

<b>Capin &amp; Assoc., Inc. v 599 W. 188th St., Inc.</b>
2018 NY Slip Op 31691(U)
July 18, 2018
Supreme Court, New York County
Docket Number: 650888/2013
Judge: Shlomo S. Hagler
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 17**

-----X  
**CAPIN & ASSOCIATES, INC.,**

**Plaintiffs,**

**Index No. 650888/2013**

**-against-**

**Motion Seq. Nos.: 004, 005**

**599 WEST 188<sup>th</sup> STREET, INC., LEZE GAZIVODA, PR  
559 WEST 188 LLC, NATHANIEL RAHAV, JOAN PRICE,  
and MICHAEL RAHAV,**

**DECISION/ORDER**

**Defendants.**

-----X  
**HON. SHLOMO S. HAGLER, J.S.C.:**

Plaintiff Capin & Associates, Inc., a licensed real estate brokerage company, commenced this action seeking to recover real estate brokerage fees from defendants. Defendants PR 559 West 188<sup>th</sup> LLC, Nathaniel Rahav, Joan Price, and Michael Rahav (the “Rahav defendants”), the purchasers of the subject real property, move for summary judgment dismissing the complaint, and defendants 599 West 188<sup>th</sup> Inc., and Leze Gazivoda (the “Gazivoda defendants”), the sellers of the subject real property, also move for summary judgment dismissing the complaint.

**FACTUAL AND PROCEDURAL BACKGROUND**

In late 2007 or early 2008, plaintiff’s employee Farideh Benelyahou (“Benelyahou”), a licensed real estate broker, received a listing for 599 West 188<sup>th</sup> Street, New York, New York (the “Property”) from Paul Gazivoda, the husband of defendant Leze Gazivoda (the “2007 Listing”). Defendant Leze Gazivoda is the record owner of the Property. It was a non-exclusive listing, and there was no written brokerage agreement (the “First Agreement”). On January 11, 2008, Benelyahou allegedly faxed an offer to Paul Gazivoda, care of his attorney Marc Winston, from the Rahav defendants, to purchase the Property for \$2.8 million (the “January 2008 fax”).

This offer provided that the commission, without mentioning amount, was to be paid by the purchaser. The Rahav defendants own the building adjacent to the Property. At the time of the offer the Rahav defendants allegedly signed a contract of sale for the Property and tendered a \$100,000 down payment.<sup>1</sup> Ultimately, the Gazivoda defendants decided not to sell the Property.

In late 2011, plaintiff received a second listing from Paul Gazivoda for the same Property (the "Second Agreement"). According to Benelyahou, she called Michael Rahav to inform him about the new listing (the "2011 Listing"). However, Michael Rahav allegedly told her that he, his wife, Joan Price, and Nathaniel Rahav, their son, were not interested in the Property, and that they no longer wanted to have business dealings with plaintiff.

Benelyahou procured another buyer for the Property, Christopher DeAngelis, who offered a purchase price of \$2.875 million. However, after a period of negotiations with DeAngelis, the Gazivoda defendants informed Benelyahou that they were not going forward with DeAngelis because they had another buyer. The Gazivoda defendants did not reveal the identity of the new buyer, but told Benelyahou that the purchasers were a mother and son.

On January 27, 2012, the Gazivoda defendants entered into a contract of sale for the Property with the Rahav defendants, or an entity controlled by them. The closing took place on May 9, 2012.

