Property"

> "Defendant Chieffo knew of the agreement between Plaintiff and Defendants B&B and Park..."

Therefore, the Complaint does not allege the existence of any express written agreement between JTRE and Chieffo.

An implied contract, however, may be established where the owner accepted and benefitted from the broker's services; it cannot be assumed that a broker acts gratuitously, and the landlord and tenant are held to that knowledge when they accept the broker's services (*Retail Advisors, Inc. v. SLG 625 Lessee LLC*, 2013 WL 534863, 2013 N.Y. Slip Op. 32288(U) [Sup Ct New York Cty 2013], *citing Gronich & Co., Inc. v. 649 Broadway Equities Co.*, 169 A.D.2d 600, 565 N.Y.S.2d 18 [1st Dept 1991]).[2] In other words, in the absence of an agreement to the contrary, the broker becomes entitled to a commission when it produces a buyer or tenant who is ready, willing and able to lease at the terms set by the landlord (*see Feinberg Bros. Agency, Inc. v. Berted Realty Co., Inc.*, 70 N.Y.2d 828 [1987]). In the related scenario of a purchase of real property, "[i]t is not enough simply to open negotiations between parties; unless the broker can produce a purchaser who is ready, willing and able to buy, under the terms as specified by the seller, he has done nothing to induce a purchase, and will not be entitled to a commission even if

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[2] In *Chera* and *Gronich*, the broker brought the property to the lessee's attention, brought the parties together, helped negotiate the essential lease terms, conveyed an offer on behalf of the lessee to the owner, advised the owner of the method of calculating its commission, and otherwise acted as a catalyst for the resulting lease (*see Chera*; *Gronich*, supra).

that prospect ultimately purchases the property" (*see Cushman & Wakefield, Inc. v. 214 East 49th Street Corp.*, 218 A.D.2d 464, 466, 639 N.Y.S.2d 1012 [1st Dept 1996]).

Critically, the broker must be the "procuring cause" of the meeting of the minds between the parties (*see Sholom & Zuckerbrot Realty Corp. v. Citibank*, 205 A.D.2d 336, 338, 613 N.Y.S.2d 588 [1st Dept 1994]). This, although it does not require the broker to negotiate the transaction's final terms or be present at the closing (*see Sholom, supra*), requires a "a direct and proximate link, as distinguished from one that is indirect and remote, between the bare introduction [of the landlord and prospective tenant] and the consummation [of the lease]" (*see Greene v. Hellman*, 51 N.Y.2d 197, 206 [1980]).[3]

Further, even if a broker is unable to prove that it was the procuring cause of a leasing transaction, it may be able to prove that the defendant terminated its activities "in bad faith and as a mere device to escape the payment of the commission" to prevent the broker from becoming the procuring cause of the transaction (*see SPRE Realty Ltd. v. Dienst*, — N.Y.S.2d —, 2014 WL 205033 [1st Dept May 20, 2014], *citing Di Stefano v. Rosetti–Falvey Real Estate*, 270 A.D.2d 631, 632, 704 N.Y.S.2d 344 [3d Dept 2000]; *Sibbald v. Bethlehem Iron Co.*, 83 N.Y. 378, 384 [1881]; *Winick Realty Group LLC v. Austin & Assoc.*, 51 A.D.3d 408, 857 N.Y.S.2d 114 [1st Dept 2008]; *Williams Real Estate Co. v. Viking Penguin*, 228 A.D.2d 233, 233, 644

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[3] The "direct and proximate link" standard contrasts with the "amicable atmosphere" test, which permits the recovery of a commission even if the broker did not participate in the negotiations if he shows that he created an amicable atmosphere in which negotiations went forward or that he generated a chain of circumstances which proximately led to the sale (*see SPRE Realty, Ltd. v. Dienst*, — N.Y.S.2d —, 2014 WL 205033 [1st Dept May 20, 2014]). The First Department noted that it used the more lenient "amicable atmosphere" standard in *Aegis Prop. Servs. Corp. v. Hotel Empire Corp.*, (106 A.D.2d 66, 484 N.Y.S.2d 555 [1st Dept 1985]), but that such use was an "aberration" and that the "direct and proximate link" test has been more frequently and recently used. Thus, the First Department rejected the "amicable atmosphere" test as overly broad and nebulous, and explicitly held that the "direct and proximate link" standard was the proper test going forward (*see SPRE Realty, supra*).

N.Y.S.2d 19 [1st Dept 1996]).

Here, assuming the complaint's allegations as true, JTRE failed to allege an implied contract between it and Chieffo. It is alleged that Sasson and Chieffo met after a tour of the Property. Chieffo suggested that JTRE send him a letter of intent and marketing package of B&B's concept. Then, Sasson submitted a proposed offer to Park, who advised that the offer could not be submitted to Chieffo due to their fee-splitting dispute. Following that, Sasson told Chieffo that JTRE and B&B were working out an issue and would "hopefully submit an offer shortly." After that communication, contact between JTRE and all defendants ended, and one-to-two months later, Sasson observed that the Property's previous tenant had vacated.

