

Lansco Corp. v Strike Holdings LLC

2013 NY Slip Op 32550(U)

October 16, 2013

Sup Ct, New York County

Docket Number: 601089/10

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DORIS LING-COHAN
J.S.C.
Justice

PART 36

Index Number : 601089/2010
LANSCO CORPORATION
vs.
STRIKE HOLDINGS LLC
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for Summary judgment
Notice of Motion/Order to Show Cause — Affidavits — Exhibits 4 memo | No(s). 1, 2, 3
Answering Affidavits — Exhibits 4 memo | No(s). 3
Replying Affidavits (none) | No(s). 4, 5

Upon the foregoing papers, it is ordered that this motion is by defendant GFI
Rity Services, Inc's motion for summary
judgment of dismissal is granted in
accordance with the attached memorandum
decision.

(consolidated for disposition with
motion sequence number 003 + 005)

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

FILED

OCT 21 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/16/13

[Signature], J.S.C.

DORIS LING-COHAN
J.S.C.

- 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 36

THE LANSKO CORPORATION,
Plaintiff,

-against-

STRIKE HOLDINGS LLC and GFI REALTY
SERVICES, INC.,
Defendants.

INDEX NUMBER 601089/10
Motion Sequence 003 & 004 &
005

DECISION & ORDER

FILED

OCT 21 2013

DORIS LING-COHAN, J.:

**COUNTY CLERK'S OFFICE
NEW YORK**

In this action concerning a claim for real estate commissions allegedly earned on the lease of a commercial property, motions bearing sequence numbers 003, 004 and 005 are hereby consolidated for decision. Plaintiff Lansco Corporation (Lansco), a real estate brokerage firm, moves, pursuant to CPLR 3212, for summary judgment dismissing the first counterclaim of defendant Strike Holdings LLC (Strike), an operator of bowling alleys, and for sanctions against Strike and its counsel (Mot. Seq. 003). Defendant GFI Realty Services, Inc. (GFI), another real estate firm, moves, pursuant to CPLR 3212, for summary judgment dismissing the second amended complaint as against it (Mot. Seq. 004). Strike moves for summary judgment, pursuant to CPLR 3212, in its favor on the first, second, third and seventh causes of action in the second amended complaint as against it (Mot. Seq. 005). Lansco, in turn, cross-moves for summary judgment, pursuant to CPLR 3212, in its favor on the first and second causes of action in the second amended complaint.

Procedural Background

Lansco commenced the instant action on or about April 28, 2010, for, *inter alia*, commissions allegedly earned, based on Lansco's claim that it had an "exclusive" or "preferred" brokerage agreement with Strike for the selection and leasing of a property in Manhattan suitable

for a bowling alley complex. The original complaint was amended as of right to assert causes of action for: (1) breach of contract by Strike; (2) tortious interference with a business relationship by Strike; (3) tortious interference with a right to a commission by Strike and GFI, acting together; (4) breach of contract by Strike and GFI; and (5) a right to future commissions from Strike and GFI. That first amended complaint sought damages of at least \$1 million on each of the first four causes of action. On January 20, 2011, the court granted Lansco leave to amend the first amended complaint. *Abrams Aff. (Mot. Seq. 003)*, Ex. 3.

The second amended complaint essentially repeats the first three causes of action, adding alleged factual detail, but repleads the fourth and fifth causes of action as follows: (4) tortious interference with Lansco's business relationship with Robert K. Futterman & Associates LLC (RKF), the prospective landlord's real estate broker, and Strike by GFI; (5) tortious interference with Lansco's business relationship with Africa Israel Investments, Ltd., (AFI), the prospective landlord, owner of a building located at 229 West 43rd Street, New York County (the Building),¹ by GFI; (6) violation of New York's Real Property Law (RPL) §§ 440-a and 442-e; and (7) a right to future commissions from Strike and GFI. *Id.*, Ex. 1. The damages requested for the first five causes of action in the second amended complaint are \$1.2 million, with punitive damages of \$1 million for the third and fourth causes of action. The Appellate Division, First Department, affirmed the decision granting Lansco leave to amend, with the exception of the proposed sixth cause of action, because Lansco was not a "person aggrieved" under the statute. *Lansco Corp. v Strike Holdings LLC*, 90 AD3d 427, 428 (1st Dept 2011).

Legal Standard for Summary Judgment

¹Formerly the headquarters of the New York Times.

“The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law.” *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, “the party opposing a motion for summary judgment bears the burden of ‘produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.’” *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978); *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224 (1st Dept 2002).