On March 13, 2013, plaintiff commenced this action, and, in its June 24, 2013 amended complaint, seeks payment of a brokerage fee for the 2008 Listing, and payment of a second fee for the May 9, 2012 sale of the Property. Plaintiff also seeks damages under the theory of

---

<sup>1</sup> The November 2008 contract of sale, which plaintiff alleges was signed by the Rahav defendants, was blank where the name of the purchaser should be listed. Further, paragraph 7 of the contract indicated that there was no broker involved in the transaction.

fraudulent misrepresentation and tortious interference with a contract. The amended complaint asserts ten causes of action against the Gazivoda defendants: breach of the First Agreement, breach of an implied First Agreement, quantum meruit and unjust enrichment with respect to the First Agreement, breach of the Second Agreement, breach of an implied Second Agreement, quantum meruit and unjust enrichment with respect to the Second Agreement, fraudulent misrepresentation, and tortious interference with a contract. The amended complaint alleges two causes of action against the Rahav defendants, fraudulent misrepresentation and tortious interference with a contract.

By decision and order dated March 12, 2015, this Court denied the Gazivoda defendants' motion to dismiss and denied the Rahav defendants' motion to dismiss. In opposition to the Rahav and Gazivoda defendants' motions to dismiss, plaintiff submitted the affidavit of Luca Capin ("Capin"), its principal, dated June 21, 2013. In his affidavit, Capin stated that, with respect to the January 2008 offer, plaintiff worked directly with the Rahav defendants, assisted in the negotiations of a purchase price and due diligence, and that the Rahav defendants entered into a contract of sale for the purchase price of \$2.85 million and tendered a \$100,000 down payment. Capin also stated that plaintiff introduced the Rahav defendants to the Gazivoda defendants, it arranged for an inspection of the property, and facilitated the exchange of information between the parties. Thus, Capin claimed that plaintiff was entitled to a commission for the 2008 Listing and the 2012 sale, since it produced the Rahav defendants as ready, willing, and able buyers.

In its March 12, 2015, decision and order, this Court relied on Capin's factual allegation, denying the Gazivoda defendants' motion to dismiss by stating:

Luca Capin's affidavit sufficiently alleges facts showing that the plaintiff procured the Rahav defendants as ready willing and able buyers for the property in 2008, in that it introduced the Rahav defendants to the Gazivoda defendants, arranged for the Rahav defendants to inspect the Property, scheduled and attended meetings between the Rahav defendants and the Gazivoda defendants, facilitated the exchange of information between the Rahav defendants and the Gazivoda defendants, submitted offers from the Rahav defendants to the Gazivoda defendants which resulted in a mutually agreed upon purchase price and a contract of sale for the Property between the Gazivoda defendants and the Rahav defendants.

\* \* \*

Although a broker does not make out a case for a commission simply because he initially called the Property to the attention of the ultimate purchaser, the facts alleged by the plaintiff here indicate plaintiff took more steps than merely calling the Property to the attention of the ultimate purchaser, especially considering the initial efforts made by plaintiff with both the Rahav defendants and the Gazivoda defendants in 2008 (Decision and Order, 15-17).

The Rahav defendants appealed.

On May 31, 2016, the Appellate Division, First Department, in *Capin & Assoc., Inc. v 599 West 188th St., Inc.* (139 AD3d 634 [1<sup>st</sup> Dept 2016]), modified the March 12, 2015 decision and order, by granting dismissal of the ninth cause of action, fraudulent misrepresentation, against the Rahav defendants, and affirming the March 12, 2015 decision and order in all other respects with regard to the Rahav defendants.<sup>2</sup>

The Rahav defendants now move for summary judgment dismissing the complaint. In support of their motion, the Rahav defendants argue that the only remaining cause of action

---

<sup>2</sup> Plaintiff's tenth cause of action alleges that defendants "tortiously conspired together to defeat [p]laintiff's claim to its [c]ommission". The First Department stated that although "New York does not recognize an independent cause of action for conspiracy to commit a civil tort", for purposes of the motion to dismiss, "plaintiff has a cause of action against the Rahav defendants for tortious interference with contract" (*Capin & Assoc., Inc. v 599 West 188th St., Inc.*, 139 AD3d at 635).

asserted against them is tortious interference with a contract, and there is no credible evidence that they interfered with any agreement between plaintiff and the Gazivoda defendants. The Rahav defendants argue that, at her June 29, 2016 deposition, Benelyahou admitted that there was no contract between plaintiff and the Gazivoda defendants. Rather, there was an expectation of an agreement for a commission should plaintiff procure the actual buyer of the Property. Further, the Rahav defendants argue that there is no evidence that they were aware of a contract between plaintiff and the Gazivoda defendants. Finally, the Rahav defendants argue that, even if a contract existed, there is no evidence that they intended to procure the Gazivoda defendants' breach of that contract.

