Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IA Part 6**
Justice

PYRGOS REALTY NY CORP. d/b/a REALTY EXECUTIVES TODAY and 7119 REAL ESTATE, INC. d/b/a RE/MAX TEAM,
Plaintiffs,

-against-

ASTORIAN L.L.C., DIMITRIOS GALLAN and LEO A. GALLAN,
Defendants.

Index Number 20131 2011

Motion Date May 22, 2012

Motion Cal. Number 19

Motion Seq. No. 1

The following papers numbered 1 to 19 read on this motion by Astorian LLC, and Dimitrios Galanis to dismiss the complaint pursuant to CPLR 3211 (a)(1), (3), (7) and (8); and cross motion by plaintiffs to extend the time to effectuate service of process on Dimitrios Galanis i/s/h/a Dimitrios Gallan, for leave to amend the complaint to add Marcus & Millichap Real Estate Investment Services of New York, Inc., as party-defendants and to reflect the correct and proper name of defendant Dimitrios Gallan, to wit, Dimitrios Galanis.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1 - 5
Notice of Cross Motion - Affidavits - Exhibits	6 - 9
Answering Affidavits - Exhibits.....	10 - 15
Reply Affidavits.....	16 - 19

Upon the foregoing papers it is ordered that the motion and cross motion are decided as follows:

Plaintiffs in this breach of contract action are real-estate agencies which seek damages (both consequential and punitive) alleged to be due plaintiffs based on the sale of real property known as 28-40 34th Street, in Astoria, New York (the property). The complaint contains four causes of action against the defendants: fraud and misrepresentation, unjust enrichment, prima facie tort and quantum meruit. Defendants move to dismiss the complaint on the grounds that (1) documentary evidence establishes a complete defense to each of the four causes of action;

(2) plaintiffs are unlicensed and therefore, lack the legal capacity to sue defendants; (3) the pleadings fail to state a cause of action; and (4) the court has no jurisdiction over Dimitrios Galanis. Plaintiffs oppose the motion and cross-move for leave to extend the time to serve Galanis; to add Marcus & Millichap as defendants and for leave to amend the complaint to assert that they are indeed licensed real-estate brokers. The cross motion is opposed by defendants.

Facts

Pyrgos Realty NY Corp d/b/a Realty Executives Today (Realty), is a real-estate agency which represents both sellers and buyers. 7119 Real Estate, Inc. d/b/a Re/Max Team (Re/Max), a partnership, is also a full service real estate agency which represents both buyers and sellers. Leo Gallan was the owner of property located at 28-40 34th Street, in Astoria, New York (property).

The complaint alleges that Re/Max was the listing broker for Gallan, and that Re/Max was promised a commission upon the sale of the property. Dimitrios Galanis is the registered agent for Astorian. It is alleged that Realty, acting as a buyer's agent, introduced Galanis of Astorian to Leo Gallan. It is further alleged that Astorian "promised". Realty a commission upon its purchase of the said property. On October 28, 2009, Astorian purchased the property located at 28-40 34th Street, Astoria, New York, from Leo Gallan. The purchase price was $3,275,000.00. The crux of the complaint is that neither plaintiff received a commission upon the sale of the property. Instead the commission went to Marcus & Millichap, another broker.

In an email dated December 19, 2008, to Michael A. Gallan, the attorney for the seller of the property (Leo A. Gallan), from M. Evan Metalios (representing the Re/Max team), plaintiffs appears to have agreed that they would receive no compensation if the property were sold by another broker who received a commission based on two percent of the purchase price. The contract of sale between Leo A. Gallan, as seller and Blue Sky Equities, LLC (Astorian's predecessor-in-interest), as purchaser, indicates on page 2 that Marcus & Millichap was the broker that procured the sale.

