Kassin Sabbagh Realty LLC v Beekman Tower Assoc. LLC
2016 NY Slip Op 32371(U)
November 29, 2016
Supreme Court, New York County
Docket Number: 653828/2015
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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KASSIN SABBAGH REALTY LLC,

Plaintiff,

-against-

BEEKMAN TOWER ASSOCIATES LLC and
DAVID LICHTENSTEIN,

Defendants.

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DECISION AND ORDER

Index No. 653828/2015
Mot. Seq. 002

HON. ANIL C. SINGH:

Defendant Beekman Tower Associates LLC (the "purchaser") and co-defendant David Lichtenstein ("Lichtenstein") move to dismiss plaintiff Kassin Sabbagh Realty LLC's (the "broker") amended complaint pursuant to CPLR 3211(a)(1) and (7). Plaintiff opposes the motion.

In December 2014, Beekman Residential Suites LLC (the "seller") contracted to sell a property known as the Beekman Tower to 3 Mitchell Place Loft LLC (the "defaulted third party") for $137,500,000. See Beekman Residential Suites LLC v. 3 Mitchell Place Loft LLC, Index No. 651042/2015. Compl. ¶ 2. Closing was scheduled for February 6, 2015, but was extended to March 24, 2015, at the defaulted third party's request. The defaulted third party was absent at closing and did not pay the additional $7,000,000 payment as required by the contract for an extension of the closing date. Id. ¶¶ 2, 3. Consequently, on March

31, 2015, the seller commenced a declaratory judgment action against the defaulted third party, alleging that the defaulted third party had breached the contract of sale resulting in termination of the contract and entitling the seller to retain the $8,000,000 deposit.

While that suit was pending, the plaintiff facilitated negotiations for the defendant to purchase the Beekman Tower from the seller for $127,000,000. See Ex. K ¶ 2. On April 22, 2015, the broker and the defendant entered into a commission agreement whereby the broker would be paid a 0.5% commission on the purchase price in the amount of $635,000. See Klein Ex. A. See also Klein Ex. K ¶ 2. The commission agreement provides in part as follows: "Other than the commission set forth herein, broker shall not be entitled to any other fee, payment or compensation in connection with the project. The commission shall be due and payable upon final closing of title. In the event the contract is terminated, or the matter does not close for any other reason, no commission shall be due to broker." See Klein Ex. A ¶ A.

The following day, on April 23, 2015, the defendant and the seller entered into a sale contract (See Klein Ex. C to the Affirmation of Solomon Klein.) The closing was scheduled for June 8, 2015. The seller was required to provide the

property in "good and marketable title ... subject only to the Permitted Exceptions."[1] (§ 7(A)(2)).

The contract barred the seller from selling the property or settling the pending litigation with the defaulted third party.[2] (§ 8(A)(10)).

Defendant had the right to terminate the contract for unpermitted exceptions defined as "defects, objections or exceptions in the title to the property which are not Permitted Exceptions and to which purchaser objects" (Section 7(B)(2), (B)(3)).

In the event an Unpermitted Exception was filed as a result of the pending litigation, the defendant was permitted to cancel the contract (Section 11(D)). The seller **may** extend closing either by thirty days to eliminate encumbrances or forty-five days to eliminate Unpermitted Exceptions with regards to the pending litigation. Id. (emphasis added). If the seller defaults, the purchaser gets Purchaser's Damages. Id. at § 11(B).

On May 7, 2015, while the seller and the defendant were still negotiating, the defaulted third party filed a notice of pendency and counterclaimed for specific performance or, in the alternative, a refund of the $8,000,000 deposit made to the

[1] Permitted Exceptions are listed in the Contract of Sale, Klein Ex. C § 7(A)(1) at 32 pursuant to Schedule 10.