In his affidavit in support of the motion, Michael Rahav states that Benelyahou did not call him in 2008 to inform him about the sale of the Property. Further, the only time he had ever spoken to Benelyahou was in late 2011. Moreover, during the 2011 call, before Benelyahou had a chance to tell him about the Property, he told her he was not interested in doing business with plaintiff. Rahav states that he refused to work with plaintiff because, in 2007, Luca Capin, had convinced his wife, Joan Price, against her better judgment, to enter into a contract to buy a group of eight buildings. However, that deal was disastrous for Price.

Michael Rahav states that, in the Spring of 2011, he learned from the superintendent of his building that the building next door (the Property) was for sale. Rahav states that, through his superintendent and the Property's superintendent, he was given Paul Gazivoda's phone number. Rahav then called Paul Gazivoda, and negotiated a purchase price for the Property.

In further support of their motion, the Rahav defendants also submit the affidavits of Joan Price and Nathaniel Rahav, who each state that they were not involved in the negotiations for the

purchase of the Property, and that they had no knowledge of any brokerage agreement between plaintiff and Paul or Leze Gazivoda.

The Rahav defendants also ask this Court to sanction plaintiff, because it allegedly intentionally made false allegations in its amended complaint and in Capin's affidavit, submitted in opposition to their motion to dismiss. The Rahav defendants argue that, in the amended complaint, plaintiff falsely claims that, in April 2008, after it sent the Gazivoda defendants the Rahav defendants' offer to purchase the building for \$2.8 million, the Gazivoda's attorney prepared a contract of sale which was signed by the Rahav defendants, and that they tendered a \$100,000 check. Further, in his June 21, 2013 affidavit submitted in opposition to the Rahav and Gazivoda defendants' motions to dismiss, Luca Capin, also falsely alleged that, on April 29, 2008, the Rahav defendants executed a contract of sale for the Property, and tendered a \$100,000 down payment check. However, at her June 29, 2016 deposition, Benelyahou testified that that claim was not correct. Benelyahou testified that, in January 2008, simultaneously with the Rahav defendants' offer, she submitted an offer from a second buyer, Wolf Landau, who made an offer of \$2.930 million for the Property. Benelyahou testified that the Gazivoda defendants then rejected the Rahav defendants' offer, and began negotiations with Landau. After negotiations between Paul Gazivoda and Landau, a contract was drafted for a purchase price of \$2.85 million. The contract was signed by Wolf Landau, who tendered the \$100,000 down payment check.

The Rahav defendants argue that plaintiff knowingly made these false allegations, in the amended complaint and in Capin's affidavit, in an attempt to "shake down" the defendants, forcing them to pay an unearned brokerage fee. The Rahav defendants request an award of costs

and attorney's fees.

The Gazivoda defendants also move for summary judgment dismissing the amended complaint. At the outset, the Gazivoda defendants argue that, in the context of this motion, they are entitled to an adverse inference against plaintiff for its failure to provide them with documentation of emails plaintiff claimed to possess.

The Gazivoda defendants further argue that they did not receive the Rahav defendants' 2008 offer from plaintiff, but, even if they had, plaintiff acknowledges that said offer was rejected. Thus, no brokerage fee was earned from the 2007 Listing. Moreover, plaintiff is not entitled to a fee for the 2011 Listing on the ground that it produced Wolf Landau as a buyer, since there is no evidence that Landau was a ready, willing, and able buyer. Further, plaintiff did not earn a brokerage fee from the 2012 sale to the Rahav defendants because, there was no written or oral brokerage agreement between the Gazivoda defendants and plaintiff, and, even if there was an agreement, plaintiff was not the procuring cause of the 2012 sale of the Property.

