| **MB Prop. Group, LLC v Church & Swan Props. LLC** |
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| 2016 NY Slip Op 30081(U) |
| January 12, 2016 |
| Supreme Court, New York County |
| Docket Number: 653400/2012 |
| Judge: Joan A. Madden |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11
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MB PROPERTY GROUP, LLC

Plaintiff,

Index No. 653400/2012

- against -

CHURCH & SWAN PROPERTIES LLC, DEBORAH BYRNE, KEVIN BYRNE, HJO HOLDINGS LLC, and EDWARD OSTAD,

Defendants
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JOAN A. MADDEN, J.

In this action to recover a brokerage fee in connection with the sale of a building located at 715 East 5th Street in Manhattan ("the Property"), defendants Church & Swan Properties LLC ("Church"), Deborah Byrne ("D Byrne"), and Kevin Byrne ("Byrne") (collectively "the Church defendants") move for summary judgment dismissing the claims against them. Plaintiff MB Property Group, LLC ("MB") opposes the motion.

Background

MB is a licensed real estate broker. Non-party Moshe Melamed ("Melamed") is MB's president. Church, the former owner of the Property, is alleged to have entered into a non-exclusive brokerage agreement with MB to sell the Property. D Byrne is the managing member of Church. Byrne is the ex-husband of D Byrne and assisted D Byrne in managing the Property. Defendant Edward Ostad ("Ostad") is the managing member of defendant HJO Holdings, Inc. ("HJO"), which purchased the Property from Church for $3,650,000, pursuant to a Contract of Sale dated May 17, 2012 ("the Contract"). The Contract was signed on behalf of HJO, by Alonna Ostow ("Ostrow"), a manager of HJO and Ostad's sister-in-law. D Byrnes executed a Commission Agreement dated

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May 4, 2012, in connection with the sale of the Property to HJO, in which Church agreed to pay a $75,000 commission to the brokerage firm Hakimian Properties Inc. After the closing on September 6, 2012, Hakimian Properties was paid the commission. MB received no commission in connection with the sale of the Property.

Before the closing, HJO sued Church in connection with Contract, and Church answered the complaint and asserted various counterclaims against HJO . By Stipulation of Settlement dated August 30, 2012, the parties agreed to close title on the Property in accordance with the Contract, and to discontinue their respective claims against the other. Under paragraph 7, HJO, Ostad and Ostrow agreed to "defend, indemnify and hold [Church] harmless from any brokers and/or commission claims made by [Melamed] and/or [MB]...with regard to the sale of [the Property]."

In the instant action, which was commenced on September 27, 2012, MB seeks to recover a brokerage commission of $109,500, representing 3% of the sales price of the Property. The complaint asserts causes of action for (1) breach of contract (against Church), (2) tortious interference with contract (against D Byrne, Byrne, HJO and Ostad), and (3) unjust enrichment (against D Byrne, Byrne, HJO and Ostad).

At his deposition, Melamed testified to the following with respect to business procedures and the sequence of events at issue in this action. Melamed stated that MB typically generates its brokerage business via open listings which entail cold-calling individual landlords to inform them about prospective buyers for their property, and if the landlords are interested, MB would usually make an oral agreement over the phone or in person (Melamed Dep. at 12). MB's typical oral agreement would involve informing an interested seller that if MB sells the building, MB is due a commission which could range from 3 to 6 percent of the selling price, depending on the type of the

building (Id.). With respect to the Property, Melamed testified that he had an oral agreement with Byrne to set the brokerage commission at 3% (Id at 20). Melamed learned about the Property via cold calling Byrne on April 16, 2012 (Id. at 21).

Melamed further testified that during their first conversation, Byrne showed an interest in selling the Property, indicated $4 million as the desired price, and told Melamed "everything [he] needed to know pertaining to the sale of the Property" (Id. at 28). The day after their first phone conversation, Byrne sent the rent roll of the Property to Melamed, and they met in person at the Property (Id. at 28-29). At the meeting, Byrne showed various parts of the Property to Melamed and they sat down and discussed price, commission and Melamed's buyers. Melamed identified Ostad as someone who had purchased a building in the area and who, in Melamed's opinion, would be interested in the Property (Id. at 29-30).