[2] An Unpermitted Exception is defined as "not Permitted Exceptions and to which the Purchaser objects." See Contract of Sale, Ex. C § 7(B)(2) at 32.

seller in 2015 in the pending litigation. See Klein Ex. G. The notice of pendency was an unpermitted exception to good and marketable title. Id. at Section 7(A).

On May 18, 2015, the seller moved by order to show cause for summary judgment in the pending litigation, seeking a declaration that the seller properly terminated its contract with the defaulted third party and that the seller should be allowed to keep the deposit. See Klein Ex. H. The seller sought expedited relief and moved to dismiss the counterclaims and the notice of pendency. See Klein Ex. I. The Court set the return date on the order to show cause for July 14, 2015, which was after the expected closing date between the seller and the defendant. See Klein Ex. J.

Meanwhile, on May 20, 2015, the seller and defaulted third party reached an agreement. See Ross Ex. H. The parties entered into a proposed stipulation, which stayed the action. See Ross Ex. I. See also Klein Ex. K ¶¶ 10, 48. Subsequently, the pending litigation was discontinued on July 8, 2015. See Beekman Residential Suites LLC v. 3 Mitchell Place Loft LLC, Index No. 651042/2015.

The defaulted third party paid the defendant the sum of $3,000,000 as a breakup fee and paid the seller's asking price of $138,850,000. See Ex. K ¶¶ 3, 5. Accordingly, the defendant received $3,000,000 for terminating the contract, and the seller realized $11,850,000 more than what was contracted for between the

seller and the defendant. See Ex. K ¶ 5. Plaintiff did not receive a commission as the defendant did not close on the contract to purchase Beekman Tower.

Plaintiff commenced this action by filing a summons and verified complaint on November 19, 2015. The amended complaint asserts four causes of action. The first cause of action alleges breach of contract and the implied covenant of good faith and fair dealing. The second cause of action alleges breach of contract based on an alleged amended agreement. The third cause of action alleges quantum meruit. The fourth cause of action alleges unjust enrichment.

Plaintiff seeks to recover a broker's commission pursuant to the commission agreement due on a $127,000,000 real estate transaction in the sum of $635,000. Alternatively, plaintiff seeks damages sounding in quasi-contract arising from a $3,000,000 breakup fee the defendant received after the deal between the defendant and the seller did not close.

Discussion

On a motion to dismiss pursuant to CPLR 3211(a)(7), a court accepts as true the facts as alleged in the complaint and affidavits opposing the motion, accords the plaintiff the benefit of every possible favorable inference, and determines only whether the facts alleged manifest any cognizable legal theory. Elmaliach v. Bank of China Ltd., 110 A.D.3d 192, 199 (1st Dept 2013) (citing Sokoloff v. Harriman

Est. Dev. Corp., 96 N.Y.2d 409, 414 (2001)). See also Allianz Underwriters Ins. Co. v. Landmark Ins. Co., 13 A.D.3d 172 15 (1st Dept 2004). If factual allegations are discerned from the pleading's four corners which, taken together, state a valid cause of action, the motion to dismiss must be denied. 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 152 (2002)).

Dismissal under CPLR 3211(a)(1) is warranted only if the documentary evidence submitted conclusively establishes a defense as a matter of law. Leon v. Martinez, 84 N.Y.2d 83, 88 (1994)). Further, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or contradicted by documentary evidence, are not entitled to such consideration. Quatrochi v. Citibank, N.A., 210 A.D.2d 53 (1st Dept 1994)).

Breach of contract

The common law rule in New York is that a real estate broker earns a commission if he or she "produces a person ready and willing to enter into a contract upon the seller's terms." Mizrahi v. Hovas, 139 A.D.3d 624 (1st Dept 2016). However, parties to a brokerage agreement are free to add whatever conditions they may wish to their agreement. Feinberg Bros. Agency v. Berted Realty Co., 70 N.Y.2d 828, 830 (1987).