With respect to the 2012 sale to the Rahav defendants, the Gazivoda defendants argue that the Rahav defendants learned that the Property was being offered for sale from their building's superintendent, not plaintiff. The Gazivoda defendants further argue that, even if, in 2008, plaintiff had introduced the Property to the Rahav defendants, it did not create a chain of circumstances that lead the Rahav defendants to purchase the Property. The Gazivoda defendants note that plaintiff was not involved in the negotiations for the sale of the Property, it did not show the Property to the Rahav defendants, and it did not attend the closing. Therefore, plaintiff was not the procuring cause of the sale.

The Gazivoda defendants argue that, because there is no written or oral contract between



them and plaintiff, there is no implied contract. They argue further that, since plaintiff was not the procuring cause of the sale and it performed no work for them, plaintiff is not entitled to recover damages under the theory of quantum meruit or unjust enrichment. The Gazivoda defendants contend that there was no fraudulent misrepresentation because plaintiff was not involved in the sale of the Property.

Like the Rahav defendants, the Gazivoda defendants seek sanctions against plaintiff for submitting false pleadings.

In support of their motion, the Gazivoda defendants submit the affidavit of Paul Gazivoda. Paul Gazivoda states that the superintendent of the Property discussed the fact that the Property was for sale with the Rahav defendants' superintendent. Paul Gazivoda further states that the Property's superintendent told him that he had given Paul Gazivoda's phone number to the Rahav defendants' superintendent, so that Michael Rahav could contact him directly. According to Paul Gazivoda, Michael Rahav called him a few months later, and expressed an interest in buying the Property. Paul Gazivoda states that, while he was negotiating with Michael Rahav, Benelyahou presented him with another prospective buyer, Christopher DeAngelis ("DeAngelis"), with whom he began negotiating a purchase price. A contract of sale was then drafted for DeAngelis' signature, but, according to Paul Gazivoda, DeAngelis wanted major changes to the contract that were not acceptable. Paul Gazivoda states that, thereafter, he decided not to proceed with DeAngelis, and to proceed with the sale to the Rahav defendants. Paul Gazivoda states that after the Property was sold to the Rahav defendants, Benelyahou asked him who had purchased the Property, but he could only recall that it was sold to a son and mother.

In opposition to both summary judgment motions, plaintiff argues that there are issues of fact which preclude summary judgment. Plaintiff argues that it is settled New York law that, in the absence of any agreement to the contrary, a licensed real estate broker earns a commission when it produces a buyer who is ready, willing, and able to purchase the real property, at the terms set by the seller. Plaintiff contends that there is no dispute that, on two occasions, it procured the Rahav defendants as ready, willing, and able buyers, and, in fact, submitted an offer to Gazivoda on their behalf in 2008. Moreover, since there is no dispute that the Rahav defendants purchased the Property in 2012, it has earned a commission on that transaction. Plaintiff argues that the fact that it was not involved in the negotiations, is not dispositive on the issue of its entitlement to a broker's fee, because it was the procuring cause of the transaction.

Plaintiff further argues that, even if there was no formal brokerage agreement, it is entitled to pursue its claims for breach of implied contract, unjust enrichment, and quantum meruit, because it performed work on the Gazivoda defendants' behalf, by finding the Rahav defendants to purchase the Property. Plaintiff argues that the Gazivoda defendants knew it was working on their behalf, because they sent it the non-exclusive listing, in 2007 and 2011, and asked it to market the Property. Plaintiff argues that, at the very least, there are questions of fact regarding the existence of a contract, its entitlement to quasi contract relief, and whether it was the procuring cause of the transaction.

