SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MELISSA ANNE CRANE** **PART** **IAS MOTION 15EFM**

Justice

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VENTURE CAPITAL PROPERTIES LLC.,

Plaintiff,

- v -

THE RELATED COMPANIES, L.P., NYSANDY2 30-50 21ST LLC and NYSANDY2 11-15 BROADWAY LLC,

Defendants.

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INDEX NO. 156448/2014

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 58, 59, 60, 61, 62, 63, 64, 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, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

In this action seeking to recover a real estate broker's commission, plaintiff Venture Capital Properties LLC moves, pursuant to CPLR 3212, for summary judgment on its first cause of action for breach of contract and for summary judgment dismissing two affirmative defenses of defendants Related Companies, L.P. (Related), NYSANDY2 30-50 21ST LLC (21 LLC) and NYSANDY2 11-15 Broadway LLC (Broadway LLC) (collectively, defendants). For the reasons set forth below, the court grants the motion in part.

Background and Procedural History

Plaintiff is a licensed real estate brokerage firm (NY St Cts Elec Filing [NYSCEF] Doc No. 61, affirmation of Lionel A. Barasch [Barasch], exhibit 1 [complaint], ¶ 2; NYSCEF Doc No. 92, Barasch affirmation, exhibit 32 at 2). Salim "Soly" Halabi (Halabi) and Daniel Rahmani (Rahmani) are licensed real estate salespersons (NYSCEF Doc No. 88, Barasch affirmation, exhibit 28 at 2; NYSCEF Doc No. 91, Barasch affirmation, exhibit 31 at 2). Related and its

subsidiaries, 21 LLC and Broadway LLC, own and develop real property in New York City (NYSCEF Doc No. 110, Seth Blau [Blau] aff, ¶¶ 1 and 6).

In December 2012, Rahmani alerted Pamela Samuels (Samuels), a former senior vice president at Related (NYSCEF Doc No. 87, Barasch affirmation, exhibit 27 [Samuels transcript] at 9), to the availability of three multi-family residential buildings – 30-50 21st Street, 11-15 Broadway and 12-07 Broadway in Astoria, Queens (collectively, the Properties) – for purchase "off market," and furnished her with information for each building (NYSCEF Doc No. 72, Barasch affirmation, exhibit 12 at 1; NYSCEF Doc No. 73, Barasch affirmation, exhibit 13 at 1-2). Nonparty Criterion Group LLC (Criterion) or its affiliates owned the Properties (NYSCEF Doc No. 59, Halabi aff, ¶¶ 10-11).

On February 6, 2013, Samuels, Halabi and Rahmani met at Related's office (NYSCEF Doc No. 74, Barasch affirmation, exhibit 14 at 1; NYSCEF Doc No. 75, Barasch affirmation, exhibit 15 at 1), although not for the sole purpose of discussing the Properties (NYSCEF Doc No. 106, affirmation of Elan R. Dobbs, exhibit A [Halabi transcript] at 140-142). Shortly thereafter, Samuels proposed a tour of the Properties (NYSCEF Doc No. 75 at 4), and Halabi tentatively confirmed that a February 13, 2013 tour date "should be fine" (*id.* at 1). Halabi also sent Samuels a contract setting plaintiff's fee at 1.5% of the gross selling price for the Properties (NYSCEF Doc No. 75 at 1 and 6). Samuels acknowledged receiving the document, but challenged whether they had "discussed a point" (NYSCEF Doc No. 76, Barasch affirmation, exhibit 16 at 1). Halabi later agreed to a 1% fee (NYSCEF Doc No. 77, Barasch affirmation, exhibit 17 at 1).

A series of email exchanges between Halabi and Hany Arnut (Arnut), one of Criterion's principals, reveal Halabi's attempts to set the date and time for Related's tour (NYSCEF Doc

No. 80, Barasch affirmation, exhibit 20 at 3). After Halabi pressed Arnut to confirm, Arnut responded on February 12, 2013 at 12:38 p.m. and directed Halabi to arrange the tour through Helen Hwang (Hwang), a real estate broker at nonparty Cushman & Wakefield (C&W)[1] (*id.* at 1). Halabi testified this was the first time he had heard of C&W's involvement (NYSCEF Doc No. 106 at 161). Halabi could not recall if he told Rahmani that C&W represented Criterion at that time, but they "probably" discussed it because Rahmani "was involved in this" (*id.* at 169). Halabi further testified he did not believe he told Related about C&W's involvement when he learned of it (*id.* at 183). Rahmani testified he could not remember whether he learned of C&W's involvement at or near the time of Arnut's February 12 email (NYSCEF Doc No. 90, Barasch affirmation, exhibit 30 [Rahmani transcript] at 65).

