Vasiliu v Miller
2018 NY Slip Op 32487(U)
October 2, 2018
Supreme Court, New York County
Docket Number: 653419/2015
Judge: O. Peter Sherwood

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

- X

VASILIOS VASILIU,

Plaintiff,

-against-

CHAIM "HARRY" MILLER, XI HUI WU A/K/A STEVEN WU, 3 MITCHELL PLACE LOFT LLC, BEEKMAN TOWERS LLC, and BEEKMAN TOWERS HOLDINGS, LLC,

Defendants.

- X

DECISION AND ORDER
Index No.: 653419/2015

Mot. Seq. Nos.: 003-and-005

O. PETER SHERWOOD, J.:

As this is a motion to dismiss, the facts are taken from the Second Amended Complaint and are assumed to be true.

Under motion sequence 003, defendants Beekman Towers, LLC ("Beekman Towers") and Beekman Towers Holdings, LLC ("Beekman Holdings," together with Beekman Towers, the "Beekman Defendants"), move to dismiss the Second Amended Complaint ("SAC") as against them. Defendant 3 Mitchell Place Loft, LLC moves for the same relief under motion sequence 005. After motion sequence 003 was set for oral argument, the parties requested an adjournment to allow for that motion to be argued alongside motion sequence 005 (NYSEF Doc. No. 151). For the reasons discussed below, the motions are granted, and the Second Amended Complaint will be dismissed in its entirety.

I. ALLEGATIONS OF THE SECOND AMENDED COMPLAINT

In the SAC, plaintiff Vasilios Vasiliu ("Vasiliu" or "plaintiff"), a licensed real estate broker, seeks to recover a $2,750,000 brokerage commission based on an alleged oral contract relating to the sale of certain real property located at 3 Mitchell Place, New York, NY 10017 (the "Premises").[1] After learning that the then owner, Beekman Residential Suites LLC (the "Seller") was willing to sell the Premises for $140 million, plaintiff conveyed this non-public information

[1] The SAC refers to this as the sale of "Beekman Towers," which is defined in the SAC as defendant Beekman Towers (*see* SAC ¶¶ 6, 8). However, as is evident from the facts alleged in the complaint, plaintiff is not referring to the defendant LLC, but rather the property located at this address (*see id.* ¶ 22).

to Defendant Xi Hui Wu ("Wu") (*see* SAC ¶¶ 8-9, 14). In turn, Wu responded that he and his partner, defendant Chaim Miller ("Miller") were interested in purchasing the Premises (*id.* ¶ 10). Accordingly, on December 19, 2014, Wu agreed that plaintiff would be entitled to a two percent commission contingent on Wu, Miller, or any entity in which one of them was a "partner, principal or joint venturer," closing on the purchase of the Premises (*id.* ¶ 11). Plaintiff organized a walk-though of the Premises for Wu and Miller, which at least one of them took, and on December 26, 2014, defendant 3 Mitchell Place Loft LLC ("Mitchell Place" or "Original Purchaser"), whom Miller and Wu had an interest in, signed a contract to purchase the Premises for $137,500,000 (the "Original Contract") (*id.* ¶¶ 13-14). Mitchell Place came into existence a few days later, on December 30, 2014 (*id.* ¶ 14).

Although Miller and Wu both had an interest in Mitchell Place, Ben Reifer, not plaintiff, was listed as the broker of record in the Original Contract (*id.* ¶¶ 14, 16). Reifer is not listed as a licensed New York Real Estate broker on the New York Secretary of State's website (*id.* ¶ 17). The Original Contract was entered into without notice to plaintiff, and when plaintiff learned of its existence, he demanded that Miller and Wu enter into a written agreement to pay him a 2% commission, amounting to $2,750,000 (*id.* ¶ 18). Miller, through Wu, offered to pay plaintiff a $500,000 brokerage commission on a take it or leave it basis, which plaintiff rejected (*id.* ¶ 20). Subsequently, on or about January 20, 2015, plaintiff filed an Affidavit of Entitlement to Commission against the Premises for "completed brokerage services," and all defendants proceeded with full knowledge of plaintiff's claim for a commission (*id.* ¶ 21).

On May 18, 2015, before closing on the sale of the Premises, Mitchell Place assigned the Original Contract to defendant Beekman Towers (the "A/A Agreement"), controlled by non-party Alexander Levin ("Levin") (*id.* ¶¶ 22, 25). The A/A Agreement stated, in relevant part, that Beekman Towers "unconditionally assumes, and agrees to be bound by, all obligations and liabilities of Assignor [Mitchell Place] under or relating to the Contract" (*id.*). Seller never signed the A/A Agreement (*id.* ¶ 45). On May 20, 2015, Beekman Towers entered into an amended contract with Seller, whereby Seller consented to the Assignment and a new purchase price of $138,850,000 was set (the "Amended Contract") (*id.* ¶ 23). On July 2, 2015, Beekman Towers assigned the Amended Contract to Beekman Holdings, also controlled by Levin. Beekman Holdings acquired title to the Premises the same day (*id.* ¶¶ 24-25).

Plaintiff alleges that, notwithstanding the Assignment, Miller, Wu, and/or Mitchell Place retained "some type of undisclosed, residual interest" in the Premises (*id.* ¶ 26). Plaintiff bases this allegation on "multiple press reports" stating that Miller retains a partnership interest in the Premises (*id.*), on the fact that one of the law firms listed in the notice provision for Beekman Towers in the Amended Contract is the same law firm Mitchell Place uses (*id.* ¶ 27), and on the fact that, while Levin and Miller have denied any connection between Mitchell Place and Beekman Towers, they have not denied any connection between Mitchell Place and Beekman Holdings (*id.* ¶ 28).[2]

Plaintiff asserts the following causes of action: (1) breach of contract for failure to honor the terms of an "oral brokerage agreement" with Miller and Wu (asserted simply against "defendants"), (2) "successor liability" (again, asserted against "defendants"), (3) "assumption of liability" against Beekman Towers and Beekman Holdings, (4) unjust enrichment (against "defendants"), and (5) injunctive relief to prevent payment on the last two of three promissory notes – executed as part of the sale of the Premises – until plaintiff has been paid in full. These promissory notes were delivered by Beekman Towers to Mitchell Place and became due and payable on July 2, 2016 and July 2, 2017 respectively (*id.* ¶¶ 60-61).

II. ARGUMENTS

As none of the moving parties are alleged to have been parties to the oral agreement, both motions attack the claim of successor liability. Movants also challenge the claims for unjust enrichment and injunctive relief. Significantly, Mitchell Place also argues broadly that plaintiff's claims should be dismissed for (a) failure of a condition precedent, and (b) failure to allege that plaintiff was the procuring cause of the sale. As set forth in the Discussion section, the latter argument requires dismissal of the case.

