SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN PART 58
Justice

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DOUGLAS ELLIMAN, LLC,

Plaintiff,

- v -

SAUNDERS VENTURES, INC, DANIEL HEDGES I, LLC, ALAN SCHNURMAN

Defendant.

INDEX NO. 151763/2017

MOTION DATE 6/23/2017

MOTION SEQ. NO. 002

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79

were read on this application to/for Dismiss

Upon the foregoing documents, it is

The motion to dismiss is granted in part and denied in part. The Complaint alleges that Craig Beem, a sales agent working on behalf of plaintiff, entered into an agreement with defendant Alan Schnurman regarding the property located at 23 Hedges Lane, Sagaponack, New York. Defendant Daniel Hedges I LLC was the owner of the property and entered into a listing contract with defendant Saunders Ventures, Inc. Schnurman is a managing member of Daniel Hedges and was working as the listing agent on behalf of Saunders. According the Complaint, on August 13, 2015, Beem telephoned Schnurman with a potential buyer for the property. Beem had seen the property on the Open RealNet Exchange system pursuant to a Universal Co-Brokerage agreement. The Universal Co-Brokerage agreement provides that if a co-broker is the

procuring cause for a sale, the listing broker would split the commission 50% with the co-broker. The Complaint alleges that Beem was concerned about identifying his buyer and wanted to protect his commission; that Schnurman assured Beem that if he just identified the buyer and the buyer came to the property that day, the commission would be protected. According to the Complaint, this agreement meant that plaintiff would earn the commission not for being a procuring cause of the sale, but for the identification of the potential buyer. Beem then sent Schnurman an email with the subject of "Exclusive Buyer" and named Mitch Morgan as the buyer.

Morgan went to view the property and was not interested. Beem alleges to have shown several other properties to Morgan, which did not result in an offer or purchase. After August 13, 2015, the Complaint does not allege that Beem and Morgan discussed the Hedges property again. However, several weeks later, after learning that Morgan had been back to the property and intended to purchase it, Beem emailed Schnurman regarding his "registration" of Morgan and Schnurman's intention with respect to the commission. Schnurman did not respond to any of Beem's emails. On or about November 17, 2015, Morgan purchased the property for $18,000,000 and a commission of $905,000 was paid to Saunders. The Complaint alleges that $724,000 was paid to Schnurman as the exclusive listing agent by Saunders.

The Complaint alleges four causes of action; 1) breach of contract against all defendants pursuant to the agreement between Beem and Schnurman made on August 13, 2015; 2) breach of contract against Saunders for failure to pay a commission pursuant to the Universal Co-Brokerage agreement; 3) quantum meruit against all defendants; and 4) unjust enrichment against all defendants. Defendant moved to dismiss pursuant to CPLR 3211(a)(1) and (7).

When deciding a motion to dismiss pursuant to CPLR §3211, the court should give the pleading a "liberal construction, accept the facts alleged in the complaint to be true and afford the plaintiff the benefit of every possible favorable inference" (*Landon v. Kroll Laboratory Specialists, Inc.*, 22 NY3d 1, 5-6 [2013]; *Faison v. Lewis*, 25 NY3d 220 [2015]). However, if a complaint fails within its four corners to allege the necessary elements of a cause of action, the claim must be dismissed (*Andre Strishak & Associates, P.C. v. Hewlett Packard & Co.*, 300 AD2d 608 [2d Dept 2002]. A motion to dismiss pursuant to CPLR § 3211(a)(1), should not be granted unless the documentary evidence submitted is such that it resolves all factual issues as a matter of law and conclusively disposes of the claims set forth in the pleading (*Art & Fashion Grp. Corp. v Cyclops Prod., Inc.*, 120 A.D.3d 436, 438 [1st Dept 2014]). Under CPLR § 3211(a)(7), the court "accepts as true the facts as alleged in the complaint and affidavits in opposition to the motion, accords the plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged manifest any cognizable legal theory" (*Elmaliach v Bank of China Ltd.*, 110 A.D.3d 192, 199 (1st Dept 2013) (quoting *Sokoloff v Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414 [2001])).