Fourteen minutes after Halabi received Arnut's message, Rahmani wrote the following to Samuels at 12:52 p.m.: "What is the status of the agreement on the Astoria Package? Need to show to ownership before he confirm [sic] the appointment tomorrow for sure …" (NYSCEF Doc No. 78, Barasch affirmation, exhibit 18 at 1). Later that same day, Samuels returned a signed copy of the "Confidential Offering Disclaimer" (the Agreement) the Michael H. Orbison (Orbison), Related's former general counsel, executed, together with a rider Orbison had prepared (NYSCEF Doc No. 79, Barasch affirmation, exhibit 19 at 1-3).

The provisions of the Agreement relevant to this action state, in pertinent part:

> "This confidentiality agreement between Venture Capital Properties LLC licensed real estate broker and the undersigned party (hereinafter 'Purchaser') for the sale of property(s) referred to as '30-50 21st Street, Queens, NY; 11-15 Broadway, Queens, NY & 12-07 Broadway, Queens, NY' (hereinafter 'Property')

[1] Shibber A. Khan (Khan), one of Criterion's principals, testified that Criterion retained C&W as its exclusive agent to market the Properties (NYSCEF Doc No. 95, Barasch affirmation, exhibit 35 [Khan transcript] at 20-21). The exclusive sales agency contract between Criterion and C&W is dated November 7, 2012 (NYSCEF Doc No. 100, Barasch affirmation, exhibit 40 at 1).

> The offering memorandum of this Property will be forwarded to you upon receipt of this Agreement ... Seller and Agent make no representation or warranties as to the accuracy of the information ... (collectively, the 'Materials') ... [t]hese Materials include highly confidential information ... [Y]our signature on the Confidentiality Agreement is a binding pledge to hold the contents in the strictest confidence ... .
>
> ...
>
> It is understood and agreed by the undersigned party that Venture Capital Properties will be the sole contact and any discussion, inquires, questions and telephone conversations with seller, must be delivered by Venture Capital Properties L.L.C. Any offers to purchase this Property both in writing and verbally, will be presented through Venture Capital Properties, LLC.
>
> In the event of a sale, Purchaser agrees to pay a Commission of 1.0% (One percent) of the gross selling price at closing to Venture Capital Properties LLC if the undersigned or any person or entity associated with the undersigned consummates a purchase of the referenced Property"

(NYSCEF Doc No. 79 at 2). The Agreement was in effect for one year (*id.* at 2-3). The terms "Seller" and "Agent" are not defined, and the Agreement lists "12-07 Broadway," not 12-15 Broadway.

After plaintiff received the Agreement, Halabi sent Samuels a "basic property description on each property as well as the income & expense report for each" (NYSCEF Doc No. 99, Barasch affirmation, exhibit 39 at 1; NYSCEF Doc No. 59, ¶ 26). The tour scheduled for February 13, 2013 did not take place (NYSCEF Doc No. 87 at 36), and efforts to secure a new date amenable to the parties failed.

On April 8, 2013, C&W sent Related an email listing the Properties for sale (NYSCEF Doc No. 85, Barasch affirmation, exhibit 25 at 1; NYSCEF Doc No. 87 at 38). That same day, Blau, a managing director for a Related subsidiary and a vice president of 21 LLC and Broadway LLC, asked Samuels which firm held the listing (NYSCEF Doc No. 85 at 1). In response to