New York courts have refused to allow a broker to collect a commission where the closing failed and the commission agreement specified that a

commission is due at closing. In Mizrahi, supra, the court held that since no closing took place, plaintiff did not earn his commission. The sale was never consummated, and the brokerage agreement clearly stated that the commission was conditioned on the sale of the property. Additionally, there was no evidentiary support for plaintiff's allegation that the defendant had frustrated the transaction. Accordingly, the complaint was dismissed.

Likewise, in Liggett Realtors, Inc. v. Gresham, 38 A.D.3d 214 (1st Dept 2007), the court reasoned that the broker was not entitled to a commission as the contract specifically stated that no commission will be paid unless there was a closing on the sale of an apartment.

In Donald Yoo Corp. v. Laszlo Tauber & Associates, 281 A.D.2d 171 (1st Dept 2001), a broker sued for a commission on a real estate transaction that failed. The broker was the "procuring cause." There was no formal brokerage agreement, but there was a promise to pay a commission when "certain pre-contract events" pertaining to the sale occurred. Id. at 172. As a condition precedent, defendant was to remove the property from an existing real estate investment trust portfolio, which he failed to do despite his efforts. After extensive delays, the defendant sold the property to someone else through another broker. The court reasoned that the "obligation to pay a broker's commission upon consummation of a sale requires a formal act of closing." Id. (citing Corcoran Group v. Morris, 107 A.D.2d 622 (1st

Dept 1985)). Only the "willful default" by the seller prevents the broker from receiving a commission. Id. As there was no formal commission agreement and no closing, the plaintiff failed to earn his commission.

In Graff v. Billet, 101 A.D.2d 355 (2d Dept 1984), aff'd, 64 N.Y.2d 899 (1985), plaintiff entered into a contract with a prospective purchaser that a commission would be earned once title passes, except for willful default by the seller. The seller sold the property to a third party, however, before the seller and the prospective purchaser signed a contract. The broker sued for a commission. The trial court found for the seller. The Second Department reversed, reasoning that where a seller and prospective buyer have entered into a sales contract and the brokerage agreement specifically provides for a commission to be paid in the event of closing only, the broker gets no commission if no closing occurs, unless the failure is a result of some action or default by the seller. Further, since "there was no executed sales contract to be breached," there was no "fault" or "default" by the seller. Id. at 356-57.

Here, the commission agreement states unambiguously that "[a]t closing, broker shall be paid a commission equal to one-half percent (0.5%) of the purchase price." See Klein Ex. A, ¶ A. Similar to Mizrahi, a condition precedent for the payment of the commission was the closing. A closing occurs where a seller transfers title to a buyer, and the buyer transfers consideration to the seller. See

Black's Law Dictionary Online 2d Ed. Here, no deal was consummated as the documentary evidence established irrefutably that a condition precedent to plaintiff earning the commission that a closing take place, did not occur. Therefore, plaintiff is not entitled to the brokerage commission. See Liggett Realtors, 38 A.D.3d at 214 (broker did not receive a brokerage commission when the condition of the sale was not met).

Breach of the implied covenant of good faith and fair dealing

Nor does the implied covenant of good faith and fair dealing prevent defendant from terminating the contract of sale. The doctrine is rooted in the promise that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." Moran v. Erk, 11 N.Y.3d 452, 456 (2008) (internal citations omitted). Further, an implied covenant "encompasses promises which a reasonable person in the position of the promisee would be justified in understanding were included." Id. In Moran, the condition precedent unambiguously stated that the attorney must agree to the contract for it to become valid. Here, the commission was conditioned on the closing of title.