While Melamed testified that Byrne told him that if Melamed sold the Property for $4 million he would pay him a 4% in commission (Id. at 33), he also stated that he did not expressly discuss with Byrne whether he would receive a brokerage commission in the event he failed to sell the Property for $4 million (Id. at 35). Melamed did not provide Byrne with a written Brokerage Agreement, and did not have an exclusive brokerage agreement since the Property was "an open listing," meaning that there is not one specific broker working on the deal (Id. at 36). Melamed had no further in-person meetings with Byrne, but testified that he communicated with him several times via telephone and email (Id. at 36-37).

As to Ostad, Melamed testified that he first spoke to him by cold-calling him on the phone about a year and a half prior to showing him the Property in April 2012 (Id. at 25). According to Melamed, he did not tell Ostad about the Property until after he met with Byrne (Id. at 31). When

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Ostad indicated an interest in the Property, Melamed sent him relevant documentation such as setups, rent rolls and offering memorandums (Id. at 27-28). He showed the Property to Ostad, and when Ostad indicated that he wanted to buy it, he asked Melamed about a commission (Id. at 67). Melamed said his commission was anywhere from 3 to 4 percent depending on the sales price, and Ostad told him that if Melamed could procure a deal at $3.5 million, he will pay a commission of $75,000 to Melamed in cash, under the table (Id. at 68). Melamed responded that it did not matter if he received his commission in cash or by check. (Id.).

Several days after meeting with Byrne, Melamed testified he submitted a $3.5 million offer from an individual named Steve Shokouhi to Byrne via email and telephone (Id. at 38). Byrne rejected Shokouhi's offer as too low and indicated that the price need to be closer to $3.7 or $3.8 million. (Id.). Melamed submitted an offer on behalf of Ostad for $3.5 million with a shorter closing time than Shokouhi's, and told Byrne that he wanted 4% as commission, which offer Byrne rejected as too low, and indicated that the closing date was not very important. (Id. at 40-41). When Melamed called Byrne to talk about Ostad's offer and about the commission, Byrne indicated that a deal could happen if Melamed obtained an offer of $3.7 or $3.8 million but even with those numbers he would not pay 4% commission. At that point Melamed testified he believed that the issue of commission was still open to negotiation. (Id. at 49).

After Byrne rejected Ostad's $3.5 million offer, and sometime after April 20, Melamed sent an email to Ostad indicating that Byrne was sitting firm on $3.7 or 3.8 million and that the offer should be raised to $3.7 or 3.8 million to make a deal possible (Id. at 62-63). Ostad did not respond to these emails, and did not tell Melamed whether he was willing or unwilling to increase his offer to $3.7 or $3.8 million (Id. at 69-70). Melamed testified that Byrne then became "reluctant" to

communicate with Melamed and did not return his emails and phone calls. (Id.). Moreover, Melamed said he submitted an additional offer on behalf of an individual named Michael Cohen, which was made at a time when, unknown to Melamed, the Property was already in contract (Id. at 39).

Melamed testified he never met with D. Byrne and that while his main contact was Byrne, he spoke twice to D Byrne who was "reluctant" to talk to him (Id. at 87-89). According to Melamed, his first phone conversation with D Byrne took place sometime in April 2012, and during that conversation, she told Melamed that $3.5 million was too low and then she hung up (Id. at 88-89).

On the matter of his commission, Melamed sent an email to Byrne, dated April 19, 2012, which email, reads in relevant part: "MB Property's commission is 3 percent on the proposed purchase price. Please Advise" (Id. at 96). Melamed acknowledged that there is no email from Byrne which accepts or rejects the 3 percent commission (Id. at 97). According to Melamed, while Byrne initially wanted $4 million for the Property and agreed to pay a 4 percent commission to Melamed, he later told Melamed "g[et] him 3 1/2 million, everything is up for negotiation, so I threw out the 3 percent to him." (Id. at 97). Melamed testified that there is no written agreement between him and Church or with either of the Byrnes (Id. at 102-103). Melamed did prepare a Letter of Intent for Ostad, which is essentially a written memorandum of Ostad's offer for this property (Id. at 109). Although Melamed sent the document in an electronic form to Ostad in an email dated April 25, 2012, he did not send it to Byrnes, who told him not to send it since the offer was too low (Id. at 109-111).