With respect to its tortious interference with contractual relations claim against the Rahav defendants, plaintiff argues that Michael Rahav lied to Benelyahou when he told her he was not interested in the Property. Michael Rahav was, in fact, interested in the Property, and contacted the Gazivoda defendants behind Benelyahou's back to avoid paying the broker's fee.

Plaintiff argues that, even if it were not the procuring cause of the sale, the Rahav defendants' intentional misrepresentation and interference prevented it from being the procuring cause of the transaction. Plaintiff argues further that the Rahav and Gazivoda defendants acted together to prevent it from earning a broker's fee.

In her affidavit submitted in opposition to the motions, Benelyahou states that, in 2008 during her conversation with Michael Rahav about the Property, he told her that he did not need any due diligence materials, other than the rent roll, because he was familiar with the Property. Benelyahou states further that, in 2008, she presented Paul Gazivoda with the Rahav offer of \$2.8 million and the Landau offer of \$2.93 million. Benelyahou states that the Gazivoda defendants rejected the Rahav offer, and proceeded to negotiate with Landau. Those negotiations resulted in the drafting of a contract of sale for the purchase price of \$2.85 million, and Landau's tender of a \$100,000 down payment. Benelyahou stated that, at the time the complaint, amended complaint, and Capin's affidavit were drafted, she had misremembered who had executed the 2008 contract of sale and tendered the down payment. Nevertheless, it was an honest mistake.

With respect to the 2011 Listing, Benelyahou states that during the negotiations between Gazivoda and DeAngelis, Paul Gazivoda informed her that he was not proceeding with DeAngelis. When she asked Gazivoda, to whom was he selling the property, Gazivoda told her that he was selling to a mother and son from Brooklyn. Benelyahou states that after that conversation, on November 1, 2011, she sent Gazivoda a fax which stated "Paul, please look at the attached letter that Michael Rahav had made you an offer through me to you. This letter was sent to you and Marc Winston. Please if he buys the building tell him he must pay us a

commission. I already spoke to him. He is being dishonest” (see Benelyahou aff, Exhibit “I”). Attached to that fax was a copy of the January 11, 2008 offer Benelyahou claims she submitted to Gazivoda on behalf of the Rahav defendants.

With respect to both defendants’ request for the imposition of sanctions for making incorrect statements in the complaint, amended complaint, and the Capin affidavit, plaintiff argues that the factual discrepancy was an honest mistake. Notably, in June 2016, when Benelyahou realized the error, she submitted a supplemental answer to defendants’ interrogatories. In her supplemental response, Benelyahou explained that it was not Rahav, but Landau, who executed the contract of sale in 2008 and tendered the \$100,000 down payment check.

### DISCUSSION

“To obtain summary judgment it is necessary that the movant establish his cause of action or defense ‘sufficiently to warrant the court as a matter of law in directing judgment’ in his favor [CPLR 3212, subd. (b)], and he must do so by tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must ‘show facts sufficient to require a trial of any issue of fact’ [CPLR 3212, subd. (b)]” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] quoting *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-1068 [1979]).

#### **The Gazivoda Motion for Summary Judgment**

To the extent that the Gazivoda defendants claim that, in the context of this motion for summary judgment, they are entitled to an “adverse interest charge” against plaintiff for not providing them with emails they requested during discovery, as this Court noted at oral argument

on this motion, such a request is only appropriate at the time of trial. In any event, since the emails are not part of the record herein, this Court cannot consider them when making its determination on these motions (March 21, 2017 transcript, at 8-9).

A commission agreement with a licensed real estate broker may be oral and does not fall within the Statute of Frauds (see General Obligations Law § 5-701[a] [10]; *Lane-Real Estate Dept. Store v Lawlet Corp.*, 28 NY2d 36 [1971]). It is well settled that in order to state a direct claim for a commission, a broker must prove (1) that he or she is duly licensed, (2) that he or she had a contract, express or implied, with the party to be charged with paying the commission, and (3) that he or she was the “procuring cause” of the sale (*Greene v Hellman*, 51 NY2d 197, 206 [1980]). A broker does not earn a commission merely by calling the property to the attention of the buyer. While the broker need not be the dominant force in the ensuing negotiations, or in the completion of the sale, 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. (*See SPRE Realty, Ltd. v Dienst*, 119 AD3d 93 [1<sup>st</sup> Dept 2014]).