Motion

To succeed on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (*see, G Cap. Funding Partners, L.P. v. State Street Bank and Trust Co.,* 5 NY3d 582, 590–591 [2005]; *511 West 232nd Owners Corp. v. Jennifer Realty Co.,* 98 N.Y.2d 144, 152 [2002]; *Held v Kaufman,* 91 NY2d 425, 430–431 [1998]; *Cohen v. Nassau Educators Fed. Credit Union,* 37 AD3d 751 [2007]; *Sheridan v. Town of Orangetown,* 21 AD3d 365 [2005]; *Teitler v. Max J. Pollack & Sons,* 288 AD2d 302 [2001]; *Museum Trading Co. v. Bantry,* 281 AD2d 524 [2001]; *Jaslow v. Pep Boys–Manny, Moe & Jack,* 279 AD2d 611 [2001]; *Brunot v. Joe Eisenberger & Co.,* 266 AD2d 421 [1999]). If the documentary evidence disproves an essential allegation of the complaint, dismissal is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action (*see, Snyder v. Voris, Martini & Moore, LLC,* 52 AD3d 811 [2008]; *Peter F.*

Gaito Architecture, LLC v. Simone Dev. Corp., 46 AD3d 530 [2007]).

In support of their motion, defendants submitted a copy of the email letter dated December 19, 2008, indicating that plaintiffs agreed that they would receive no compensation in the event that the property was sold by another brokerage firm that received a two percent commission. The record reveals that this is what occurred. According to the letter, plaintiffs further agreed to "make arrangements for showings or to facilitate the sale in any way [we] can, without compensation". The December 19, 2008 letter went on to provide that upon the designated release of $150,000 then held in escrow, the parties would have no further rights or obligations with regard to each other. The $150,000 was disbursed as per the December 19, 2008 email letter.

"A motion to dismiss pursuant to CPLR 3211(a)(1) will be granted only if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Fontanetta v. John Doe 1,* 73 AD3d 78, 83 [2010] [internal quotation marks omitted]; *see, Reid v. Gateway Sherman, Inc.,* 60 AD3d 836, 837 [2009]). The evidence submitted in support of such motion must be "'documentary'" or the motion must be denied (*Fontanetta v. John Doe 1,* 73 AD3d at 84, quoting Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C 3211:10, at 22). In order for evidence submitted under a CPLR 3211(a)(1) motion to qualify as "documentary evidence," it must be "unambiguous, authentic, and undeniable" (*Granada Condominium III Assn. v. Palomino,* 78 AD3d 996, 996–997 [2010] [internal quotation marks omitted]). "[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case" (*Fontanetta v. John Doe 1,* 73 AD3d at 84–85 [internal quotation marks omitted]). At the same time, "[n]either affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR 3211(a)(1)" (*Granada Condominium III Assn. v. Palomino,* 78 AD3d at 997 [internal quotation marks omitted]; *see, Suchmacher v. Manana Grocery,* 73 AD3d 1017 [2010]; *Fontanetta v. John Doe 1,* 73 AD3d at 86). Here, the email letter (purported agreement) submitted by defendants does not constitute "documentary evidence" under CPLR 3211(a)(1) and, thus, cannot be considered by the Court as grounds to dismiss the complaint (*see, Integrated Constr. Servs., Inc. v. Scottsdale Ins. Co.,* 82 AD3d 1160, 1163 [2011]; *Granada Condominium III Assn. v. Palomino,* 78 AD3d at 997; *Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.,* 10 AD3d 267, 271 [2004]). Without the email letter, defendants did not establish the existence of an agreement to pay another broker or the fact that the terms of the agreement were met. Accordingly, the defendants' motion pursuant to CPLR 3211(a)(1) to dismiss the complaint insofar as asserted against it, is denied.

The branch of the motion which is to dismiss the complaint pursuant to CPLR 3211 (a)(3), on the ground that plaintiffs are not licensed real-estate brokers and thus have no capacity to sue, is denied as academic in light of the court's decision below granting plaintiffs leave to properly assert that they are indeed licensed.

On a motion to dismiss pursuant to CPLR 3211(a)(7), the complaint must be liberally construed, giving the plaintiff the benefit of every favorable inference (*see, Leon v. Martinez,* 84

NY2d 83, 87–88 [1994]; *Mitchell v. TAM Equities, Inc.,* 27 AD3d 703, 704 [2006]). In addition to accepting the allegations contained in the complaint as true, the court may consider any factual submissions made in opposition to a motion to dismiss in order to remedy pleading defects (*see, 511 W. 232nd Owners Corp. v. Jennifer Realty Co.,* 98 NY2d 144 [2002]; *Sokoloff v. Harriman Estates Dev. Corp.,* 96 NY2d 409 [2001]; *Alsol Enter., Ltd. v. Premier Lincoln–Mercury, Inc.,* 11 AD3d 493 [2004]). The court considers only whether the facts, as alleged in the complaint, fit within any cognizable legal theory (*see, Leon v. Martinez,* 84 NY2d 83, 87–88 [1994]; *Uzzle v. Nunzie Court Homeowners Assn., Inc .,* 55 AD3d 723 [2008]; *Simmons v. Edelstein,* 32 AD3d 464 [2006]; *Hartman v. Morganstern,* 28 AD3d 423 [2006]; *Ark Bryant Park Corp. v. Bryant Park Restoration Corp.,* 285 AD2d 143, 150 [2001]).