The complaint fails to allege that JTRE produced a tenant who was ready, willing and able to lease at the terms set by Chieffo or the Property's owners, as there are no allegations that they ever set an asking price when JTRE was involved in discussions regarding the Property (*see Feinberg Bros., supra*). And, unlike the brokers in *Chera* and *Gronich*, JTRE does not allege that it submitted an offer to Chieffo or the Property's Owners, and further admits that relations among the parties broke down. Chieffo (and/or the Company or Property's owners) did not "accept" JTRE's services. Chieffo never even had an opportunity to accept JTRE's services, because JTRE never submitted an offer to him on B&B's behalf. More important, JTRE's failure to submit an offer was due to B&B's withholding of authority, which, as seen above, is a crucial factor in determining whether a broker is entitled to a commission (*see SPRE Realty, supra*; *Duross Co., supra*).

Despite Sasson's statement to Chieffo that an offer would be forthcoming, the parties' relations ended. Combined with the time between the end of JTRE's involvement and the

alleged leasing of the Property to B&B, even accepting JTRE allegations as true, it cannot be said that JTRE was the "procuring cause" of any subsequent lease (*see Sholom, supra*).

Moreover, there are no allegations indicating that Chieffo acted "in bad faith and as a mere device to escape the payment of the commission" (*see SPRE Realty, supra*). Rather, the allegations indicate that Chieffo was waiting for an offer from JTRE which he never received.

Further, the complaint is devoid of a substantive allegation that Chieffo, an officer of the Company, acted fraudulently or in bad-faith, or that he committed independent torts.[4] Thus, he is immune from personal liability, even assuming *arguendo* a contract existed between the Chieffo (on the Property's owners' behalf), the Property's owners and/or the Company and JTRE (*see Murtha v. Yonkers Child Care Ass'n, Inc.*, 45 N.Y.2d 913 [1978]; *Manhattan Film, Inc. v. Entertainment Guarantees, Ltd.*, 156 A.D.2d 152, 548 N.Y.S.2d 200 [1st Dept 1989]; *Fire Island Real Estate, Inc. v. Coldwell Banker Residential Brokerage*, 39 Misc.3d 1208(A), 971 N.Y.S.2d 71 [Cty Ct Suffolk Cty 2013] (action for brokerage commission brought by listing broker against listing agent company and employee of listing agent company dismissed against employee on the grounds that he was an employee and acted within the scope of his employment)).

As such, the breach of contract claim against Chieffo must be dismissed.

*Fraudulent Inducement*

The elements of fraudulent inducement are: (1) a false representation of material fact; (2) known by the speaker to be untrue; (3) made with the intention of inducing reliance and forbearance from further inquiry; (4) that is justifiably relied upon; and (5) results in damages

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[4] This finding is also based on the court's remaining findings, *infra*.

(*see Schumaker v. Mather*, 133 N.Y. 590 [1892]; *Levy v. Bartfeld*, 2014 WL 1028714 [Sup Ct New York Cty 2014]). Additionally, CPLR § 3016 requires particularity in the pleading of a fraud cause of action (*see Levy, supra*).

Here, the cause of action fails, as JTRE fails to plead any false representation on the part of Chieffo. The allegation that "defendants" knew they would be demanding half of the brokerage commission fee for the "real estate arm" of B&B, yet failed to disclose this to JTRE when entering into its "agreement" to use JTRE as defendants' broker" is insufficient, as this allegation pertains to Park's statement made on behalf of B&B. In this regard, Chieffo stated in his affidavit that he has no proprietary or other interest in B&B or with Park, and there is no allegation to the contrary. Thus, there is no allegation of a false representation on the part of Chieffo, and the claim fails (*see Velon v. DI Modolo Intern. LLC*, 2014 WL 2094130, 2014 N.Y. Slip. Op. 31313(U) [Sup Ct New York Cty 2014]).

Also, any claim that Chieffo made a false representation regarding his suggestion that JTRE send a letter of intent and marketing package of B&B's concept is unavailing. It is undisputed that JTRE never provided Chieffo with same, or with an offer for the Property.

Moreover, this cause of action fails because it not pled with any particularity as to Chieffo (*see Levy, supra*). No details as to Chieffo's alleged fraudulent inducement are pleaded, as the claim is grounded entirely upon speculation that Chieffo had a personal interest in circumventing JTRE as broker. As such, the cause of action must be dismissed (*see Abu Dhabi Commercial Bank P.J.S.C. v. Credit Suisse Securities(USA) LLC*, 2011 WL 11074827, 2011 N.Y. Slip. Op. 33863(U) [Sup Ct New York Cty 2011]).

*Unjust Enrichment*

The essential inquiry in any action for unjust enrichment, a quasi-contract claim, is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. The plaintiff must allege that (1) the other party was enriched; (2) at that 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 (*see Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173 [2011]).

