

**Greenstone Group FZC v Mack Real Estate Credit  
Strategies, L.P.**

2018 NY Slip Op 30159(U)

January 18, 2018

Supreme Court, New York County

Docket Number: 652127/2017

Judge: Gerald Lebovits

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NEW YORK STATE SUPREME COURT  
NEW YORK COUNTY: PART 7

GREENSTONE GROUP FZC,

Plaintiff,

-against-

Index No: 652127/2017  
**DECISION/ORDER**  
Motion Seq. No. 001

MACK REAL ESTATE CREDIT STRATEGIES, L.P.  
and CARLOS MORTGAGE TRUST, INC.,

Defendants.

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendants' motion to dismiss plaintiff's complaint under CPLR 3211 (a) (1) and CPLR 3211 (a) (7).

**Papers**

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*Novack Burnbaum, LLP*, New York (Anthony D. Dougherty and Catherine M. Ferrara of counsel), for plaintiff.  
*Storch Amini, PC*, New York (Bijan Amini and John W. Brewer of counsel), for defendants.

Gerald Lebovits, J.

Defendants Mack Real Estate Credit Strategies L.P. (Mack) and Carlos Mortgage Trust, Inc. (CMTG), move pre-answer under CPLR 3211 (a) (1) and (7) to dismiss all causes of action in the complaint based on documentary evidence and for failure to state a cause of action.

According to the complaint, plaintiff, Greenstone Group FZC (Greenstone), and defendant, Mack, entered into an agreement (Agreement) on February 8, 2016. Mack assigned the Agreement to CMTG, and CMTG assumed the Agreement on the same day. The Agreement provides that plaintiff will provide investor discovery services in a defined geographic territory. Plaintiff arranged a meeting between defendants and a potential investor (Aramco) on February 25, 2016. On June 7, 2016, the investor notified plaintiff and defendants that it would be moving forward with the investment. On August 3, 2016, defendants terminated the Agreement under the Agreement's 30-day notice provision. On or about April 4, 2017, plaintiff issued an invoice with the amount of \$1,825,000, reflecting a net success fee. On CMTG's behalf, Mack's General Counsel contested the invoice and notified plaintiff that defendants will not process the invoice for payment. (Motion to Dismiss, Affirmation of Bijan Amini, Exhibit 1, Complaint.)

Plaintiff brought this action on April 20, 2017, against defendants asserting four causes of action: (1) breach of contract; (2) fraudulent inducement; (3) unjust enrichment; and (4) breach of implied covenant of good faith and fair dealing.

Defendants move to dismiss plaintiff’s four causes of action on the supposed basis that plaintiff fails to state a cause of action for each cause of action. Defendants argue that there is no cause of action, first cause of action, for breach of contract. Defendants argue that the Agreement cannot be characterized as a finder’s fee agreement and that the recommendation email is not a confirmation required by Section 4.1 of the Agreement. Defendants also contend that the complaint does not plead that plaintiff met its obligation under the contract or that plaintiff was the procuring cause of the transaction.

Defendants also move to dismiss plaintiff’s second, third, and fourth causes of action on the supposed basis that they duplicate the contract claim.

**I. CPLR 3211 (a) (7)**

On a motion to dismiss under CPLR 3211 (a) (7) for failure to state a cause of action, a court must “determine whether, accepting as true the factual statements of the complaint, plaintiff can succeed upon any reasonable view of the facts stated.” (*Aristy-Farer v State of NY*, 29 NY3d 501, 509 [2017], quoting *People v NY City Tr. Auth.*, 59 NY2d 343 [1983] [citations and internal quotation omitted].) A plaintiff is entitled to all favorable inferences from its pleadings and, hence, “[i]f we determine that plaintiffs are entitled to relief on any reasonable view of the facts stated, our inquiry is complete and we must declare the complaint legally sufficient.” (*Aristy-Farer*, 29 NY3d at 509, quoting *NY City Tr. Auth.*, 59 NY2d at 343 [internal quotation marks omitted].)

**1. First cause of action**

Defendants’ motion to dismiss the first cause of action, breach of contract, is denied.

For a cause of action for breach of contract, “the proponent must allege the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages. (*Second Source Funding, LLC v Yellowstone Capital, LLC*, 144 AD3d 445, 445-46 [1st Dept 2016] [citations omitted].)

