Georgia Malone & Co., Inc. v E & M Assoc.
2017 NY Slip Op 31355(U)
June 20, 2017
Supreme Court, New York County
Docket Number: 150660/2014
Judge: Kelly A. O'Neill Levy

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

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GEORGIA MALONE & COMPANY, INC.,

Plaintiff,

-against-

E & M ASSOCIATES, MICHAEL LANGER, IRVING LANGER, SCOTT J. KATZ, LEIBEL LEDERMAN, ARYEH GINZBERG, et al.,

Defendants.

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DECISION/ORDER

Index No. 150660/2014

Mot. Seq. 004

KELLY O'NEILL LEVY, J.S.C.:

Plaintiff Georgia Malone & Company, Inc. (Malone) moves for partial summary judgment on its first and sixth causes of action. All of the defendants cross-move for partial summary judgment, dismissing the first through fourth and sixth causes of action.

In this action for recovery of a brokerage commission, plaintiff broker asserts that, under the terms of the parties' agreement, it earned its commission because it introduced defendants to the seller and/or the properties, which consisted of a large group of properties in Manhattan, and defendants closed on the properties. Thus, it seeks recovery on its motion for breach of contract, and for legal fees, as provided in the agreement. Defendants contend that the documentary evidence and undisputed facts show that the brokerage agreement unambiguously defined the buyer, and that the buyer was not the entity or entities which bought the properties. It also urges that the transaction that actually closed was not because of the minimal actions by the plaintiff, but, rather, was the result of a long-standing relationship among the parties who successfully negotiated the deal that ultimately came to fruition.

BACKGROUND

Plaintiff Malone is a licensed real estate brokerage firm, and its president, Georgia Malone, is a broker and an attorney. Defendant E & M Associates LLC (E & M Associates), a limited liability company established in 1998, manages apartment buildings in the New York City area, and has two members, defendant Irving Langer and his wife Miriam Langer (exhibit K to defendants' notice of cross motion). Defendants Michael Langer, Leibel Lederman and Aryeh Ginzberg are employees of defendant E & M Associates (exhibit A to defendants' notice of cross motion, complaint, ¶¶ 2-4; *see* aff of Irving Langer, dated March 17, 2016 [I. Langer aff], ¶¶ 2-3; aff of Aryeh Ginzberg, dated March 17, 2016 [Ginzerg aff], ¶ 3; aff of Michael Langer, dated March 18, 2016 [M. Langer aff], ¶ 2; aff of Leibel Lederman, dated March 17, 2016 [Lederman aff], ¶ 3). Defendants Ginzberg and Lederman are both in the real estate syndication business, have bought and sold real estate by themselves and through entities they wholly own, and have negotiated and concluded deals with other individuals and entities (Ginzberg aff, ¶ 2; Lederman aff, ¶ 2). Defendant Scott Katz is employed by Galil Management LLC, and is not a member or partner of E & M Associates (aff of Scott Katz, dated March 18, 2016 [Katz aff], ¶2). All of the remaining defendants are limited liability companies (complaint, ¶ 5). The properties at issue, listed in exhibit A to the complaint, consist of 85 multi-family properties containing 90 buildings and 1.4 million square feet in upper Manhattan (*id.*, ¶ 6 and exhibit A) (the Properties).

In the summer of 2012, plaintiff received the listing for the Properties from Baruch Singer, the principal of the owner of the Properties (*id.*, ¶ 7; *see* aff of Georgia Malone, dated Dec 15, 2015 [Malone aff], ¶ 10; Ginzberg aff, ¶¶ 5-6). Previously, plaintiff had performed substantial due diligence and review of the Properties in connection with an earlier "Unwind

Transaction," in which the owner of the Properties negotiated to modify its lender's right to purchase (Malone aff, ¶ 10). This due diligence and related work was confidential and for use only by the owner for the Unwind Transaction, and for the potential sale of the Properties (*id.*, ¶ 11).