Grounded in the implied covenant of good faith and fair dealing is the doctrine that "a party to a contract cannot rely on the failure of another to perform

a condition precedent where he has frustrated or prevented the occurrence of the condition." Thor Props., LLC v. Chetrit Group LLC, 2010 N.Y. Misc. LEXIS 926 at *15 (Sup. Ct. N.Y. Cnty. 2010) (citing Kooleraire Serv. & Installation Corp. v. Board of Ed. of City of New York, 28 N.Y.2d 101, 106 (1971)). Further, "[w]here a promisor himself is the cause of the failure of performance of a condition upon which his own liability depends, he cannot take advantage of the failure." Id. at *15-16 (citing Amies v. Wesnofske, 255 N.Y. 156, 162 (1931)). "At bottom, the application of this [prevention] doctrine rests on an implied obligation under the contract not to frustrate or prevent the performance of the condition precedent." Id. (citing HGCD, 37 A.D.3d at 53). The seller is held liable if he refuses "to remove curable defects or clouds on his title." Levy v. Lacey, 22 N.Y.2d 271, 276 (1968). But "[a] mutual cancellation of an agreement, neither party being in default, is not a default by either." Warnecke v. Countrywide Realty, Inc., 29 A.D.2d 54, 60-61 (1st Dept 1967). Further, "it is well settled that a broker is not entitled to recover commissions merely because his principal has secured a benefit equivalent to what he would have received had the contract been performed." Tankers Int'l Nav. Corp. v. Nat'l Shipping & Trading Corp., 1987 AMC 478, 483 (1986) (citing Caldwell Co. Inc. v. Connecticut Mills Co., 225 A.D. 270 (1st Dept 1929).

Here, the filing of the notice of pendency by the defaulted third party clouded the title, permitting the defendant to exercise his rights under the

Unpermitted Title Exceptions provision of the contract. The title was no longer "good and marketable." Since contracting parties are free to set their terms, there is nothing that legally bars defendant from accepting different than what was provided for in the contract.

Although the seller could have extended the closing date until the matter in the pending litigation was resolved, he was not obligated to do so. "Waiver of the condition upon which the payment of commissions depends, occurs only where defendant's conduct actually hinders or interferes with its performance and not where he merely is passive." Rosenberg v. Refco Facilities Corp., 59 Misc.2d 25, 26 (Civ. Ct. 1969) (citing Grad v. Roberts, 14 N.Y.2d 70 (1964)).

Here, the defendant had the right to terminate the contract once the notice of pendency was placed on the property, for the title is no longer "good and marketable" and the notice of pendency is not one of the Permitted Exceptions listed in Schedule 10 of the contract. Furthermore, "[t]he prospective seller will be held to have waived the condition that title actually close where closing of title was prevented solely by his refusal to remove curable defects or clouds on his title." Lacey, 22 N.Y.2d at 276. "The failure to actively engage in suit in order to remedy obstacles to performance, even where the outcome of litigation seems favorable, is not a manner contemplated to cure defects." Rosenberg, 59 Misc.2d at 26. But the seller is responsible for curing the title, not the defendant. By contrast to

Rosenberg, the seller was not passive. He tried to remove the notice of pendency before the anticipated closing date of June 8, 2015, by requesting an expedited relief. Since the seller is to remove the notice of pendency and not the defendant, the defendant could not have prevented the closing. The defendant did not frustrate the closing by not going through with the deal and by accepting compensation.

Therefore, defendants' motion to dismiss plaintiff's first cause of action for breach of contract and implied covenant based on written contract is granted.

Whether the contract was terminated pursuant to its terms

For clearly written contracts, courts look at the plain meaning of the words of the contract only. Accordingly, "[w]hen parties set down their agreement in a clear, complete document, their writing should … be enforced according to its terms." HGCD Retail Servs., LLC v. 44-45 Broadway Realty Co., 37 A.D.3d 43, 49 (1st Dept., 2006) (citing Vermont Teddy Bear Co. v. 538 Madison Realty Co., 1 N.Y.3d 470, 475 (2004) (internal quotation marks and citations omitted)).