Factual Background

Robin Abrams (Abrams), an executive vice president of Lansco, testified that she first met Thomas Shannon (Shannon), Strike’s CEO, and Mark Simpson (Simpson), Strike’s real estate director, at a trade show in December 2007. Zelmanovitz Affirm. (Mot. Seq. 004), Ex. J (Abrams Transcript), at 73-74. From that time, Strike told Lansco that, “although [Strike] would work with us [Lansco] for the Manhattan market, [Strike] didn’t give written exclusives.” *Id.* at 76. Nevertheless, Lansco drafted a letter for Strike to sign, dated December 13, 2007, giving Lansco “the exclusive right to find, negotiate for, and secure space or property in the City of New York for lease or purchase by Strike.” Shannon Aff. (Mot. Seq. 005), Ex. B. It is not disputed that the letter was never signed by Strike, but Abrams continued to contact Strike, with respect to properties in New York. In an e-mail message to Simpson, dated December 19, 2007, copied to Shannon, among others, Abrams wrote: “Understanding you do not grant written exclusives but are willing to work on a ‘preferred’ basis where you will protect Lansco as your broker, are we

authorized to send out something like this [e-mail naming Strike, or a listing of space requirements without naming the tenant,] to the brokerage community?” *Id.*, Ex. C. The record contains no written response to this message. Abrams persisted in trying to get an exclusive representation of Strike, without success. For instance, on January 16, 2008, Abrams sent an e-mail message to Simpson, copying Shannon, stating that “it would make it easier for us and give us credibility if we could tell people we represent you and want info. on your behalf.” *Id.*, Ex. E. Ultimately, Abrams testified that she was comfortable with the working arrangement between the two companies in the absence of a formal agreement. “I know of many incidents where [Strike] called brokers that either gave them info direct or did not want to give Lansco info, and told those brokers: Lansco is our broker, please submit the information to us through Lansco.” Abrams Transcript at 79.

Simpson, Strike’s real estate director, was deposed on November 14, 2011. Zelmanovitz Affirm. (Mot. Seq. 004), Ex. M (Simpson Transcript). Simpson testified that he reported directly to Shannon, who was very involved in real estate matters. *Id.* at 21, 30. Simpson gave a general description of his treatment of realtors; “if you initiated a deal and if you had a paper trail for that deal, and if that deal would have been consummated within a year, that (*sic*) I would recognize your involvement in terms of a commission.” *Id.* at 54. It was his opinion that a realtor warranted protection “if somebody initiated a deal and left a paper trail.” *Id.* at 56. He testified that at “Strike we had preferred brokerage network in different states and regions we were looking to expand into [In Manhattan,] I found it very difficult to have a structured preferred arrangement.” *Id.* at 44. He faulted New York brokers for being unwilling to work with each other when a preferred arrangement was in place. *Id.* at 44-45. The following is one exchange to that effect:

“Q. Did you refer brokers, other brokers to Robin Abrams regarding Strike?

A. I tried to and I found that that arrangement was not a successful one.”

Id. at 45-46.

Simpson recalled discussing this with Abrams and concluding that “there would be no exclusive arrangements.” *Id.* at 45. Simpson amplified his description of the relationship between Strike and Lansco, as follows:

“I use the term more loosely preferred arrangement in Manhattan than I would anywhere else.

So I would, what was meant to be a preferred relationship, because of the relationship between the brokerage community in New York City being generally uncooperative with one another, if they submitted a site, they wanted it – they wanted me to only respect their submittal and not include Lansco.

So I would call a so-called preferred arrangement, that was my intention, but I terminated the so-called preferred arrangement. I guess that’s the best I can describe it as.”

Id. at 52-53.

Simpson stated that Strike and Lansco “worked together [in 2008] for about six months or so. It might have been a couple months more than that. I’m not sure. At the end of the period, I terminated Lansco.” *Id.* at 48. Testifying more than three years later, Simpson was vague about Lansco’s efforts on behalf of Strike. He believed that Strike made some proposals directly to AFI before he left in 2008, but that none were made via Lansco. *Id.* at 51. When shown four proposals from June, July and August 2008, Simpson recognized only the June 8, 2008 proposal, the first of the four, if only because “[i]t’s my signature. So I signed this.” *Id.* at 57.

According to Simpson, Shannon told him that he was being terminated in late 2008 because the chain of locations was not expanding. *Id.* at 32. A “few months” before, Shannon

asked Simpson if he “would like to involve [Lon Rubackin of GFI] in the site selection process.” *Id.* at 36. The three of them then met several times to discuss sites submitted by real estate brokers. *Id.* at 39-40.

While Shannon was apparently deposed on July 27, 2011 (Barasch Reply Affirm. [Mot. Seq. 003], Ex. 4 [Shannon I]) and on October 24, 2011 (Abrams Aff. [Mot. Seq. 003], Ex. 46 [Shannon II]), none of the parties have submitted complete transcripts of such depositions. Instead, fragments are contained throughout the papers. It is noted that the parties are in violation of this Part’s Rules which requires that complete deposition transcripts be supplied in support and/or in opposition to a motion. The failure to comply with such rule, is grounds for a denial of the motion/cross-motion.

When shown a copy of the June 18, 2008 proposal to AFI, Shannon commented that “I probably wrote most of it.” Shannon I at 191-192. Shannon stated that he had a simple arrangement with Lansco in 2008: “If they got a deal done, they would get a commission from the landlord.” Shannon II at 349. He denied that Lansco operated for Strike under any other terms or agreement. *Id.* at 349-350.