Melamed also submits an affidavit in support of the motion, containing the following statements. Melamed asserts he had an implied agreement with Church that it would pay MB a

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reasonable real estate commission if he was the procuring cause of the sale of the Property. He further states that on April 17, 2012, he sent Ostad the set-up for the Property, including the projected net operating income and the rent roll; that on April 19, 2012, he sent Ostad a list of violations for the Property; on April 20, 2012 he showed the Property to Ostad and notified Ostad that Church was staying firm on the $3.7 to $3.8 million. On April 25, 2012, Ostad, through MB, made a $3.5 million offer with a 7-day closing period and, on that day, Ostad contacted him and inquired as to the response to the offer. Melamed informed him that he expected an answer on April 27 or April 30; and that on April 30, he notified Ostad that Church was at $3.7 million. Attached to Melamed's affidavit are emails and attachments showing the communications between Melamed and Ostad, and Melamed and the Byrnes. Melamed states that "[a]s of April 30, 2012, Church and Ostad were only $200,000 apart [and that] Church...as Seller, and Ostad, as Buyer, were on the verge of agreeing to all material terms of the transaction. Yet, Ostad, suddenly and without explanation, ceased communicating with me. He refused to return my telephone calls" (Melamed Aff., ¶ 12). Melamed states that a few days later, he discovered that Ostad, using the brokerage firm Hakimian Properties, made a $3.6 million offer which eventually led to Church accepting an offer to purchase the Property for $3.65 million.

On the other hand, at his deposition, Byrne testified to the following conversations and sequence of events. On April 17, 2012, he asked D Byrne to send to Melamed an income statement for the year 2011 for the Property, showing the rents and expenses. (Byrne Dep. at 6-7). Later that day he met with Melamed at the Property, and then met to talk at a local restaurant, where Melamed indicated there were buyers who would be interested in the Property. Melamed did not specifically mention that one of the potential buyers was a doctor in Queens (referring to Ostad) (Id. at 7-9).

Byrne further testified that in addition to showing the Property to Melamed on April 17, he showed it to various other brokers during that week, including Hal Fuchs (of Hakimian Properties), and sent the brokers the same information he sent to Melamed (Id. at 11-12).

Byrne also testified he rejected the offers submitted through Melamed as they were too low (Id. at 18). He did not recall Melamed informing him that Melamed had a Letter of Intent from a buyer, nor did he recall Melamed mentioning any names to him, including Ostad's or Shokouhi's. (Id. at 19). Moreover, Byrne did not remember having any discussions with Melamed regarding a commission (Id.). However, he testified that Melamed gave him an Exclusive Listing Agreement, which he passed on to D Byrnes but, at the time of his deposition, the document was not in his possession (Id. at 21). He also remembered having a conversation with Melamed on or about April 30, where he indicated an interest in accepting an offer if it reached $3.7 million. (Id. at 24).

As to a commission, Byrne testified that the first conversation he had about this issue was with Hal Fuchs and Hakimian on May 4, 2012, when they reached an agreement on a $75,000 commission (Id. at 22-23). Byrnes first met Hakimian and Ostrow on the date the Contract was signed (Id. at 23-26). At the time of that meeting, he believed that Ostrow was the purchaser, and the first time he had heard of the name Edward Ostad was when D Byrnes told him that Church was being sued by HJO Holdings and Ostad (Id. at 27-28). After that action was brought, he discovered that Ostad was the purchaser, and Ostrow was Ostad's sister-in-law (Id. at 29). He did not recall having any conversations with anyone regarding MB as being a broker in the sale of the Property, and he also does not recall any attendee at the May 17, 2012 contract signing mentioning MB (Id. at 30-31).