Plaintiff was contacted by Oren Richland, a potential investor, who indicated that he was seeking a multi-family portfolio of properties for purchase by a group of real estate investors, E & M Associates (Malone aff, ¶ 12). Plaintiff responded that it was involved in the potential sale of such a portfolio, had substantial confidential due diligence material, and was authorized to show the Properties (*id.*). Plaintiff informed Mr. Richland that E & M Associates would have to sign a confidentiality/noncircumvent/commission agreement, which it sent to Michael Langer of E & M Associates (*id.*, ¶ 13).

On August 30, 2012, plaintiff, as "Broker," entered into a Confidentiality/ Noncircumvent/Commission Agreement (Commission Agreement) with "Michael Langer of E & M Associates," as "Buyer" (exhibit B to defendants' notice of cross motion, Commission Agreement). In the preamble to the Commission Agreement, the parties agreed that all confidential information about the Properties furnished by the Broker to the "Buyer or its Representatives" was confidential, and for the purpose of allowing the Buyer to evaluate the Properties. The Buyer's "Representatives" were defined as "the Buyer's directors, officers, employees, managers, members, partners, affiliates, potential joint venturers, representatives and advisors, including, without limitation, attorneys, accountants, but excluding all brokers, agents, and consultants" (*id.* at 1). Section 5, entitled "Brokerage Agreement," provided, in part, that "BUYER acknowledges that it was introduced to Seller and/or the Property, BUYER agrees to

pay Broker a commission pursuant in the amount 1% (one) percentage points of purchase price upon contract closing" (*id.*, section 5 at 2). It also provided that if a court determined that the buyer breached this or any other provision of the agreement, the buyer shall reimburse broker for all money damages, including, but not limited to, attorneys' fees, costs, disbursements, and expenses (*id.* at 2-3). The signature block identifies the "BUYER" as "E & M Associates, By: Michael Langer" (*id.* at 3). On the bottom of the page, the following footnote appears: "*Signatories each have apparent and actual authority to bind all employees, officers, successors, assigns and agents of all their related entities and affiliates to this letter agreement" (*id.*).

Michael Langer signed the agreement on behalf of E & M Associates. Plaintiff then sent him the written confidential information about the Properties by email, which Michael Langer forwarded to defendant Leibel Lederman, another employee of E & M Associates.

On September 12, 2012, plaintiff arranged for an inspection of the Properties by Michael Langer and his father, defendant Irving Langer, the managing member of E & M Associates (I. Langer aff, ¶ 2; Malone aff, ¶¶ 23- 26). On September 13 and October 18, 2012, Mr. Richland followed up with Michael Langer by email (Malone aff, ¶ 27). Plaintiff had no further contact with Michael Langer or E & M Associates (M. Langer aff, ¶ 11).

In June 2013, plaintiff was marketing the Properties to other potential buyers, including to FBE Limited, LLC (FBE), a real estate and capital management company owned and managed by the Fruchthandler family (exhibit L to defendants' notice of cross motion).

In July 2013, Singer, as principal of the owner of the Properties, contacted defendant Ginzberg to discuss a possible sale (Ginzberg aff, ¶ 8). Singer indicated to Ginzberg that he was already in discussions with the Fruchthandlers and FBE about the Properties, but that if they

could not move on the deal immediately, he would make a deal with Ginzberg if he was interested (*id.*). On July 18, 2013, FBE entered into a purchase and sale agreement with the owner of the Properties (exhibit D to defendants' notice of cross motion). After it executed the agreement, FBE had difficulty raising the funds to complete the purchase (Ginzberg aff, ¶ 10).

