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

PRESENT: MANUEL J. MENDEZ **PART** 13
Justice

RETAIL ADVISORS, INC.,
Plaintiff,
-against-
SLG 625 LESSEE LLC, and
FRATELLI ROSSETTI NEW YORK LTD.,
Defendants.

INDEX NO. 650779/2013
MOTION DATE 02-11-2015
MOTION SEQ. NO. 003
MOTION CAL. NO.

The following papers, numbered 1 to 13 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-6
Replying Affidavits	7-8

Cross-Motion: ☐ Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that Defendants' motion for summary judgment dismissing the Amended Complaint is granted, the Amended Complaint is dismissed.

Retail Advisors, Inc. (herein "Broker") is a licensed commercial real estate broker. SLG 625 Lessee LLC (herein "Owner") was the owner and landlord of a commercial property located at 625 Madison Avenue, New York, New York (herein "Building"). Fratelli Rossetti New York Ltd. (herein "Tenant") is the tenant of the ground floor space known as "Store 113" (herein "Commercial Space"). The lease was subsequently amended to alter the location of the basement storage space in 2001, and the amended lease (herein "Lease") expired as of August 31, 2013.

In 2010, Tenant advised Broker of its interest in early renewal of the Lease. Broker contacted non-party Newmark & Company Real Estate, Inc. (herein "Newmark"), an outside retail leasing broker for Owner about a potential early renewal of the Lease. From February 2010 through November 2010, the parties negotiated the preliminary Lease renewal terms, and the negotiations were conducted between Broker and Newmark. The proposals included a provision for broker fees, that would give each broker one half of the full commission to be paid upon lease execution.

On January 26, 2011, Newmark advised Broker that negotiations had reached a point where the parties either agreed to the proposed lease terms or postponed discussions until a later date. On February 25, 2011, a final proposed lease renewal was sent by Newmark to Broker, which included the same language concerning brokerage fees. On April 20, 2011, Diego Rossetti, president of Tenant's company sent an email to Larry Swiger, senior vice-president of Owner, stating that Tenant could not accept the terms of the proposed modifications of the lease renewal. Swiger sent a return e-mail indicating that there was nothing more to discuss since the Lease did not expire for another two years.

On May 10, 2012, Swiger sent an e-mail only to Rossetti about a possible lease renewal. Owner and Tenant re-negotiated the lease renewal without Broker and entered into a renewal lease(herein "Renewal") on November 14, 2012. Throughout 2012, Broker conducted searches for new locations for Tenant. On November 26, 2012, Rossetti sent an email to Broker advising Broker that Tenant entered into the Renewal with Owner.

Broker commenced this action by summons and complaint, and subsequently served an Amended Complaint asserting causes of action for breach of express special contract, tortious interference with a contract for punitive damages, tortious interference with a business advantage, and unjust enrichment as against Owner, and asserts a cause of action for breach of contract as against Tenant.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v. City of New York, 81 N.Y. 2d 833, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 569 N.Y.S. 2d 337 [1999]).

The Court first addresses the Second cause of action for the breach of contract claim asserted against Tenant.

The elements for a breach of contract claim are the existence of a contract, performance by the plaintiffs under the contract, defendant's breach of the contract, and resulting damages (See Harris v. Seward Park Housing Corp., 79 AD3d 425, 913 N.Y.S.2d 161 [1st Dept., 2010]; Morris v. 702 E. Fifth St. HDFC, 46 AD3d 478, 850 N.Y.S.2d 6 [1st Dept., 2007]).

Broker contends that he had an oral exclusive agreement with Tenant to negotiate the Renewal Lease, and that the exclusive agreement need not be in writing. Broker further contends that Tenant is estopped from repudiating the oral exclusive agreement because Broker continued to perform brokerage services for Tenant in 2012.

The Court of Appeals has held that "[a] broker is entitled to a commission upon the sale of the property by the owner only where the broker has been given the exclusive right to sell; an exclusive agency merely precludes the owner from retaining another broker in the making of the sale," and that "a contract giving rise to an exclusive right of sale must "clearly and expressly provide that a commission is due upon sale by the owner or exclude the owner from independently negotiating a sale" (Morpheus Capital Advisors LLC v. UBS AG, 23 N.Y.3d 528, 535, 15 N.E.3d 1187, 1191-1192, 992 N.Y.S.2d 178, 182-183 [2014]) Further, "[w]ithout an unequivocal expression of intent by its own terms or by necessary implication from its terms, the . . . contract is at most considered to create an exclusive agency, not excluding the owner's inherent right to sell his or her own property" (Id.).