According to Byrne, HJO's offer was submitted to him via Fuchs, and that in telephone

negotiations from late April until May 3 or 4, Fuchs negotiated the price down to $3.65 million by pointing out the shortcomings of the Property (Id. at 33-34). Byrnes testified that Fuchs submitted one offer from one buyer, and that Fuchs never mentioned who that buyer was (Id). As previously stated, while Byrne learned that Ostad was buying the Property when he heard about the lawsuit, he first met Ostad at the September closing (Id. at 38, 41). As to his communications with Melamed, Byrne testified that he met with Melamed in person only once, which was on April 17, and since he does not use email, all his subsequent communications with Melamed were done via telephone (Id. at 40-41).

At her deposition, D Byrne testified that she is the owner of Church and that Byrne is neither a shareholder nor part of Church (D Byrne Dep. at 6-7). She knew Melamed only as an agent, had never met him in person, but knew that Byrne met with Melamed on her behalf at the Property on April 17, 2012 (Id. at 7-8). She testified that while there were several brokers, including Melamed and Hal Fuchs, who inspected the Property, the Property was not listed with any of those brokers, nor did any broker have an exclusive listing (Id. at 9-10). D Byrne further testified that she never met Hal Fuchs in person, only communicated with him via email, and that she never met Ivan Hakimian in person, nor had she ever communicated with him (Id. at 12-13). The first time she heard the name Edward Ostad was in June 2012, in connection with the lawsuit brought by his company regarding the sale (Id. at 13), and met him the first time on the day of the closing of the sale of the Property in September 2012. Moreover, she testified that she did not speak to Ostad during, or at any time prior to the meeting (Id. at 15).

D Byrne accepted only one of the written offers sent via email to purchase the Property (Id. at 22). While she received several emails from Melamed that contained two offers, she received the

emails after a conversation with Melamed during which she told him that she had already accepted an offer (Id. at 24). One of Melamed's emails contained the document labeled "Brokerage Commission," which provided that "the seller will pay the commission to MB brokers," meaning that if she had accepted the offer submitted through Melamed or MB, she would have paid a commission (Id. at 29). She testified that as per her usual practice, any broker could bring her an offer, and if she liked the offer and accepted it, she would pay commission to the one who brought her the offer (Id.). Her target price for the Property was $4 million, and, for that price, she would have been willing to pay the commission in the numerical amount between $75,000 to $100,000 rather than a percentage ( Id. at 30). She signed a contact with the broker (i.e. Hakimian) when she accepted the offer to buy the Property (Id. at 40).

Ostad, at his deposition, testified that his first conversation with Melamed regarding the Property took place sometime in April 2012, and, at that time, Ostad was not entirely clear whether Melamed fully represented the seller for the proposed sale of the Property (Ostad Dep. at 13). According to Ostad, in April 2012, Melamed provided to Ostad his own analysis and underwriting concerning the Property and also his valuation of the Property, and then Ostad valuated the Property with the data provided by Melamed and made an offer (Id.). Ostad testified that he met with Melamed in person only once and inspected the Property with him, but cannot remember exactly what Melamed looked like (Id. at 14). Ostad testified that after touring the Property with Melamed, he made an offer to purchase the Property based on the data – also called "setups" – provided by Melamed. (Id. at 15).

According to Ostad, he switched brokers for the Property from MB to Ivan Hakimian of Hakimian Properties, at the May 1, 2012 contract signing for a property located at 407 Amsterdam

Avenue, New York, NY, ("the Amsterdam Avenue Premises"), which he was purchasing, through his company Shogoja Holdings, LLC (Id. at 33-35). Ostad testified that he worked with Hakimian on numerous deals and had a long standing relationship with him (Id. at 32-33). According to Ostad, with respect to the Property, Hakimian told him it "was for sale and proceeded to show me what he thought it was worth and what his underwriting and his value for the property was...[a]nd why he thought it was based on his expert opinion about the market" (Id. at 35). He also testified that Hakimian showed him that "[Melamed's] underwriting and his opinion and valuation was the market analysis by Mr. Melamed was not accurate and was flawed" (Id. at 39).

