Excel Realty Advisors LP v Engel Burman Group LLC

2013 NY Slip Op 34107(U)

June 4, 2013

Supreme Court, Nassau County

Docket Number: 601682/12

Judge: Timothy S. Driscoll

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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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EXCEL REALTY ADVISORS LP,

Plaintiff,

-against-

THE ENGEL BURMAN GROUP LLC a/k/a THE ENGEL BURMAN GROUP, EB AT EAST NORTHPORT, LLC HARRISON STREET REAL ESTATE CAPITAL LLC, HSRE-EB I, LLC, BRISTAL HOLDING LLC, CSH NORTH HILLS LP, CSH MASSAPEQUA LP, CSH WESTBURY LP, CSH EAST MEADOW LP, CSH LYNBROOK LP, and CSH HUNGRY HARBOR, LP,

Defendants.

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TRIAL/IAS PART: 16
NASSAU COUNTY

Index No: 601682/12
Motion Seq. Nos. 3, 4 and 5
Submission Date: 4/5/13

The following papers having been read on these motions:

Notice of Motion....................x
Affirmation in Support and Exhibit....................x
Memorandum of Law in Support....................x
First Amended Verified Complaint with Exhibits....................x
Chartwell Defendants' Reply Brief in Further Support....................x
Notice of Motion, Affidavits in Support and Exhibits....................x
Memorandum of Law in Support....................x
Reply Affidavit, Affidavit of V. Volodarski and Exhibits....................x
Reply Memorandum of Law in Further Support....................x
Notice of Motion....................x
Memorandum of Law in Support....................x
Reply Memorandum of Law in Further Support....................x
Dochter Affidavit in Opposition and Exhibits....................x
Memorandum of Law in Opposition to Motions to Dismiss....................x
Memorandum of Law in Opposition to Motion for Summary Judgment......x

[* 2]

This matter is before the Court for decision on 1) the motion filed by Defendants Bristal Holding LLC, CSH North Hills LP, CSH Massapequa LP, CHS Westbury LP, CSH East Meadow LP, CSH Lynbrook LP, and CSH Hungry Harbor LP (collectively "Chartwell Defendants") on January 28, 2013, 2) the motion filed by Defendants The Engel Burman Group LLC a/k/a The Engel Burman Group and EB at Northport LLC on January 28, 2013, and 3) the motion filed by Defendants Harrison Street Real Estate Capital, LLC and HSRE-EB I, LLC ("HSRE Defendants") on January 28, 2013, all of which were submitted on April 5, 2013. For the reasons set forth below, the Court grants the motions and dismisses the First Amended Verified Complaint against all Defendants.

A. Relief Sought

The Chartwell Defendants move, pursuant to CPLR § 3211(a)(7), for an Order dismissing the Tenth Cause of Action of the First Amended Verified Complaint ("Amended Complaint") with prejudice, and for an assessment of costs and attorney's fees against Plaintiff Excel Realty Advisors LP ("Excel" or "Plaintiff").

Defendants The Engel Burman Group LLC a/k/a The Engel Burman Group ("Engel Burman") and EB at Northport LLC ("EB") move, pursuant to CPLR § 3212, for an Order granting summary judgment dismissing the Amended Complaint against them.

The HSRE Defendants move, pursuant to CPLR § 3211(a)(7), for an Order dismissing with prejudice the Ninth Cause of Action in the Amended Complaint.

Plaintiff opposes the motions.

B. The Parties' History

The Amended Complaint,[1] which is verified by Ivan M. Dochter ("Dochter"), the Managing Partner of Excel, alleges as follows:

Engel Burman employed Excel, a licensed real estate broker in New York, and specifically Ivan Dochter ("Dochter"), Excel's Managing Partner, as its broker and consultant to procure a joint venture partner to invest with it in purchasing, financing, managing and/or developing assisted living projects. Engel Burman promised and agreed to pay Excel a commission of 2% of the total dollar value of any transactions involving the procurement of a

[1] There were two previous motions filed which sought to dismiss the initial complaint. Those motions were withdrawn, apparently due to Plaintiff's filing of the Amended Complaint. The Amended Complaint makes reference to a November 21, 2012 Affidavit in Support of Jan Burman ("Burman") submitted in connection with the prior motion by Defendants Engel Burman and EB at Northport LLC to dismiss the initial complaint (Ex. 1 to Am. Compl.).

joint venture partner by Excel ("Broker Agreement").

Relying on the Broker Agreement, Excel expended substantial time and resources trying to obtain a joint venture partner for Engel Burman. Excel prepared an investment presentation ("Investment Presentation") (Ex. 2 to Am. Compl.) which it presented to prospective capital partners. As a result of the services provided by Excel, Excel produced Harrison Street Real Estate Capital, LLC ("Harrison Street") as the joint venture partner for Engel Burman.

On May 22 and 24, 2012, Engel Burman and Harrison Street announced, via press release, that they created HSRE-EB I, LLC ("Joint Venture") to 1) acquire six assisted living properties, previously owned and developed by Engel Burman ("Bristal Portfolio") for $320 million; 2) acquire a seventh assisted living property owned by Engel Burman and/or EB (the Bristal at East Northport) at a purchase price of approximately $52 million; and 3) double the size of the Joint Venture's assisted living property portfolio by 2013 and continue to grow the number of its communities throughout the tri-state region thereafter.