Blau's email, Samuels wrote, "The listing came to us through an independent broker, Soly Halibi, Venture Capital Properties. Then, he lost it[,] the exclusive. He said it was going to CBRE. Then, Helen called who was C&W" (*id.*). In July 2013, defendants executed a purchase and sale agreement for the Properties (NYSCEF Doc No. 84, Barasch affirmation, exhibit 24 at 1). Documents recorded in the Office of the City Register show that 21 LLC purchased 30-50 21st Street for $26.35 million (NYSCEF Doc No. 64, Barasch affirmation, exhibit 4 at 7), and that Broadway LLC purchased 11-15 Broadway for $33.9 million (NYSCEF Doc No. 65, Barasch affirmation, exhibit 5 at 7). It is not disputed that Related dealt directly C&W in completing the transaction (NYSCEF Doc No. 93, Barasch affirmation, exhibit 33 [Hwang transcript] at 59-60]; NYSCEF Doc No. 97, Barasch affirmation, exhibit 37 [Blau transcript] at 59).

After learning of the sale, plaintiff transmitted an invoice seeking a commission of $602,500 to defendants (NYSCEF Doc No. 98, Barasch affirmation, exhibit 38 at 2). When defendants refused to pay (NYSCEF Doc No. 61, ¶ 14), plaintiff commenced the present action by filing a summons and complaint pleading claims for breach of contract, breach of implied contract, quantum meruit and unjust enrichment. Defendants have interposed seven affirmative defenses in their answer to the complaint.

Plaintiff now moves for summary judgment on the first cause of action for breach of contract and for summary judgment dismissing the fourth affirmative defense of fraudulent inducement and sixth affirmative defense of unclean hands. Plaintiff principally relies on Halabi's affidavit, deposition transcripts of witnesses for plaintiff, defendants, Criterion and C&W, email correspondence, and other exhibits. Defendants, in opposition, submit Blau's affidavit, email correspondence, and Halabi's full deposition transcript.

Discussion

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]), including the "absence of genuine issues of material fact on every relevant issue raised by the pleadings, including any affirmative defenses" (*Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 70 [1st Dept 2002], citing *Aimatop Rest. v Liberty Mut. Fire Ins. Co.*, 74 AD2d 516, 517 [1st Dept 1980]). A motion for summary judgment must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and by the pleadings and other proof such as affidavits, depositions and written admissions (*see* CPLR 3212 [b]). The movant's "failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013], citing *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

A. The First Cause of Action for Breach of Contract

The first cause of action alleges that defendants breached the Agreement by refusing to pay plaintiff a commission. Plaintiff argues that the evidence demonstrates each element necessary to prevail on a breach of contract claim. Defendants contend that plaintiff has not dispelled all questions of material fact as to plaintiff's own performance under the Agreement.

To prevail on a cause of action for breach of contract, a plaintiff must prove the existence of a contract, plaintiff's performance, defendant's breach, and damages (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]).

Here, plaintiff has established the existence of a written agreement between the parties. Halabi avers that plaintiff introduced defendants to the Properties, and that he and Samuels agreed Related would pay plaintiff a 1% commission if Related purchased any of them (NYSCEF Doc No. 59, ¶¶ 9, 17, 20, 22 and 25). Samuels testified that, although she did not remember meeting Halabi or Rahmani, she recalled "a conversation [with Rahmani] about "if they had something, how would they get paid" (NYSCEF Doc No. 87 at 29-30 and 62). Samuels explained that "typically, if they have something that is off market, they would be seeking to get some kind of commission from the buyer" (*id.* at 30). She confirmed forwarding the Agreement to Orbison, who was authorized to sign agreements on Related's behalf (*id.* at 33). Orbison testified that he signed and initialed the Agreement (NYSCEF Doc No. 89, Barasch affirmation, exhibit 29 [Orbison transcript] at 18).

Plaintiff has also demonstrated defendants' breach and plaintiff's damages. Halabi avers Samuels told him that "after discussing the Properties internally, [Related] no longer had an appetite for them" (NYSCEF Doc No. 59, ¶ 30). Defendants, though, acquired the Properties through C&W, despite the plain terms of the Agreement (*id.*, ¶ 33). As for its damages, $602,500 represents 1% of the $60,250,000 gross selling price for 30-50 21st Street and 11-15 Broadway.