An e-mail message from RKF, AFI’s real estate broker, to Lansco, dated June 3, 2008, was the first detailed exchange of information about the Building. Shannon Aff. (Mot. Seq. 005), Ex. F. RKF gave rental rates for the ground, second, lower and sub-lower floors – “Possession Oct 1 2008.” Lansco produces four written proposals for Strike to lease space in the Building. Abrams Aff. (Mot. Seq. 003), Exs. 5-8. These proposals, dated June 18, 2008, July 8, 2008, July 22, 2008 and August 4, 2008, materially differ in the size of the premises to be leased, the term of the lease, and the rent. Each proposal, however, had the same language under the heading Brokers:

“Landlord and Tenant each represent that it has dealt with no broker or brokers, except The Lansco Corporation and Robert K. Futterman with respect to the premises. Landlord shall be responsible for any and all payments due The Lansco Corporation and Robert K. Futterman. Each party shall indemnify, defend and hold the other harmless from claims or demands for brokerage commissions, finder’s fees or other compensation resulting from a breach of the foregoing representation.”

The July 8, 2008 proposal from Strike to AFI was the only one of the four, as submitted here, that is accompanied by a formal cover letter from Lansco. The proposal addressed the entire third floor, a portion of the Building’s second floor, and a minimum of 1,000 square feet of the ground floor, at an annual rent starting at \$2.95 million. It evoked a counterproposal from RKF, dated July 16, 2008, on behalf of AFI, for the same space at an annual rent of \$5.035 million, about a 70% increase. *Id.*, Ex. 9. RKF’s version said simply, “Robert K. Futterman and Associates, LLC and The Lansco Corporation to split one (1) full commission.” The July 22, 2008 proposal was drafted by Strike, forwarded by Shannon to Abrams, who “emailed to agent and hand delivering to Paz [Kaspi of AFI].” *Id.*, Ex. 7. On August 1, 2008, Shannon sent an e-mail to Abrams changing the lines of communication between AFI and Strike. “Don’t bother with RKF. They don’t appear to have the full respect of AFI. I am having Brett [Parker, Strike’s chief financial officer,] send our counter back directly to Paz on Monday and we will see how that plays out. I will keep you posted.” *Id.*, Ex. 19. On August 4, 2008, Parker sent an e-mail message to Kaspi, with Strike’s latest offer attached. Shannon Aff. (Mot. Seq. 005), Ex. J. The message read: “It appears that there is some ongoing confusion between the brokers, so in order to clarify and simplify the message, I am sending the attached directly to you.” While no one at Lansco is copied on this message, Parker apparently sent a copy to Abrams, with the proposal itself. *Id.* Abrams, in turn, circulated the documents among her colleagues. *Id.*

An e-mail exchange between Shannon and Kaspi, on August 21, 2008, summed up their

respective positions and seemed to close negotiations. Abrams Aff. (Mot. Seq. 003), Ex. 10. Shannon repeated his last offer, of August 4, 2008, at a little over \$4 million,² while Kaspi countered in a telephone call at about \$7.6 million and then summed up their respective positions in the last writing of the day as, “[y]our recent offer of \$4 million for 106,000 SF averages \$38/SF which is half of the \$75 we asked for.” *Id.* Shannon concluded that he “can only assume that you are not interested in our tenancy. Accordingly, our offer for the space is withdrawn.” *Id.* In response to a request from Shannon, Abrams sent him an e-mail message, on August 24, 2008, detailing the negotiations with AFI from June through August. Barasch Affirm. (Mot. Seq. 004), Ex. 22. Her message concluded, “[h]ope this helps, although really just a question of whether [AFI] is motivated to do deal with Strike, which we should again question. Based on the mixed feedback, appears not.” On August 26, 2008, Shannon sent an e-mail message to Lansco stating that “I emailed Rotem [Rosen, a top executive at AFI,] and outlined the sordid history of the deal as an explanation of why we withdrew our offer.” Abrams Aff. (Mot. Seq. 003), Ex. 11.

According to Abrams, she spoke to Shannon in mid-November 2008, about “revisiting” the deal on the Building, because of the economic crisis hitting global financial markets. *Id.*, ¶ 10. To support this, she attaches a copy of an unsigned, unsworn page of handwritten notes, where, on 12/4, it says that: “We had called Strike few wks. ago to suggest revisiting deal w/market deflating.” *Id.*, Ex. 13.

On November 11, 2008, Abrams sent Shannon a letter identifying four buildings that Lansco had examined on Strike’s behalf, including the Building, and declaring that if “Strike elects to pursue any of the four buildings listed above in terms of discussions, negotiations, offers

²Even though this proposal was handled directly by Strike, in accord with Shannon’s August 1, 2008 message to Abrams and Parker’s cover message to Kaspi, it still contained the language of earlier proposals regarding brokerage and commissions.

or proposals, you will conduct all of the foregoing through The Lansco Corporation, as broker.”