Plaintiff alleges that, despite its having procured Harrison Street and having enabled Engel Burman to enter into the Joint Venture, Defendants have refused to compensate Excel for its services, which constitutes a breach of the Broker Agreement. Plaintiff also alleges that the Defendant entities jointly owned by Chartwell Seniors Housing REIT and ING Real Estate Australia PTY, specifically Bristal Holding LLC, CSH North Hills LP, CSH Massapequa LP, CSH Westbury LP, CSH East Meadow LP, CSH Lynbrook LP, and CSH Hungry Harbor LP have been unjustly enriched, at Plaintiff's expense, with the benefits resulting from the Joint Venture in that they were able to sell the Bristal Portfolio to the Joint Venture for $320 million.

Plaintiff alleges that Dochter and Jan Burman ("Burman"), the President of Engel Burman, orally agreed upon the material terms of the Broker Agreement "(as was standard for them)" (Am. Compl. at ¶ 32). Plaintiff alleges that the Broker Agreement was further evidenced in correspondence between the parties and in a confidentiality agreement ("Confidentiality Agreement") dated as of July 28, 2011 between Engel Burman and Harrison Street which was executed by Scott Burman, a Principal of Engel Burman, and Michael Gordon ("Gordon"), a Principal and the Head of the Transactions Group of Harrison Street. Plaintiff also alleges that, despite its having procured Harrison Street as a capital joint venture partner for Engel Burman, in August of 2011, Engel Burman excluded Excel from its subsequent conversations and negotiations with Harrison Street, allegedly to avoid paying Excel the compensation it had earned.

The Amended Complaint contains ten (10) causes of action: 1) breach of contract against Engel Burman for its breach of the Broker Agreement by refusing and failing to compensate Excel pursuant to the Broker Agreement, 2) breach of contract against Engel Burman and EB, a wholly owned and controlled subsidiary of Engel Burman, for their breach of the Broker Agreement by refusing and failing to compensate Excel for its services rendered pursuant to the Broker Agreement, 3) anticipatory breach of contract against Engel Burman for their anticipatory breach of the Broker Agreement by refusing to compensate Excel for the services it performed pursuant to the Broker Agreement, 4) a request for a declaratory judgment that Engel Burman employed Excel as its broker and is required to pay Excel 2% of any current or future transactions involving the purchase, development, financing, management and/or investment in any assisted living facility community by any joint venture between Engel Burman and Harrison Street, 5) promissory estoppel against Engel Burman based on the allegation that, to the extent that the Broker Agreement does not apply to the services for which Plaintiff seeks compensation, Engel Burman promised to compensate Excel for services rendered in connection with the procurement of a joint venture partner and Excel relied on that promise to its detriment, 6) quantum meruit against Engel Burman based on the allegation that, to the extent that the Broker Agreement does not apply to the services for which Plaintiff seeks compensation, Excel is entitled to equitable compensation for the services it performed at Defendants' request, 7) unjust enrichment against Engel Burman based on the allegation that, to the extent that the Broker Agreement does not apply to the services for which Plaintiff seeks compensation, Engel Burman has been unjustly enriched by its refusal to compensate Excel for services performed on its behalf, 8) unjust enrichment against Engel Burman and EB which benefitted from the Joint Venture's acquisition of the Bristal at East Northport, which would not have been possible without Excel's services, 9) unjust enrichment against the HSRE Defendants which benefitted from the Joint Venture's acquisition of the Bristal Portfolio, which would not have been possible without Excel's services, and 10) unjust enrichment against Bristal Holding LLC, CSH North Hills LP, CSH Massapequa LP, CSH Westbury LP, CSH East Meadow LP, CSH Lynbrook LP, and CSH Hungry Harbor LP ("Chartwell/ING Defendants") which have been unjustly enriched by selling the Bristal Portfolio to the Joint Venture, solely at Excel's expense.

The Chartwell Defendants submit that the Tenth Cause of Action in the Amended Complaint, the sole cause of action asserted against them, is not viable because the Chartwell Defendants did not have, and are not alleged to have had, any contact with Plaintiff concerning

the real estate transactions at issue.

Defendants Engel Burman and EB provide Affidavits of Burman, Gordon and Paul Lamas ("Lamas") in support of their motion. Those affidavits our outlined below.

Burman, a principal of EB, submits that Plaintiff's claims are "frivolous, unfounded, and should be dismissed in its entirety as a matter of law" (Burman Aff. in Supp. at ¶ 1). Burman affirms that he, and his partners Sydney Engel and Steven Krieger ("Krieger"), are partners in Engel Burman which owns, develops and manages commercial and residential properties in the tri-state area and elsewhere. Engel Burman is best known for building, developing and managing luxury assisted-living facilities for seniors which operate under the trade name "The Bristal." Since 1998, Engel Burman has concentrated its efforts on growing this "niche market" (*id.* at ¶ 5) using their "unique in-house expertise and experience" (*id.*).

Burman affirms that from 1998 through 2007, Engel Burman built and developed six assisted-living facilities throughout Nassau County, which Plaintiff has designated the Bristal Portfolio. All aspects of the Bristals were completed in-house, including finding appropriate locations, obtaining necessary zoning approvals, building the facility and financing the acquisition and development costs. Engel Burman financed each new Bristal facility through the Industrial Development Agency ("IDA") using tax exempt bonds. To obtain the bonds, Engel Burman used an investment banking firm called Roosevelt & Cross ("RC"), and Engel Burman successfully financed and built the Bristals in the Bristal Portfolio on its own. In addition, all of the facilities in the Bristal Portolio are managed by Ultimate Care New York LLC ("Ultimate Care"), a management company owned and operated by Engel Burman. Thus, Engel Burman is also the manager of the facilities in the Bristal Portfolio.