As an initial matter, plaintiff’s first four causes of action: breach of contract, breach of implied contract, quantum meruit, and unjust enrichment, all seek damages with respect to the 2007 Listing. The only documentary evidence regarding an offer by the Rahav defendants to purchase the Property is the January 2008 fax from Benelyahou to Paul Gazivoda which provided that the commission was to be paid by the purchaser. In contrast, Benelyahou testified at her deposition that plaintiff did not have an agreement for a commission with Paul Gazivoda, but that she only had an “expectation” that plaintiff would agree to a commission with the Gazivoda defendants. However, even if this Court were to hold that there was a valid, non-

exclusive oral brokerage agreement between plaintiff and the Gazivoda defendants in 2007, the property was not sold in 2007, nor is there any proof that the buyer procured by plaintiff, Wolf Landau, was a ready, willing and able buyer. Therefore, there is no evidence to support plaintiff's claim that it earned a commission from the 2007 Listing and the offer from Wolf Landau. Accordingly, the first, second, third, and fourth causes of action must be dismissed.

Plaintiff's next four causes of action, numbered five through eight for breach of contract, breach of implied contract, quantum meruit, and unjust enrichment, refer to the 2011 non-exclusive listing the Gazivoda defendants allegedly sent to plaintiff. Plaintiff argues that, since it introduced Paul Gazivoda and Michael Rahav in 2008, and apprised Michael Rahav of the new listing in 2011, it is entitled to a commission as the procuring cause of the sale of the Property. The Gazivoda defendants argue that these claims must be dismissed because there was no brokerage agreement between them and plaintiff. Moreover, even if there was such an agreement, plaintiff was not the procuring cause of the 2012 sale to the Rahav defendants.

Here, the only evidence of a connection between plaintiff and the sale of the Property to the Rahav defendants in 2012, is Benelyahou's two alleged phone calls to Michael Rahav: one in 2008 resulting in an alleged offer to purchase the Property, and the other in 2011, during which Rahav indicated that he refused to work with plaintiff. At her deposition, Benelyahou testified that she had never spoken to Joan Price or Nathaniel Rahav. Benelyahou also testified that, in 2008, she did not show the property to the Rahav defendants, did not have any meetings with the Rahav defendants, and did not participate in negotiations between Paul Gazivoda and Michael Rahav. Benelyahou also testified that, in 2011, when she received the second listing for the Property, she called Michael Rahav and told him about the listing, but that he refused to work

with plaintiff. Thereafter, Benelyahou marketed the Property to other potential buyers, including Christopher De Angelis.

These two phone calls are insufficient to demonstrate that plaintiff was the procuring cause of the 2012 sale of the Property. Plaintiff has not shown a direct and proximate link between its alleged introduction of the Rahav and Gazivoda defendants in 2008, and the 2012 sale of the Property. Viewing the evidence in a light most favorable to plaintiff, it merely called the Property to the attention of the Rahav defendants, nothing more.

This case is similar to *Good Life Realty, Inc. v Massey Knakal Realty of Manhattan, LLC* (93 AD3d 490 [1<sup>st</sup> Dept 2012]), in which the Appellate Division, First Department affirmed the motion court's decision and order granting summary judgment to defendant, finding that plaintiff broker was not the procuring cause of the sale of a cooperative unit to qualify for a real estate brokerage commission. The court noted that while the broker made the buyer aware that the unit was being offered for sale, there was no direct and proximate link between that "bare introduction and the consummation" of the sale. Notably, the plaintiff did not introduce the buyer to the seller, did not show the unit to the buyer, did not negotiate the sale price, did not personally see the unit, and did not attend the closing.