Plaintiffs' first cause of action for fraud and misrepresentation is dismissed. The plaintiffs' complaint fails to allege the essential elements of fraud and misrepresentation, and does not set forth in detail the circumstances constituting the alleged fraud (*see,* CPLR 3016; *Barclay Arms v. Barclay Arms Assocs.,* 74 NY2d 644 [1989]). Bare, conclusory allegations of fraud are insufficient to sustain a cause of action sounding in fraud (*see, Gill v. Caribbean Home Remodeling Co.,* 73 AD2d 609, 610 [1979]; *Lanzi v. Brooks,* 54 AD2d 1057 [1976]; *affd* 43 NY2d 778, 780 [1977]; *New York Fruit Auction Corp. v. City of New York,* 81 AD2d 159, 161 [1981], *affd* 56 NY2d 1015 [1982]). Contrary to the requirements of CPLR 3016(b), no facts or circumstances are detailed in support of plaintiffs' purely conclusory allegations that the representations made by defendants, inter alia, as to payment of a commission to plaintiffs, were false, nor do they allege any facts tending to connect their alleged losses with the alleged fraudulent representations.

The branch of the defendants' motion which is to dismiss the second cause of action sounding in unjust enrichment is granted. To prevail on a claim for unjust enrichment, which is at issue here, a party must show that (1) the other party was enriched, (2) at that party's expense, and (3) it is against equity and good conscience to permit the other party to retain what is sought to be recovered (*see, Corsello v. Verizon NY, Inc.,* 77 AD3d 344, 370 [2010]; *Spector v. Wendy,* 63 AD3d 820, 822 [2009]; *Anesthesia Assoc. of Mount Kisco, LLP v. Northern Westchester Hosp. Ctr.,* 59 AD3d 473, 481 [2009]). "The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (*Paramount Film Distrib. Corp. v. State of New York,* 30 NY2d 415, 421[1972]). Unjust enrichment does not require a showing that the party enriched committed a wrongful act, as innocent parties may frequently be unjustly enriched (*see, Cruz v. McAneney,* 31 AD3d 54, 59 [2006]). Here inasmuch as the commission was indeed paid, albeit to another broker, there is no allegation or showing that defendants were enriched by their payment of the commission to another broker (*see generally, Paramount Film Distrib. Corp. v. State of New York,* 30 NY2d 415, 421 [1972]; *AHA Sales, Inc. v. Creative Bath Prods., Inc.,* 58 AD3d 6, 19 [2008]; *Cruz v. McAneney,* 31 AD3d 54, 59 [2006]).

The branch of defendants' motion which is to dismiss count four, to wit, quantum meruit, is denied. It is permissible to sue for services under a special contract, and if that is not proved, to recover upon quantum meruit. It has been held, even where the complaint contains two counts for the same services, one under special contract and one on quantum meruit, that the plaintiff

should not be compelled on motion in advance of the trial to elect upon which count he will proceed (*Rubin v. Cohen*, 129 AD395 [1908]). In short, since plaintiffs are entitled to plead inconsistent causes of action in the alternative, the quasi-contractual claims are not precluded by the pleading of a cause of action for breach of a written agreement (*see, Winick Realty Group LLC v. Austin & Associates*, 51 AD3d 408 [2008]). Inasmuch as there is a bona fide dispute as to the existence of a contract, the plaintifsf may proceed on theories of breach of contract and quantum meruit (*see*, *Breslin Realty Development Corp. v. 112 Leaseholds, LLC*, 270 AD2d 299 [2000]).