On October 27, 2013, defendants Ginzberg and Lederman reached an agreement with the owner of the Properties and the Fruchthandlers, whereby FBE agreed to assign its purchase and sale agreement with the owner to defendants Ginzberg, Lederman and Irving Langer (Ginzberg aff, ¶ 26). Ginzberg asserts that FBE suggested that Ginzberg, Lederman, and Irving Langer use an entity known as Manhattanville Holdings LLC, that FBE had previously formed on August 14, 2013 (exhibit F to defendants' notice of cross motion, operating agreement at 2), to purchase the Properties, which they did (Ginzberg aff, ¶ 18). On November 12, 2013, FBE assigned the purchase and sale agreement to Manhattanville Holdings LLC. On November 14, 2013, Manhattanville Holdings LLC closed on the deal with the owner of the Properties (*id.*, ¶ 19). Ginzberg, Lederman, and I. Langer became members of the managing member of Manhattanville Holdings LLC, defendant LIA MM LLC (*id.*, ¶¶ 20-21). Michael Langer and E & M Associates are not members of Manhattanville Holdings LLC, and do not own equity interests in the Properties (*id.*, 25; M. Langer aff, ¶¶ 12-13; aff of Leibel Lederman, dated March 17, 2016 [Lederman aff], ¶¶ 17-18).

On January 22, 2014, plaintiff commenced this action seeking recovery on six causes of action: (1) breach of the brokerage agreement; (2) breach of an implied brokerage agreement; (3) in quantum meruit; (4) unjust enrichment; (5) breach of confidentiality; and (6) for legal fees pursuant to the brokerage agreement (exhibit A to defendants' notice of cross motion,

complaint).

In March 2014, defendants answered the complaint, denying the material allegations, and asserting a number of affirmative defenses (exhibit Z to plaintiff's notice of motion).

In moving for partial summary judgment on its claims for breach of the brokerage agreement (first cause of action) and for legal fees under that agreement (sixth cause of action), plaintiff argues that the clear terms of the Commission Agreement, and the admission in response to plaintiff's notice to admit by the entity defendants (with street name addresses) that they purchased the Properties (plaintiff's exhibit B), warrant judgment in its favor on those claims. It contends that defendants used its brokerage services, and then purchased the Properties behind plaintiff's back, cutting plaintiff out of the deal. Plaintiff argues that defendants are all related and affiliated with one another as business partners, affiliates and joint venturers, within the meaning of the Commission Agreement.

In opposition and in support of their cross motion, defendants argue that the contract claims must be dismissed because neither Michael Langer nor E & M Associates were purchasers of the Properties. They urge that the agreement unambiguously defined the "Buyer" as "Michael Langer of E & M Associates," and section 5 provided that only the "Buyer" agreed to pay a brokerage commission. They submit proof that the July 18, 2013 purchase and sale agreement was made between the owner c/o Baruch Singer and FBE Limited, LLC, and the November 12, 2013 assignment agreement was between FBE Limited, LLC, as assignor, and Manhattanville Holdings LLC, as assignee. Further, defendants urge that plaintiff is not entitled to a commission because it was not the procuring cause of the sale and because none of the defendants, other than Michael and Irving Langer, and defendant E & M Associates, had any contact with plaintiff and

these defendants had no further contact with plaintiff after they toured the Properties on September 12, 2012, over a year before the sale. Defendants also urge that plaintiff's breach of an implied brokerage agreement, in quantum merit, and unjust enrichment causes of action (second, third, and fourth causes of action) fail as a matter of law because there is an express written brokerage agreement that governs the transaction.

In reply, plaintiff asserts that E & M Associates bought the Properties as a matter of law and fact. Plaintiff also argues that all of the defendant purchasing entities are related to, affiliated with, or are in a partnership or joint venture with E & M Associates and its members and partners, defendants Irving Langer, Leibel Lederman, Aryeh Ginzberg, Scott Katz and Michael Langer, and that all of their addresses are the same (Malone aff, ¶ 41). Plaintiff argues that it does not need to show that it was the procuring cause of the sale, under the terms of the parties' agreement. Plaintiff also urges that it had an exclusive right to sell the Properties (exhibit A to plaintiff's notice of motion).

In their reply, defendants assert that the fact that the same individuals who are employed at E & M Associates, a limited liability company, are employed at the entities that bought the Properties, does not make the purchasing entities the same as E & M Associates. Defendants maintain that plaintiff is attempting to assert that defendants committed fraud, without pleading or proving such claim. They argue that plaintiff did not have an exclusive right to sell the Properties, because such a right could only be granted by the seller or owner.

DISCUSSION

Plaintiff's motion for partial summary judgment is denied, and defendants' cross motion for partial summary judgment is granted, and the first through fourth and sixth causes of action

are dismissed.