Burman affirms that in 2007, Engel Burman sold the Bristal Portfolio to a joint venture named Chartwell/ING for approximately $320,000,000 ("Sale"). During the Sale, Engel Burman developed a relationship with the principals of Chartwell and ING. As a condition of the Sale, it was agreed that Ultimate Care would continue to manage and operate the Bristal Portfolio pursuant to a management agreement with Chartwell/ING and, therefore, Engel Burman's relationship with Chartwell/ING continued after the Sale in 2007. Pursuant to a separate non-competition agreement (Ex. C to Burman Aff. in Supp.), Engel Burman was prohibited from operating assisted-living facilities in Nassau or Suffolk County for a period of four (4) years.

Burman affirms that, following the Sale, Engel Burman decided to develop a new chain

of luxury assisted-living facilities that were not prohibited by the non-competition agreement and would operate under a different trade name. Engel Burman also began building a new assisted-living facility in East Northport, New York. Although this facility was within the territorial limits of the non-competition agreement, Chartwell/ING did not object to the construction of this facility and permitted Engel Burman to license the "Bristal" trade name for a fee. The East Northport facility opened in 2011 and is owned by EB.

Burman affirms that he had a personal and professional relationship with Dochter, a real estate broker who is also a licensed and registered attorney in New York. Engel Burman worked with Dochter previously on transactions unrelated to the Bristals, or assisted-living facilities. In those prior transactions, Dochter sold commercial real property for Engel Burman and was paid a 1 ½% broker's commission on one transaction and a 2% broker's commission on the other. Engel Burman never used Excel for anything other than selling the "occasional piece of commercial property" and "never needed him or used him at all for anything relating to the Bristals or assisted-living facilities because we did all of that business in house" (Burman Aff. in Supp. at ¶ 24) (underlining in original).

In April of 2011, Dochter contacted Burman and advised him that business was slow and asked whether Burman needed his assistance in any fashion, or could provide his son with employment. Burman described to Dochter Engel Burman's plans to develop assisted-living facilities in Westchester County and its prior efforts to obtain financing for that project. Burman agreed to allow Dochter to attempt to find an investor for the White Plains facility and advised him that, if he was successful in finding such an investor and Engel Burman was able to finance that facility, Engel Burman had two other new developments in Armonk and New Jersey "in the pipeline" (Burman Aff. in Supp. at ¶ 28). During this conversation, Dochter mentioned that he worked with someone who was involved in distressed properties and asked Burman whether he was interested in acquiring distressed properties. Burman advised Dochter that he was not looking to invest in that area but would consider an opportunity that came along.

Burman affirms that he and Dochter never discussed a reacquisition of the Bristal Portfolio, as alleged in the Amended Complaint, and Dochter never sent or received an email that mentions that reacquisition. The only subject that Burman and Dochter discussed was Engel Burman's obtaining financing for facilities in White Plains and possibly Armonk and New Jersey. Moreover, they never discussed the specific terms of any compensation that Dochter might receive. Burman never offered to pay Dochter a 2% commission, and Plaintiff's

allegation that Engel Burman offered to pay Plaintiff 2% on any transaction involving the purchase/development/financing/management/investment of any future assisted living facility is "completely fabricated and false" (Burman Aff. in Supp. at ¶ 33).

Dochter subsequently sent to Burman the document referred to in the Amended Complaint as the Investment Presentation, annexed to the Amended Complaint as Exhibit 2. The Investment Presentation described Engel Burman's past success with the Bristal Porfolio and discussed Engel Burman's desire to find an investor in connection with obtaining bond financing for new facilities ("New Facilities") in White Plains, Armonk and Woodcliff Lake, New Jersey. The Investment Presentation also discussed opportunities relating to distressed properties, and Page 3 of that document contains a heading titled "Investing in Distressed Property" and page 4 of that document contains a heading titled "Distressed Construction." Although Dochter put Engel Burman in touch with certain companies regarding the bond financing, these discussions did not prove successful as none of the investors were willing to provide the collateral necessary to obtain bond financing.

On July 14, 2011, Dochter sent an email to Harrison Street, an investment group out of Chicago with which he had no prior dealings, in which he advised Harrison Street that he was looking for a "joint venture equity Partner." Burman affirms that all of Dochter's emails addressed only the New Facilities. Following a conference call on July 18, 2011, Gordon made plans to come to New York to discuss the New Facilities. On July 28, 2011 a Confidentiality Agreement (Ex. H to Burman Aff. in Supp.) was executed which made reference to the development of assisted living facilities and made no mention of the purchase or sale of an existing facility.

Burman affirms that on August 3, 2011, Gordon visited the recently opened Bristal facility in East Northport and, as outlined in Gordon's affidavit, they never discussed the purchase of the Bristal Portfolio. On August 8, 2011, Harrison sent a draft Letter of Intent ("LOI") to form a Joint Venture and provide financing for the White Plains facility. Engel Burman did not sign the LOI or enter into any agreement with Harrison Street regarding the New Facilities.

Around this time, Burman learned that Engel Burman could proceed with unrated bond financing with respect to its White Plains facility, as it had done on its own in the past with RC, and therefore had no need to find someone to pledge the collateral necessary to obtain Credit Enhanced Bond Financing. Thus, Engel Burman had no further need for Dochter.

Burman affirms that by press release dated May 22, 2012 (Ex. S to Burman Aff. in Supp.), it was publicly announced that the new Joint Venture had signed a contract to acquire the Bristal Portfolio for approximately $320 million ("Reacquisition Transaction"). A few days after the press release, Dochter asked Burman to meet with him at which time Dochter asked Burman when he would be receiving his commission. Burman advised Dochter that he was not entitled to any commission because he had "nothing whatsoever" to do with the Reacquisition Transaction (Burman Aff. in Supp. at ¶ 82). Burman affirms that Dochter demanded $7 million for contacting Harrison Street and attending one meeting despite the fact that he had not been successful in securing an investor willing to provide the necessary collateral to obtain the Credit Enhanced Bond Financed for the New Facilities.