1. *Failure of Condition Precedent*

Mitchell Place contends that there can be no liability for the alleged oral commission agreement due to the non-occurrence of a condition precedent under that agreement (NYSCEF Doc No. 150 ["005 mem"] at 12-14). The SAC states that plaintiff's entitlement to a commission "was contingent on [Wu or Miller], or any entity in which one of them was a partner, principal or

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[2] Plaintiff claims Justice Oing described these transactions as "a shell game." The allegation is false. Justice Oing was merely describing plaintiff's theory of that case as the transcript containing the statement shows. "You on other hand on the plaintiff's side, look they're claiming this. It's a shell game" (Index No. 156325/2015, NSCEF Doc. No. 95, page 22, lines 12-13).

joint venturer, closing on the purchase of the Premises" (SAC ¶ 11). Mitchell Place argues that this condition precedent "indisputably did not occur" (005 mem at 13) as the SAC alleges that the "Original Purchaser did not close upon the purchase of the Premises." (SAC ¶ 22). This allegation relates only to Mitchell Place, however, and says nothing regarding whether Wu, Miller, or any related entity closed on the Premises. Mitchell Place further argues that the allegation that Mitchell place "retained some type of undisclosed, residual interest in the Premises" (SAC ¶ 26) cannot establish the occurrence of the condition precedent since that condition requires, at a minimum, that an entity related to Wu or Miller close on the property, not an entity related to Mitchell Place (005 mem at 14). Mitchell Place further contends it is "beyond dispute that Mitchell Place is not a partner, principal, or joint venturer with Beekman Holdings" (*id.*).

In opposition, plaintiff does not dispute the existence of a condition precedent, but contends it has sufficiently pleaded satisfaction of that condition by alleging that Original Purchaser, Miller and Wu continued to own an interest in the Premises (NYSCEF Doc. No. 169 ["005 opp"] at 13-14). As discussed further below, however, this allegation still says nothing as to whether an entity related to Wu or Miller closed on the Premises.

Plaintiff additionally contends that Original Purchaser had an obligation not to frustrate the brokerage agreement by failing to close on the property (*id.* at 15, citing *e.g. Lane--Real Estate Dept. Store, Inc. v Lawlet Corp.*, 28 NY2d 36, 43 [1971] [noting that "even where the broker and seller expressly provide that there shall be no right to a commission unless some condition is fulfilled, and the condition is not performed, the seller will nevertheless be liable if he is responsible for the failure to perform the condition"]). Plaintiff argues this obligation was passed on to the Beekman Defendants through assignment and contends that the assigning documents must be read as allowing the Beekman Defendants to satisfy this condition by closing on the Premises since it would not be a reasonable interpretation "to hold that the new buyer assumed all Original Purchaser's obligations under and related to the Original Contract, including the obligations to close, but that defendants escape liability upon the brokerage contract that new buyer assumed" (*id.* at 16-17). In the alternative, plaintiff argues that Original Purchaser is liable for the fee based on its frustration of the condition precedent (*id.* at 17).

In reply, Mitchell Place notes the discrepancy between the terms of the condition precedent as alleged in the SAC and plaintiff's allegation that Mitchell Place, Wu and/or Miller retained an interest in the Premises (NYSCEF Doc. No. 189 ["005 reply"] at 6). Mitchell Place additionally

notes that the SAC specifically alleges that the commission was contingent on Wu or Miller or any entity in which "one of them" was involved, closing on the premises (SAC ¶ 11). Accordingly, the condition expressly excludes any entity in which Mitchell Place was a partner, principal or joint venture (005 reply at 6). Regarding plaintiff's argument that the relevant agreements must be read as allowing the Beekman Defendants to satisfy the precondition, Mitchell Place contends that, regardless of plaintiff's objections now, these reflect the specific parameters of the oral agreement plaintiff allegedly bargained for (*id.* at 8).

Regarding plaintiff's argument that, in the alternative, Mitchell Place may still be liable if it frustrated the occurrence of the condition, Mitchell place argues that the doctrine plaintiff relies on has no application here because "there is no allegation that Mitchell Place frustrated, or in bad faith caused the non-occurrence of the Closing" (*id.*).

2. Whether Plaintiff Was the Procuring Cause

Mitchell Place notes that, in order to be entitled to a commission, plaintiff must establish that he was the "procuring cause," which in turn requires "a direct and proximate link, as distinguished from one that is indirect and remote, between the bare introduction and the consummation" (*Greene v Hellman*, 51 NY2d 197, 206 [1980]). Mitchell Place contends plaintiff's allegations, at best, demonstrate that plaintiff made a "bare introduction," thus failing to show plaintiff was the procuring cause of either the Original Contract or the Amended Contract (005 at 16-20).

Mitchell Place notes that, as alleged in the SAC, the full extent of plaintiff's involvement with the Original Contract is that plaintiff "conveyed the non-public information about the availability of the Premises for sale at $140,000,000 to Steven Wu" (SAC ¶ 10) and "organized a walk-through of the Premises," which, plaintiff is only able to allege "[u]pon information and belief," actually occurred (*id.* ¶ 13). Mitchell Place further notes that the SAC fails to allege plaintiff's further involvement in the transaction, such as "talk[ing] to the members of Mitchell Place, organiz[ing] a meeting between the parties, or even negotiat[ing] material terms of the contract" (005 mem at 16). As was the case in *Greene v Hellman* (51 NY2d 197, 206–07 [1980]) plaintiff "never arranged nor attempted to arrange for a meeting of these persons, much less of their minds."

Mitchell Place contends plaintiff alleges less than the acts the Fourth Department found insufficient as a matter of law in *Briggs v Rector* (88 AD2d 778, 779 [4th Dept 1982]). In that case, the court entered a directed verdict after finding that the following facts failed to make a prima facie showing that the plaintiff was the procuring cause of the sale in question:

- After buyer came to plaintiff's office and inquired about dairy farms, plaintiff took him to the property and "showed him the barn, looked at the fields and described the property," which took approximately half an hour; plaintiff described the boundaries of the farm, but did not show buyer the house because sellers were not home;

- Buyer, called as plaintiff's witness, testified had no further contact with plaintiff until "approximately two months later when he called [plaintiff] to inform him that he was interested in the farm" whereupon plaintiff told buyer "he should deal directly with Rector because of 'lack of communication' between [plaintiff] and [seller]"

- According to his own testimony, plaintiff neither participated in the negotiations nor knew the terms of the sale

(*id.* at 779).