Id., Ex. 48. The November 11, 2008 letter requested countersignature by Strike. One week later, on November 18, 2008, Abrams sent an e-mail message to Shannon and Simpson following up on the attempt to preserve Lansco’s position on the four properties that Strike had considered.

Abrams Aff. (Mot. Seq. 004), Ex. 19. “When Mark called to let us know you would be terminating our working relationship, he asked that we send a letter outlining the properties that we had actively pursued with Strike, and told us that you would protect us for those few sites.”

Abrams’s message contained “a ‘laundry list’ of every site reviewed on your behalf,” 28 sites in all, but, responding to Simpson’s request, she “outline[d] those specific locations for which we did significant due diligence per Strike’s expressed interest.” Abrams again requested a countersignature on the November 11, 2008 letter, which was never secured. The message closed with mention of a forthcoming lunch with Rubackin “to discuss how to proceed with regard to any open items.”

The November 18, 2008 e-mail message from Abrams to Strike indicates that it was sent at 5:04 P.M.; Lansco submits a copy of a purported telephone message for Abrams left by Simpson at 5:46 P.M. that day:

“Hey Robin, Mark Simpson, uh, we are in receipt of your letter, uh, where you have four locations noted you want to be protected on. I mean, were something to happen with three out of four of these, uh, something would be worked out, but, uh, you know, we don’t want to sign off on anything. I don’t know if the other brokers, you know, if Lon will work these deals or between you and him. World Trade Center is something that is five years out and we don’t see any reason to protect you on that. So, if you have any questions give me a call: 212-777-2214, extension 5216. Thank you.”

Id., Ex. 7. An audio recording of this telephone message was played for Simpson at his deposition. Simpson Transcript at 68-70. “After hearing it, I remember leaving a message like

that,” Simpson said. *Id.* at 70.

Joseph Leinsdorf, a Lansco realtor, also testified about the relationship between Strike and Lansco. Zelmanovitz Affirm. (Mot. Seq. 004), Ex. K (Leinsdorf Transcript). For almost a year, from late 2007 to late 2008, in conjunction with Abrams, he worked on finding space for Strike, researching locations, gathering information, sending photographs and floor plans, and conducting walkthroughs of prospective sites. He recalled that Abrams asked him to prepare information on the Building for Strike in May or June 2008. *Id.* at 50-51. Leinsdorf testified that he went on three walkthroughs of the Building, usually with Shannon, Abrams, someone from RKF, and others representing various parties. *Id.* at 65-66. Each walkthrough covered a different arrangement of space for Strike’s prospective occupancy. *Id.* at 64-66. He claimed that the landlord changed the suggested space arrangements, necessitating multiple visits. *Id.* at 69-71. He said that “[w]e were looking for spaces for Strike throughout Manhattan,” even while trying to put a deal together for the Building, because of the lack of agreement on space and rent with AFI. *Id.* at 130.

Leinsdorf did not remember doing any work for Strike after the exchange of messages in late August 2008, but he “believe[d] that Robin [Abrams] was still in communication with them regarding the Times building.” *Id.* at 77. He said that, in October or November 2008, Abrams told him “that Strike was no longer using us as their Manhattan broker.” *Id.* at 35. Leinsdorf was not aware of a specific reason for the change, but Abrams told him that Lon Rubackin was going to be Strike’s Manhattan broker. *Id.* Leinsdorf wrote or co-wrote the letter to Strike, dated November 11, 2008, listing the four properties for which Lansco wanted to preserve its rights to represent Strike. *Id.* at 156-157. He stated that Strike “requested that we send this letter,” focusing “on the important sites” of the dozens that had gotten some attention. *Id.* at 158. He

learned from Abrams that Strike eliminated the World Trade Center redevelopment site from the list of four, “but that the other three sites they were amenable to protecting us on.” *Id.* at 158-159.

Nevertheless, Abrams continued to contact Strike. On January 5, 2009, Abrams sent Shannon an e-mail message headed Happy New Year, ending with “[p]lease keep us apprised of status of negotiations on Times Building and let us know if there is any support we can offer.”

Barasch Affirm. (Mot. Seq. 004), Ex. 34. Shannon responded the next day, stating that

“[i]f you come across anything interesting for us, please bring it to Lon’s attention. Regarding the NY Times Building, they have not responded to our latest offer. I think they are paralyzed with the realization that their pro-forma is far above market and only get farther above it. I don’t think they can show their lender/partners a deal that is actually close to market vs. what they have said it is.”

Id. Shannon indicates in his supporting affidavit that this response “was sent as a common courtesy.” Shannon Opp. Aff. (Mot. Seq. 003), ¶ 26.

