SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARTHUR F. ENGORON** **PART** **IAS MOTION 37EFM**

Justice

----------X

CORE GROUP MARKETING LLC,

Plaintiff,

- v -

CLAIRE OLIVER, IAN RUBINSTEIN, 132 CLOUD NINE LLC

Defendant.

----------X

INDEX NO. 655478/2019

MOTION DATE 12/18/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

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

Upon the foregoing documents and for the reasons stated hereinbelow, the instant motion by plaintiff, CORE Group Marketing LLC, pursuant to CPLR 3212, for summary judgment is granted as against defendants Claire Oliver and Ian Rubinstein in the amount of $53,000.00, plus pre-judgment interest from August 21, 2019 (the date of breach) on plaintiff's first cause of action, for breach of contract, and denied as against defendant 132 Cloud Nine LLC.

Background

Plaintiff, CORE Group Marketing LLC, asserts that it is a licensed real estate broker in New York State. Defendants Claire Oliver ("Oliver") and Ian Rubinstein ("Rubinstein") (Oliver and Rubinstein, collectively, "the Individual Defendants") are the sole members of defendant 132 Cloud Nine LLC ("Cloud Nine"). Plaintiff asserts that Cloud Nine's sole asset was Unit 9 in the Stanwick Condominium Building, located at 132 West 22nd Street in New York, NY ("the Unit"). At all times prior to August 21, 2019, the closing of the sale of the Unit, as to which plaintiff was, in fact, the procuring broker, Oliver and Rubinstein were the beneficial owners of the Unit. (NYSCEF Doc. 2.)

On March 7, 2018 (effective March 8, 2018), the Individual Defendants entered into an exclusive sales and marketing agreement ("the CORE Exclusive," NYSCEF Doc. 3) with plaintiff, pursuant to which the Individual Defendants provided plaintiff with the exclusive right to market and sell the Unit. The Agreement provided, in part, the following:

> You are the owner of the Unit and have the authority to enter into this Agreement. This Agreement shall be effective as of the date hereof. Owner authorizes CORE

> to start marketing the Unit on the internet and disseminating information concerning the Unit to the brokerage community on 3/8/2018 (Posting Date) and shall continue in full force and effect for three (3) months until 6/8/2018 (Expiration Date).

The CORE Exclusive also held that if, during the duration of the CORE Exclusive, the Unit was sold, the Individual Defendants would pay plaintiff 6% of the Unit's total sale price ("the Full Commission"). (NYSCEF Doc. 2.)

Plaintiff performed its obligations pursuant to the CORE Exclusive and procured the buyer ("the Buyer") who purchased the Unit for $5,050,000.00. On about August 14, 2019, plaintiff sent a copy of the commission invoice to Cloud Nine. In response, defendants' attorney "stated without explanation that per Oliver's advice, the commission amount would be inexplicably and improperly reduced to $249,600" ("the Reduced Commission"). Plaintiff reiterated that, pursuant to the CORE Exclusive, it was entitled to the Full Commission, namely $303,000.00. (NYSCEF Doc. 2.)

On August 21, 2019, the sale of the Unit closed ("the Closing") "as a result of [plaintiff's] efforts," and defendants apparently recognized plaintiff as the procuring broker. At the Closing, defendants presented plaintiff with an attorney escrow check in the amount of the Reduced Commission. Plaintiff deposited the check for the Reduced Commission but wrote "deposited under protest, without prejudice and with reservation of all rights" in the check's memorandum and endorsement sections. (NYSCEF Doc. 2.)

Plaintiff now asserts that (1) plaintiff did not agree to accept the Reduced Commission; (2) defendants breached their obligation to plaintiff; and (3) defendants "have wrongfully advised that" they will not be paying plaintiff the $53,400.00 remaining ("the Remaining Commission Balance") on the Full Commission. (NYSCEF Doc. 2.)

By summons with notice dated September 20, 2019 and complaint dated October 14, 2019, plaintiff commenced the instant action against defendants, jointly and severally, to collect the Remaining Commission Balance. Plaintiff asserts causes of action against defendants, jointly and severally, for (1) breach of contract; (2) quantum meruit; (3) unjust enrichment, each in an amount not less than the Remaining Commission Balance, plus statutory pre-judgment interest; and (4) attorney's fees, pursuant to the CORE Exclusive Paragraph 13, in an amount to be determined. (NYSCEF Doc. 2.)