Broker does not have a written agreement expressing Tenant's intention to grant Broker an exclusive right to sell, as opposed to an exclusive agency. Broker fails to establish "the direct proximate link between his efforts and the deal that was ultimately consummated" as the Renewal Contract was entered into more than one year after the initial negotiations ended (Rosenhaus Real Estate, LLC v S.A.C. Capital Mgt., Inc., 121 A.D.3d 409, 993 N.Y.S.2d 694, 695 [1st Dept., 2014]).

Broker's contention that Tenant is estopped from repudiating the oral agreement fails. The record indicates that after the 2011 negotiations failed, Tenant informed Broker that its services in relation to the Lease Renewal were not desired and expressly stated that Tenant did not want Broker speaking to Owner on Tenant's behalf (see In re Estate of Carr, 99 A.D.2d 390 473 N.Y.S.2d 179 [1st Dept., 1984]). Broker also fails to cite evidence showing that it reasonably relied on Tenant's alleged false misrepresentations. Summary judgment in favor of defendants dismissing the Second cause of action alleging breach of contract as against Tenant is granted.

Broker's Third cause of action for tortious interference with a contract fails as there existed no enforceable agreement between Broker and Tenant as to the negotiations for the lease renewal (see NBT Bancorp v. Fleet/Norstar Fin. Group, 87 N.Y.2d 614, 664 N.E.2d 492, 1641 N.Y.S.2d 581 [1996]). Summary judgment in favor of defendants dismissing the Third cause of action alleging tortious interference with a contract as against Owner is granted.

Broker's Fourth cause of action for tortious interference with a prospective business advantage fails. "To state a cause of action for tortious interference with prospective contractual relations, a plaintiff must plead that the defendant directly interfered with a third party and that the defendant either employed wrongful means or acted for the sole purpose of inflicting intentional harm on plaintiff" (Posner v Lewis, 18 N.Y.3d 566, 570, 965 N.E.2d 949, 952, 942 N.Y.S.2d 447, 450 [2012]).

Swiger, who testified on behalf of Owner during his deposition, was asked:

> Q. Is it correct that between April 20, 2011 .... and May 10, 2012, that you did not have any communication with [Tenant] about the renewal of the ... lease"
> A. I believe that's correct, yes.
> Q. In the email you say, "it has been a while since we last spoke about a possible renewal of your lease at [the commercial space], and I thought now might be a good time" ..... Why did you think that now might be a good time?
> A. Because that was closer to the expiration date of his lease.
> (See Aff. in Supp., Exhibit 32, pg. 118-119).

Broker contends that Owner's motivation, specifically Swiger's motivation for failing to include Broker in the subsequent Lease Renewal negotiations was "to save [Owner] a commission and to punish [Broker] for [Tenant] changing its mind in April

2011 for a second time. Moreover, Owner made it clear in writing to [Tenant] in August of 2012 that there would be no broker," and that "there was no economic justification for [Owner's] actions ..." (see Aff. in Opp., pg. 17).

However, the terms of the proposed renewal lease in 2011 and the actual Lease Renewal in 2012 were very distinct. The Lease Renewal did not contain a $650,000 premium for renegotiating the lease prior to the expiration, and the Lease Renewal contained a $1.6 Million savings in base rent over the term of the Renewal Lease. The monetary difference between the proposed 2010 lease renewal and the 2012 Lease Renewal provided Tenant with a total savings of over $2.3 Million (see Aff. in Supp., Pg. 7).

During his deposition, Broker stated:

Q. "Your existing store is, in my opinion, a far better layout with better windows" --
A. It's [the Commercial Space] not comparable. It's not a comparable location, not a comparable real estate transaction.
Q. If it's a better layout with better windows in an equivalent location, why would it rent for less?
A. Because you are an existing tenant with whom the landlord has 15 years of history. They're not concerned about your credit. You're there. You established the block for the building. There's a lot of reasons the landlord would make a lower-market transactions with an existing tenant with whom they have a long-term, positive relationship.
(see Aff. in Supp., Exhibit 1, pg. 303).

Summary judgment in favor of defendants dismissing the Fourth cause of action alleging tortious interference with a prospective business advantage as against Owner is granted. Broker fails to show that Owner directly interfered with Tenant, and that the Owner either employed wrongful means or acted for the sole purpose of inflicting intentional harm on Broker.

The Fifth cause of action asserted in the Amended Complaint alleges that Owner benefitted from Broker's services without having to pay for such services, and that Owner was unjustly enriched. "To prevail on a claim of unjust enrichment, a party must show 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" (Suntrust Mortg., Inc. v. Mooney, 113 A.D.3d 836, 978 N.Y.S.2d 901, 902 [2nd Dept., 2014]).

