SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN **PART** IAS MOTION 58EFM

Justice

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INBAR GROUP, INC.,

Plaintiff,

- v -

ST. MARK'S WORLD, INC.,ST. MARK'S WORLD ACQUISITION LLC,MICHAEL MORGAN, FLEX EMPLOYEE SERVICES, LLC,SCOTT HARTMAN,

Defendant.

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INDEX NO. 653565/2016

MOTION DATE 11/14/2018

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 102, 104, 105, 106, 107, 108, 109, 110, 111, 112, 114, 115, 116, 118, 119, 120, 121, 123, 124, 125, 126, 127, 146

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

Plaintiff's motion is granted in part and defendants' cross-motion to amend is granted. The portion of the cross-motion seeking dismissal of the claims against Michael Morgan personally is denied.

The following facts are not in dispute. On March 19, 2014, St Mark's World, Inc. ("SMW") entered into a listing agreement with Inbar Group, Inc. ("Inbar"). The listing agreement provided that SMW granted Inbar the exclusive right to sell, lease, exchange, merge or contract to sell the real property, stock, and assets of SMW, including equipment, trademarks, trade names, and other inventory. In consideration, Inbar was to receive an 8% commission based on the purchase price, or $80,000, whichever was higher. If SMW made a sale without the permission of Inbar, a commission would be immediately due and payable to Inbar. Moreover, if a deposit or down payment was forfeited by a prospective buyer, the amount would be split in half between the parties. The agreement was signed by Jay Inbar for plaintiff as broker, and by

SMW as the seller, with Michael Morgan signing as principle. The listing agreement was originally signed for a 6-month period but was extended through December 10, 2015. The extension was signed by Michael Morgan as seller. On July 10, 2014, plaintiff alleges that it procured Habib Noor as a prospective buyer of SMW. A $100,000 deposit was put down by Noor; however, the deal fell through and the $100,000 was forfeited. The Amended Complaint alleges that in June 2015, Defendant Hartman on behalf of defendant Flex Employee Services, LLC ("Flex") entered into a non-disclosure agreement relating to a purchase of SMW stock.

After the expiration of the extension to the listing agreement, in April of 2016, St. Marks World Acquisition, LLC ("SMWA") was formed by Hartman and entered into a stock purchase agreement ("SPA") with Morgan for the purchase of his SMW stock. Morgan sold 80% of his shares in SMW to SMWA. Morgan retained a 20% interest in SMW and remained its president. A separate services agreement was entered into between Morgan, in his individual capacity, and SMW for his salary as a consultant at SMW. There was no commission paid to plaintiff as a result of the SPA between Morgan, SMWA, and SMW, nor for the services agreement. Plaintiff commenced this action for breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment/quantum meruit and other causes of action. Following the exchange of some, but not all discovery, this motion and cross motion followed. In support, plaintiff submits the listing agreement with signature pages, the SPA and the affidavit of its president, Jay Inbar. In opposition and support of the cross-motion, defendants SMW and Michael Morgan submit the affidavit of Morgan and supporting documents.[1]

[1] Following submission of the motion and cross-motion, counsel for defendants Flex, SMWA and Hartman submitted a "cross-motion." This cross-motion was withdrawn per stipulation.

Summary judgment is a drastic remedy that should not be granted where there exists a triable issue of fact (*Integrated Logistics Consultants v Fidata Corp.*, 131 AD2d 338 [1st Dept 1987]; *Ratner v Elovitz*, 198 AD2d 184 [1st Dept 1993]). The moving party must establish a prima facie case showing that it is entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). This burden is a heavy one, and all facts must be viewed in a light most favorable to the non-moving party (*Jennack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470 [2013]). The proponent of a summary judgment motion makes a *prima facie* showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to eliminate any material issues of fact from the case (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). After the moving party has demonstrated its *prima facie* entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial (*Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824 [2014]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Plaintiff's motion seeking summary judgment is granted on liability as against Michael Morgan and denied as to SMW. Section 1 of the listing agreement granted plaintiff the "exclusive right to sell, lease, exchange, merge or contract to sell the real property, stock and/or the assets of the above described business ("the business")." Thus, the agreement permitted both the assets of the SMW to be sold and also permitted the sale of the SMW stock. Although Morgan argues that the listing agreement was between SMW and plaintiff and not him (and points to the fact that SMW is called the seller), Morgan's argument is belied by the fact that the agreement clearly contemplated the sale of the SMW stock held by the owner of such stock, which could only be sold by Michael Morgan, as the sole owner of all SMW stock. Even if it could be said that the initial agreement was only with SMW, there is no disputing that Morgan