Defendant's motion to dismiss the Complaint as to defendants Daniel Hedges I LLC and Schnurman personally is granted and all causes of action are dismissed against these defendants. Nothing in the Complaint suggests that either of those defendants should be subject to liability in this matter. On August 13, 2015, Beem telephoned Schnurman in his capacity as listing agent on behalf of Saunders. Assuming that Schnurman entered into some sort of agreement with Beem, as this Court must do, said agreement would be for a commission to be split with Saunders, not with him personally (or Hedges). Any subsequent communication was about the listing and the commission that would need to be split with Saunders. In short, any alleged agreement and

breach thereof involves two co-brokers and non-payment of a commission and does not involve any individual person or entity.

Similarly, as to these defendants, the equitable causes of action are dismissed as the commission was paid to Saunders, as were the alleged services performed by Beem in favor of Saunders. The fact that Schnurman may have been compensated by Saunders does not provide Beem with a claim when he has not provided services to Schnurman nor enriched Schnurman.

Plaintiff's first cause of action survives dismissal against defendant Saunders. Saunders argues that the Universal Co-Brokerage agreement requires the co-broker to be a procuring cause and that is not the case here. Saunders further argues that the Universal Co-Brokerage agreement could not be modified by Beem and Schnurman. However, defendant does not support that argument with any documents or case, only a conclusory statement. Further, the Universal Co-Brokerage agreement states that it is subject to the resolutions contained in the Realtor Code of Ethics. Standard of Practice 3-3 of the Realtor Code of Ethics permits the listing broker and cooperating broker to change the terms of compensation. Taking the facts as true and giving plaintiff the benefit of all inferences, plaintiff has properly stated a cause of action for breach of contract relating to the August 13, 2015 alleged agreement between Beem and Schnurman acting on behalf of Saunders.

However, the second cause of action against Saunders is dismissed. Plaintiff alleges that either it was the procuring cause of the sale or that defendant frustrated plaintiff's ability to procure the sale vitiating the procurement requirement. The Complaint alleges that plaintiff made an introduction and then found out that Morgan was not interested. The Complaint does not allege that following Morgan's initial disinterest, plaintiff did any more work in furtherance of the sale. Thus, at most, plaintiff merely made an introduction which is not enough to be the

procuring cause of the sale insufficient to establish his entitlement to commissions resulting from the sale (*Jagarnauth v Massey Knakal Realty Services, Inc.*, 104 AD3d 564 [1st Dept 2013]; *Good Life Realty, Inc. v Massey Knakal Realty of Manhattan, LLC*, 93 AD3d 490 [1st Dept 2012]). Although the Complaint also alleges that Beem showed other properties to Morgan. The Complaint does not allege that the Hedges property was discussed. In fact, the Complaint does not state that Beem and Morgan ever discussed the Hedges property following August 13, 2015. Hence, Beem was not the procuring cause of the sale.

Plaintiff second cause of action also states that because defendant frustrated plaintiff's ability to procure the sale said actions vitiated the procurement requirement. However, the Complaint fails to state any facts that support this allegation. Specifically, the Complaint accuses the parties of bad faith to cut plaintiff out of its commission but does not state a single communication, email or statement that shows that plaintiff and Morgan engaged in any bad faith. Because plaintiff was not the procuring cause of the sale and because plaintiff has not stated any facts that show bad faith, the second cause of action is dismissed.

Accordingly, it is therefore

ORDERED, that the Complaint is dismissed as to Daniel Hedges I LLC and Alan Schnurman in its entirety; and it is further

ORDERED, that the second cause of action is dismissed; and it is further

ORDERED, that the remainder of defendants' motion is denied.

This constitutes the decision and order of the Court.

12/14/2017
DATE

DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT		REFERENCE

HON. DAVID B. COHEN J.S.C.