Brokers are "agent[s] who, for a commission or brokerage fee, bargai[n] or carr[y] on negotiations in behalf of [their] principal" (*see Gerstein v 532 Broad Hollow Rd. Co.*, 75 AD2d 292, 296 [1st Dept 1980]). They must ordinarily bring the negotiating parties to a completed agreement (*Northeast Gen. Corp. v Wellington Adv.*, 82 NY2d 158, 163 [1993]). Finders, in contrast, must "introduce and bring the parties together," but do not have the power or obligation to negotiate the transaction (*id.*; *see also Minichiello v Royal Bus. Funds Corp.*, 18 NY2d 521, 527 [1966], *cert denied* 389 US 820 [1967]).

Generally, with regard to brokerage commissions, "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 Intl. Nav. Corp. v National Shipping & Trading Corp.*, 116 AD2d 40, 43 [1st Dept 1986]). However, where the parties have a special contract, the broker's entitlement to commissions depends entirely upon the language of that contract, which may or may not require the broker to "earn" its commission by being the procuring cause of the sale (*see id.*; *see also Graff v Billet*, 101 AD2d 355, 356 [2d Dept 1984], affd 64 NY2d 899, 902 [1985] [any ambiguity in commission agreement construed against broker who drafted it]).

Where an agreement, including a brokerage or finder's agreement, is unambiguous, the parties' intent must be found within the four corners of the agreement, giving a practical interpretation to the words used, and reading the agreement as a whole (*Ellington v EMI Music, Inc.*, 24 NY3d 239, 244 [2014]). The words and phrases must be given their plain meaning (*Brooke Group v JCH Syndicate 488*, 87 NY2d 530, 534 [1996]). "An agreement is

unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (*Ellington*, 24 NY3d at 244 [internal quotation marks and citations omitted]). A contract is ambiguous when, read as a whole, it "fails to disclose its purpose and the parties' intent, or when specific language is susceptible of two reasonable interpretations" (*id.* [internal quotation marks and citations omitted]). The best evidence of what the parties intend "is what they say in their writing" (*id.* at 245). Whether an agreement is ambiguous is "an issue of law for the courts to decide" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). "However, the assertion by a party to a contract that its terms mean something to him or her 'where it is otherwise clear, unequivocal and understandable when read in connection with the whole contract' is not sufficient to make a contract ambiguous so as to require a court to divine its meaning" *(Marin v Constitution Realty, LLC*, 128 AD3d 505, 508 [1st Dept 2015], *affd* 28 NY3d 666, 673 [2017], citing *Vesta Capital Mgt. LLC v Chatterjee Group*, 78 AD3d 411, 411 [1st Dept 2010]; *see Universal Am. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 NY3d 675, 680 [2015] [agreement not ambiguous simply because the parties interpret provisions differently]).

The Commission Agreement at issue is clear. First, it unambiguously states that it was "made and agreed between [plaintiff] ('Broker') and Michael Langer of E & M Associates ('Buyer')" (exhibit B to defendants' notice of cross motion, Commission Agreement at 1). The agreement had two aspects: a confidentiality/noncircumvent provision and the brokerage provision. Section 5 of the agreement, regarding the brokerage agreement, clearly provides that "Buyer acknowledges that it was introduced to Seller and/or the Property. Buyer agrees to pay

Broker a commission pursuant in the amount of 1 % (one) percentage points of purchase price upon contract closing" (*id.* at 2). E & M Associates, as the defined Buyer, is the party that agreed to pay the commission upon its purchase of the Properties. Plaintiff urges that preamble, which defines "Buyer's Representatives" as "Buyer's directors, officers, employees, managers, members, partners, affiliates, potential joint venturers, representatives and advisors, including, without limitation, attorneys, accountants, but excluding all brokers, agents and consultants," should be read into Section 5 to provide that those "Buyer's Representatives" are the "Buyer," and were bound by the agreement to pay the commission if they purchased the Properties (*id.* at 1). This court, however, will not rewrite the definition of "Buyer" to include these "Representatives," particularly where the contract was negotiated between sophisticated and counseled business entities, such as plaintiff and defendants (*see Matter of Wallace v 600 Partners Co.*, 86 NY2d 543, 548 [1995]; *Jade Realty LLC v Citigroup Commercial Mtge. Trust 2005-EMG*, 83 AD3d 567, 568 [1st Dept 2011], *affd* 20 NY3d 881 [2012]). Moreover, plaintiff's president, Georgia Malone, is not only a broker, but a real estate lawyer (exhibit N to defendans' notice of cross motion), and plaintiff drafted this Commission Agreement (*see Graff*, 64 NY2d at 902 [resolving ambiguity against broker who prepared agreement]). If plaintiff had wanted to include "Buyer's Representatives" in the definition of the term "Buyer," or in the section regarding the payment of commission, it could have, but it did not. The reference to "Buyer's Representatives" appears in the preamble in connection with the Broker's delivery of confidential information about the Properties "to the Buyer or its Representatives (as defined below)" (Commission Agreement at 1). The preamble goes on to provide that the "Broker has determined to require Buyer to execute and deliver this Agreement as a condition of its review

and inspection of the confidential information" (*id.*). While section 2 of the agreement, regarding the nondisclosure and use of the confidential information, actually uses the term "Buyer's Representatives" (*id.* at 2), section 5, addressing the commission due, does not (*id.* at 2-3). According to the agreement, "Buyer" and "Buyer's Representatives" are different parties. "Under accepted cannons of contract construction, when certain language is omitted from a provision but placed in other provisions, it must be assumed that the omission was intentional" (*United States Fid. & Guar. Co. Annunziata*, 67 NY2d 229, 233 [1986]; *Sterling Inv. Servs., Inc. v 1155 Nobo Assoc., LLC*, 30 AD3d 579, 581 [2d Dept 2006]; *see Assured Guar. Mun. Corp. v DLJ Mtge. Capital, Inc.*, 117 AD3d 450, 450-451 [1st Dept 2014] [failure to include a party among those governed by contract provision construed as intentional exclusion from its application]). Because plaintiff was aware of how to broaden the definition of "Buyer," and did so with respect to the confidentiality provision, but failed to do so with respect to the commission provision, this court must assume that the omission was intentional.

Plaintiff's contention, that the definition of "Buyer" should be expanded based on language after the signature block regarding actual and apparent authority, is unpersuasive. On the last page of the Commission Agreement, after an asterisk under the signature block, the following language appears: "Signatories each have apparent and actual authority to bind all employees, officers, successors, assigns and agents of all their related entities and affiliates to this letter agreement" (exhibit B to defendants' notice of cross motion, Commission Agreement at 3). This language, however, does not alter or expand the definition of "Buyer," particularly as it appears in section 5. Instead, it simply indicates that for the parts of the agreement, such as the confidentiality provisions, which refer to obligations of officers, employees, managers, members,

partners and agents of affiliates, Michael Langer of E & M Associates has the authority to bind them. The Commission Agreement does not provide that such officers, employees, successors, assigns or agents of affiliates have an obligation to pay a brokerage commission, nor does it provide that they have authority to act as the "Buyer."

Plaintiff argues that this was a special brokerage agreement, pursuant to which it earned its commission if it introduced defendants to the Properties and/or the seller, and defendants closed on the contract and purchased the Properties at issue, and that defendants unequivocally admitted, in response to plaintiff's notice to admit, that they, in fact, did close on the contract and purchased the Properties. This argument uses a very broad definition of "Buyer," without any regard for the language of the agreement plaintiff itself drafted. While in the defendants' responses, the entity defendants, whose names indicate the various property addresses, admitted that they purchased the Properties, neither Michael Langer nor E & M Associates admitted that they purchased the Properties (exhibit D to plaintiff's notice of motion). Plaintiff seeks to group all of the defendants together and, without any reference to the contract language, to claim that they were the "Buyer" obligated to pay a commission.

Plaintiff's reliance on *Eastern Consol. Props., Inc. v 5 E. 59 Realty Holding Co., LLC* (2015 NY Slip Op 31124 [U] [Sup Ct, NY County 2015], *affd* 146 AD3d 622 [1st Dept 2017]), is misplaced, as that case is distinguishable on the facts. First, the commission agreement in that case was between the property seller and the broker, and the language in that commission agreement provided, in relevant part:

> "This letter sets forth our Commission Agreement with regard to the Proposed Purchase (defined below) of the Property by any potential buyer *or his nominee or an entity in which he is a*

> *partner, principal or joint venturer (collectively 'Purchaser,') or Purchaser's assignee (also included in the collective 'Purchaser,")* to whom we as broker introduced, or shall introduce the Property"

(*id.* at * 1 [emphasis supplied]). This language is entirely different from the contract language in the instant case, as it defines "Purchaser" broadly to include an entity in which the potential buyer is a partner, principal or joint venturer, or an assignee. Here, the agreement, which is between the potential buyer and broker, defines Buyer in the first sentence as simply Michael Langer of E & M Associates, and provides that Buyer pay the commission if Buyer purchases the Properties. In addition, in *Eastern Consol. Props., Inc.*, the court specifically found that there was no dispute that the listed purchaser for the property was related to the defendants within the meaning of that commission agreement (*id.* at * 4). Here, plaintiff makes a conclusory, unsupported claim that the buyer of the Properties is related to E & M Associates (plaintiff's memo in support at 10). Further, in *Eastern Consol. Props., Inc.*, the court recounted proof that plaintiff broker was in continuous contact with the buyers and the seller of the property (*id.* at * 3). In this case, there is no proof, or even any allegations, that plaintiff was continuously in contact with E & M Associates.

Defendants have submitted the relevant and undisputed documents governing the purchase of the Properties: the Purchase & Sale Agreement between the seller, which was represented by Mr. Singer, and FBE Limited LLC, which was represented by Ephraim Fruchthandler (exhibit D to defendants' notice of cross motion); and the Purchase Agreement between FBE Limited LLC and Manhattanville Holdings LLC, which was represented by Leibel Lederman (exhibit E to defendants' notice of cross motion). They also have submitted proof of

the equity structure of the purchaser of the Properties, which clearly shows that E & M Associates is not part of that equity structure (exhibit B to reply affirmation of Jennifer Rossan). In addition, Ginzberg, Irving Langer, Lederman, and Michael Langer all attest that neither Michael Langer nor E & M Associates is a member of Manhattanville Holdings LLC, and that neither has ever owned an equity interest in the Properties (Ginzberg aff, ¶ 25; I. Langer aff, ¶ 17; M. Langer aff, ¶¶ 12-13; Lederman aff, ¶ 17). Plaintiff argues that, as a matter of law, E & M Associates purchased the Properties. Plaintiff bases this argument on its own assertions that all of the purchasing entities are "all related to, affiliated with or are in partnership or joint venture with E & M and its members and partners, Irving Langer, Leibel Lederman, Aryeh Ginzberg, Scott Katz and Michael Langer" and that they share the same address as E & M Associates (plaintiff's reply memo at 11). It contends that defendants were trying to evade paying the commission by creating new entities to buy the Properties, and were conspiring to cut it out of its commission. It is clear, however, that E & M Associates is not a partnership, but a limited liability corporation (exhibit K to defendants' notice of cross motion), and its members cannot personally be held liable for the corporation's obligations unless the plaintiff can show a basis to pierce the corporate veil (*see Board of Mgrs. of 325 Fifth Ave. Condominium v Continental Residential Holdings LLC*, 149 AD3d 472, 475 [1st Dept 2017]; *Matias v Mondo Props. LLC*, 43 AD3d 367, 367-368 [1st Dept 2007]). Simply because some of the same individuals are employed at E & M Associates and at the entities that bought the Properties, and the various defendant entities share an address for service of process, does not mean that the purchasing entities are the same as E & M Associates. Plaintiff fails to meet its heavy burden of showing that the company was dominated by the individual owners, as to the transaction attacked, and that

such domination resulted in wrongful consequences to plaintiff, required in order to pierce the corporate veil (*ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 229 [2011]; *Board of Mgrs. of 325 Fifth Ave. Condominium*, 149 AD3d at 475; *Skanska USA Bldg. Inc. v Atlantic Yards B2 Owner, LLC*, 146 AD3d 1, 12 [1st Dept 2016]). Plaintiff has failed to raise any triable issues of fact on its unsupported assertions.

Further, even if plaintiff's interpretation of the Commission Agreement were accepted, and the term "Buyer" included all affiliates of E & M Associates, plaintiff's argument that future affiliates of E & M Associates also are bound, is unavailing. "Absent explicit language demonstrating the parties' intent to bind future affiliates of the contracting parties, the term 'affiliate' includes only those affiliates in existence at the time that the contract was executed" (*Ellington*, 24 NY3d at 246, citing *VKK Corp. v National Football League*, 244 F3d 114, 130-131 [2d Cir 2001] [contract reference to 'affiliates' is stated in the present tense, so no indication parties intended future rather than present members] and *Budget Rent A Car Sys., Inc. v K&T, Inc.*, 2008 WL 4416453, *4, 2008 US Dist LEXIS 73024, *10-11 [D NJ 2008] [no language in contract to extend it to future corporate parents or affiliates]). The parties here did not include any forward-looking language in the Commission Agreement. If they intended to bind E & M Associates' future affiliates, they would have included language expressing that intent. Absent such language, at best, only E & M Associates and other affiliated entities which existed at the time would be bound by the agreement, not entities that affiliated with it after execution of the agreement (*see Ellington*, 24 NY3d at 245; *see also Wellington Shields & Co. LLC v Breakwater Inv. Mgmt. LLC*, 2016 WL 5414979, * 6 [SD NY 2016] [future affiliates are not bound to contracts with third parties where contract did not account for possibility of future

affiliates]). It is undisputed that defendants Manhattanville Holdings LLC and the entities that were created as members of Manhattanville Holdings to hold title to the various properties which together comprise the Properties (exhibit B to reply affirmation of Jennifer Rossan [Rossan reply]) were created long after the Commission Agreement was entered into between plaintiff and E & M Associates (*see* exhibits H-K of defendants' notice of cross motion and exhibit A to Rossan reply).

Plaintiff's argument that it had an exclusive right to sell also is rejected. While plaintiff correctly argues that a broker with an exclusive right to sell need not show that it was the procuring cause of the sale, such an agreement would need to be executed with the seller of the property and explicitly provide that the broker's right was exclusive. Here, the Commission Agreement was entered into with a potential buyer, and there was no mention of any exclusivity (*cf. Sioni & Partners, LLC v Vaak Props., LLC*, 93 AD3d 414, 417 [1st Dept 2012] [parties entered into exclusive right to sell agreement, and the commission agreement expressly stated that seller acknowledged that broker was procuring cause of sale]; *see also Rachmani Corp. v 9 E. 96th St. Apt. Corp.*, 211 AD2d 262, 268 [1st Dept 1995] ["an exclusive right to sell agreement entitles the broker to receive a commission on a sale to any purchaser, whether or not the broker played a part in the negotiations"]). Further, this argument is beside the point because plaintiff's contract claims are being denied based on the language of the agreement and not because it was not a procuring cause of the sale. Accordingly, plaintiff is denied partial summary judgment, and defendants are granted partial summary judgment, and the first and sixth causes of action for breach of the brokerage agreement with regard to paying a commission and for attorneys' fees are dismissed.

Plaintiff's claims for breach of implied contract, unjust enrichment and quantum merit also are dismissed. First, with respect to the claim for breach of implied contract as to defendants Michael Langer and E & M Associates, there was a valid and enforceable agreement covering the subject matter; thus, this quasi-contractual remedy is unavailable (*see MG W. 100 LLC v St. Michael's Prot. Episcopal Church*, 127 AD3d 624, 626 [1st Dept 2015]). With respect to the other defendants, plaintiff must show, or at least raise a triable issue of fact, that there was no express agreement to pay the broker's commission, and that defendants accepted and benefitted from the broker's services (*see Joseph P. Day Realty Corp. v Chera*, 308 AD2d 148, 153 [1st Dept 2003]). Plaintiff fails to present any proof that it had contact with any defendants, other than Irving Langer and Michael Langer, and that contact was solely in connection with showing the Properties to E & M Associates. It did not introduce the other defendants to the Properties, or provide any of the confidential materials to them. There is, in fact, no proof that plaintiff, or its confidential due diligence work, played any role at all in the ultimate sale of the Properties by Singer, on behalf of the owner, to FBE Limited, or in the subsequent assignment of the sale agreement to Manhattanville Holdings LLC. Moreover, most of the entity defendants did not even exist in August and September 2012, when plaintiff provided its services to Michael Langer of E & M Associates. Therefore, plaintiff fails to present any basis for the alleged breach of an implied brokerage contract.

Plaintiff's claims for recovery in quantum merit and unjust enrichment similarly are dismissed. An unjust enrichment claim is based on the assertion that the defendant has obtained a benefit which in "equity and good conscience" should be paid to the plaintiff (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quotation marks and citation

omitted]). Unjust enrichment, however,

> "is not a catchall cause of action to be used when others fail. It is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff. Typical cases are those in which the defendant, though guilty of no wrongdoing, has received money to which he or she is not entitled"

(*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012]). It is not available where it simply replaces, or duplicates, a conventional contract or tort claim (*id.*; *see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388-389 [1987]). Similarly, where the parties have entered into a contract that governs the dispute, a party may not recover in unjust enrichment (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009] [Unjust enrichment invokes an "obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned"]; *Cox v NAP Constr. Co., Inc.*, 10 NY3d 592, 607 [2008]). To establish unjust enrichment, a plaintiff 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" (*Mandarin Trading Ltd.*, 16 NY3d at 182 [internal quotation marks and citation omitted]).

Here, the unjust enrichment claim against E & M Associates is barred by the Commission Agreement. With regard to the remaining defendants, plaintiff presents no proof that they were enriched by plaintiff's work, at plaintiff's expense. In addition, though "privity is not required for an unjust enrichment claim, a claim will not be supported if the connection between the parties is too attenuated" (*id.* at 182). There is no showing of any relationship, or even any

awareness, existing between plaintiff and the defendants other than Michael Langer, Irving Langer, and E & M Associates. Plaintiff also fails to show that these defendants unjustly received something of value at the expense of plaintiff (*see North Salem Psychiatric Servs., P.C. v Medco Health Solutions, Inc.*, 50 AD3d 986, 986 [2d Dept 2008]).

To establish a claim in quantum meruit, plaintiff must demonstrate: "(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" (*Caribbean Direct, Inc. v Dubset LLC*, 100 AD3d 510, 511 [1st Dept 2012][internal quotation marks and citation omitted]). To establish such a claim with regard to a commission, the broker must demonstrate that a sale was effected through its acts as the procuring cause (*see Edward S. Gordon Co. v Peninsula N.Y. Partnership*, 245 AD2d 189, 190 [1st Dept 1997] [broker presented proof it expended much effort in bringing tenant and defendant together]). Plaintiff fails to support its claim that the defendants, other than E & M Associates, accepted the services it purportedly provided to them through the confidential materials and the physical tours of the Properties in September 2012. Moreover, it fails to present proof that it expended any effort in bringing together the defendants that actually purchased the Properties with the seller, and, thus, cannot recover in quantum meruit. Therefore, the second, third and fourth causes of action (breach of implied contract, in quantum meruit, and unjust enrichment) are all dismissed.

Accordingly, it is

ORDERED that the plaintiff's motion for partial summary judgment is denied, and the defendants' cross motion for partial summary judgment is granted, and the first through fourth and sixth causes of action are dismissed; and it is further

ORDERED that the action shall continue as to the fifth cause of action.

This constitutes the decision and order of the court.

Dated: June 20, 2017

ENTER:

Kelly O'Neill Levy
J.S.C.

HON. KELLY O'NEILL LEVY
J.S.C.