SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER Justice

PART 45

MIRON PROPERTIES

-v-

BRUNO W. EBERLI, et al

INDEX NO. 652925/2011

MOTION DATE _____

MOTION SEQ. NO. 001

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is by defendants for summary judgment is GRANTED, and plaintiff's motion for summary judgment is DENIED per the attached Decision and Order

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: August 29, 2013

J.S.C.
MELVIN L. SCHWEITZER

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☑ GRANTED ☑ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

MIRON PROPERTIES, LLC, Plaintiff, -against- BRUNO W. EBERLI, JUNO, LLC., and CAREN OSTEN GERSZBERG, AS TRUSTEE OF, THE RENEE OSTEN REVOCABLE LIVING TRUST Defendants.	Index No. 652925/2011 DECISION AND ORDER Motion Sequence No. 001

MELVIN L. SCHWEITZER, J.:

This is an action for a brokerage commission in connection with the purchase of real property.

Background

Benjamin Getman (Mr. Getman) is a broker for Miron Properties, LLC (Miron). On March 2, 2011, Mr. Getman met with Bruno Eberli (Mr. Eberli) to assist him in locating a potential property for Mr. Eberli's daughter to live in. During this meeting Mr. Eberli entered into a Commission Agreement (Agreement) with Miron.

The Agreement states that Miron will, "act as Broker on behalf of the undersigned [Mr. Eberli] for the purpose of assisting in the location and renting or purchasing of an apartment/property." It states that, "It is understood that if the undersigned purchases, rents, sublets or otherwise obtains any apartment(s)/property located at an address...listed below...then undersigned agrees to pay a Broker's Commission amounting to...six percent of the full purchase price to Miron Properties, LLC within thirty days of the lease signing or closing." The Agreement listed several properties, including those located at "200-210 East 65th

Street, New York, New York 10065." The property that this action revolves around (the subject property) is located at unit 42N at 200-210 East 65th Street, New York, NY 10065 and was covered by the Agreement.

During the March 2, 2011 meeting, Mr. Getman showed Mr. Eberli several properties. According to his testimony he did not show Mr. Eberli the subject property. He also did not show him any floor plans or pictures of the subject property. Mr. Getman testified that he did not believe he was authorized to sell the subject property and that he was not aware that the subject property was available at the time when he showed properties to Mr. Eberli. He also testified that he was not familiar with the previous owner of the subject property, Caren Osten Gerszberg (previous owner).

On June 23, 2011, Juno, LLC (Juno), was formed for the purchase of the subject property. The sole owner of Juno is Christina Eberli. Christina Eberli is Mr. Eberli's daughter. Mr. Eberli and his wife Sylvia Eberli are the Co-Managing Members of Juno. On June 23rd, 2011, Juno entered into a contract with the previous owner to purchase the property for Five Million One Hundred Thousand ($5,100,100.00) Dollars.

On June 27th, 2011, Mr. Getman sent Mr. Eberli an email inquiring into the status of his apartment search. Mr. Eberli's email in response stated, "we bought the apt below" and then linked to the subject property. The second last line of the email's message said, "thanks for your help."

On August 18, 2011 Miron sent a letter to Mr. Eberli notifying him that Miron was of the position that it was entitled to a commission of six percent (6%) (Commission Fee) of the full purchase price for the subject property. On September 8, 2011, the previous owner transferred

title of the subject property to Juno. Mr. Eberli did not pay Miron any portion of the Commission Fee.

Discussion

Both parties have moved for summary judgment in this action. To obtain summary judgment, the moving party must establish its cause of action "sufficiently to warrant a court's directing judgment in its favor as a matter of law." *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 (1988). In order to defeat the motion, the defending party must produce admissible evidence to establish a factual issue requiring trial. *Id.* The motion must be scrutinized in a light most favorable to the opposing party. *Negri v Stop and Shop, Inc.*, 65 NY2d 625, 626 (1985).

The plaintiff's primary cause of action is a breach of contract claim against Mr. Eberli. The remaining causes of action are ancillary to the primary claim. The breach of contract claim is a syllogism claiming that (1) Mr. Eberli contracted to pay the Commission Fee upon purchasing the subject property, and (2) Mr. Eberli purchased the subject property, therefore (3) Mr. Eberli owes the Commission Fee.

Mr. Eberli did contract to pay the Commission Fee upon purchasing the subject property. Mr. Eberli argues that despite the Agreement, he does not owe the Commission Fee because Miron did not broker the purchase. To support this argument Mr. Eberli points to New York cases that explain what it means to broker a deal. The governing rule is that a broker employed to sell property is only entitled to a commission if that broker brought, "the buyer and seller to an agreement." *Sibbald v Bethlehem Iron Co.*, 83 NY 378 (1881). It is clear that Miron was at best an extremely remote cause of the eventual purchase agreement. Mr. Getman testified that he

never showed the subject property to Mr. Eberli and played no role in negotiating the purchase agreement.

The purpose and context of this rule relating to brokers is to describe the required work for a broker to be entitled to a commission for brokering the sale of property. This does not indicate that a broker cannot be entitled to a fee if a contract explicitly awards them a fee in other contexts. One such situation is an exclusivity agreement. "It is true that a contract giving a broker the exclusive right to sell...establishes the right to a commission even upon sale by the owner." *Solid Waste Inst., Inc. v Sanitary Disposal, Inc.*, 120 AD2d 915, 916 (3d Dept 1986) (Citations Omitted).