Burman affirms that Dochter provided Burman with emails which, Dochter submitted, supported his demand for a commission (Ex. U to Burman Aff. in Supp.). Burman notes that these emails make no reference to an acquisition of any existing Bristal facility, or the Bristal Portfolio, but rather discuss financing for the New Facilities. Moreover, there are no emails after August 16, 2011, except for the email demanding payment after the press release in May of 2012.

Gordon affirms that he was previously a Senior Vice President and is now a Principal of Harrison Street. Gordon had limited communication with Dochter which began in July of 2011 and ended in August of 2011. These communications consisted of emails, one or two conference calls and a single meeting on August 3, 2011 when Gordon toured the East Northport Bristal. Gordon never heard from Dochter after August of 2011. Gordon never discussed with Dochter the acquisition of the Bristal Portfolio from Chartwell/ING. The only subject he ever discussed with Dochter was whether Harrison Street was willing to provide the collateral necessary to obtain credit enhanced bond financing for the New Facilities.

On July 14, 2011, Gordon received an email from Dochter which erroneously referred to Gordon as "Mark" Gordon. Neither this email, nor any email that Dochter sent, mentions that the Moving Defendants were seeking a partner to reacquire the Bristal Portfolio from Chartwell/ING, or to purchase assisted-living facilities, or to manage assisted-living facilities. Rather, they discuss the financing of the New Facilities. On July 18, 2011, Gordon participated in a conference call with Burman, Dochter and others during which they discussed the financing of the New Facilities. The next day, Gordon made plans to come to New York, as reflected by emails between Burman and Gordon (Ex. V to Gordon Aff. in Supp.).

Gordon affirms that on July 28, 2011, Harrison executed the Confidentiality Agreement which states at paragraph A that Harrison Street "desires to explore a possible, but as of yet undetermined, investment in and/or with Engel Burman in the *development* [emphasis added] of assisted living facilities (collectively, the "Opportunities")." After the Confidentiality Agreement was signed, Burman provided Gordon with projections and other information concerning the first two New Facilities in White Plains and Woodcliff Lake (*see* Ex. I to Gordon Aff. in Supp.). On August 3, 2011, Gordon visited the Bristal facility in East Northport and had lunch with Burman, his partners and Dochter at which time they discussed the New Facilities. They did not discuss the acquisition of the Bristal Portfolio. On August 8, 2011, Gordon provided Burman with the LOI for the White Plains facility but the LOI was never signed and Engel Burman subsequently financed that facility on its own.

Gordon denies the allegations in the Amended Complaint that 1) Dochter provided Gordon with projections for future Bristal projects; 2) Gordon asked Dochter whether there was an opportunity to purchase the Bristal Portfolio; 3) Dochter arranged for Gordon to travel to New York in August of 2011; and 4) Dochter created an "amicable atmosphere" (Am. Compl. at ¶¶ 55 and 59) for the negotiations between Engel Burman and Harrison Street. Gordon provides emails supporting his assertion that he made his own travel arrangements (Ex. V to Gordon Aff. in Supp.).

Lamas affirms that he is an investment banker at RC, a municipal bond broker-dealer specializing in tax exempt and taxable municipal bonds. Lamas has worked closely with Burman and Krieger for approximately 15 years with respect to the financing of their assisted-living facilities operating under the trade name The Bristal. RC finds institutional buyers for municipal bonds, serving "more as a placement agent rather than a bank" (Lamas Aff. in Supp. at ¶ 2).

Lamas affirms that, since 1998, RC has helped facilitate financing for 11 Bristal facilities for Engel Burman in excess of $300 million bonds. In all of these transactions, Engel Burman obtained financing by using unrated tax-exempt bonds which are sold in the marketplace to institutional buyers, providing proceeds that fund the loan to the borrower. RC's role was to find a buyer for the tax-exempt bonds.

Lamas avers that there was a particular institutional investor with whom RC developed a strong relationship. As a result of the fiscal difficulties in the credit market in 2008 and 2009, this institutional investor lacked funds to invest in the Engel Burman transactions and Engel

Burman sought a different type of financing, specifically obtaining a letter of credit from a commercial bank, known as "credit enhanced bond financing" (Lamas Aff. in Supp. at ¶ 9). By the third quarter of 2011, however, the credit crisis had subsided and the institutional investor was once again able to lend money to Engel Burman for the New Facilities.

In opposition, Dochter submits that there is documentation supporting Plaintiffs' allegations, and refuting Defendants' affidavits in opposition, including but not limited to 1) the term sheet dated May 13, 2011 between Engel Burman and BayBridge Seniors Housing USA, Inc. (Ex. D to Burman Aff. in Supp.) ("Baybridge Term Sheet"), 2) an April 2011 investor update issued by ING Real Estate Community Living Group, a partner in the ING/Chartwell Defendants (Ex. 1 to Dochter Aff. in Opp.), 3) a March 28, 2011 article in the National Real Estate Investor, to which Kriger contributed, which discussed projects that Engel Burman was pursuing (*id.* at Ex. 2), 3) an August 16, 2011 email from Gordon to Burman commenting on the term sheet between Harrison Street and the EB Defendants (Ex. L to Burman Aff. in Supp.), 4) a draft joint venture term sheet that Gordon sent to Burman on August 9, 2011 and subsequently forwarded to Dochter (Exs. 3 and 4 to Dochter Aff. in Opp.), 5) the Investment Presentation which, Dochter affirms, Engel Burman authorized Dochter to submit to potential joint venture partners, 6) sale summary and income statements for the Bristal at East Meadow and the Bristal at Westbury (*id.* at Ex. 10) which, Dochter affirms, Engel Burman provided to Excel to submit to potential joint venture partners, 11) emails between Dochter and Gordon (*id.* at Exs. 12 and 13), and 12) emails regarding Dochter arranging a conference call on July 18, 2011 (*id.* at Ex. 14) during which, Dochter affirms, he suggested to Burman that any information he provided to Harrison Street should be pursuant to a confidentiality agreement.