Nevertheless, defendants have raised a triable issue of fact as to plaintiff's performance (*see Billy Chicago Ltd. v Chicago China Tour, LLC*, 176 AD3d 566, 567 [1st Dept 2019] [granting the plaintiff partial summary judgment on a breach of contract claim where the plaintiff showed it had performed its contractual obligations]). The Agreement required plaintiff to send Related an offering memorandum (NYSCEF Doc No. 79 at 2), the agreement does not define the terms "offering memorandum" and "highly confidential" materials. An offering memorandum,

as that term is commonly used in real estate parlance, refers to detailed investment information, such as "due diligence" information, rent rolls, leases, property condition reports, environmental reports, maps, square footage, and income and expense reports (NYSCEF Doc No. 93 at 3; NYSCEF Doc No. 106 at 61). An offering memorandum is often exchanged only after a prospective purchaser executes a confidentiality agreement (NYSCEF Doc No. 93 at 35-36). An offering memorandum differs from a "teaser," which is a document provided to prospective purchasers containing basic or minimal information about a property (NYSCEF Doc No. 87 at 46; NYSCEF Doc No. 93 at 36; NYSCEF Doc No. 95 at 17; NYSCEF Doc No. 96, Barasch affirmation, exhibit 36 [Arnut transcript] at 27 and 35; NYSCEF Doc No. 97 at 107).

In this instance, it appears that Halabi sent Samuels a teaser, as the 14-page document does not contain the type of "highly confidential" information ordinarily contained in an offering memorandum. First, Rahmani had previously emailed five pages from the document to Samuels in December 2012. As such, the information contained in those five pages cannot constitute "highly confidential" materials, as the agreement uses that phrase. Second, the remaining nine pages consist of items Halabi received from Neel Dvivedi (Dvivedi), a former Criterion employee, on September 24, 2012 (NYSCEF Doc No. 59, ¶ 10; NYSCEF Doc No. 106 at 47; NYSCEF Doc No. 94, Barasch affirmation, exhibit 34 [Dvivedi transcript] at 26; NYSCEF Doc No. 95 at 37-38). Dvivedi, though, described the documents he had furnished to Halabi as a "teaser" (NYSCEF Doc No. 94 at 26). Moreover, Halabi labeled the documents he had received from Dvivedi a "teaser," and stated that "[n]one of this information was encumbered with any form of confidentiality agreement" (NYSCEF Doc No. 59, ¶ 10). Hence, a question of fact exists whether plaintiff performed under the Agreement. Thus, that part of plaintiff's motion for summary judgment on the first cause of action is denied. To the extent plaintiff submits it need

not demonstrate it was the "procuring cause" (NYSCEF Doc No. 103, plaintiff's memorandum of law at 18), defendants did not address this issue in their opposition.

B. The Fourth Affirmative Defense of Fraudulent Inducement

In their fourth affirmative defense, defendants allege that plaintiff represented that it served as Criterion's agent, that they reasonably relied on plaintiff's representation, and that they would have never entered into the Agreement had they been aware plaintiff was not Criterion's agent (NYSCEF Doc No. 62, Barasch affirmation, exhibit 2 [answer], ¶¶ 41-42).

Plaintiff argues that defendants cannot demonstrate the falsity of the alleged misstatement, scienter, or reliance. Defendants posit that triable issues of fact exist as to whether plaintiff knowingly misrepresented that Criterion needed to see the Agreement, and whether defendants justifiably relied on the misrepresentation. At issue is the statement contained in Rahmani's February 13, 2013 email asking Samuels for "the status of the [A]greement … [because he] need[ed] to show [the Agreement] to ownership" before confirming Related's tour scheduled to take place the next day (NYSCEF Doc No. 78 at 1). Rahmani's statement implies that Criterion would not permit Related to access the Properties unless Related executed the Agreement.