The branch of the motion which is to dismiss count three, to wit, prima facie tort, is also granted. The complaint fails to set forth facts sufficient to support a cause of action for prima facie tort. The requisite elements for a cause of action sounding in prima facie tort include (1) intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, (4) by an act or series of acts which are otherwise legal (*see, Del Vecchio v. Nelson,* 300 AD2d 277, 278 [2002]; *see also, Curiano v. Suozzi,* 63 NY2d 113 [1984]; *Drago v. Buonagurio,* 46 NY2d 778 [1978]). "The key to the prima facie tort is the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or a series of acts which would otherwise be lawful" (*Ruza v. Ruza*, 286 App Div 767, 769, republished 1 AD2d 669). An essential element of the cause of action in prima facie tort is an allegation of special damages *(ATI, Inc. v. Ruder & Finn*, 42 NY2d 454 [1977]). In addition to failing to allege special damages, the alleged conduct of the defendants does not constitute the tort of intentional harm without excuse or justification. There is no pleading, nor is there proof of intentional and/or malicious harm to plaintiff by the failure to pay the commission to plaintiffs (*see, Simaee v. Levi,* 22 AD3d 559, 563 [2005] [internal quotation marks omitted]; *see, Lancaster v. Town of E. Hampton,* 54 AD3d 906, 908 [2008]). The payment to another realty company, if true, was made in light of the alleged contract between the parties. It is submitted that Marcus & Millichap (the other realty company) actually earned the commission and not plaintiffs. If this is true then the payment of the commission to the other company would be done without "malice", but could reasonably be expected. A claim of prima facie tort does not lie where the defendant's action has any motive other than a desire to injure the plaintiff *(Korry v. International Tel. & Tel. Corp*., 444 F Supp 193 [1978]). Moreover, "prima facie tort was designed to provide a remedy for intentional and malicious actions that cause harm and for which no traditional tort provides a remedy, and not to provide a 'catch all' alternative for every cause of action which cannot stand on its legs" (*Bassim v. Hassett*, 184 AD2d 908, 910 [1992] [internal quotation marks omitted]). Accordingly, count three of the complaint is dismissed.

Defendants also contend that plaintiffs are not entitled to a commission because they acted as a dual agent in the sale of the property. In the court's view, there is no evidence of this contention. A real estate broker is deemed to have earned his or her commission when he or she produces a buyer who is ready, willing and able to purchase the property, and who is in fact capable of doing so (*Rusciano Realty Servs. v. Griffler,* 62 NY2d 696 [1984]; *Halstead Brooklyn, LLC v. 96–98 Baltic, LLC,* 49 AD3d 602 [2008]). During the process of facilitating a real estate transaction, the broker owes a duty of undivided loyalty to its principal (*Dubbs v. Stribling & Assoc.,* 96 NY2d 337, 340 [2001]). If this duty is breached, the broker forfeits his or her right to a commission, regardless of whether damages were incurred (*Wendt v. Fischer,* 243 NY 439

[1926]). Where a broker's interests or loyalties are divided by reason of a personal stake in the transaction or the representation of multiple parties, the broker must disclose to the principal the material facts illuminating the broker's divided loyalties (*see, Matter of Goldstein v. Department of State, Div. of Licensing Servs.,* 144 AD2d 463, 533 NYS2d 1002 [1988]; *Queens Structure Corp. v. Jay Lawrence Assoc., Inc.,* 304 AD2d 736, 737 [2003]). The record evidence in this case does not reveal facts which even suggest that plaintiff/broker was acting as a dual agent in the transaction.

Finally, the branch of the motion which is to dismiss the complaint pursuant to CPLR 3211 (a)(8), insofar as asserted against Dimitrios Galanis for lack of personal jurisdiction against Galanis, is granted. Service of process must be made in strict compliance with statutory 'methods for effecting personal service upon a natural person' pursuant to CPLR 308" (*Santiago v. Honcrat,* 79 AD3d 847, 847–848 [2010] [some internal quotation marks omitted], quoting *Macchia v. Russo,* 67 NY2d 592, 594 [2010]). CPLR 308(1) authorizes service to be made "by delivering the summons within the state to the person to be served" (CPLR 308[1]; *see, Estate of Edward S. Waterman v. Jones,* 46 AD3d 63, 65 [2007]). " 'The plaintiff bears the ultimate burden of proving by a preponderance of the evidence that jurisdiction over the defendant was obtained by proper service of process' " (*Santiago v. Honcrat,* 79 AD3d at 848 [some internal quotation marks omitted], quoting *Bankers Trust Co. of Cal. v. Tsoukas,* 303 AD2d 343, 343 [2003]). As the plaintiffs conceded that they failed to effect service upon this individual, the Court grants defendants' motion pursuant to CPLR 3211(a)(8) to dismiss the complaint for lack of personal jurisdiction as to Galanis. Moreover, the plaintiff did not demonstrate good cause for the failure to serve this defendant (*see,* CPLR 306-b).