Mitchell Place also directs the court's attention to the facts of *Byrne, Bowman & Forshay, Inc. v 488 Madison Ave., Inc.* (11 Misc 2d 587 [Sup Ct 1954], affd sub nom. *Byrne, Bowman & Forshay v 488 Madison Ave.*, 286 AD 826 [1st Dept 1955]), which it argues presents a closer analogue to the facts as alleged here. In that case, the special referee found after trial that plaintiff's evidence "f[e]ll[] far short of establishing that [plaintiffs] were the procuring cause of the lease" in question (*id.* at 590). In arriving at this conclusion, the special referee noted that the proof adduced at trial demonstrated that:

- "plaintiffs did not have an exclusive agency with respect to leasing space in the then proposed new office building or in any part thereof" but rather were "on the same 'employment' basis as all other licensed real estate brokers in the city of New York to whom the owner impliedly agreed to pay commissions if they procured tenants who signed leases" (*id.* at 588);

- plaintiffs did not "contend that they *actually* earned a commission, but merely assert that they were prevented from so doing as a result of [a] purported conspiracy" (*id.* at 588);

- plaintiffs "never discussed with the lessee any particular space or floor in [the premises] or the construction of any special facilities which were required by the lessee" nor "negotiate[d] with either the lessee or the owner concerning the amount of rent to be fixed for the proposed office space, other than some incidental and inconsequential reference thereto" (*id.* at 589).

Upon these facts, the special referee concluded that plaintiffs were in effect "claiming that even though they were engaged in a nonexclusive, competitive undertaking, they secured proprietary rights in a prospective tenant merely by interesting such potential lessee in a particular building" (*id.*).

Mitchell Place contends that, like the *Bryne* plaintiffs, plaintiff here alleges only that he engaged in a "non-exclusive, competitive undertaking," in which plaintiff never discussed the specifics of the Premises, took part in negotiations, nor did more than "interesting such potential [buyer] in a particular building" (005 mem at 18).

Mitchell Place argues the allegations of the SAC show plaintiff had "had no involvement and made no efforts to bring the Seller and Beekman Towers together" (*id.* at 20). Mitchell Place also argues that under New York law, when "months have passed" between when the initial broker was involved in the negotiations and when a buyer enters into a purchase agreement, the initial broker is no longer the procuring cause of the sale (*id.* at 19-20, citing *Greene v Hellman*, 51 NY2d 197, 207 [1980] [noting that "[t]here was not even the slightest prodding towards any meeting of the minds from [the initial communication between plaintiff and seller, whereby seller indicated he was interested in finding a buyer] until the time six months later when [the buyer and seller] . . . independently and directly, and without any aid or intervention by [the broker] on their own entered upon meetings, discussions and negotiations" and dismissing claims for commissions after finding that "the most that can be said for [plaintiff's] efforts is that he alerted [buyer] to the availability of the property"]; *Helmsley-Spear, Inc. v 150 Broadway N.Y. Assoc. L.P.*, 251 AD2d 185 [1st Dept 1998] [finding "[n]o issue of fact exists as to whether plaintiff was the procuring cause of the October 1994 lease" where "the uncontroverted evidence show[ed]" among other things, that "the principals did not begin to discuss specific proposals for essential terms of a lease until . . . more than a year after plaintiff ceased to make any substantive efforts"], and *Briggs*, 88 AD2d at 779 [finding after trial that plaintiff was not the procuring cause where more than two months elapsed after plaintiff introduced the buyer to the property and where buyer and seller entered into an agreement where the broker "did not participate in the negotiations and did not know the terms of the sale"]). Accordingly Mitchell Place argues that the facts that Beekman Towers did not enter into the Amended Contract until nearly five months after the Original Contract and the Amended Contract didn't close until a few months after that, further demonstrate plaintiff was not the procuring cause of the sale (*id.* at 20).

In opposition, plaintiff contends that Mitchell Place "has misstated the proper test for earning a commission when a broker is the procuring cause of a sale" (005 opp at 18). Plaintiff argues that generally, a real estate broker "will be deemed to have earned his commission when he produces a buyer who is ready, willing and able to purchase at the terms set forth by the seller" (*id.* quoting *David Day Realty, Inc. v Spiegel*, 216 AD2d 241, 242 [1st Dept 1995]), but acknowledges that there must also be a direct and proximate link between the broker's actions and the sale. Nevertheless, plaintiff cautions that this standard does not require that the broker "must have been the dominant force in the conduct of the ensuing negotiations or in the completion of the sale" (*id.* quoting *Greene*, 51 NY2d at 206).

Plaintiff notes that the issue of whether a plaintiff is the "procuring cause" is "a question of fact to be decided on the evidence" (*id.* quoting *Gregory v Universal Certificate Group LLC*, 32 AD3d 777, 778 [1st Dept 2006]). Relying primarily on *SPRE Realty, Ltd. v Dienst* (119 AD3d 93, 98 [1st Dept 2014]), plaintiff argues that his allegations, at minimum, raise a question of fact regarding this issue. In that case, plaintiff alleged in relevant portion that:

> "[it] brought defendants to the building on several occasions; introduced defendants to the developer and attended several meetings between the developer and defendants; reviewed floor plans with defendants; negotiated favorable terms for defendants on the original units; prepared a deal sheet with defendants' preliminary offer terms on the first duplex for the developer's consideration; drafted a contract of sale; and connected defendants with a reputable architect whom [plaintiff] specially selected to implement defendants' design plans"

(*SPRE Realty*, 119 AD3d at 100). Although plaintiff describes the facts of this case, plaintiff does not further detail how they parallel this case, nor attempts to distinguish the two cases on which Mitchell Place relies.

Regarding Mitchell Place's argument that too much time had passed for plaintiff to be the direct and proximate cause of the Amended Contract, plaintiff notes that an 18-month gap did not defeat plaintiff's claim in *SPRE Realty* (*id.* at 95, 100). Plaintiff also notes that it need not establish it was the procuring cause of the transaction if it shows "defendants terminated its activities in bad faith and as a mere device to escape the payment of the commission" *id.* at 100 (internal quotation marks and citation omitted). Accordingly, plaintiff contends that there is a question of fact regarding whether Miller and Wu, on behalf of Mitchell Place, abandoned use of plaintiff's services in good faith (005 opp at 20).

In reply, Mitchell Place first notes plaintiff's failure to dispute or distinguish the cases Mitchell Place relied on in its moving papers and contends that plaintiff has cited no case indicating that the facts alleged here are sufficient to state a cause of action (005 reply at 9-10). As an example, in *SPRE Realty* the broker is alleged to have taken many more relevant actions than are alleged here. Mitchell Place also notes that, as alleged in the SAC, Mitchell Place did not accept the price set by Seller (*see* SAC ¶¶ 10, 14). Accordingly, plaintiff did not "bring the minds of [the] buyer and seller to agreement on the sale" (*id.* at 9, quoting *Cushman & Wakefield, Inc. v 214 E. 49th St. Corp.*, 218 AD2d 464, 466 [1st Dept 1996] [noting that "a broker's duty is to bring the minds of a buyer and seller to agreement on the sale [i.e., its terms and price], and until that is accomplished, no right to commissions accrues"]).