"To sustain a claim for fraudulent inducement, there must be a knowing misrepresentation of material fact, which is intended to deceive another party and to induce them to act upon it, causing injury" (*Sokolow, Dunaud, Mercadier & Carreras*, 299 AD2d at 70). The party must show that it relied on a material misrepresentation and that its reliance was reasonable (*see Stuart Silver Assoc. v Baco Dev. Corp.*, 245 AD2d 96, 97 [1st Dept 1997]). To that end, the element of reliance requires a party to demonstrate that it "was induced to act or refrain from acting to [its] detriment by virtue of the alleged misrepresentation or omission" (*Shea v Hambros*

PLC, 244 AD2d 39, 46-57 [1st Dept 1998] [internal quotation marks and citation omitted]). Ordinarily, the elements of material misrepresentation and reasonable reliance are not subject to summary disposition (*see Brunetti v Musallam*, 11 AD3d 280, 281 [1st Dept 2004]), unless "the facts in the case … present a rare circumstance in which the issue of reasonable reliance can be resolved at the stage of summary judgment" (*Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 99 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007]). As applied here, triable issues of fact regarding the merits of defendants' fourth affirmative defense of fraudulent inducement also preclude granting plaintiff summary judgment.

As to the first element of fraudulent inducement, plaintiff has not dispelled all questions of material fact whether Rahmani's statement constitutes a misrepresentation. Rahmani could not recall at his deposition why he told Samuels that Criterion needed to see the Agreement, or whether he discussed the existence of the Agreement with Criterion (NYSCEF Doc No. 90 at 59). Halabi testified that "[w]e needed the agreement before the tour because I wasn't letting anyone go into the building without a confidentiality agreement" (NYSCEF Doc No. 106 at 180). He explained it was "normal practice" for a broker to show its confidentiality agreement to a seller (*id.* at 60). However, Halabi also testified that Criterion "never asked to see anything" (*id.* at 177). He further testified that Criterion was not aware of the signed Agreement, and "they never asked about it, they never asked to see it" (*id.* at 178). Thus, a question of fact exists whether Rahmani's statement constitutes a misrepresentation.

In addition, a question of fact exists whether C&W or Criterion would have accepted the Agreement in lieu of their own nondisclosure forms. At his deposition, Khan expressed his displeasure concerning Halabi's handling of confidential information related to the Properties, describing the situation as "so messy" (NYSCEF Doc No. 95 at 79 and 86). As a consequence,

Criterion required plaintiff and its clients to execute nondisclosure agreements on forms supplied by Criterion (*id.* at 78-79), as evidenced in the documents signed by plaintiff and nonparty Soha Real Estate Group (NYSCEF Doc No. 69, Barasch affirmation, exhibit 9 at 3; NYSCEF Doc No. 70, Barasch affirmation, exhibit 10 at 6). Khan also testified that once Criterion hired C&W, C&W "had nondisclosure agreements executed by all of their clientele" on C&W's own form (*id.* at 83-84). Hwang testified that unless an investor tells her it is represented by a broker, C&W sends the investor a "principal confidentiality agreement" to protect both the seller and C&W (NYSCEF Doc No. 93 at 61-62). If an investor is represented by a broker, then Hwang sends the investor a "broker confidentiality form" which, in addition to a confidentiality provision, contains additional language that the investor would pay its own broker a fee (*id.* at 62). Here, plaintiff and Related are the only signatories to the Agreement.

Further, a question of fact exists whether the alleged misrepresentation is material, and whether defendants reasonably relied on the misrepresentation to their detriment. According to Samuels, Rahmani represented that he needed to show the signed Agreement to Criterion before she could tour the Properties (NYSCEF Doc No. 87 at 82). However, Samuels testified there was "no reason" to sign the Agreement had she been aware C&W represented Criterion (NYSCEF Doc No. 87 at 90). Blau clarifies Related's position in his affidavit. He avers that Related's policy on property acquisitions is to maintain a direct relationship with the seller, usually through the seller's broker, who is paid a commission by the seller (NYSCEF Doc No. 110, Blau aff, ¶¶ 5 and 7). In his experience, Related and its affiliates retain a broker's services only where that broker has "valuable information regarding a property not being publicly marketed … has a direct relationship with the owner, and … would be the only broker working on the transaction" (*id.*, ¶ 7). In this case, Blau avers that C&W, as Criterion's exclusive broker,

directly marketed the Properties to Related (*id.*, ¶ 9). As discussed above, neither Halabi nor Rahmani could recall telling defendants that Criterion had retained C&W as its exclusive broker. Had they timely advised defendants of this development, then there would have been no need for Related to execute the Agreement, as Blau and Samuels have indicated.