In another similar case, *Jagarnauth v Massey Knakal Realty Servs., Inc.*, 104 AD3d 564 [1<sup>st</sup> Dept 2013]), the Appellate Division, First Department affirmed the granting of summary judgment dismissing the complaint, holding that the fact that plaintiff introduced the buyer and the sellers was insufficient to establish his entitlement to commissions resulting from the sale, because there was no direct and proximate link to the purchase. The court also noted that pursuant to the broker's own testimony, he had no communications with the buyer about the

property from 2004, when the first transaction between buyer and seller was cancelled, until after the closing in 2007. Further, the broker was not involved in the negotiations of the second contract, between the same buyers and seller, which ultimately resulted in the sale in 2007.

Likewise, in *Mollyann, Inc. v Demetriades* (206 AD2d 415 [2d Dept 1994]), the Second Department, affirming the motion court's grant of summary judgment dismissing the complaint, held that the plaintiff broker was not the procuring cause of the sale, where the record indicated that the broker's sole efforts consisted of some brief contacts with the sellers with respect to the property, and showing the prospective buyers the property. Further, the best and the only price offer the broker obtained from the prospective buyers was less than what the sellers had originally set as the asking price. After the sellers rejected the offer, no further negotiations took place between the sellers and the plaintiff broker. Subsequently, the sellers negotiated an entirely different deal with the purchasers through a different broker, and the sale was consummated.

Based on the foregoing, the Gazivoda defendants have demonstrated, as a matter of law, that while plaintiff may have introduced the Rahav defendants to the Property, plaintiff was not the procuring cause of the 2012 sale. Accordingly, plaintiff's fifth cause of action for breach of the oral brokerage agreement and sixth cause of action for breach implied contract, must be dismissed.

With respect to plaintiff's quasi contract claims, its seventh and eighth causes of action, the elements of a cause of action sounding in quantum meruit are: "(1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the



services rendered” (*Caribbean Direct Inc. v Dubset LLC*, 100 AD3d 510 [1<sup>st</sup> Dept 2012]; see *Evans-Freke v Showcase Contr. Corp.*, 85 AD3d 961, 962 [2d Dept 2011]). “The essential inquiry in any action for unjust enrichment . . . is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. A plaintiff must show that (1) the other party was enriched, (2) at that party’s expense, and (3) it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered” (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quotation marks and citations omitted]). Here, since plaintiff was not the procuring cause of the sale of the Property, it is not entitled to quasi contract damages.

With respect to its ninth and tenth cause of actions, to recover damages for fraudulent misrepresentations, a plaintiff must prove: “(1) the defendant made a material false representation, (2) the defendant intended to defraud the plaintiff[ ] thereby, (3) the plaintiff[ ] reasonably relied upon the representation, and (4) the plaintiff[ ] suffered damages as a result of their reliance” (see *J.A.O. Acquisition Corp v Stavitsky*, 18 AD3d 389, 390 [1<sup>st</sup> Dept 2005]; see *Lewis v Wells Fargo Bank, N.A.*, 134 AD3d 777, 778 [2d Dept 2015]). Plaintiff claims that the Gazivoda defendants lied to Benelyahou when they did not reveal that they were in negotiations with the Rahav defendants. However, in view of the fact that this was not an exclusive brokerage agreement, and in any event, plaintiff was not the procuring cause of the sale, even if the Gazivoda defendants misrepresented to plaintiff with whom they were negotiating, plaintiff is not entitled to any damages.

In *Brown & Son Realty v Greenberg* (195 AD2d 583 [2d Dept 1993]), the Second Department, reversing denial of summary judgment to buyers, held that, even assuming that the

buyers concealed their interest in the property from the broker, and then secretly negotiated for, and purchased, the property from the owner, the broker was not entitled to a commission because he was not the procuring cause of the sale. In *Brown*, the broker had merely provided information about the subject building after the buyer had spotted it from the roof of another building that he was being shown by the broker. The court held that, as a matter of law, this was insufficient proof that the broker was the procuring cause of the sale.