Regarding plaintiff's claim that there is an issue of fact as to whether Michell Place abandoned use of plaintiff's services in bad faith, Mitchell Place contends the SAC fails to allege any facts that might create a theory of "abandonment" (*id.* at 11).

3. *Whether Mitchell Place is Bound by the Oral Agreement*

All moving defendants argue that Mitchell Place is not bound by the oral agreement since Miller and Wu allegedly entered into the agreement individually, prior to the formation of Mitchell Place (005 mem at 8-12, 10 n 4, 003 mem at 11-12, citing *e.g. Perrino v MTS Funding, Inc.*, 14 AD3d 865, 866 [3d Dept 2005] [finding defendant corporate entity not bound by contract signed by president and sole shareholder in his individual capacity, in spite of fact that contract "recite[d] that title to the subject premises would be held in [corporate] defendant's name," on the basis that "defendant was neither named in the contract as a party thereto nor did [it] sign as such" and noting that "the mere reference in the contract to defendant is insufficient to create any legal duty on defendant's part in favor of plaintiff"]).

Mitchell Place additionally contends the documentary evidence conclusively refutes plaintiff's claims that Wu and Miller could bind Mitchell Place as principals, or that the two have any interest in Mitchell Place. In support, Mitchell Place submits the Operating Agreements for Mitchell Place, showing Kings Park Holdings LLC and Sam Sprei as the sole members, and the Operating Agreement of Kings Park Holdings, showing Yoel Zagelbaum and Shaul Greenwald as the sole members (005 mem at 10-11; Greenwald aff, exhibits A, B).[3]

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[3] Mitchell Place also contends plaintiff has not made any allegations that implicate Mitchell Place for "successor liability," and that, accordingly, the claim should be dismissed with prejudice as against Mitchell Place (005 mem at

In opposition, plaintiff first submits evidence that raises an issue of fact as to whether Miller was a principal of Mitchell Place (005 opp at 5, citing Gross aff, exhibits C [transcript of Miller EBT, in which Miller testifies that he "flipp[ed] a contract" for property at 3 Mitchell Place] at 158-161, L [purported information subpoena in which Miller answers that he owns 50% of the Original Purchaser]). Plaintiff further notes that a corporation may be liable for a contract entered into by its promoters prior to incorporation if that corporation subsequently adopts that contract either expressly or through acceptance of the benefits referable to that contract (*id.* at 8-10, citing *e.g. Morgan v Bon Bon Co.*, 222 NY 22, 27 [1917] and *The Carlton Group, Ltd. v VS 125, LLC*, 2017 WL 347489, * 3[Sup Ct, NY County, 2017] [finding plaintiff sufficiently alleged facts to show that corporation was bound by contract entered into prior to its incorporation where plaintiff alleged that the corporation "was created for the express purpose of acquiring and developing the Property," that signatory "entered into the Agreement as its duly authorized agent and as joint venture partners" and that the corporation "subsequently ratified the Agreement"]; 003 opp at 11-12). Plaintiff argues that Original Purchaser accepted the benefits of the oral agreement by signing the Original Contract, and that accordingly, it may be held liable for plaintiff's commissions.

In reply, the Beekman Defendants contend plaintiff's argument fails because the SAC alleges only Miller and Wu entered into the oral agreement individually, and not on behalf of Original Purchaser (003 reply at 2-4). For the same reason, these defendants distinguish the cases plaintiff relies on to establish that a soon-to-be-formed entity may be bound by an agreement.

Mitchell Place notes that the SAC fails to allege that either Miller or Mitchell Place assented to plaintiff's oral agreement (*see* SAC ¶ 11 [alleging that "Steven Wu agreed that if he and Chaim Miller closed on the purchase of the Premises, Plaintiff would be entitled to a two (2%) percent commission"]). Mitchell Place notes also that plaintiff has not alleged any facts that indicate Wu was a "partner, principal, or joint venturer" with Mitchell Place, or that Wu had authority to enter Miller or one of Miller's entities in to a binding agreement (005 reply at 3-4).

Finally, Mitchell Place argues that plaintiff has failed to allege that Wu or Miller were its "organizers" or "promoters," or that Mitchell Place either expressly accepted the benefits of the oral agreement or benefits attributable to that agreement, as required by the doctrine plaintiff relies

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20-21). Plaintiff's opposition does not directly address this argument, but contends that the alleged de facto merger makes Mitchell Place a permissible defendant for joint and several liability under CPLR 1002 (b) (005 opp at 22).

on (*id.* at 4-5). Mitchell Place argues that its actions with respect to the Original Contract have no bearing on its acceptance of the oral agreement. Mitchell Place also distinguishes *The Carlton Group, Ltd.* (2017 WL 347489) on the basis that the agreement there, on its own terms, continued past closing "if [the signatory corporation] or one of its affiliates . . . continued to work with [plaintiff] to "facilitate a closing of a transaction with respect to the Property" (*id.* at *1).

4. *Statute of Frauds*

Mitchell Place contends that, since plaintiff has not alleged the existence of a clear writing evidencing Mitchell Place's agreement to assume Wu's debt, plaintiff's claim against Michell Place must be dismissed as barred by the Statute of Frauds (005 mem at 12, citing *e.g.* General Obligations Law § 5-701 (a) (2) [providing that an agreement is "void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking . . . [i]s a special promise to answer for the debt, default or miscarriage of another person]).

In opposition, plaintiff contends that it is not General Obligations Law § 5-701 (a) (2) that applies, but rather subsection (a) (10) that the Statute of Frauds does "not apply to a contract to pay compensation to . . . a duly licensed real estate broker or real estate salesman" (005 opp at 12-13). Plaintiff contends its claim against Mitchell Place is not for a "special promise to answer for the debt . . . of another person," but rather a claim to which Mitchell Place was bound by its principals. In reply, Mitchell Place reaffirms its position that subsection (a) (2) applies, arguing that this provision applies since plaintiff "plainly alleges that his oral agreement was with Wu" (005 reply at 5-6).

5. *Successor Liability Against the Beekman Defendants*

The Beekman Defendants argue first that there can be no successor liability against them since Mitchell Place was not bound by the oral agreement in the first instance (NYSCEF Doc. No. 102 ["003 mem"] at 8). The Beekman Defendants also note that Section 10 of the Original Contract provided that Original Purchaser and Seller warranted they had "not dealt with any broker, finder or other middleman in connection with" the Original Contract, other than Eastdil Secured, LLC, and that "no broker, finder middleman or Person, other than [Eastdil Secured, LLC] has claimed or has the right to claim a commission" (003 mem at 15-16, quoting Gal aff, exhibit A § 10).