The conclusory claim that Chieffo was enriched at JTRE's expense regarding the commission allegedly owed to JTRE is purely speculative, and insufficient (*see Mazeh Const. Corp. v. VNB New York Corp.*, 35 Misc.3d 1237(A), 953 N.Y.S.2d 550 [Sup Ct New York 2012]). And, Chieffo established by his affidavit that he has no proprietary interest in the Company, the Property's owners, B&B and/or with Park. JTRE offers nothing in opposition to counter this showing; thus, the claim fails.

*Quantum Meruit*

To state a cause of action for *quantum meruit*, plaintiff must allege (1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services (*see Soumayah v Minnelli*, 41 AD3d 390, 391, 839 N.Y.S.2d 79 [1st Dept 2007]).

This claim fails on the grounds discussed above. The conclusory assertions of the elements are insufficient, and the allegations do not indicate that Chieffo (and/or the Company or Property's owners) requested or "accepted" JTRE's services (*see Soumayah, supra*).

*Tortious Interference With Prospective Business Relations*

The elements of a claim for tortious interference with prospective business relations are: (1) business relations with a third-party; (2) defendants interference with those relations; (3) defendant acting with the sole purpose of harming plaintiff or using wrongful means; and (4) injury to the business relationship (*see Carvel Corp. v Noonan*, 3 N.Y.3d 182, 190 [2004]). Wrongful means include fraud or misrepresentation, and some degrees of economic pressure; they do not, however, include persuasion alone although it is knowingly directed at interference with the contract. Simple economic persuasion does not qualify as wrongful means (*see Lion's Property Development Group LLC v. New York City Regional Center, LLC*, 2013 WL 1147365, 2013 N.Y. Slip. Op. 33374(U) [Sup Ct New York Cty 2013]).

The alleged tortious conduct is that Chieffo knew of the agreement between JTRE and B&B/Park, and yet failed to work with JTRE to execute a lease and instead purposefully circumvented JTRE by dealing directly with B&B and Park.

However, even assuming the truth of the factual allegations, there is no indication that Chieffo interfered with JTRE's and B&B's/Park's relations. If anything, the complaint alleges that Chieffo was waiting for JTRE to present him with an offer to take to the Property's owners. The claims that Chieffo "failed to work with JTRE" and "circumvented JTRE" are purely speculative, and cannot be used to defeat the instant motion to dismiss (*see Newport Service & Leasing, Inc. v. Meadowbrook Distributing Corp.*, 18 A.D.3d 454, 794 N.Y.S.2d 426 [2d Dept 2005]).

And, even assuming that Chieffo somehow interfered with JTRE's and B&B's relationship, there are no allegations (other than claims that are speculative or conclusory) that

Chieffo's actions were either outside the scope of his employment or without justification. Thus, the claim for tortious interference must fail (*see Eluto v. Helmsley Spear, Inc.*, 2008 WL 2157889 [Sup Ct New York Cty 2008]).

Any issue of fact as to the alleged amount of money Chieffo allegedly caused to be diverted from JTRE goes to damages and not liability, and thus, insufficient to defeat the instant motion to dismiss.

Further, the amount of power Chieffo may have had regarding his ability to enter into leases on behalf of the Property's owners is irrelevant. These allegations in opposition (found nowhere in the complaint), as well as the additional claims that all defendants made a deal "among each other" to avoid JTRE's involvement in the signing of a lease and/or that Chieffo was "self-interested" in the lease are entirely speculative, beyond the scope of the pled causes of action, and will not be considered by the court (*see Flanzer v. Ellington*, 2014 WL 1262768, 2014 N.Y. Slip. Op. 30788(U) [Sup Ct New York Cty 2014]).

Moreover, JTRE's request for leave to amend the complaint is denied, due to the lack of a proper motion or cross-motion for this relief and a proposed pleading, and in the absence of any showing of any merit to the claims asserted (*see Favara Constr., LLC v. The Comptroller Of The City Of New York,* 2009 WL 5244936 [Sup Ct New York Cty 2009]; *see also Lee v. Freedman*, 2014 WL 505481 [Sup Ct New York Cty 2014]). A request to amend a pleading requires an examination of the proposed amended pleading to determine whether it is palpably insufficient, clearly devoid of merit, or duplicative of dismissed claims (*see Sullivan v. Harnisch*, 100 A.D.3d 513, 514, 954 N.Y.S.2d 68 [1st Dept 2012]).

However, notwithstanding the above, the court, in its discretion, declines to award Chieffo costs, as it does not find that JTRE's complaint against him was frivolous (*see* 22 N.Y.C.R.R. § 130-1.1(a); *Grayson v. New York City Dept. of Parks and Recreation*, 99 A.D.3d 418, 952 N.Y.S.2d 8 [1st Dept 2012]).

*Conclusion*

Based on the foregoing, it is hereby

ORDERED that Chieffo's motion to dismiss is granted solely pursuant to CPLR 3211(a)(7) for failure to state a cause of action, and the complaint as to Chieffo is severed and dismissed with prejudice; and it is further

ORDERED that Chieffo shall serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the remaining parties to the action shall appear for a preliminary conference on August 5, 2014, at 2:15 p.m.

This constitutes the decision and order of the Court.

Dated: June 6, 2014

Hon. Carol R. Edmead

HON. CAROL EDMEAD