Plaintiff contends that "documents executed at about the same time and covering the same subject matter are to be interpreted together … as long as they are substantially contemporaneous," Brax Capital Group LLC v. WinWin Gaming Inc., 83 A.D.3d 591, 592 (1st Dept 2011) (citing Nau v Vulcan Rail & Constr. Co., 286 N.Y. 188, 197 (1941), so both the contract of sale and the commission agreement should be read as one document. Thus, the plaintiff wants the

commission agreement to read: "In the event the [defendant's] contract is terminated **per its terms**, or the matter does not close for any other reason, no commission shall be due to Broker" (emphasis added). See Plaintiff's Memorandum of Law in Opposition of Motion to Dismiss at 20. Further, the referenced termination in the contract refers to termination by judicial compulsion. Plaintiff argues that since the contract was not terminated by judicial compulsion, the breakup fee was not an excused condition of contract termination. Therefore, the plaintiff argues that termination was a breach.

Plaintiff's construction alters the terms of the commission agreement. Here, the commission agreement unambiguously provides that if "the contract is terminated ... no commission shall be due." Klein Ex. A, docket # 38. "[C]ourts 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." Reiss v. Fin. Performance Co., 97 N.Y.2d 195, 199 (2001) (internal citations omitted). Had the parties intended to limit termination to "forced judicial termination," the commission agreement would have specifically included that condition (see Vermont Teddy Bear Co. v. 538 Madison Realty Co., 1 N.Y.3d 470, 475 (2004) ("courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include") (quoting Rowe v. Great Atl. & Pac. Tea Co., 46 N.Y.2d 62, 72 (1978).

Breach of the amended commission agreement

Next, plaintiff argues that the parties entered into an amended commission agreement. Plaintiff alleges in paragraph 56 of its amended complaint that upon discovering defendant's receipt of a $3,000,000 breakup fee, plaintiff e-mailed defendant David Lichtenstein to receive his commission on the breakup fee. However, plaintiff e-mailed Sanford Blumenthal, not Lichtenstein, who was included in the e-mail chain. Lichtenstein replied, "Please take me off this e-mail chain."

In an e-mail addressed to Sanford Blumenthal, plaintiff states that either the defaulted third party defaults on closing, which gives the defendant five days to close, or the defaulted third party closes and the defendant receives a breakup fee. Plaintiff states further, "We delivered this deal to you and we realize that given the circumstance the 2 options above seem very reasonable. We also expect to be compensated if there is a breakup fee." Klein Ex. B.

Clearly, plaintiff was aware of -- and agreed with -- the possibility that the defendant might not close. Plaintiff's concern was that he received a commission either on the sale between seller and defendant, or on the breakup fee received by defendant. The e-mail chain does not show that the defendant, Lichtenstein, agreed to modify the commission agreement.

In Parker Realty Group Inc. v. Petigny, 68 A.D.3d 571 (1st Dept 2009), aff'd, 14 N.Y.3d 864 (2010), plaintiff produced an e-mail correspondence where plaintiff expressed an expectation to be compensated when the sale closed. Plaintiff was not to receive a commission if the seller defaulted. However, the seller did not default; the buyer did. There was no provision in the contract for the broker to receive a commission if the buyer defaulted. The court held that the plaintiff failed to prove the written broker's agreement was orally modified for the plaintiff to receive a broker's commission if the buyer defaulted.

"[A]n oral modification of a written agreement requires plaintiff to show all the elements of contract formation, including mutual assent." Naccarato v. Commercial Capital Corp., 19 Misc.3d 1109(A) (Sup. Ct. N.Y. Cnty. 2008) (citing Beacon Terminal Corp. v. Chemprene Inc., 75 A.D.2d 350, 354 (2d Dept 1980)). Although a "modification may be proved circumstantially by the conduct of the parties," Beacon, 75 A.D.2d at 354, there was no evidence of such conduct by the defendant. Further, "mere silence, when not misleading, cannot be construed as acceptance." Karpen v. Ali, 46 Misc.3d 1228(A) (Sup. Ct. Kings Cnty. 2015).