On January 30, 2009, Joshua Strauss (Strauss), RKF vice president, sent Rubackin an e-mail message stating that “Robin Abrams just called. I told her that Strike was in discussions w us through you (which she said she already knew). Expect a call.” *Id.*, Ex. 20. One month later, Rubackin, in an e-mail message to Strauss, conceded Lansco’s claim to some commission on the Strike deal. “BTW, have you worked out the dollar amount of the commission? I’ll need to sit with Lansco soon and to try and make a deal.” *Id.*, Ex. 21.

Simpson’s recorded telephone message, of November 18, 2008, references Rubackin, and he recollected that Rubackin was introduced to the process some months before Simpson was terminated in late 2008. Rubackin states that “Strike engaged GFI as its Manhattan broker”, in or about October 2008, after he joined GFI. Rubackin Aff. (Mot. Seq. 005), ¶ 12. At the time, Strike’s deal on another property, not involving Lansco, “fell apart,” and Strike asked GFI to

arrange a meeting with AFI on the Building, according to Rubackin. *Id.*, ¶¶ 13-14. “My understanding from Strike, AFI and AFI’s broker was that any prior proposal involving Lansco was no longer on the table and was discontinued months before.” *Id.*, ¶ 15. Strike told him that its previous negotiations with AFI “never progressed to the point where AFI entertained serious consideration of such a lease in large part due to the incompetence of its former broker, Lansco.” *Id.*, ¶ 14. Rubackin claims that “GFI spent over fourteen months working on the deal before a lease was finally executed by Strike in late December 2009 for space at the Times Square Building.” *Id.*, ¶ 5; *see also* Lease Agreement, Ex. D. GFI’s efforts themselves are not in dispute; the complaint raises the issue of the propriety of Strike and GFI’s behavior towards Lansco throughout the process. Strike’s counterclaim challenges Lansco’s actions.

Lansco’s Motion to Dismiss First Counterclaim (Mot. Seq. 003)

In its answer to the second amended complaint, Strike asserts one counterclaim against Lansco. Abrams Aff. (Mot. Seq. 003), Ex. 2 (Strike’s Answer). It asserts that Lansco “lacked the necessary expertise to properly represent the Defendant’s interests, and Plaintiff’s performance was so lacking and deficient that it became impossible” for Strike and AFI to reach agreement on a lease. *Id.*, ¶ 25. Strike’s Answer states that subsequently, with GFI as Strike’s broker and RKF as AFI’s broker, a lease was executed. *Id.*, ¶¶ 29-31. However, valuable time was lost, and Strike’s facility was delayed for more than one year, with a commensurate loss of income. *Id.*, ¶ 32.

Lansco contends that the counterclaim “is fabricated, without merit and was designed primarily for delay and to harass, intimidate and maliciously injure plaintiff with the assertion of material factual allegations that are false and known by Strike to be false.” Barasch Affirm., (Mot. Seq. 003), ¶ 2. Lansco claims that it was not the cause of any delay in reaching an

agreement with Strike, and cannot be held responsible for any alleged damages to Strike.

Strike's counterclaim seems to be asserted, merely to preserve GFI's full commission share. On July 21, 2009, Shannon wrote to Rubackin that

"it was clear that Lansco was terminated as evidenced by their November [letter] to that effect which asked to be protected. We will fully support your claim [to] a full commission if it ever came to a dispute with Lansco. They were completely ineffective (I would argue that they were an impediment to the deal) and the deal was completely dead when we terminated our (uncontracted) relationship with them."

Barasch Affirm. (Mot. Seq. 004), Ex. 23.

Strike and GFI provide evidence that *supports* Lansco's motion to dismiss Strike's counterclaim. Shannon's message to Kaspi, on August 21, 2008 ("our offer for the space is withdrawn"), and Shannon's message to Lansco, on August 26, 2008 recapping another message to AFI ("the sordid history of the deal as an explanation of why we withdrew our offer"), ended Strike's negotiations with AFI in cooperation with Lansco. Lansco's November 11, 2008 letter and the written and recorded oral communications between Abrams and Simpson, at about the same time, marked a more formal separation, as all seemed to recognize. Lansco actively pursued a deal with AFI for Strike, from early June through late August, when Shannon pronounced it over. There is no evidence submitted to support that Shannon or Simpson, or anyone else from Strike, throughout this period, criticized Lansco's performance. While Shannon expressed displeasure with RKF to Abrams on August 1, 2008, criticism of Lansco seems only to have emerged after this action commenced, and only in communications between Strike and GFI. While Shannon later characterized Abrams' November 11, 2008 letter as terminating their relationship, on January 6, 2009, he was exchanging holiday greetings with Abrams, asking her to report interesting opportunities to Rubackin, and keeping her abreast of

the status of negotiations with AFI.