In its complaint, plaintiff sufficiently pleaded all the elements of a breach-of-contract cause of action. Here, the complaint states that plaintiff and Greenstone entered into an agreement (later was assigned to CMTG) in which defendants promised to pay a success fee to the plaintiff “upon completion of a commitment for all or a portion of the transaction by a party or parties.” Plaintiff also argues that the Agreement provides that for a period of two years after the termination of the contract, defendants owe a success fee for any investment “which otherwise results from, or is connected to any introduction by Advisor.” Plaintiff alleges that it fulfilled its obligations under the agreements and defendants breached the Agreement by not paying the success fee under the agreement, plaintiff was damaged.

Defendants’ core argument with regard to the first cause of action is that the Agreement is a broker agreement rather than a finder’s fee agreement and, therefore, that plaintiff was

obliged to perform more than a mere arrangement for a meeting. Defendants fail to meet the standard for dismissal under CPLR 3211 (a) (7).

A court must give the plaintiff all favorable inferences from its pleadings for a motion to dismiss under CPLR 3211 (a) (7). Plaintiff's complaint satisfies the requirement for pleadings and survives a motion to dismiss.

**2. Second cause of action**

Defendants' motion to dismiss the second cause of action for fraudulent inducement is granted.

It is well-established that "a fraud claim that arises from the same facts as an accompanying contract claim, seeks identical damages and does not allege a breach of any duty collateral to or independent of the parties' agreements is subject to dismissal as redundant of the contract claim." (*Cronos Group Ltd. v XComIP, LLC*, 2017 NY Slip Op 06515, at \*6, 2017 WL 4125643, at \*6 [1st Dept 2017] [citations and internal quotation omitted].)

Here, plaintiff does not establish the required elements of a distinctive cause of action for fraud. Plaintiff seeks the same damages as it does in its breach-of-contract claim. Moreover, plaintiff fails successfully to plead defendants' breach of any duty collaterally independent of the Agreement.

**3. Third cause of action**

Defendants' motion to dismiss third cause of action for unjust enrichment is granted.

As the Court of Appeals has held, "unjust enrichment is not a catchall cause of action to be used when others fail. It is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff." (*Corsello v Verizon New York, Inc.*, 18 NY3d 777, 790 [2012].) Unjust enrichment is not available when a binding agreement between parties governs the subject of the claim. (*Allenby, LLC v Credit Suisse, AG*, 134 AD3d 577, 579 [1st Dept 2015], citing *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987].) Here, a contract exists between the parties that governs the subject of the complaint. Hence, plaintiff failed to adequately plea the unjust enrichment cause of action.

**4. Fourth cause of action**

Defendants' motion to dismiss the fourth cause of action for breach of implied covenant of good faith and fair dealing is granted.

A cause of action for breaching the implied covenant of good faith and fair dealing duplicates a breach-of-contract claim when "both claims arise from the same facts and seek the identical damages for each alleged breach." (*Amcan Holdings, Inc. v Can. Imperial Bank of Commerce*, 70 AD3d 423, 426 [1st Dept 2010].) Plaintiff alleges the same facts and seeks the same damages in the complaint as plaintiff's breach-of contract claim. Plaintiff's fourth cause of action duplicates its breach-of-contract claim. Plaintiff's fourth cause of action is dismissed.

**II. CPLR 3211 (a) (1)**

Defendants' motion under CPLR 3211 (a) (1) is denied.

A court considering a motion to dismiss under CPLR 3211 "must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory." (*Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Servs., Inc.*, 20 NY3d 59, 63 [2012].) Dismissal is granted under CPLR 3211 (a) (1) "only if the documentary evidence submitted utterly refutes plaintiff's factual allegations and conclusively establishes a defense to the asserted claims as a matter of law." (*Mill Fin., LLC v Gillett*, 122 AD3d 98, 103 [1st Dept 2014]; accord *Leon v Martinez*, 84 NY2d 83, 88 [1994].) Defendants fail conclusively to establish a defense to the asserted claims. Defendants' motion to dismiss the complaint under CPLR 3211 (a) (1) is denied.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss plaintiff's complaint is granted in part and denied in part: the second, third, and fourth causes of action are dismissed and the remaining cause of action survives; and it is further

ORDERED that plaintiff is directed to serve a copy of this decision and order with notice of entry on defendants; and it is further

ORDERED that defendants must serve and file its answer within 20 days of service of this decision and order with notice of entry; and it is further

ORDERED that the parties appear for a preliminary conference on April 25, 2018, at 11:00 a.m. in Part 7, room 345, at 60 Centre Street.

Dated: January 18, 2018

  
J.S.C.

**HON. GERALD LEBOVITS**  
J.S.C.