At his deposition, Ivan Hakimian testified that while he previously pitched deals to Ostad, prior to the sale of the Property, the only deal he did with Ostad was for Amsterdam Avenue Premises (Hakimian Dep at 10-12). He did not recall bringing his set ups for the Property to the contract signing for the Amsterdam Avenue Premises, but remembered telling Ostad about the Property (Id. at 13).

The Church defendants move for summary judgment dismissing the claims against them for breach of contract, tortious interference with contract and unjust enrichment, arguing that the undisputed evidence establishes, as a matter of law, that MB was not the procuring cause of the sale. Specifically, they argue that the record establishes that under the terms of any oral agreement that MB had with Church, (1) Byrne agreed to pay the commission (of 4%) only if MB obtained a sales price of $4,000,000, and that MB never obtained an offer of more than $3.5 million; (2) regardless of whether Melamed mentioned the name Ostad to the Byrnes before the Contract was signed, Hal Fuchs of Hakimian Properties was the only broker to obtain acceptance of an offer in the amount of $3,650,000, and to bring together HJO and Church resulting in a

signed contract. Moreover, the Church defendants argue that even if Melamed had mentioned Ostad to the Church defendants, such introduction is insufficient to give rise to MB's right to a commission.

MB opposes the motion, arguing that the court should search the record and grant summary judgment as to liability in its favor, or, at the very least, find that there are triable issues of fact as whether MB was the procuring cause of the sale of the Property to Ostad. Specifically, MB points to evidence that MB introduced Ostad to the Church defendants; provided Ostad with the necessary information about the Property; negotiated favorable terms for Ostad; and negotiated the price to the point where the parties were only $200,000 apart, i.e. Ostad offering $3.5 million and Church asking for $3.7 million, on what would be a $3.65 million purchase.

Moreover, MB asserts that the record shows that Ostad acted in bad faith when it replaced MB with Hakimian to cut MB out of the deal before the final terms could be negotiated. MB argues that discovery in this action reveals that the $75,000 commission was paid to Hakimian Properties to make up for a commission not paid on the Amsterdam Avenue Premises so that Ostad could make a "no broker" bid on that property. Specifically, MB points out that the Contract of Sale for the Amsterdam Avenue Premises states that there is no broker, even though evidence in the record, shows otherwise. MB also questions the authenticity of a brokerage agreement dated May 1, 2012, between Hakimian and Ostad's company Shogoja Holdings, LLC, which provided for payment of Hakimian of a $75,000 commission in connection with the sale of the Amsterdam Avenue Premises, noting that the agreement does not specify that either seller or buyer are obligated to pay the commission. MB further argues that the Church defendants also acted in bad faith, pointing to provisions in the Contract (which they executed) warranting that

no brokers, other than Hakimian Properties, were involved in the sale, even though MB introduced them to Ostad.

In reply, the Church defendants argue that they are entitled to summary judgment as MB was not the procuring cause of the sale since there is no evidence that it introduced Ostad to them, or presented his offer to them.[1] In addition, they argue that the record demonstrates that the only viable claim is against Ostad for tortious interference with contract, and asserts that there is no evidence that the Church defendants acted in bad faith in connection with the sale, or that they were even aware that Ostad was the purchaser, noting that the Contract was not signed by Ostad on behalf of HJO.

Discussion

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case..." Winegrad v. New York Univ. Med. Center, 64 NY2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986).