Exclusivity agreements must be expressed "clearly and expressly." *Id.* However, this does not indicate that "exclusivity" is a magic word. Courts have recognized that the contract must express exclusivity, "by its own terms or by necessary implication from its terms." *Id.* The requirement of clear expression is simply an extension of the general principles of contract. "A clear and complete agreement will be enforced according to the terms set forth therein by the parties." *CV Holdings, LLC v Artisan Advisors, LLC*, 9 AD3d 654, 656 (3d Dept 2004) (discussing the ambiguity of the term "transaction" in attempting to determine if an agreement was an exclusivity contract) (citations omitted).

The instant situation is analogous to an exclusivity agreement. The Agreement does not necessarily prohibit Mr. Eberli from working with another broker, but by the terms of the Agreement if Mr. Eberli purchased a particular property he owed Miron the Commission Fee regardless of who brokered the deal. Mr. Eberli has argued that the contract required Miron to actually assist with the sale in order to earn a fee. A plain reading of the Agreement does not support this interpretation. The Agreement requires Miron to "act as Broker on behalf of the

undersigned [Mr. Eberli] for the purpose of assisting in the location and renting or purchasing of an apartment/property." This did require Miron to do some brokerage work, or at the very least to do work if Mr. Eberli requested it of them. When Mr. Getman showed various properties to Mr. Eberli that was brokerage work, even if it fell far short of brokering a deal. The Agreement did not require Miron to act as a broker in regard to the actual sale of a property listed by the Agreement.

If Mr. Eberli purchased the subject property he owed Miron the Commission Fee. Mr. Eberli did not purchase the subject property in his own name. If it can be said that Mr. Eberli purchased the property, it could only be in his role as a co-managing member of Juno. Common sense dictates that one is not considered the "purchaser" of a property solely by the fact that one is co-managing member of a limited liability company. Mr. Eberli is not the owner of Juno. His daughter is the sole owner of Juno. That relationship does not indicate that Mr. Eberli "purchased" the subject property.

The court has surmised that Miron views Mr. Eberli as an "alter ego" for Juno. The corporate veil shall be pierced "when a corporation has been so dominated by an individual... and its separate entity so ignored that it primarily transacts the dominator's business instead of its own and can be called the other's alter ego, the corporate form may be disregarded to achieve an equitable result." *Austin Powder Co. v McCullough*, 216 AD2d 825, 827 (3d Dept 1995). Mr. Eberli is not an owner of Juno and the facts do not vaguely suggest that he has the sort of complete control over Juno necessary to invoke the doctrine.

Even if Mr. Eberli was the dominant force controlling Juno, the court would decline under these circumstances to invoke the alter ego rule. The finding that one is an alter ego is a discretionary tool used to achieve equitable results. It would be unfair to enforce a strict textual

reading of the portion of the Agreement that establishes something analogous to an exclusivity agreement, while simultaneously relying upon a fictional account of which entity actually purchased the subject property. Furthermore, the doctrine of alter ego is most appropriate in circumstances when one is attempting to resist creditors or avoid tort liability. This is a contractual situation, where the parties agreed that Mr. Eberli only owed the Commission Fee under the specific circumstance of Mr. Eberli's purchase of the subject property.

The plaintiff also claims that Mr. Eberli breached a duty of "good faith and fair dealing." All contracts have an implied duty of good faith. *See Dalton v Educ. Testing Serv.*, 87 NY2d 384, 389 (1995). This duty prohibits each party from undermining the other party's rights under the contract and incorporates reasonable promises into that contract. *See Id.* Nothing suggests that Mr. Eberli implicitly promised to purchase the property and nothing prohibited him from assisting another in acquiring that property. Any attempt to construe a broken promise into the contract is belied by the simple "if-then" conditionality of the contract.

The court grants summary judgment in favor of the defendants finding that the plaintiff's "breach of contract," "breach of good faith," and "breach of implied contract" causes of action have no merit. The "declaratory judgment," "promissory estoppel, "unjust enrichment" and "*quantum meruit*" causes of action are entirely redundant to the breach of contract claim and therefore are dismissed. The "tortious interference" cause of action is also dismissed insofar as there is no indication of breach of contract. The fraud cause of action is dismissed insofar as there is no evidence of any material misrepresentation by any defendant.

The court has also considered the defendants' argument that Miron violated section 443 of the Real Property Law. Having already found in favor of the defendants the court need not address this issue.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted; and it is further

ORDERED that plaintiff's motion for summary judgment is denied.

Dated: August 29, 2013

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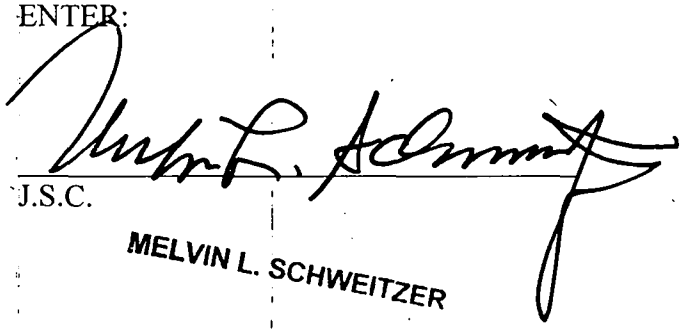

J.S.C.

MELVIN L. SCHWEITZER