These defendants add that, even if Mitchell Place was bound by that alleged agreement, they would still not be liable for unpaid commissions. In so arguing, the Beekman Defendants dispute the Second Amended Complaint's assertions that they expressly assumed liability or that there was a de facto merger "between the interests of Wu, Miller and Original Purchaser, on one hand, and [the Beekman Defendants], on the other" (SAC ¶ 38). With respect to the express assumption of liability, the Beekman Defendants note that the Assignment Agreement between Mitchell Place and Beekman Towers expressly stated that Beekman Towers, as assignee "shall not assume, and expressly does not assume and shall have no liability for any obligations or liabilities of the Assignor" (Gal aff, exhibit B § 2.02). Additionally, the Amended Contract states that "no broker, finder, middleman or Person, other than [Easdil Secured, LLC] has claimed or has the right to claim a commission, finder's fee or other brokerage fee in connection with this Agreement" (*id.*, exhibit C § 10) and further provides that the agreement "set[s] forth the entire agreement and understanding of the parties in respect of the transactions contemplated by [it], and supersede[d] all prior agreements" (*id.* § 18.C). With respect to plaintiff's attempt to rely on the language of the A/A Agreement (which defendants refer to as the "Assignment Form"), the Beekman Defendants contend that document is unenforceable because Seller never signed it (003 mem at 11-12, citing *e.g. Hurant v Faerber*, 125 Misc 262, 263 [App Term 1925] [finding renewed lease was not binding where only one of two colessors signed the document and there was no evidence "to show that the defendant chose to sign both for himself individually and for his cotenant in a representative capacity"]).

Although plaintiff contends the A/A Agreement was binding because it was attached as an exhibit to the Amended Contract, the Beekman Defendants note that the form was actually attached to the Assignment Agreement, which expressly disclaimed assumption of liability (003 mem at 12-13, citing Gal aff, exhibits C, B at "Exhibit E to Assignment Agreement Contract of Sale,"). The Beekman Defendants maintain the Assignment Agreement, as an agreement specifically prepared for the transaction, supersedes any contrary language in the A/A Agreement, as a form document executed in the same transaction (*id.* at 13, citing *Trade Bank & Tr. Co. v Goldberg*, 38 AD2d 405, 406 [1st Dept 1972] ["where two documents are to be . . . construed [together] —one specifically prepared for the transaction in question and the other a general form—the former takes precedence as to all provisions which are repugnant in the two documents"]). Additionally, although plaintiff notes that Levin attached the A/A Agreement to one of his affidavits filed in a

separate legal proceeding, the Beekman Defendants argue that such an action has no bearing here since "layperson testimony is not dispositive of [a] legal question" (*id.* at 14, quoting *Aristocrat Leisure Ltd. v Deutsche Bank Tr. Co. Americas*, 618 F Supp 2d 280, 295 [SD NY 2009]), and since Levin only included that document to demonstrate Beekman Tower's interest in the Premises, and also attached the fully executed Assignment Agreement to that same affidavit while taking no position as to which agreement governed (*id.* at 14-15).

With respect to plaintiff's contention that there was a de facto merger, the Beekman Defendants note that such a theory of liability requires "continuity of ownership" which "exists where the shareholders of the predecessor corporation become direct or indirect shareholders of the successor corporation," rather than merely an asset of the corporation (*id.* at 16-17 quoting *Oorah, Inc. v Covista Communications, Inc.*, 139 AD3d 444, 445 [1st Dept 2016]). The Beekman Defendants contend this element is not satisfied since plaintiff alleges only "continuity of an ownership interest of Miller (and, upon information and belief, Wu) in the Premises," (SAC ¶ 39) and not in any of the entities themselves (003 mem at 17). Additionally, the Beekman Defendants contend that, since submitted documentary evidence shows Beekman Towers paid cash for Original Purchaser's interest in the Original Contract (Gal aff, exhibit B § 3.01), any claim of continuity of ownership must fail as well (003 mem at 17, citing *Oorah, Inc.*, 139 AD3d at 445 ["[t]he documentary evidence submitted by [defendant] shows that it paid cash for [assignor's] assets; hence, there was no continuity of ownership]).

In opposition, plaintiff argues first that since the Amended Contract "recited the assignment of the Original Contract to Beekman Towers LLC, Beekman Towers Holdings, LLC's assumption of liabilities incorporated all obligations of Beekman Towers LLC relating to the Original Contract" (NYSCEF Doc. No. 118 ["003 opp"] at 11, citing *e.g. Dysal, Inc. v Hub Properties Tr.*, 92 AD3d 826, 827 [2d Dept 2012] [finding defendant assumed obligation to pay plaintiff's commission pursuant to "the express terms of, among other things, an agreement for the assignment and assumption of leases entered into between the defendant . . . and its predecessor in interest"]). Plaintiff does not respond to the Beekman Defendants argument that the Original Contract expressly disclaimed liability.

Plaintiff contends that the A/A agreement, and not the Assignment Agreement, controls since the Assignment Agreement "stated that it 'shall' - - in other words in the future - - assign the Original Contract" (and thus did not itself assign the contract) (*id.* at 12, citing Assignment

Agreement § 2.01) and because the A/A Agreement was signed later in time (*id.* citing *e.g. Cont. Stock Transfer & Tr. Co. v Sher-Del Transfer & Relocation Services, Inc.*, 298 AD2d 336 [1st Dept 2002] [finding petitioner was not bound by arbitration clause on reverse side of bills petitioner's representative had signed where "there was no express or unequivocal agreement to arbitrate the parties' dispute" and where the "parties clearly understood themselves to be bound by a 'proposal' letter agreement executed by the mover and apparently delivered to the customer before the work was to be performed"]). Although Seller did not sign the A/A Agreement, plaintiff contends that by signing the Amended Contract, Seller demonstrated its intent to be bound by the A/A Agreement (*id.* at 16, citing *e.g. Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 369 [2005] ["an unsigned contract may be enforceable, provided there is objective evidence establishing that the parties intended to be bound"]). Specifically, because Recital B of the Amended Contract states that "Assignor has assigned its interest in the Original Contract to Purchaser . . . and Seller has consented to such assignment," and because, as plaintiff argues, the A/A Agreement and not the Assignment Agreement effectuated the assignment, plaintiff argues that by signing the Amended Contract, plaintiff evinced its understanding that the A/A Agreement was binding. Although the Amended Contract states that no other broker has a right to claim commissions, plaintiff argues that this provision cannot "undo the assumption of liabilties by Beekman Towers" (*id.* at 14).