As for scienter, this is "the element most likely to be within the sole knowledge of the" party charged with fraud, and is the element "least amenable to direct proof" (*Houbigant, Inc. v Deloitte & Touche*, 303 AD2d 92, 98 [1st Dept 2003]). Although fraudulent intent may "be divined from surrounding circumstances" (*Oster v Kirschner*, 77 AD3d 51, 56 [1st Dept 2010]), intent is generally a question of fact for a jury (*see ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 131 AD3d 427, 428 [1st Dept 2015]). In this matter, the fact that neither Halabi nor Rahmani could recall having discussed C&W's involvement before Rahmani asked Samuels for an update on the Agreement does not prove the lack of fraudulent intent. Rahmani testified he could not recall why he told Samuels that Criterion needed to see the Agreement in advance of the tour, nor could he recall having had a discussion with anyone at Criterion about the Agreement (NYSCEF Doc No. 90 at 59). Halabi also testified that no one at Criterion had asked to see the Agreement. Thus, plaintiff has not dispelled all questions of fact as to its fraudulent intent.

Plaintiff also argues that the fraudulent inducement defense must be dismissed because defendants point to the Agreement as the source of the alleged misrepresentation. This argument is unpersuasive. To sustain a fraudulent inducement claim, the "alleged misrepresentation should be one of then-present fact, which would be extraneous to the contract and involve a duty separate from or in addition to that imposed by the contract" (*Hawthorne Group v RRE Ventures*, 7 AD3d 320, 323 [1st Dept 2004]). Counter to plaintiff's assertion, defendants' answer

sufficiently alleges that "[h]ad Defendants known that Plaintiff did not have the authority that it claimed to have, Defendants would never have entered into the 'brokerage agreement' and agreed to pay Plaintiff any fee" (NYSCEF Doc No. 62, ¶ 41). As such, the alleged misrepresentation that Criterion needed to see the contract is "a misrepresentation of then present fact that was collateral to the contract" (*GoSmile, Inc. v Levine*, 81 AD3d 77, 81 [1st Dept 2010], *lv dismissed* 17 NY3d 782 [2011]). Consequently, that part of plaintiff's motion for summary judgment dismissing defendants' fourth affirmative defense is denied.

C. The Sixth Affirmative Defense of Unclean Hands

The sixth affirmative defense centers on the alleged disclosure of confidential information to defendants without Criterion's consent (NYSCEF Doc No. 62, ¶¶ 48-49]). Defendants further allege this was a "willful violation" of plaintiff's agreement with Criterion (*id.*, ¶ 50).

"The doctrine of unclean hands is only available where plaintiff is guilty of immoral or unconscionable conduct directly related to the subject matter, and the party seeking to invoke the doctrine is injured by such conduct" (*Frymer v Bell*, 99 AD2d 91, 96 [1st Dept 1984], citing *Weiss v Mayflower Doughnut Corp.*, 1 NY2d 310, 316 [1956]; *see also Kopsidas v Krokos*, 294 AD2d 406, 407 [2d Dept 2002]). To invoke the doctrine as a defense, the plaintiff's immoral or unconscionable conduct must be directed toward the defendant in the transaction (*Frymer*, 99 AD2d at 96, citing *Brown v Lockwood*, 76 AD2d 721, 729 [2d Dept 1980]).

Applying these principles herein, plaintiff has demonstrated that the doctrine of unclean hands is inapplicable. The conduct complained of, namely whether plaintiff breached an agreement with Criterion, was not directed at defendants in the transaction at issue and is not the subject of the present litigation. Defendants did not address this portion of the motion in their

opposition. Thus, that part of plaintiff's motion for summary judgment dismissing defendants' sixth affirmative defense is granted.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted to the extent of dismissing defendants' sixth affirmative defense of unclean hands, and defendants' sixth affirmative defense of unclean hands is dismissed, and the motion is otherwise denied.

DATED: ~~January 30~~ February 3, 2020

MELISSA A. CRANE, J.S.C

HON. MELISSA CRANE

Check one: ☐ **FINAL DISPOSITION** ☒ **NON-FINAL DISPOSITION**
Check if appropriate: MOTION IS: ☐ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE** ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **FIDUCIARY APPOINTMENT**