Dochter submits that, while the Confidentiality Agreement refers to the "development" of assisted living facilities, that term was not intended to limit Excel's services to finding a joint venture partner for the purchase of real estate on which to develop a new facility. Rather, he contends, his employment "clearly included both acquisitions and developments of assisted living facilities" (Dochter Aff. in Opp. at ¶ 52) and argues that the documentation he provides supports this interpretation.

Dochter submits, further, that Defendants have failed to produce relevant documents, including but not limited to the joint venture agreement between the EB Defendants and the agreement concerning the acquisition of the Bristal at East Northport by the Joint Venture. Dochter affirms that Excel does not have possession of these documents and submits that discovery is necessary to permit Excel to obtain these, and other relevant documents, from

Defendants.

In reply, Burman submits that Dochter has failed to produce any documentation that mentions the acquisition of the Bristal Portfolio, or discusses the terms of a potential acquisition of the Bristal Portfolio. Burman notes, further, that after Engel Burman obtained conventional IDA financing for the new White Plains facility in August 2011 on its own, Engel Burman had no further communication with Dochter. Given the value of the Bristal Portfolio, Burman argues, "it defies common sense, logic, and human nature to believe that Dochter never once asked me or anyone else after August 14, 2011 about the status of the alleged transactions he falsely claims he was retained to broker" (Burman Reply Aff. at ¶ 4).

Burman provides a time line from 2009 to February of 2013 (pp. 4-7 of Burman Reply Aff.). Burman submits that this action is premised on faulty assumptions that are refuted by the documentary evidence and affidavits provided. Those allegedly faulty assumptions include that 1) ING/Chartwell was selling the Bristal Portfolio as early as April 2011; and 2) ING's investor update was evidence that ING wanted to sell the Bristals. Burman notes that both ING and Chartwell are public companies that are required to disclose information and transactions to their shareholders, and ING did not mention selling the Bristal Portfolio until November of 2011. Burman affirms, further, that the Baybridge Term Sheet involved a transaction that Burman negotiated directly with Baybridge throughout 2010 and 2011, which had "nothing to do" with Excel or Dochter (Burman Reply Aff. at 17). Burman notes, further, that neither the initial complaint nor the Amended Complaint mentions the Baybridge Term Sheet and suggests that Dochter is now mentioning it in an attempt to bolster his claims.

C. The Parties' Positions

The Chartwell Defendants submit that the facts alleged by Excel in the Amended Complaint cannot support an unjust enrichment claim against the Chartwell Defendants because Excel does not allege that it had any relationship or dealings with the Chartwell Defendants.

Engel Burman and EB submit that 1) the Court must dismiss Plaintiff's breach of contract claims because Plaintiff, who alleges that it is entitled to a brokerage commission, was not the procuring cause of any successful transaction between Engel Burman and EB, and Harrison Street as demonstrated by the fact that Plaintiff's only involvement was his unsuccessful attempt to obtain Credit Enhanced Bond Financing for the unrelated New Facilities, which Engel Burman was ultimately able to finance on its own; 2) Plaintiff's breach of contract claims based on an oral agreement to pay broker's commissions are barred by the statute of frauds in light of the fact that Plaintiff alleges that the oral agreement entitles Plaintiff to receive

commissions for an unlimited duration and therefore are not capable of being performed within one year; the Amended Complaint includes allegations that Burman promised to pay Plaintiff a commission on "any transaction," "any current or future deals," "any current or future purchases," and transactions "whether currently contemplated or to occur in the future" (*see* Ds' Memo. of Law at pp. 21-22, quoting ¶¶ 2, 9, 13, 34, 56, 63, 66, 73, 84, 97 and 109 of the Am. Compl.); 3) Plaintiff's quantum meruit claim is barred because an express contract, the alleged oral brokerage agreement, governs the subject matter involved; 4) Plaintiff's unjust enrichment claims are barred as a matter of law because they are duplicative of the breach of contract claims based on the alleged oral brokerage agreement; 5) the Court should dismiss the third cause of action for anticipatory breach in light of Plaintiff's allegation that it has performed all of its obligations as required under the alleged broker agreement (Am. Compl. at ¶ 98); 6) the Court should dismiss Plaintiff's declaratory judgment claim because Plaintiff has an adequate remedy at law in its breach of contract claims; and 7) the Court should dismiss the promissory estoppel claim as duplicative of Plaintiff's breach of contract claim. [2]

The HSRE Defendants submit that the sole cause of action against them, the fifth cause of action alleging unjust enrichment, is not viable in light of the fact that Plaintiff has not alleged facts that, if proved, would establish that the HSRE Defendants unjustly obtained the benefits alleged. Plaintiff does not allege any facts that would establish that either of the HSRE Defendants would be unjustly enriched if they do not pay Excel for the services that it allegedly rendered because those services were rendered for Engel Burman under its contract with Engel Burman, not the HSRE Defendants. The allegation in paragraph 65 of the Amended Complaint that "[i]n June 2012, Burman told Dochter that the Joint Venture and/or Harrison Street were responsible for paying Excel's commission," which was made "*long after* Excel allegedly had rendered its services to EBG" (HSRE Ds' Memo. of Law in Supp. at p. 5) (emphasis in original) is insufficient to support the unjust enrichment claim against the HSRE Defendants.