Plaintiff additionally notes that, in the case that was before Justice Oing, Levin filed an affidavit stating that the A/A Agreement was "to formalize its [Original Purchaser's] assignment of rights under the Old Contract to Beekman Towers" (*see* Index No. 156325/2015, NYSCEF Doc. No. 13 ¶ 4). Plaintiff attests that this affidavit was "successfully employed to vacate the notice of pendency filed against the Premises" in that case, and that accordingly, the Beekman Defendants are judicially estopped from contesting the enforceability of the A/A Agreement (003 mem at 17-18).

Plaintiff also argues that, because "[l]iability under a contract can arise in the absence of privity where it is established that the defendant is in a joint venture or partnership with a signatory to the contract" (*id.* at 18, quoting *Alper Rest., Inc. v Catamount Dev. Corp.*, 137 AD3d 1559, 1560–61 [3d Dept 2016]), the SAC's allegations that "Original Purchaser, Miller, and/or Wu have an undisclosed partnership or joint venture interest in Beekman Towers and the Premises" raise an issue of fact that cannot be resolved on a motion to dismiss.

On the issue of continuity of ownership, plaintiff contends only that "there is no need to plead with particularity" and that "an indirect interest suffices" to establish this element (003 opp at 19-20). Plaintiff fails to address the Beekman Defendants' arguments that continuity of ownership must relate to the corporation, not the asset, and that there is no continuity of ownership because Beekman Towers paid cash for the asset in question.

In reply, the Beekman Defendants contend plaintiff's assertions that Seller consented to the assignment is a "red herring," since the dispute is not over whether Seller consented to an assignment, but over the terms under which that assignment was made (NYSCEF Doc. No. 119 ["003 reply"] at 6). Regarding plaintiff's assertion that the A/A Agreement is the only document that assigned the Original Contract, the Beekman Defendants note that the Assignment Agreement states that the assignment could be effectuated without executing the A/A Agreement if execution was waived by the Assignor or Assignee (*id.*, citing Gal aff, exhibit B § 7.02 - 7.03).

Regarding plaintiff's arguments on judicial estoppel, the Beekman Defendants contend this doctrine does not apply since Lavin never took the position that the terms of the A/A Agreement control over the Assignment Agreement, and accordingly, Justice Oing never relied on such a position (*id.* at 8-9; affirmation of Erica Wolff, exhibit A [Justice Oing decision and order]).

Finally, regarding plaintiff's assertions that issues of fact are raised by the SAC's allegations that Original Purchaser, Miller and/or Wu are partners or joint venturers in Beekman, the Beekman Defendants note that these allegations are contradicted by the Original Contract's provision providing that Seller's consent was not required if assignment was made "to an entity (i) controlled by Sam Sprei or Harry Miller, or (ii) with the same beneficial ownership as [Original] Purchaser" (*id.* at 10, quoting Gal aff, exhibit A § 18.R).

6. *Unjust Enrichment*

The Beekman Defendants contend first that this claim should be dismissed as duplicative of plaintiff's breach of contract claims (003 mem at 18-20). They also contend that the claim should be dismissed because plaintiff alleges no relationship between him and the Beekman Defendants, and therefore cannot demonstrate he conferred a benefit upon them. In so arguing, these defendants note that a claim for unjust enrichment "will not be supported if the connection between the parties is too attenuated" because there are "no indicia of an enrichment that was unjust where the pleadings failed to indicate a relationship between the parties that could have caused reliance or inducement" (*id.* quoting *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173,

174 [2011]). They also note that "an unjust enrichment claim can only be sustained if the services were performed at the defendant's behest" (*id.* quoting *Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011], *affd Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511 [2012] [describing holdings of prior cases from that court and other departments]).

Mitchell Place first contends that the documentary evidence conclusively debunks plaintiff's claims that Miller or Wu could have bound Mitchell Place (005 mem at 21-24). Like the Beekman Defendants, it argues that plaintiff could not have performed at the behest of Mitchell Place since the SAC does not allege any relationship between plaintiff and Mitchell Place or its members. Lastly, Mitchell Place argues that this claim fails because, by virtue of the assignment, Mitchell Place did not receive the benefit on which this claim is based.

In opposition, plaintiff contends he is entitled to assert this claim in the alternative and in light of the fact that Miller denies the existence of the oral agreement (003 opp at 22-24, citing *Winick Realty Group LLC v Austin & Assoc.*, 51 AD3d 408 [1st Dept 2008] [finding that "since plaintiff is entitled to plead inconsistent causes of action in the alternative, [its] quasi-contractual claims are not precluded by the pleading of a cause of action for breach of an oral agreement"]; NYSCEF Doc. No. 107 [Miller Answer] ¶ 4). Plaintiff also distinguishes *Georgia Malone* (19 NY3d at 511) on the basis that defendants here were made aware of plaintiff's claim for commissions and that plaintiff alleges the Beekman Defendants retained some form of joint venture interest in the Premises with Wu, Miller, and Original Purchaser – which plaintiff contends establishes a "sufficiently close relationship."

Plaintiff also notes that the First Department in *E. Consol. Properties, Inc. v Waterbridge Capital LLC* (149 AD3d 444, 444–445 [1st Dept 2017]) found that the allegations that plaintiff "performed valuable services in good faith, including providing confidential information concerning the property to Waterbridge, that the services were rendered with an expectation of compensation, and that they were accepted by defendants" were sufficient to state a claim to recover unpaid commissions in quantum meruit (005 mem at 22-23). That court also noted that a "dispute over the validity of the oral settlement agreement allows plaintiff to plead this cause of action in the alternative" (*E. Consol. Properties, Inc.*, 149 AD3d at 445).

Finally, plaintiff contends that, in the absence of an express oral agreement for commissions, there is no basis for finding that closing on the Premises is a precondition to plaintiff's claim for unjust enrichment (005 mem at 24). Plaintiff argues that, absent an agreement

to the contrary, a real estate broker's quantum meruit claim accrues when the contract is signed (*id.* citing *Zere Real Estate Services, Inc. v Parr Gen. Contr. Co., Inc.*, 102 AD3d 770, 771–72 [2d Dept 2013] [finding that broker's cause of action to recover damages in quantum meruit accrued upon the "execution of the contract procured through the broker's services"]).