"In order for a broker to be entitled to a commission for services rendered, the broker must plead and prove a contract of employment, either express or implied, with the defendant" Joseph P. Day Realty Corp. v. Chera, 308 AD2d 148, 151 (1st Dept 2003)(internal citations

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[1]In response, MB seeks to submit a sur-reply, asserting that this argument was initially raised as a basis for the Church defendants' summary judgment motion in their reply papers, and that, in any event, the argument is contrary to the evidence in the record.

omitted). "'[T]he contract of employment may be established either by proof of an express and original agreement that the services should be rendered, or by facts showing, in the absence of such express agreement, a conscious appropriation of the labors of the broker. Indeed, 'the contract may be established in some cases by the mere acceptance of the labors of a broker." Id, quoting Sibbald v. The Bethlehem Iron Co., 83 NY 378, 380 (1881). In the absence of an exclusive right to sell agreement, to be entitled to a commission, a broker must establish that it was the "procuring cause of the transaction, bringing together the minds of the buyer and seller." Mautner Glick Corp. v. Edward Lee Cave, Inc., 157 AD2d 594, 594 (1st Dept 1990)(internal quotations and citations omitted).

The First Department recently clarified that the "direct and proximate link" standard is used to determine if a broker is a procuring cause of a transaction, writing that:

> A broker does not earn a commission merely by calling the property to the attention of the buyer.... But this does not mean that the broker "must have been the dominant force in the conduct of the ensuing negotiations or in the completion of the sale" Rather, the broker must be the 'procuring cause' of the transaction, meaning that 'there must be a direct and proximate link, as distinguished from one that is indirect and remote,' between the introduction by the broker and the consummation of the transaction.... this standard requires something beyond a broker's mere creation of an "amicable atmosphere" or an "amicable frame of mind" that might have led to the ultimate transaction. At the same time, a broker need not negotiate the transaction's final terms or be present at the closing.

SPRE Realty, Ltd. v. Dienst, 119 AD3d 93, 99 (1st Dept 2014), quoting, Greene v. Hellman, 51 NY2d 197, 206 (1980).

When the broker is responsible for opening negotiations between the parties, but ends the negotiations based on a failure to have the buyer agree to the seller's terms, there is no meeting of the minds, and the seller is not liable to the broker for the commission even if the sale is made to the same prospective buyer. Bob Howard, Inc. v. Baltis, 178 AD2d 740, 741 (3d Dept 1991),

appeal denied, 79 NY2d 757 (1992). On the other hand, even if a broker is unable to show that it is a procuring cause of a sale, it can recover its commission if it can "prove that defendants terminated its activities in bad faith and as a mere device to escape the payment of the commission" SPRE Realty, Ltd. v. Dienst, 119 AD3d at 101 (internal citation and quotation omitted). The issue of whether defendants acted in good faith is best resolved after trial. Id.; see also Howard, Inc. v. Baltis, 178 AD2d at 740; Priestley v. Buildmaster Housing Corp., 28 AD2d 707 (2d Dept 1967).

Here, even assuming *arguendo* that Church defendants have made a prima facie showing of entitlement to summary judgment based on evidence that Church's agreement with MB required that it provide a purchaser willing to pay $4,000,000 for the Property, and that MB did not produce such a purchaser, MB has controverting this showing by providing sufficient proof of an implied agreement to pay MB a commission for its efforts. Joseph P. Day Realty Corp. v. Chera, 308 AD2d at 151. In addition, while the Church defendants point to evidence that the $3,650,000 offer they accepted from Hakimian Properties was greater than any offer submitted by MB, proof that MB introduced Ostad to the Church defendants, through identifying the Property to Ostad and negotiating for his purchase of the Property,[2] provided Ostad with the necessary information about the Property, and negotiated the price to the point where the parties were only $150,000 from the price eventually agreed upon, is sufficient to raise a triable issue of fact as to whether MB was the procuring cause of the transaction. See generally, SPRE Realty,

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[2]In the context of real estate brokerage commissions, introducing a perspective purchaser to the seller is construed broadly to include bringing the property to the attention of the purchaser. See generally, SPRE Realty, Ltd. v. Dienst, 119 AD3d at 99

Ltd. v. Dienst, 119 AD3d at 99 ("a broker need not negotiate the transaction's final terms or be present at the closing").