Strike maintains that Lansco's three-month active role in negotiations with AFI somehow severely compromised its eventual lease deal on the Building, even though the deal took an additional 14 months to conclude with GFI's assistance. This dubious proposition is buoyed only by generalized accusations of Lansco's incompetence. Strike's counterclaim states that "Plaintiff failed to keep Defendant apprised of the status of proposals, failed to convey offers, alienated A[F]I by scheduling meetings without notifying all parties or confirming who would attend, and did not or could not provide any meaningful advice or analysis." Strike's Answer, ¶ 26. These allegations, which are not expanded with any factual details in the within submissions, do not match Shannon's descriptions of Lansco's relationship with Strike, or the messages exchanged among Strike, Lansco, AFI and RKF during the June-August 2008 period. No party offers a contemporaneous account of Lansco's alleged deficient performance, that approaches the allegations asserted in Strike's counter claim.

Additionally, the contents of the final deal also do not support Strike's allegations that it suffered tangible harm. Strike does not suggest that its negotiations with AFI during the interval from mid-November 2008 until early March 2009, leading to the executed letter of intent with GFI's assistance, were somehow inhibited by Lansco. Similarly, in the period March 2009-December 2009, leading to the final execution of the lease, negotiations seemed to be entirely under the control of all the parties, except Lansco. The submissions include many copies of messages among the contracting parties and their agents, as they moved from the five-page letter of intent to the 89-page lease.³

³There were the inevitable rocky moments along the way. On March 30, 2009, Rubackin sent an e-mail message to RKF announcing that "[w]e got a big problem. Africa Israel changed the deal and tried to sneak it in without telling us. . . . We've been through this time and time

Strike, in opposing Lansco's motion and supporting GFI's and its own motion, is unable to offer a factual account of its dealings with Lansco that resembles the conclusory statements in its counterclaim. Strike carefully demonstrates that it had no written exclusivity agreement with Lansco, and dismisses the suggestion that there was an oral exclusivity agreement, Simpson-to-Abrams, as "false, and absurd, in light of the fact that we explicitly rejected the written exclusivity agreement." Shannon Aff. (Mot. Seq. 004), ¶ 14. Strike finds it "incredible that a broker intent on working for Strike would only fortuitously chance upon the Times Square Building after months 'searching' for appropriate space, since the Times Square Building had been on the market for years." *Id.*, ¶ 16. Since Strike was explicit in its denial of reliance upon Lansco, to the exclusion of other real estate brokers, it cannot evoke sympathy from Lansco's alleged inability to put a deal together.

Further, Shannon, for Strike, indicates that, in the period June to August 2008, when Lansco had an association with Strike, "all four [letters of intent] were rejected", as if Lansco was ineffective in gaining AFI's agreement. *Id.*, ¶ 18. He asserts that "it became apparent that Plaintiff lacked the expertise to properly represent Strike or to be able to have the parties reach an agreement on the material terms upon which to enter into a letter of intent or lease." Shannon Opp. Aff. (Mot. Seq. 003), ¶ 18. However, he admits, as he had in his testimony, that the letters of intent were actually drafted by Strike, and not by Lansco. Shannon Aff. (Mot. Seq. 004), ¶ 22.

While there is evidence that Lansco's active role in representing Strike, even unofficially, ended as early as August 2008, but no later than November 2008, Strike never effectively conveyed this fact, and its purported underlying displeasure with Lansco, to the other parties until after

again. Either they move forward with the deal that we shook hands on or we're gone." Abrams Aff. (Mot. Seq. 003), Ex. 28.

commencement of Lansco's action. For instance, on January 30, 2009, Kaspi sent an e-mail message to Rubackin, copying Shannon, explaining that he is holding back consent to Strike's letter of intent, because "we must get a clarification from Strike with regard to who are the [real estate] brokers from the tenant's side." Abrams Aff. (Mot. Seq. 003), Ex. 22. *Significantly*, on March 27, 2009, Rubackin sent RKF a message that "I'll need to sit with Lansco soon and try and make a deal." Barasch Affirm. (Mot. Seq. 004), Ex. 21.

In the submitted papers, Strike has gone to great lengths to insist that Lansco was not its exclusive representative, or that the two companies had nothing more than a casual relationship. Lansco's designated duties have been defined by Strike as delivering messages and arranging meetings. Strike comments that "the little work that Lansco did, during a period of less than three months, had no relationship to the deal that was actually consummated more than sixteen months later." Shannon Aff. (Mot. Seq. 004), ¶ 2. Yet, *to the contrary*, Strike's counterclaim asserts that its "damages were contemplated by the parties at the time they entered into their agreement . . . [these] damages were the natural and probable consequence of Plaintiff's breach of the parties['] agreements and of its failure to perform." Strike Answer, ¶¶ 33-34. Lansco's alleged slight amount of effort exercised in such a short amount of time, cannot support Strike's alleged counterclaim. It is contradictory for Strike to insist that it limited Lansco to ministerial functions, yet maintain that if Lansco "had properly performed its services, . . . a deal could have been easily struck prior to onset of the financial crisis." Strike's Memorandum of Law (Mot. Seq. 003), at 4. While Shannon "believe[s] a deal could have easily been finalized before the commencement of the financial crisis," he offers no facts connecting this lack of resolution to Lansco, and ignores AFI's insistence at the time on rent far greater than he was willing to pay. Shannon Aff. (Mot. Seq. 004), ¶ 29. As there are no material facts in dispute concerning Lansco's alleged conduct in failing

to arrange a deal between Strike and AFI, Lansco's motion to dismiss Strike's counterclaim is granted (Mot. Seq. 003).