In reply, the Beekman Defendants argue that plaintiff's attempts to distinguish *Georgia Malone* (86 AD3d at 406) are irrelevant to the principle of law for which it was cited (003 reply at 12-13). Additionally, these defendants dispute plaintiff's argument that he may assert this claim in the alternative, relying exclusively on *Maimonides Med. Ctr. v First United Am. Life Ins. Co.* (35 Misc 3d 570, 580 [Sup Ct 2012], *affd,* 116 AD3d 207 [2d Dept 2014]). However, that case did not involve a dispute as to the existence of the underlying contracts, and also acknowledged that a "plaintiff may state alternative causes of action for breach of contract and unjust enrichment that are predicated on the same facts only where there is a bona fide dispute as to the existence of a contract" (*id.*). In its own reply, Mitchell Place reasserts its claim that the connection between it and plaintiff is "too attenuated" on which to base this claim (005 reply at 14-15). Mitchell Place also distinguishes *Waterbridge* (149 AD3d 444) on the basis that the court there noted that the broker provided "valuable services," "*including* providing confidential information" [emphasis added]. Mitchell Place notes that the plaintiff in that case pled a far greater extent of "valuable services" than plaintiff has pleaded here, including extended involvement in later negotiations (*see* NYSCEF Doc. Nos. 187 [*Waterbridge* Complaint], 188 [*Waterbridge* First Amended Complaint]).

7. *Injunctive Relief and Request for Additional Discovery*

Movants both contend plaintiff is not entitled to injunctive relief because his claims are reducible to monetary damages (003 mem at 21-22, 005 mem at 24-25). Additionally, the Beekman Defendants note that New York courts "have consistently refused to grant general creditors a preliminary injunction to restrain a debtor's asset transfers that allegedly would defeat satisfaction of any anticipated judgment" (003 mem at 22, quoting *Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 94 NY2d 541, 545 [2000]).

In opposition, plaintiff concedes that he is not entitled to a preliminary injunction, but contends that he is entitled to sue for permanent injunctive relief (003 opp at 24, citing *Mut. Benefits Offshore Fund v Zeltser*, 32 Misc 3d 1241(A) [Sup Ct 2011] [denying motion to dismiss cause of action for permanent injunction "enjoining [defendant] from further transferring, liquidating, or using [plaintiff's] property, based on the concern that defendants will move the

funds outside the jurisdiction if an injunction is not granted" after noting that *Credit Agricole* addressed a motion for a preliminary injunction, and not a permanent injunction]; 005 opp at 24-25). Movants reiterate their earlier arguments in reply (003 reply at 14, 005 reply at 15).

Plaintiff also requests additional discovery, on basis that facts are in the exclusive control of the moving parties (003 opp at 24-25, 005 opp at 25). In reply, movants contend discovery is not warranted on the basis that their have conclusively foreclosed plaintiff's claims.

III. DISCUSSION

On a motion to dismiss a plaintiff's claim pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State,* 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.,* 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.,* 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]; *Sokol v Leader,* 74 AD3d 1180 [2d Dept 2010]).

To succeed on a motion to dismiss pursuant to CPLR 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see, 511 W. 232nd Owners Corp. v Jennifer Realty Co.,* 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.,* 28 AD3d 180, 182 [1st Dept 2006]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*McCully v. Jersey Partners, Inc.,* 60 AD3d 562, 562 [1st Dept. 2009]). The facts as alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit of every favorable inference (*see Leon v Martinez,* 84 NY2d 83, 87-88 [1994]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*see e.g. Nisari v Ramjohn,* 85 AD3d 987, 989 [2nd Dept 2011]).

CPLR 3211 (a) (1) does not explicitly define "documentary evidence." As used in this statutory provision, "'documentary evidence' is a 'fuzzy term', and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v John Doe 1,* 73 AD3d 78, 84 [2nd Dept 2010]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*id.* at 86, citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically that means "judicial records such as judgments and orders, as well as documents reflecting out-of-court transactions such as contracts, releases, deeds, wills, mortgages and any other papers, "the contents of which are 'essentially undeniable'" (*id.* at 84-85). Here, the documentary evidence is the various contracts, assignment agreements, and the receipt and confirmation of closing attached as exhibits to the affirmation of Dov Gal (NYSCEF Doc. Nos. 94-99).

1. *Condition Precedent*

It falls to the court to determine, as a matter of law, whether an express condition precedent exists in a contract (*see Two Guys from Harrison-N.Y. v S.F.R. Realty Assoc.*, 63 NY2d 396, 403 [1984]; *Comprehensive Health Solutions v Trustco Bank, Natl. Assn.*, 277 AD2d 861, 863 [3rd Dept 2000]). "[A] contractual duty ordinarily will not be construed as a condition precedent absent clear language showing that the parties intended to make it a condition" (*Unigard Security Ins. Co. v North Riv. Ins. Co.*, 79 NY2d 576, 581 [1992]), or "where the act to be done by the plaintiff must naturally precede, in the order of time what the defendant is called upon to do, and where the former is necessary to be done to enable the defendant to perform" (*Tipton v Feitner*, 20 NY 423, 425 [1859]). As noted above, the SAC specifically alleges that plaintiff's entitlement to a commission would be contingent on Wu, Miller, or any entity in which one of them was a "partner, principal or joint venturer," closing on the purchase of the Premises. Plaintiff does not dispute that this allegation sets forth an express condition precedent on the purported oral agreement.

Mitchell Place correctly notes that the SAC fails to allege that this condition occurred, triggering plaintiff's entitlement to a commission. Specifically, the SAC makes (or fails to make, as the case may be) the following allegations, which when viewed together (and alongside the documentary evidence submitted by the Beekman Defendants), establishes that the entity that closed on the property was not Wu, Miller, "or any entity in which one of them was a partner, principal or joint venturer,":

- Wu and/or Miller had an interest in Original Purchaser (SAC ¶ 14), but did not have interests in either of the Beekman Defendants, other than as a result of a purported de facto merger among the interests of all defendants (*see id.* ¶¶ 26-30, 38-39);

- Original Purchaser had a contract to purchase the Premises, which it assigned in full prior to closing (*id.* ¶¶ 18, 22); the documentary evidence submitted by the Beekman Defendants confirms the full assignment of Original Purchaser's rights under the Original Contract;

- Plaintiff suggests a connection between Original Purchaser and one or either of the Beekman Defendants (*id.* ¶¶ 26-30), but fails to allege that either of those defendants fall under the ambit of an "entity in which [Wu and/or Miller] was a partner, principal or joint venturer"

- Beekman Holdings closed on the property (*id.* ¶ 24; NYSCEF Doc. No. 99).