Furthermore, under the circumstances of this case, the Court providently exercises its discretion in denying plaintiffs' request for an extension of time to effect service in the "interest of justice" under CPLR 306-b (*see, Leader v. Maroney, Ponzini & Spencer,* 97 NY2d 95 [2001]; *Winter v. Irizarry,* 300 AD2d 472 [2002]; *Rihal v. Kirchhoff,* 291 AD2d 548 [2002]). The record reveals that this defendant's only involvement in the case was merely as the "registered agent" of Astorian. There are no facts alleged in the verified complaint to sustain any legally cognizable cause of action against Dimitrios Galanis.

Cross Motion

The branch of the cross motion which is for leave, pursuant to CPLR 306-b, to extend the time to effectuate service of process on Dimitrios Galanis i/s/h/a Dimitrios Gallan, is denied, for the reasons noted above.

The branch of the cross motion by plaintiffs which is for leave to amend the pleadings to assert that plaintiffs are licensed real-estate brokers is granted. Leave to amend the complaint is to be freely granted, provided the proposed amendment does not prejudice or surprise the defendant, is not palpably insufficient, and is not patently devoid of merit (*see,* CPLR 3025[b]; *Kinzer v. Bederman,* 59 AD3d 496 [2009]; *Lucido v. Mancuso,* 49 AD3d 220, 227 [2008]). Here, the proposed amended complaint is not palpably insufficient or patently devoid of merit.

The record reveals that plaintiffs are duly licensed in the State of New York with Pyrgos Realty NY Corp d/b/a Realty Executives Today licensed under number 10991201098; and 7119 Real Estate d/b/a Re/Max Team is licensed under number 109901807.

Furthermore, there is no showing of any prejudice, and plaintiff's delay in bringing the motion to amend does not, in itself, constitute sufficient prejudice to warrant denial. "Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine" (*Edenwald Contracting Co., Inc., v. City of New York,* 60 NY2d 957 [1983]).

The branch of the cross motion which is for leave, pursuant to CPLR 3025(b) and 1003, to add Marcus & Millichap Real Estate Investment Services of New York (Marcus & Millichap), as party defendants, is also granted. Defendants did not establish that they would be prejudiced or surprised by the plaintiff's delay in seeking leave to amend its complaint to add the additional defendant (*see, Janssen v. Incorporated Vil. of Rockville Ctr.,* 59 AD3d at 27; *Whitehorn Assoc. v. One Ten Brokerage,* 264 AD2d 516 [1999]; *Llama v. Mobil Serv. Sta.,* 262 AD2d 457 [1999]; *Barraza v. Sambade,* 212 AD2d 655 [1995]). Plaintiffs' initial failure to name Marcus & Millichap as a party is immaterial absent any claim or demonstration of prejudice by defendants or any indication that plaintiffs' failure to do so was improperly motivated.

Conclusion

The branch of the motion which is to dismiss the complaint pursuant to CPLR 3211(a)(1) and (3) is denied. The branch of the motion which is to dismiss the complaint pursuant to CPLR 3211(a)(8), is granted. The branches of the motion which are to dismiss counts one, two and three pursuant to CPLR 3211 (a)(7), are granted. The branch of the motion which is to dismiss count four, quantum meruit, is denied.

The branch of the cross motion which is for leave, pursuant to CPLR 306-b, to extend the time to effectuate service of process on Dimitrios Galanis i/s/h/a Dimitrios Gallan, is denied. The branches of the cross motion by plaintiffs which are for leave to amend the pleadings to assert that plaintiffs are licensed real-estate brokers and to add Marcus & Millichap as defendants, are granted.

Dated: August 10, 2012

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Howard G. Lane, J.S.C.