In opposition to the motion for summary judgment, Plaintiff submits that 1) Excel's claims are not barred by the statute of frauds in light of the fact that a) Dochter is an attorney and Excel is a licensed real estate broker and, pursuant to GOL § 5-701(10), the statute of frauds requirement does not apply to a contract to pay compensation to an attorney or licensed real estate broker; and b) the Confidentiality Agreement is a writing that satisfies the statute of

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[2] Engel Burman and EB also submit that Plaintiff "apparently has a history of unsuccessfully suing for broker's commissions or other relief to which he is not entitled" (Engel Burman and EB Memo. of Law at n. 2) and cite several prior actions in state and federal courts in which claims asserted by Excel and Dochter were dismissed.

frauds; 2) documentary evidence, including but not limited to the Engel Burman proposals to prospective joint venture partners, Baybridge Term Sheet and Investment Presentation, support Plaintiff's allegation that Engel Burman and EB employed Excel to procure a joint venture partner to acquire and/or develop portfolios of assisted living facilities; 3) there is, at least, a factual issue regarding the scope of the Broker Agreement that makes summary judgment inappropriate; 4) Plaintiff has alleged facts supporting the conclusion that Excel procured Harrison Street as the Joint Venture partner by "creating an amicable atmosphere in which the negotiations between the Defendants and [Harrison Street] proceeded and by generating a chain of circumstances that proximately led to the formation of the Joint Venture and the Joint Venture's acquisitions" (P's Memo. of Law in Opp. to Ds' Motion for Summary Judgment at p. 14) and, therefore, is entitled to a broker's commission; 5) there is, at least a factual issue regarding whether Excel procured the Joint Venture that makes summary judgment inappropriate; 6) Defendants are not entitled to summary judgment dismissing Excel's quantum meruit and unjust enrichment claims in light of the fact that a) the existence of the Broker Agreement is in dispute; b) the scope of the Broker Agreement is in dispute; and c) even if Excel was not the procuring cause of the Joint Venture and its acquisitions, Excel may still recover in quantum meruit for its services in producing Harrison Street as a joint venture partner and source of capital for Engel Burman and EB; 7) declaratory relief is appropriate because the mere existence of other adequate remedies does not mandate dismissal of this cause of action; and 8) the promissory estoppel claim is not duplicative of the breach of contract claim because Excel may maintain a claim for promissory estoppel to the extent that Engel Burman and EB assert that their promise to compensate Excel for its services is not encompassed by the Broker Agreement.

In opposition to the motions to dismiss, Plaintiff submits that 1) the unjust enrichment claim against the Joint Venture is viable in light of Plaintiff's allegation that Excel's services, which produced Harrison Street as the Joint Venture partner, enabled the formation of the Joint Venture and its acquisitions of the Bristal Portfolio and the Bristal at East Northport; 2) the unjust enrichment claim against Harrison Street is viable because, without Excel, Harrison Street would not have had the opportunity to make its investment in the Joint Venture and acquire the Bristal Portfolio and Bristal at East Northport, and because Excel's dealings with Harrison Street were not so attenuated as to preclude this cause of action; and 3) the unjust enrichment claim against the ING/Chartwell Defendants is meritorious in light of the fact that, without Excel's service, the ING/Chartwell Defendants would not have been able to sell the Bristal Portfolio to the Joint Venture, and the ING/Chartwells' argument that they had no interaction with Excel is

belied by evidence supporting the conclusion that, through Burman, the ING/Chartwell Defendants had direct dealings with Excel and were aware of its existence.

In reply, the Chartwell Defendants submit that Plaintiff's arguments in support of the viability of the claim against the Chartwell Defendants constitute an attempt to "circumvent" controlling authority, specifically the *Georgia Malone* and *Mandarin Trading* cases discussed herein, with a "patently false and completely untenable agency theory" (Chartwell Ds' Reply Memo. of Law at p. 2). The portion of Burman's affidavit that Plaintiff cites is not an admission that Burman served as an agent of the Chartwell Defendants, but rather explicitly disclaims any agency relationship. Paragraph 3 of the December 21, 2011 letter agreement (Ex. P to Burman Aff. in Supp.) includes language stating that "[t]he Principals [Burman and Krieger] acknowledge that they...are independent contractors and shall not be considered ING/Chartwell's agent or the agent of any of the Bristal Tenants in connection with the Transaction [the potential sale of the Bristal Portfolio]. "

In reply, Engel Burman and EB submit that 1) Excel has failed to come forward with any evidence demonstrating that it was hired to find a joint venture partner to acquire the Bristal Portfolio; 2) the documentary evidence and controlling law establish that Excel was not the procuring cause of Engel Burman's acquisition of the Bristal Portfolio in light of the fact that a) Excel concedes that it was not involved with negotiating or consummating the Bristal Acquisition which occurred approximately nine months after Excel's last involvement in August of 2011; b) Excel did not introduce the parties or bring the parties to a meeting of the minds with respect to any of the terms of the acquisition of the Bristal Portoflio or the terms of the May 2012 purchase and sale agreements; and c) Excel never had a conversation or communication with any of the Sellers of the Bristal Portfolio, or exchanged any email with them, or anyone else, concerning the sale of the Bristal Portfolio; 3) Plaintiff's claimed need for discovery is "feigned" (Engel Burman and EB Reply Memo. of Law at p. 18) in light of the fact that, if Plaintiff had in fact been the procuring cause of the Bristal Acquisition, Plaintiff would have documents supporting that assertion; 4) Plaintiff has failed to address, or refute, the unenforceability of the alleged Broker Agreement under the Statute of Frauds based on the fact that it cannot be fully performed within one year; 5) the Confidentiality Agreement does not satisfy the Statute of Frauds' writing requirement because it contains none of the material terms of the brokerage agreement; and 6) the equitable claims are barred by the existence of the alleged express Brokerage Agreement, which is itself unenforceable as violative of the Statute of Frauds.