Plaintiff's attempt to rely on the SAC's allegations of an interest Wu, Miller or Mitchell Place "retained" in the Premises does not establish the occurrence of this condition. As described above, either Wu or Miller must have a partner, principal or joint venture interest in the closing entity, not in the Premises. Plaintiff fails to make this distinction. Moreover, the allegation that these parties "retained" an interest in the property is contradicted by the allegations and documentary evidence showing full assignment of Original Purchaser's rights under the Original Contract prior to closing.[4]

Plaintiff's argument that Mitchell Place is liable under the oral agreement for failing to close must also be rejected. Plaintiff is correct that a party to a brokerage agreement may still be liable under where that party is responsible for the failure to perform a condition precedent, such as the condition that the entity close on the transaction (*see Lane--Real Estate Dept. Store, Inc.*, 28 NY2d at 43). However, as movants note, the SAC alleges merely that "Steven Wu agreed" to the purported oral agreement, without allegation that Wu was acting on behalf of Miller or as a promoter of the yet unformed Mitchell Place (*see* SAC ¶ 11). Accordingly, the failure of the Original Purchaser to close cannot be described as a contract party frustrating the occurrence of a condition precedent.

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[4] Although the issue was not raised in any of the papers, plaintiff may not rely on its allegations of a de facto merger to establish, as it must, that Wu or Miller had some form of interest in Beekman Holdings. As the Beekman Defendants note, and plaintiff fails to dispute, the fact that Beekman Towers paid cash for Original Purchaser's interest in the Original Contract defeats any claim of continuity of ownership (*see* Gal aff, exhibit B § 3.01; *Oorah, Inc.*, 139 AD3d at 445 ["[t]he documentary evidence submitted by [defendant] shows that it paid cash for [assignor's] assets; hence, there was no continuity of ownership]).

Finally, plaintiff's argument that the governing documents must be interpreted as allowing the Beekman Defendants to satisfy the condition precedent by closing on the premises fails in that such an interpretation would negate the express terms of the precondition plaintiff himself alleges was part of the oral agreement. Accordingly, claims arising out of plaintiff's allegations of breach of the purported oral agreement shall be dismissed.

2. *Procuring Cause*

Although as a general principle, "a real estate broker will be deemed to have earned his commission when he [or she] produces a buyer who is ready, willing and able to purchase at the terms set by the seller . . . [a] broker does not earn a commission merely by calling the property to the attention of the buyer" (*SPRE Realty, Ltd.* 119 AD3d at 97). Although a broker need not "have been the dominant force in the conduct of the ensuing negotiations or in the completion of the sale . . . 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 bare introduction by the broker and the consummation of the transaction" (*id.*). Although other departments have held that if a broker does not participate in the negotiations, he must at least show that he created an "amicable atmosphere" from which negotiations that proximately led to the sale went forward (*see e.g. Briggs*, 88 AD2d at 779), in *SPRE Realty* (119 AD3d at 99) the First Department declined to employ this standard, stating that the "direct and proximate link standard" articulated in *Greene* (51 NY2d 197) determines whether a broker is a procuring cause. The court in *SPRE Realty* went on to clarify that 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" but that "[a]t the same time, a broker need not negotiate the transaction's final terms or be present at the closing."

Plaintiff's claim for a commission is based solely on his allegations that he "conveyed the non-public information about the availability of the Premises for sale at $140,000,000 to Steven Wu" (SAC ¶ 10) and "organized a walk-through of the Premises," which plaintiff apparently did not himself attend (*id.* ¶ 13). Subsequently, and without any further involvement from plaintiff, Mitchell Place and Seller arrived at the purchase price of $137,500,000 (*id.* ¶ 14). Such allegations establish no more than that plaintiff "initially called the property to the attention of the ultimate purchaser" (*Greene*, 51 NY2d at 205). As Mitchell Place additionally notes, the fact that these parties negotiated a different price, without plaintiff's involvement, further shows plaintiff "was

not the procuring cause of the sale because he did not bring together the 'minds of the buyer and seller' (*id.* at 206). Furthermore, as discussed above, these facts fall short of those that were held to be insufficient as a matter of law in both *Briggs* (88 AD2d at 779) and *Byrne, Bowman & Forshay, Inc.* (11 Misc 2d 587), affd 286 AD 826).

Plaintiff's contention that there is an issue of fact regarding whether defendants "terminated its activities in bad faith and as a mere device to escape the payment of the commission" (*SPRE Realty*, 119 AD3d at 100) fails as well as there is no allegation that defendants terminated plaintiff's activities or otherwise acted in bad faith to prevent plaintiff from becoming the procuring cause of the transaction. As was the case in *SPRE Realty,* this line of authority speaks to instances in which a buyer or seller abandons negotiations or terminates activities for a period of time to artificially remove the "direct and proximate" link (*see id.*; *see also Williams Real Estate Co., Inc. v Viking Penguin, Inc.*, 228 AD2d 233, 233 [1st Dept 1996]). The SAC contains no such allegations.

Accordingly, the claims for unpaid commissions must be dismissed on the grounds that plaintiff has not alleged facts sufficient to show that he was the procuring cause of the ultimate transaction. For the same reason, the cause of action for unjust enrichment must be dismissed as well (*c.f. RMB Properties, LLC v Am. Realty Capital III, LLC*, 55 Misc 3d 1202(A) [Sup Ct 2016], affd, 148 AD3d 585 [1st Dept 2017] [after dismissing claim for breach of contract, finding that, "because plaintiff was not the procuring cause of the transaction it follows that [plaitniff's] quantum meruit claim also fails" and noting that "is not unjust under the circumstances that [plaintiff] goes uncompensated because it did nothing more than bring [defendant] and the seller together for what was an ultimately unsuccessful transaction"]).

Because additional discovery will not cure the defects in plaintiff's claims, the request for additional discovery is denied.

It is hereby

ORDERED that the motions to dismiss the Second Amended Complaint is GRANTED; and it is further

ORDERED that the complaint is hereby dismissed in its entirety and the Clerk of the Court is directed to enter judgment against plaintiff Vasilios Vasiliu and in favor of defendants Chaim "HARRY" Miller, Xi Hui Wu a/k/a Steven Wu, 3 Mitchell Place Loft LLC, Beekman Towers LLC, and Beekman Towers Holdings, LLC together with an award of costs to be taxed against plaintiff upon presentation of a proper bill of costs.

This constitutes the decision and order of the court.

DATED: October 2, 2018

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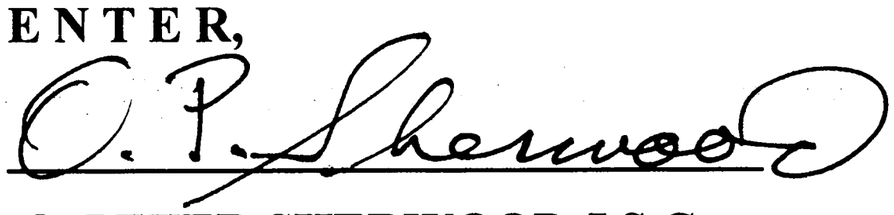

O. PETER SHERWOOD J.S.C.