Lichtenstein's refusal to comment of the commission on the breakup fee is not assent to a modification. The plaintiff has failed to allege Lichtenstein's assent either by conduct or by writing. Similar to Petigny, the plaintiff has failed to show an oral modification of the written contract.

Accordingly, defendants' motion to dismiss plaintiff's second cause of action for breach of amended commission agreement is granted.

Quantum meruit and unjust enrichment

Where the parties do not have a valid, enforceable contract, the plaintiff may recover on a quantum meruit claim (Clark-Fitzpatrick, Inc. v. Long Island Rail Road Co., 70 NY2d 382 [1987]). An action for unjust enrichment is predicated on an obligation the law creates in the absence of an actual agreement (Pappas v. Tzolis, 20 NY3d 228 [2012]). Under New York law, "a valid and enforceable written agreement governing the parties dispute precludes recovery in quasi contract for events arising out of the same subject matter." MG W. 100 LLC v. St. Michael's Prot. Episcopal Church, 127 A.D.3d 624, 626 (1st Dept 2015). See also EBC I Inc. v. Goldman Sachs & Co., 5 N.Y.3d 11, 23 (2005). "However, a party is not precluded from proceeding on both breach of contract and quasi-contract theories where there is a bona fide dispute as to the existence of a contract or where the contract does not cover the dispute in issue." Curtis Props. v. Greif Cos., 236 A.D.2d 237, 239 (1st Dept 1997).

Unjust enrichment is not a catchall cause of action to be used when others fail, and it may not be asserted where it merely duplicates or replaces a conventional contract or tort claim (Corsello v. Verizon New York, Inc., 18 NY3d 777, 790 [2012]). It is available only in unusual situations when, although

defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from defendant to plaintiff (id.).

As we noted above, the commission agreement states in pertinent part as follows:

> Other than the Commission set forth herein, Broker shall not be entitled to any other fee, payment or compensation in connection with the Project. The Commission shall be due and payable upon final closing of title. In the event the contract is terminated, or the matter does not close for any other reason, no Commission shall be due to Broker.

Plaintiff contends that the quasi-contract claims should not be dismissed because the commission agreement does not cover what occurred here – namely, a buyout of defendants' contract.

We disagree. On its face, the contract contains broad, sweeping language explicitly stating that a commission is not due if "the matter does not close for any other reason." Because the agreement clearly contemplates the possibility of unlikely, unexpected or unanticipated events – for example, a buyout – the unjust enrichment claims fail as a matter of law.

The language in the agreement that the broker "shall not be entitled to any other fee, payment or compensation in connection with the project" is also

problematic. If plaintiff were permitted to assert claims sounding in quasi-contract, that phrase would be rendered meaningless.

Plaintiff relies on a single case, Joseph Sternberg, Inc. v. Walber 36th St. Assocs., 187 A.D.2d 225 (1st Dept 1993). There, the plaintiff real estate broker claimed that the defendants had conspired to sell a building for a reduced price in order to deprive plaintiff of his broker's commission. The parties had entered into a contract that provided that plaintiff would earn a commission if he arranged to sell the building for at least $11.5 million. Plaintiff further alleged that he found such a buyer, but that the owner and buyer conspired to deprive plaintiff of his commission by agreeing to a lower price, with a commission being paid to the owner's managing agent and general partner. The defendants argued that "the contract barred recovery of a commission" on plaintiff's quasi-contract claim (id. at 227).

In holding that the trial court erred in dismissing the quasi-contract claim, the Court distinguished Clark-Fitzpatrick, noting that in that case "there was a written contract fully detailing all applicable terms and conditions of the parties" whereas in Sternberg "'the contract ... is silent as to plaintiff's entitlement to a commission in the event a sale of the building occurred for a lesser price'" (id. at 227). The court refused to dismiss the quasi-contract claim, explaining:

> Obviously, if the brokerage agreement at issue had explicitly stated that, in the event the sale did not proceed at the agreed price, plaintiff would not be entitled to any commission, it would be indisputable that nothing short of a sale at that price would entitle plaintiff to a commission. The contract, however, does not so state and is silent as to plaintiff's entitlement to a commission in the event a sale occurred for a lesser price. (id. at 228).