In reply, the HSRE Defendants submit that the allegations in the Amended Complaint demonstrate that Excel contracted only with Engel Burman, performed services for Engel Burman and expected to be compensated by Engel Burman and, therefore, there is no basis for the unjust enrichment claim against the HSRE Defendants. Moreover, there are no other allegations in the Amended Complaint to support the conclusory allegation in paragraph 65 of the Amended Complaint that Engel Burman told Dochter that the Joint Venture and/or Harrison Street were responsible for paying Excel's commission.

RULING OF THE COURT

A. Standards of Dismissal

A motion interposed pursuant to CPLR § 3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

B. Summary Judgment Standards

On a motion for summary judgment, it is the proponent's burden to make a *prima facie* showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to demonstrate the absence of any material issues of fact. *JMD Holding Corp. v. Congress Financial Corp.*, 4 N.Y.3d 373, 384 (2005); *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). The Court must deny the motion if the proponent fails to make such a *prima facie* showing, regardless of the sufficiency of the opposing papers. *Liberty Taxi Mgt. Inc. v. Gincherman*, 32 A.D.3d 276 (1st Dept. 2006). If this showing is made, however, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986). Mere conclusions or unsubstantiated allegations will not defeat the moving party's right to summary judgment. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

C. Relevant Causes of Action

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 (2d Dept. 1986).

Under the doctrine of anticipatory breach, if one party to a contract repudiates his duties thereunder prior to the time designated for performance and before he has received all of the consideration due him thereunder, such repudiation entitles the nonrepudiating party to claim damages for total breach. *Long Island Rail Road Co. v. Northville Industries Corp*., 41 N.Y.2d 455, 463 (1977), citing 11 Williston, Contracts, § 1301; 4 Corbin, Contracts, § 959. For the doctrine to apply, there must be some dependency of performances and, for this reason, a party who has fully performed cannot invoke the doctrine even though the other party has repudiated. *Long Island Rail Road Co. v. Northville Industries Corp*., 41 N.Y.2d at 464..

The basis of a claim for unjust enrichment is that the defendant has obtained a benefit which in good conscience should be paid to the plaintiff. *Corsello v. Verizon New York, Inc.*, 18 N.Y.3d 777, 790 (2012), *rearg. den*., 19 N.Y.3d 937 (2012), citing *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 (2011), quoting *Paramount Film Distrib. Corp. v. State of New York*, 30 N.Y.2d 415, 421 (1972), *reh. den*., 31 N.Y.2d 709 (1972), *cert. den*., 414 U.S. 829 (1973). Unjust enrichment is not a catchall cause of action to be used when others fail. Rather, 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. *Corsello v. Verizon New York, Inc.,* 18 N.Y.3d at 790. An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim. *Id.* at 790-791 citing, *inter alia*, *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 388-389 (1987).

Although privity is not required for an unjust enrichment claim, a claim will not be supported if the connection between the parties is too attenuated. *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d at 182. For example, in *Georgia Malone & Company, Inc. v. Rieder*, 19 N.Y.3d 511 (2012), plaintiff, a real estate company that prepared due diligence reports for a developer in connection with the potential purchase of commercial properties, alleged that a rival brokerage firm was unjustly enriched when it acquired the materials from the developer and later obtained a commission on the ultimate sale of the properties. *Id.* at 513. The issue before the Court of Appeals was whether a sufficient relationship existed between the two real estate firms

to provide a basis for an unjust enrichment cause of action. *Id.* The Court of Appeals held that the relationship between these two parties was too "attenuated," rejecting plaintiff's argument that its unjust enrichment claim should be allowed to proceed because the defendant brokerage firm was aware that plaintiff had created the due diligence reports and had used the materials for its own benefit without compensating plaintiff. *Id.* at 513 and 517. The Court of Appeals held that, similar to the *Mandarin Trading* case cited above, and *Sperry v. Crompton Corp.*, 8 N.Y.3d 204 (2007), the relationship between the plaintiff and the defendant in question was "too attenuated because they simply had no dealings with each other." 19 N.Y.3d at 517-518.

D. Relevant Contract Principles

When the parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms. *Henrich v. Phazar Antenna Corp.*, 33 A.D.3d 864 (2d Dept. 2006). A contract will be interpreted in accordance with the intent of the parties as expressed in the language of the agreement. *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (2002). The best evidence of what parties to a written agreement intend is what they say in their writing. *Id.*, *quoting Slamow v. Del Col*, 79 N.Y.2d 1016, 1018 (1992).

Courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing. *Tammone v. Tammone*, 94 A.D.3d 1131, 1133 (2d Dept. 2012), citing *Willsey v. Gjuraj*, 65 A.D.3d 1228, 1230 (2d Dept. 2009), quoting *Henrich v. Phazar Antenna Corp.*, 33 A.D.3d at 867.