Moreover, even if it were found that there was no meeting of the minds between Ostad and the Church defendants based on the $150,000 price differential between MB's offer on behalf of Ostad, and the accepted offer made on Ostad's behalf by Hakamian, the record raises factual questions as to defendants' bad faith based on proof that the Church defendants rejected Ostad's $3.5 million offer and countered with a price of $3.7 million on April 30, 2012 and, less then a week later, accepted an offer of $3.65 million made on Ostad's behalf by Hakimian,[3] and entered into an agreement to pay Hakimian a commission. Evidence of bad faith may also be inferred from evidence that after Melamed told Ostad that he needed to raise his offer to at least $3.7 million, Ostad did not return any of Melamed's calls or emails, and that Byrnes also stopped returning his phone calls and emails. In addition, evidence suggesting that Ostad decided to replace MB with Hakimian in order to avoid paying Hakimian a commission in connection with the Amsterdam Avenue Premises raises issues of fact as to bad faith. Under these circumstances, the Church defendants are not entitled to summary judgment dismissing the breach of contract claim against Church. Similarly, as issues of fact exist, MB's request that the court search the record and find it entitled to summary judgment as to liability is also denied.

The court, however, reaches a different conclusion with respect to the claims for unjust enrichment and tortious interference with the contract, both of which are asserted only against the

[3]Although Church defendants point to evidence that they did not know that the offer was made on behalf of Ostad, or that the actual purchaser was Ostad since his sister-in-law signed the Contract, this evidence is insufficient to resolve all factual questions in their favor as to their alleged bad faith.

Byrnes individually. With respect to the unjust enrichment claim, "[u]njust enrichment is a quasi-contract theory of recovery, and is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned. The plaintiff must show that the other party was enriched, at plaintiff's expense, and that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered." Georgia Malone & Co., Inc. v Ralph Reider, 86 AD3d 406, 408 (1st Dept 2011)(internal citations omitted). Here, there is no evidence that the Byrnes were unjustly enriched as a result of MB's loss of the commission, particularly as Church paid a commission to another broker. Accordingly, the unjust enrichment claim must be dismissed as against the Byrnes.

With respect to the claim for tortious interference with contract against Byrne and D Byrne, to succeed on such a claim "the plaintiff must show the existence of its valid contract with a third party, defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach, and damages." White Plains Coat & Apron Co., Inc. v. Cintas Corp, 8 NY3d 422, 426 (2007). Here, MB alleges the Byrnes interfered with the agreement between Church and MB. Agents who are alleged have induced their principal to breach a contract, cannot be found liable for tortious interference with contract unless they "do[ ] not act in good faith and commit[] independent torts or predatory acts directed at another for personal pecuniary gain." Schmidt & Schmidt, Inc. v. Town of Charlton, 68 AD3d 1314, 1316 (3d Dept 2009)(internal citations and quotations omitted). Similarly, officers and directors of corporations cannot be held liable for tortious interference with contract, unless they commit independent tortious acts. Joan Hansen & Co. v. Everlast World's Boxing Headquarters Corp., 296 AD2d 103, 109 (1st Dept

2002).[4] Here, as there is no evidence that the Byrnes committed independent torts or other wrongful acts for their own pecuniary gain, the tortious interference claim asserted against them must be dismissed.

Conclusion

In view of the above, it is

ORDERED that the Church defendants' motion is granted only to the extent of dismissing the causes of action against defendants Deborah Byrnes and Kevin Byrne for unjust enrichment and tortious interference with contract, and is otherwise denied; and it is further

ORDERED that the parties shall proceed forthwith to mediation.

DATED: January /, 2016

HON. JOAN A. MADDEN
J.S.C.

[4]Since only "a stranger to an.. [a]greement" can be held liable for tortious interference with such agreement, it has been held that agents and/or officers or principals of a contracting party cannot be held liable for tortious interference with such agreement. See Kassover v. Prism Ventures Partners, LLC, 53 AD3d 444, 449 (1st Dept 2008); see also, Angelino v. Michael Freedus, DDS, P.C., 69 AD3d 1203, 1204-1205 (3d Dept 2010)(principal of defendant that entered into lease agreement was not a third party unrelated to the contract and could not be held liable for tortious interference with the lease agreement).