The instant matter is completely distinguishable. The First Department found that the commission agreement in Joseph Sternberg was ambiguous. By contrast, we find that the commission agreement in issue is unambiguous.

Where, as here, a valid and enforceable written agreement covers the dispute in issue – namely, plaintiff's entitlement to payment for services as a broker – a plaintiff cannot recover under the theory of quantum meruit (HGCD Retail Servs., LLC v. 44-45 Broadway Realty Co., 37 AD3d 43, 54 [1st Dept., 2006]; Parker Realty Group, Inc. v. Petigny, 68 AD3d 571, 572 [1st Dept., 2009]).

Plaintiff's cause of action against David Lichtenstein individually as the sole and/or controlling member of Beekman Tower Associates LLC

Although courts have held individuals liable for corporate actions, such individuals must have "complete domination and control [over the corporation to] permit [the] corporate veil to be pierced." Island Seafood Co. v. Golub Corp., 303 A.D.2d 892, 895 (3d Dept 2003) (internal citations omitted). Plaintiff argues that Lichtenstein is the alter ego of Beekman Tower Associates LLC and, as such, "the corporate veil [should] be pierced to achieve equity, even absent fraud." Id. at 893.

An individual is considered to be a corporation's alter ego "'when a corporation has been so dominated by an individual or another corporation and its separate entity so ignored that it primarily transacts the dominator's business instead of its own.'" Id.

Piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) such domination was used to commit a fraud or wrong against the plaintiff, resulting in injury. Morris v. State Dep't of Taxation & Fin., 82 N.Y.2d 135, 143 (1993) (internal citations omitted). See also Island Seafood Co., 303 A.D.2d at 895.

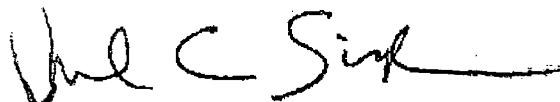
In Fantazia Intl. Corp. v. CPL Furs N.Y. Inc., 67 A.D.3d 511 (1st Dept 2009), the plaintiff alleged that the defendant was the alter ego of another defendant. The court found that sufficient evidence was not presented to show that the dominant corporation exercised complete domination and control over the transaction attacked as it pertained to the subservient corporation. As such, the court did not pierce the corporate veil. Although in Fantazia the matter concerned two corporations, the case is relevant here as the issue is the same – namely, whether one party exercised complete domination and control over the other. Here, there is no evidence that Lichtenstein exercised complete domination and control of the corporation in respect to this transaction.

According to documents exhibited by plaintiff, the first reference to Lichtenstein was in e-mail correspondence sent from the plaintiff to Sanford Blumenthal on which Lichtenstein was added on May 27, 2015. See Klein Ex. B. The commission agreement was between the plaintiff and the defendant. Mr. Joseph Teichman, Executive Vice President of Beekman Tower Associates LLC, signed the contract of sale and the commission agreement. We can conclude then that Lichtenstein was not a party to this transaction.

New York courts have dismissed alter ego claims for liability where the plaintiff failed to substantiate such claims. See Albstein v. Elany Cont. Corp., 30 A.D.3d 210 (1st Dept 2006). Here, the plaintiff has failed to show that Lichtenstein dominated Beekman Tower Associates LLC and has also failed to plead any facts to substantiate such conclusory alter ego claims.

Accordingly, it is

ORDERED that the motion to dismiss the first amended complaint is granted, and the case is dismissed without leave to replead.



Date: November 29, 2016
New York, New York

Anil C. Singh