E. Broker's Right to Commission

A real estate broker is entitled to recover a commission on establishing that it 1) is duly licensed; 2) had a contract, express or implied, with the party to be charged with paying the commission; and 3) was the procuring cause of the sale. *Hentze-Dor Real Estate, Inc. v. D'Allessio*, 40 A.D.3d 813, 815 (2d Dept. 2007), quoting *Stanzoni Realty Corp. v. Landmark Props. of Suffolk, Ltd.*, 19 A.D.3d 582, 583 (2d Dept. 2005). Unless it has a special agreement to the contrary, however, a broker does not automatically and without more make out a case for commissions simply because it initially called the property to the attention of the ultimate purchaser. *Hentze-Dor Real Estate, Inc. v. D'Allessio*, 40 A.D.3d at 815-816, quoting *Greene v. Hellman*, 51 N.Y.2d 197, 205-206 (1980). There must be a direct and proximate link, as distinguished from one that is indirect and remote, between the bare introduction and the consummation. *Hentze-Dor Real Estate, Inc. v. D'Allessio*, 40 A.D.3d at 816, quoting *Greene v. Hellman*, 51 N.Y.2d at 206.

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F. Statute of Frauds

New York General Obligations Law ("GOL") §§ 5-701(a)(1) provides as follows:

> Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:
>
> By its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime.

GOL § 5-701 requires certain designated agreements, promises or undertakings to be in writing. For a written memorandum or note to meet the requirements imposed by the Statute of Frauds, it must be subscribed by the party to be charged therewith and must contain substantially the whole agreement, and all its material terms and conditions, so that one reading it can understand from it what the agreement is. *Currier v. Prudential Insurance*, 266 A.D.2d 596, 598 (3d Dept. 1999), citing GOL § 5-701(a) and *HPSC, Inc. v. Matthews*, 179 A.D.2d 974, 975 (3d Dept. 1992), quoting *Mentz v. Newwitter*, 122 N.Y.491, 497 (1890), *reh. den.*, 26 N.E. 758 (1891).

An oral agreement will not be enforceable when the agreement by its terms is not to be performed within one year from the making thereof. *Cathy Daniels, Ltd. v. Weingast*, 91 A.D.3d 431, 434 (1st Dept. 2012), quoting General Obligations Law § 5-701(a)(1). The Court of Appeals has interpreted this provision to encompass only those contracts which, by their terms, have absolutely no possibility in fact and law of full performance within one year. As long as the agreement may be fairly and reasonably interpreted such that it may be performed within a year, the Statute of Frauds will not act as a bar however unexpected, unlikely, or even improbable that such performance will occur during that time frame. *Cathy Daniels, Ltd. v. Weingast*, 91 A.D.3d at 434, quoting *Cron v. Hargro Fabrics*, 91 N.Y.2d 362, 366 (1998) (internal quotation marks and citations omitted).

G. Application of these Principles to the Instant Action

The Court grants the three motions and dismisses the Amended Complaint against 1) Defendants Bristal Holding LLC, CSH North Hills LP, CSH Massapequa LP, CHS Westbury LP, CSH East Meadow LP, CSH Lynbrook LP, and CSH Hungry Harbor LP, 2) The Engel Burman Group LLC a/k/a The Engel Burman Group and EB at Northport LLC, and 3) Harrison Street Real Estate Capital, LLC and HSRE-EB I, LLC based on the Court's conclusion that the evidence before the Court is fundamentally at odds with Plaintiff's contention, as amplified in

the Amended Complaint, that he is entitled to a commission on the repurchase of the Bristal Portfolio, and because Plaintiff's causes of action violate the Statute of Frauds because they cannot, by their terms, reasonably be interpreted as capable of being performed within a year.

The evidence establishes that Engel Burman was self-sustainable, and only sought outside funding in the context of obtaining funding for the New Facilities. The Court declines to adopt the strained construction of the relevant documentation urged by Plaintiff, *e.g.*, that while the Confidentiality Agreement refers to the "development" of assisted living facilities, that term was not intended to limit Excel's services to finding a joint venture partner for the purchase of real estate on which to develop a new facility. The plain meaning of "development" suggests the erection, or possibly expansion, of an assisted-living facility but no logical interpretation of that term could include the reacquisition by Engel Burman of an existing facility that it owned previously. Plaintiff has not produced documentation that mentions the acquisition of the Bristal Portfolio, or discusses the terms of a potential acquisition of the Bristal Portfolio, and the documentation that is before the Court not only does not support Plaintiff's allegations, but is at odds with them.

Moreover, to the extremely limited extent that Excel had any interaction with other Defendants in the reacquisition of the Bristal Portfolio, that interaction did not rise to the level of Plaintiff "procuring" that investment. In addition, the documentation is inconsistent with Plaintiff's theory that Burman served as an agent of the Chartwell Defendants. Notably, paragraph 3 of the December 21, 2011 letter agreement states that Burman and Krieger were independent contractors and were not to be considered ING/Chartwell's agent in connection with the potential sale of the Bristal Portfolio.

Finally, Plaintiff's allegations that they are entitled to commissions on "any transaction," "any current or future deals," "any current or future purchases," and transactions "whether currently contemplated or to occur in the future," allege an agreement that is not performable within a year. The Court notes, however, that even assuming *arguendo* that the alleged agreement did not violate the Statute of Frauds, the Amended Complaint is insufficient against the Moving Defendants because its allegations are contradicted by the submissions before the Court. In addition, given the insufficiency of the breach of contract claim, the causes of action for unjust enrichment, quantum meruit and promissory estoppel fail, both because Plaintiff may not proceed with those causes of action because it alleges the existence of a contract governing the parties' dispute, and because the contractual cause of action is not viable. The unjust enrichment cause of action against the Chartwell Defendants is also not viable because Plaintiff

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had no dealings with those Defendants. The anticipatory breach cause of action is also not viable based on the Court's conclusion that the alleged Broker Agreement did not exist.

The Court denies the application of the Chartwell Defendants for an assessment of costs and attorney's fees against Plaintiff.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
June 4, 2013

HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
JUN 07 2013
NASSAU COUNTY
COUNTY CLERK'S OFFICE