Just as in *Brown*, even if the defendants concealed their negotiations from plaintiff, plaintiff is not entitled to a commission, because it was not the procuring cause of the sale.

Based on the foregoing, the Gazivoda defendants have established prima facie entitlement to summary judgment dismissing the complaint, and plaintiff failed to raise an issue of fact warranting denial of summary judgment.

#### **The Rahav Motion for Summary Judgment**

The only remaining claim against the Rahav defendants is a claim of tortious interference with contractual relations. To sustain a claim of tortious interference there must be proof of “(1) the existence of a valid contract between plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional procuring of the breach, and (4) damages” (*Foster v Churchill*, 87 NY2d 744, 749-750 [1996] quoting *Israel v Wood Dolson Co.*, 1 NY2d 116, 120 [1956]).

Here, the Rahav defendants argue that there is no credible evidence to establish the existence of a contract between plaintiff and the Gazivoda defendants, nor is there evidence that they had knowledge of that contract. The Rahav defendants also claim that, even if they knew

about the alleged oral brokerage contract between plaintiff and the Gazivoda defendants, there is no proof that they induced the Gazivoda defendants to breach that agreement.

Here, there is insufficient evidence in the record that there was even an oral contract between the Gazivoda defendants and plaintiff.<sup>3</sup> Further, there is no credible evidence that the Rahav defendants had knowledge of any alleged agreement between plaintiff and the Gazivoda defendants, or that the Rahav defendants “influenced [the Gazivoda defendants] to cease their dealings with [plaintiff]” (*Falconwood Corp. v In-Touch Tech.*, 227 AD2d 215, 216 [1<sup>st</sup> Dept 1996]).

#### **Gazivoda Defendants’ and Rahav Defendants’ Application for the Imposition of Sanctions**

Finally, the Gazivoda and Rahav defendants argue that plaintiff and its attorney must be sanctioned for submitting sworn pleadings that contained false and misleading statements.

22 NYCRR 130-1.1 permits a court to award sanctions, in the form of reimbursement for actual expenses incurred and reasonably attorney’s fees resulting from frivolous conduct.

Conduct is found to be frivolous if:

“(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false” (22 NYCRR 130-1.1[c]).

Here, the defendants argue that it was irresponsible and frivolous for plaintiff to continually make the false allegations that Rahav executed the 2008 contract of sale and tendered a down payment check. They also contend that, in 2013 when the complaint, amended

---

<sup>3</sup> In fact, Benelyahou testified that plaintiff had no definitive agreement with the Gazivoda defendants, and in any event, plaintiff’s proof in the form of the 2008 Fax provides that it was the Rahav defendants who would be obligated to pay a commission.

complaint, and Capin affidavit were drafted, had plaintiff or Benelyahou simply reviewed the 2008 contract of sale and down payment check, they would have discovered that it was Wolf Landau who signed the contract and down payment check. Defendants argue that plaintiff flagrantly failed to confirm its pleadings were accurate, and continued to perpetuate these false statements, causing defendants to have to defend against utterly baseless allegations. In opposition, plaintiff contends it made an honest mistake.

At this juncture, this Court declines in its discretion to impose sanctions against plaintiff and its counsel.

### CONCLUSION

Accordingly, it is

ORDERED that the Rahav defendants' motion for summary judgment [Motion Seq. No. 004] is granted and it is further

ORDERED that the Gazivoda defendants' motion for summary judgment [Motion Seq. No. 005] is granted; and it is further

ORDERED that the amended complaint is dismissed in its entirety; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: July 18, 2018

ENTER:

  
\_\_\_\_\_  
J.S.C.  
**SHLOMO HAGLER**  
J.S.C.