Broker performed services in relation to the 2010 through 2011 lease renewal negotiations, however, that deal did not lead to an agreement and the parties ceased negotiations. It is undisputed that the lease renewal negotiations in 2012 did not involve Broker and its services. Broker "is not entitled to recover a co-brokerage

commission under a theory of unjust enrichment since [its] efforts, which occurred [one year] prior to the consummation of the [Lease Renewal], were unsuccessful" (Jagarnauth v. Massey Knakal Realty Servs., Inc., 104 A.D.3d 564, 565, 961 N.Y.S.2d 415 [1st Dept., 2013]). Summary judgment in favor of defendants dismissing the Fifth cause of action asserting unjust enrichment as against Owner is granted.

Broker's final contention is the formation of a special contract between itself and Owner wherein Broker is entitled to a commission due to the language in the contract authorizing that commission. Broker alleges that during the 2010 and 2011 negotiations Newmark, on behalf of Owner, exchanged various proposals that called for Owner to pay Broker a 50% commission, which was later lowered to a 33% commission once a lease renewal was obtained by Owner from Tenant for the Premises.

In opposition, Owner contends that Broker is not entitled to a commission because it was not the procuring cause for the Lease Renewal, alternatively, that the proposals wherein Owner negotiated the commission agreement were repudiated by Broker by sending its own proposal as a counter-offer.

"The general rule with respect to brokerage commissions is that, in the absence of a special contract, the broker is entitled to a commission when he brings his principal and a third party together and their minds meet on the essential terms of an agreement" (Tankers International Navigation Corp. v. National Shipping & Trading Corp., 116 A.D.2d 40, 43, 499 N.Y.S.2d 697, 699 [1st Dept., 1986]) "Where a special contract exists, the broker's entitlement to commissions is entirely dependent upon the language of the contract authorizing those commissions" (Id.).

Here the parties were in constant negotiations over various terms of the proposed lease renewal, including the commission to be paid once the lease renewal was entered into by Owner and Tenant. On January 26, 2011 Owner sent a proposal which contained a provision paying Broker a 50% commission, and on January 28, 2011, Owner sent a proposal paying Broker a 33% commission. Both proposals stated:

> "This proposal is for discussion purposes only and shall not be considered an offer and shall not bind either [Owner] or Tenant in any way unless and until a mutually satisfactory lease agreement is executed between the parties and one (1) copy is returned to the Tenants" (see Aff in Opp., Exhibits 27 and 28).

After further negotiations, which included a proposed renegotiation of the commission presented to Owner by Broker (see Aff in Opp., Exhibits 38, and 40-47), the negotiations ended via an email exchange between Tenant and Owner dated April 20, 2011, in which Owner stated "[s]ince your lease does not expire for more than two (2) years there is nothing more to discuss" (see Aff. in Opp., Exhibit 53). Broker confirmed that negotiations had ended two months later by emailing Tenant apologizing and acknowledging that Broker let Tenant down in various ways during the prior negotiations (see Aff. in Opp., Exhibit 54).

More than one year later Owner reaches out to Tenant to inquire about the Lease and Lease Renewal because Tenant's Lease was near expiration. At that point, Owner and Tenant entered into new negotiations and entered into substantially different terms than the proposed terms for the 2010 and 2011 negotiations. Tenant did not enter into an exclusive right to deal agreement and was free to negotiate directly with Owner. Further, Broker cannot establish the requisite "direct proximate line between his efforts and the deal ultimately consummated" (Rosenhaus Real Estate, LLC v S.A.C. Capital Mgt., Inc., 121 A.D.3d 409, 993 N.Y.S.2d 694, 695 [1st Dept., 2014]). Nor has Broker shown the existence of a special contract between itself and Owner. Summary judgment in favor of defendants dismissing the First cause of action asserting that a special contract existed as against Owner is granted.

Accordingly, it is hereby ORDERED that Defendants' motion for summary judgment dismissing the Amended Complaint is granted, and it is further,

ORDERED, that the Amended Complaint is dismissed in its entirety, and it is further,

ORDERED, that within 15 days from the date of entry the moving parties serve a copy of this Order with Notice of Entry upon Plaintiff, and the Clerk of the Court who is directed to enter judgment accordingly.

ENTER: MANUEL J. MENDEZ J.S.C.

Dated: February 23, 2015

MANUEL J. MENDEZ
J.S.C.

Check one: X FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE