

**Brown Harris Stevens Residential Sales LLC v LMS  
1420 LLC**

2012 NY Slip Op 31430(U)

May 23, 2012

Supreme Court, New York County

Docket Number: 101387/12

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS  
*Justice*

PART 58

BROWN HARRIS STEVENS RESIDENTIAL SALES LLC,

INDEX NO. 101387/12

Plaintiff,

MOTION DATE \_\_\_\_\_

-against-

MOTION SEQ. NO. 001

LMS 1420 LLC,

Defendant.

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits - Exhibits... 1-3

Answering Affidavits Exhibits FILED 4

Replying Affidavits 5

MAY 30 2012

CROSS-MOTION:  YES  NO

NEW YORK COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that the ~~COUNTY CLERK'S~~

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 5/23/12

*Donna M. Mills*  
J.S.C.

Check one:  FINAL DISPOSITION

**DONNA M. MILLS, J.S.C.**  
NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 58

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BROWN HARRIS STEVENS RESIDENTIAL  
SALES LLC,

Plaintiff,

- against -

LMS 1420 LLC,

Defendant.

INDEX NO.  
101387/12

DECISION/ORDER

FILED

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DONNA M. MILLS, J:

MAY 30 2012

In this action for breach of contract, Defendant LMS 1420 LLC, ("LMS" or "Defendant") seeks an Order dismissing the complaint of Plaintiff Brown Harris Stevens Residential Sales LLC ("BHS" or "Plaintiff"), pursuant to CPLR § 3211(a)(1) and (7) and CPLR § 3013. Plaintiff opposes the motion and cross moves for summary judgement in its favor pursuant to CPLR § 3212.

Plaintiff brought this action to obtain judgement for \$450,000 for a purported breach of a letter agreement between Plaintiff's and Defendant's representatives concerning Plaintiff's "exclusive right to sell" a parcel of real property owned by Defendant.

The subject property is a building held by Defendant and located at 1420 Second Avenue, New York, New York (the "Property"). Plaintiff is a company that specializes in, among other things, sales of high-end residential properties in the New York Residential market through real estate brokers. The letter agreement between Plaintiff and Defendant concerning the Property was effective as of November 1, 2011, was for a term of one year (the agreement ended on October 31, 2011, and, in accordance with its terms provided for Plaintiff to receive a \$450,000 commission from Plaintiff whether or not the Property was sold by Defendant during the term of the agreement ("Agreement").

Defendant now claims that Plaintiff failed to perform its obligations under the Agreement and thereby breached the Agreement. Additionally, Defendant contends that

the Complaint should be dismissed because Plaintiff failed to sufficiently plead the elements of any legally cognizable cause of action and also failed to allege that it performed its obligations under the Agreement. Moreover, Defendants rely on documentary evidence to establish that Plaintiff failed to abide by its obligations under the Agreement and/or perform a significant number of its duties pursuant to the terms of the Agreement.

Defendant, in support of its instant motion, argue that the purported breach of contract claim alleged by Plaintiff in the complaint must be dismissed pursuant to CPLR 3211(a)(1) and (7). Defendant also cite to CPLR 3013, asserting that dismissal is also required as the allegations in the pleading are not sufficiently particular to give the court and parties notice of the transactions or occurrences intended to be proved, as well as the material elements of each cause of action.

Where a motion to dismiss is brought pursuant to CPLR 3211(a)(1) on the grounds that the action is barred by documentary evidence, such motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law ( Leon v. Martinez, 84 N.Y.2d 83, 88 [1994]; Rubinstein v. Salomon, 46 AD3d 536, 539 [2d Dept 2007] ). "When assessing the adequacy of a complaint in light of a CPLR 3211(a)(7) motion to dismiss, the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true, and provide [the] plaintiff "the benefit of every possible favorable inference" ( AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co., 5 NY3d 582, 591 [2005], quoting Leon, 84 N.Y.2d at 87; see also Goshen v. Mutual Life Inc. Co. of NY, 98 N.Y.2d 314, 326 [2002] ). Whether a plaintiff can ultimately establish its allegations "is not part of the calculus to determine a motion to dismiss" [ EBC, Inc. v. Goldman, Sachs & Co., 5 NY3d 11, 19 [2005] ). "Further, any deficiencies in the complaint may be amplified by supplemental pleadings and other evidence" ( AG Capital Funding Partners, L.P., 5 NY3d at 591; see also Rovello v. Orogino Realty Co., 40 N.Y.2d 633, 635–636 [1976] ). Such a

motion, pursuant to CPLR 3211(a)(7), must fail if the facts as alleged fit within any cognizable legal theory ( see Leon, 84 N.Y.2d at 87–88; Morone v. Morone, 50 N.Y.2d 481, 484 [1980]; Rovello, 40 N.Y.2d at 634).

To establish a cause of action for breach of contract, one must demonstrate: 1) the existence of a contract between the plaintiff and defendant, 2) consideration, 3) performance by the plaintiff, 4) breach by the defendant, and 5) damages resulting from the breach. Furia v. Furia, 116 A.D.2d 694, 498 N.Y.S.2d 12 (2d Dept. 1986).

The complaint while inartfully plead clearly indicate that the parties had a written agreement whereby the Plaintiff would for a sum certain act as a real estate broker with the goal of selling Defendant's property. Plaintiff further states in the complaint that no payment was made after the agreement expired. Defendant amplifies the complaint with an affidavit from Wolf Jakubowski, a senior vice president and managing director, who clearly lists the efforts made by Defendant to sell the property in question. He submits as an exhibit documents which reflect the listing of the property on its website and the listing in various publications. Additionally, Mr. Jakubowski presents evidence that Defendant installed two signs that appeared on the two facades of the building as evidenced by the paid invoices from a company and photographs annexed to the cross-motion.

Construing the complaint in the light most favorable to the plaintiff and accepting all of its factual allegations as true, as is generally appropriate in passing upon a motion to dismiss for failure to state a cause of action ( Morone, 50 N.Y.2d at 484), I conclude that the complaint sufficiently alleges a cause of action for breach of contract. While it is true, as defendant contends, that the above-noted rule of construction may be overcome where factual claims are flatly contradicted by documentary evidence ( see, Quail Ridge Assocs. v. Chemical Bank, 162 A.D.2d 917, 558 N.Y.S.2d 655, lv. dismissed 76 N.Y.2d 936, 563 N.Y.S.2d 64, 564 N.E.2d 674), the documentary evidence presented by defendant is, far from conclusive.

Plaintiff's cross motion for summary judgment is premature to say the least. CPLR § 3212(b) requires that for a court to grant summary judgment, the court must determine if the movant's papers justify holding, as a matter of law, "that the cause of action or defense has no merit." It is well settled that the remedy of summary judgment, although a drastic one, is appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact (Vamattam v Thomas, 205 AD2d 615 [2nd Dept 1994]). It is incumbent upon the moving party to make a prima facie showing based on sufficient evidence to warrant the court to find movant's entitlement to judgment as a matter of law (CPLR § 3212 [b]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). Summary judgment should be denied when, based upon the evidence presented, there is any significant doubt as to the existence of a triable issue of fact (Rotuba Extruders v Ceppos, 46 NY2d 223 [1978]). When there is no genuine issue to be resolved at trial, the case should be summarily decided (Andre v Pomeroy, 35 NY2d 361, 364 [1974]).

Upon reviewing all of the papers submitted on this motion to dismiss and cross-motion for summary judgment, I find questions of fact exist as to whether Plaintiff fulfilled its obligations pursuant to the terms of the Agreement between the parties.

Accordingly, it is

ORDERED that the defendant's motion to dismiss is denied; and it is further


ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 574, 111 Centre Street, on July 6, 2012, at 10:00AM.

Dated:

ENTER:

  
\_\_\_\_\_

J.S.C.

**DONNA M. MILLS, J.S.C.**

**FILED**

MAY 30 2012

NEW YORK  
COUNTY CLERK'S OFFICE