was also contemplated as a seller in the extension which was signed on June 19, 2015 by Morgan as seller. The affidavit of Morgan does not raise an issue of material issue of fact that necessitate the denials. The extension to the listing agreement was clear, precise, and complete, and Morgan signed as seller.

The agreement also states in Section 7 that "Seller agrees to pay the full comission set forth in this Agreement to the Broker in the event the property described herein is, within two years after the termination of this Agreement, sold, traded or otherwise conveyed to anyone referred to Seller by Broker or with whom Seller had negotiations during the term of this Agreement." Plaintiff has established, and SMW and Morgan do not dispute, that Hartman was introduced to SMW and Morgan for the purposes of exploring this transaction. The fact that Hartman formed a new entity for purposes of entering into this transaction does not remove him from being "anyone referred to Seller by Broker or with whom Seller had negotiations during the term of this Agreement."

As Morgan is a seller that sold to someone covered by the listing agreement, summary judgment is appropriate. However, Morgan's claim of not being paid the whole amount and that there is a dispute as to the value of the services agreement entered into in connection with the sale of the SMW stock to SMWA, precludes a grant of summary judgment beyond a finding of liability against Morgan. Further, as summary judgment is granted based upon a finding that there is no genuine dispute that Morgan was the seller, summary judgment would be inappropriate against SMW or on the unjust enrichment claim against Morgan and SMW. For the same reasons, Morgan cross-motion to dismiss the Amended Complaint against him personally is denied.

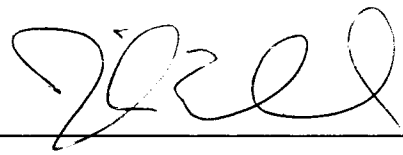
Finally, defendants' cross motion to amend their answer to include a counterclaim for $50,000 of the forfeited security deposit pursuant to paragraph 5 of the listing agreement is granted. On a motion to amend, a party need not establish the merit of its proposed new allegations but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit (*MBIA Insurance Corporation v Greystone*, 74 AD3d 499 [1st Dept 2010]). In deciding whether to permit an amendment pursuant to CPLR 3025(b), a court should end its inquiry into the matter once a prima facie basis for the amendment has been established (*Pier 59 Studios, L.P. v Chelsea Piers, L.P.*, 40 AD3d 363 [1st Dept 2007]). A motion to amend under CPLR 3025(b) shall be freely granted where plaintiff will suffer no prejudice or surprise resulting directly from the amendment (*McCaskey, Davies and Assocs., Inc. v New York City Health & Hosps. Corp.*, 59 NY2d 755, 757 [1983]). Here there is no prejudice and moving defendants are permitted to amend their answer. It is therefore

ORDERED that plaintiff's motion for summary judgment is granted against Michael Morgan as to liability and is otherwise denied; and it is further

ORDERED that defendant Morgan's motion to dismiss the Amended Complaint against him personally is denied; and it is further

ORDERED that defendants Morgan and SMW's motion to amend their answer is granted. The proposed amended answer is deemed filed and served.

This constitutes the decision and order of the Court.



12/5/2019
DATE

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

CHECK ONE:		CASE DISPOSED			[X]	NON-FINAL DISPOSITION	
		GRANTED	[ ]	DENIED	[ ]	GRANTED IN PART	[X] OTHER
APPLICATION:		SETTLE ORDER			[ ]	SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			[ ]	FIDUCIARY APPOINTMENT	[ ] REFERENCE