While Lansco also seeks sanctions against Strike and its counsel for positing the subject counterclaim, none of the occasional exaggerations and overheated rhetoric from all parties here rise to sanctionable levels. Thus, Lansco's motion for sanctions against Strike and its counsel is denied.

GFI's Motion for Summary Judgment (Mot. Seq. 004)

The second amended complaint asserts four causes of action against GFI – the third, fourth, fifth and seventh.⁴ Respectively, they charge GFI with tortious interference with a right to a commission in conjunction with Strike; tortious interference with Lansco's business relationships with RKF and Strike; tortious interference with Lansco's business relationship with AFI; and claim a right to future commissions from Strike and GFI.

“Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom.” *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 (1996). “To establish such a claim [for tortious interference with prospective economic advantage], a plaintiff must demonstrate that the defendant's interference with its prospective business relations was accomplished by ‘wrongful means’ or that defendant acted for the sole purpose of harming the plaintiff.” *Snyder v Sony Music Entertainment, Inc.*, 252 AD2d 294, 299-300 (1st Dept 1999) (citation omitted). Here, no evidence has been submitted as to *any*

⁴The proposed sixth cause of action in the second amended complaint was rejected by the Appellate Division.

tortious interference by GFI. Significantly lacking is *any proof* that, *inter alia*, GFI acted for the sole purpose of harming Lancso.

Specifically, Rubackin, who was employed by GFI as of the end of July 2008, testified that he first met Shannon at a trade show roughly in 2005 or 2006. Abrams Aff. (Mot. Seq. 004), Ex. 26, Rubackin Transcript at 78 at 62. Shannon asked Rubackin to join a Strike advisory board in 2007, which met “a few times a year, just to hear the status of the company.” *Id.* at 68. Rubackin stated that Shannon raised the idea of GFI working with Strike, and they reached an oral agreement that GFI would be Strike’s exclusive broker in October 2008. *Id.* at 71. The subject of the Building arose in November 2008, when another property that had interested Strike was leased to someone else. *Id.* at 73-74. Rubackin told Shannon that Allen I. Gross (Gross), a GFI principal, who had hired Rubackin, “ha[d] a relationship with Africa Israel and could be helpful in reaching out to them.” *Id.* at 75. Through Gross, Rubackin met Kaspi for the first time in “[l]ate November, early December of 2008.”⁵ *Id.* at 76. He told Kaspi that GFI was the exclusive broker for Strike. *Id.* at 85. Rubackin further testified that he did not see any of the four Strike proposals produced in June, July and August 2008, before his first meeting with AFI. *Id.* at 80-86. In fact, Rubackin stated that he had not seen any of the prior proposals, or RKF’s counterproposal, of July 16, 2008, until the commencement of the instant action. *Id.*

On December 1, 2008, Rubackin sent Kaspi an e-mail message “attach[ing] our Letter of Intent along with our work letter for space in your building.” Abrams Aff. (Mot. Seq. 004), Ex. 28. The letter of intent addressed the entire third floor and a minimum of 750 square feet of the ground floor⁶ for a 20-year term, beginning at \$2.45 million annual rent. The next day, Rubackin sent an

⁵The meeting date has been established as November 25, 2008.

⁶No total square footage was specified.

e-mail message to Shannon and Parker stating that, after his meeting with AFI, he believed that “pretty much the best deal they’ll do” is 63,706 sq. ft. rented for \$3.5 million annually. *Id.* On December 16, 2008, Rubackin sent Kaspi an e-mail message with a revised letter of intent, expanding the space to include about half of the fourth floor, and increasing the starting annual rent to \$3.95 million. On January 21, 2009, GFI sent AFI another e-mail message with a letter of intent to lease the entire third floor, approximately half the fourth floor and some space on the ground floor, illustrated by an attached floor plan. *Id.*, Ex. 29. The annual rent for the first five years of the 20-year term would be \$4.5 million. The e-mail message said that the proposal was “based on our hand shake from yesterday’s meeting.” Shannon identified the RKF to GFI letter, dated March 3, 2009 (Shannon Aff. [Mot. Seq. 004], Ex. R), as “the executed LOI,” although it is essentially repeated the January 21, 2009 terms. In fact, as seen above, Kaspi was ready to agree to those terms on January 30, 2009, except for the issue of “who are the re brokers from the tenant’s side.”

By the time that Rubackin, for GFI, met AFI for the first time, on November 25, 2008, Lansco’s active involvement with Strike, however characterized, was over. After negotiations with AFI ended in August 2008, Abrams was able, at most, to recollect a telephone call to Shannon in mid-November 2008 suggesting that he revisit the deal on the Building.

Significantly, Lansco fails to delineate GFI’s alleged tortious conduct. Lansco merely claims that “Strike elected to allow Rubackin to usurp Lansco’s commission,” without describing the nature or facts of that alleged usurpation, which is insufficient to establish a tortious interference cause of action. Barasch Affirm. (Mot. Seq. 004), ¶ 21. *See Carvel Corp. v Noonan*, 3 NY3d 182, 189 (2004) (“Carvel’s conduct, which did not constitute a crime or an independent tort and was not aimed solely at harming franchisees, was also not the sort of egregious wrongdoing that might

support a tortious interference claim in the absence of such an independently unlawful act or evil motive”). While there is no doubt of that GFI succeeded Lansco in negotiations with AFI, there is no evidence of GFI’s involvement with Strike while Lansco was still actively pursuing AFI, on Strike’s behalf, or any evidence of wrongdoing by GFI, or intentional acts by GFI to interfere with the relationship between Lansco and Strike. Thus, Lansco has failed to establish that GFI has interfered with its alleged right to a commission on the deal on the Building. Accordingly, GFI’s motion for summary judgment dismissing the second amended complaint as against it is granted (Mot. Seq. 004).

Strike’s Motion for Summary Judgment (Mot. Seq. 005)

Strike moves to dismiss the first, second, third and seventh causes of action in the second amended complaint as against it, which are as follows: (1) breach of contract by Strike; (2) tortious interference with a business relationship by Strike; (3) tortious interference with a right to a commission by Strike and GFI, acting together; and (7) a right to future commissions from Strike and GFI.

From the earliest days of their relationship, Lansco attempted to get Strike to agree that Lansco had “the *exclusive right* to find, negotiate for, and secure space or property in the City of New York for lease or purchase by Strike” (emphasis added), with no success. At some point, though, for some duration, according to Simpson, Strike’s real estate director, he intended to have “a so-called preferred arrangement” with Lansco, but found that other Manhattan real estate brokers prevented it. Nevertheless, the two parties worked together in some fashion in dealing with AFI and RKF through August 2008; Shannon allegedly referenced the possibility of a commission to Abrams at a cocktail party prior to December 4, 2008; Kaspi sought “a clarification

from Strike with regard to who are the re brokers from the tenant's side," on January 30, 2009; and, Rubackin thought he would have to negotiate with Lansco in March 2009. Strike's now-dismissed counterclaim states that Strike's "damages were the natural and probable consequences of Plaintiff's breach of the parties['] agreements and of its failure to properly perform." Strike's Answer, ¶ 34. Under these circumstances, there are factual issues as to the nature of the agreements between Lansco and Strike. Thus, that portion of Strike's motion which seeks to dismiss the second amended complaint's first cause of action for breach of contract by Strike is denied.

The remaining causes of action are rooted in the purported relationship between Lansco and Strike, and, therefore, fail to state a unique cause of action. *Manley v Pandick Press*, 72 AD2d 452, 454 (1st Dept 1980) ("The seventh cause of action, asserting that defendant corporation tortiously interfered with its own contract, quite clearly does not state a legally sufficient cause of action and must also be dismissed"). Additionally, they are duplicative of the breach of contract claim. *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 (1987) ("It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated").

Lansco's Cross Motion for Summary Judgment

As decided above, the second amended complaint now consists solely of a cause of action for breach of contract as against Strike. For the reasons given in denying Strike's motion to dismiss it, the breach of contract claim shall continue. Both Strike and Lansco have failed to demonstrate that there are no material issues of fact in dispute concerning the nature of their agreement.

Accordingly, it is

ORDERED that plaintiff Lansco Corporation's motion for summary judgment, pursuant to CPLR 3212, is granted to the extent of dismissing the first counterclaim of defendant Strike Holdings LLC to the second amended complaint, and is denied in requesting sanctions against Strike Holdings LLC and its counsel (Mot. Seq. 003); and it is further

ORDERED that defendant GFI Realty Services, Inc.'s motion for summary judgment, pursuant to CPLR 3212, dismissing the second amended complaint as against it is granted, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant (Mot. Seq. 004); and it is further

ORDERED that defendant Strike Holdings LLC's motion for summary judgment, pursuant to CPLR 3212, in its favor on the first, second, third and seventh causes of action in the second amended complaint as against it is granted to the extent of dismissing the second, third and seventh causes of action as against it, and is otherwise denied (Mot. Seq. 005); and it is further

ORDERED that plaintiff Lansco Corporation's cross motion for summary judgment, pursuant to CPLR 3212, in its favor on the first and second causes of action in the second amended complaint is denied, and the second cause of action is dismissed; and it is further


ORDERED that within 30 days of entry of this order defendant GFI Realty Services, Inc. shall serve a copy upon all parties, with notice of entry.

DATED: October 16, 2013

FILED

OCT 21 2013

COUNTY CLERK'S OFFICE
NEW YORK


Doris Ling-Cohan, J.S.C.