By stipulation dated February 7, 2020, plaintiff extended the date on which defendants could answer the instant complaint through and including March 16, 2020 (NYSCEF Doc. 7). On March 20, 2020, defendants answered the instant complaint with various admissions, denials, and five Affirmative Defenses (NYSCEF Doc. 8).

Plaintiff now moves, pursuant to CPLR 3212, for summary judgment on all of plaintiff's causes of action asserted against defendants (1), on plaintiff's first, second, or third cause of action, in the amount of $53,000.00, plus pre-judgment interest from August 21, 2019 (the date of breach);

and (2) on plaintiff's fourth cause of action, granting attorney's fees and costs and scheduling an inquest to determine that amount (NYSCEF Doc. 9).

Defendants oppose the instant motion. Citing to New York law "and common sense," defendants claim that "to establish entitlement to a commission for the sale of property,"

> a. the plaintiff must prove that it procured the purchaser of the property;
>
> b. the plaintiff must prove that it had an agreement with the seller that was in effect at the time it alleges it procured the purchaser; and
>
> c. the plaintiff must prove that the property was actually sold to the purchaser it claims to have procured.

Defendants allege that plaintiff has failed to prove any of the aforementioned facts. Additionally, defendants assert, inter alia, the following: (1) plaintiff has failed to prove that it possesses a real estate broker's license, which is dispositive and sufficient by itself to warrant this Court's denying the instant motion for summary judgment; (2) the CORE Exclusive expired on or about June 8, 2018; (3) plaintiff has failed to identify the Buyer by name, let alone prove that it procured him or her; (4) plaintiff has failed to prove the sale price for the Unit; (5) Cloud Nine did not sign the CORE Exclusive, and the First Department has held that "there can be no quasi-contract claim against a third-party non-signatory to a contract that covers the subject matter of the claim"; (6) the Hon. Sabrina Kraus of Civil Court previously held that Elizabeth Kee, who submitted an affidavit in support of plaintiff's instant motion, "repeatedly lied and contradicted herself throughout the course of [another] six-year litigation," "intentionally attempted to prevent the truth from being known to the court," and "has absolutely no credibility as a witness," see Norfolk Dev. LLC v Kee, 39 Misc3d 1239(A) (Civ Ct, New York County 2013); and (7) plaintiff may not attempt to "cure" its deficiencies in its reply papers. (NYSCEF Doc. 17.)

In reply, plaintiff, inter alia, (1) submits its license; (2) asserts that defendants have failed to submit an affidavit from an individual with personal knowledge; (3) asserts that despite the CORE Exclusive's statement that it had a three-month term, up to the Unit's Closing, the parties "performed consistent with their respective obligations under the CORE Exclusive"; and (4), asserts that, alternatively, plaintiff is entitled to summary judgment on its claims for quantum meruit or unjust enrichment (NYSCEF Documents 21-25).

Discussion

To prevail on summary judgment, the moving party must tender sufficient evidence to demonstrate the absence of any material issue of fact and entitlement to judgment in its favor as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Ayotte v Gervasio, 81 NY2d, 1062 (1993). Once the movant has met its initial burden, it then shifts to the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial; mere conclusions and unsubstantiated allegations are insufficient. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980); see generally American Sav. Bank v

Imperato, 159 AD2d 444, 444 (1st Dept. 1990) ("The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment").

RPL § 442-d, is entitled "Actions for commissions; license prerequisite" and states the following:

> No person, copartnership, limited liability company or corporation shall bring or maintain an action in any court of this state for the recovery of compensation for services rendered ... in the buying, ... leasing, [or] renting ... any real estate without alleging and proving that such person was a duly licensed real estate broker or real estate salesman on the date when the alleged cause of action arose.

A plaintiff must prove that it was licensed on the date on which the alleged causes of action arose. See Hentze-Dor Real Estate, Inc. v D'Allessio, 40 AD3d 813 (2d Dept. 2007). This Court finds that plaintiff has submitted sufficient proof that it was a licensed real estate broker during the subject time period. The CORE Exclusive, which the Individual Defendants signed, states that plaintiff is a licensed real estate broker in the State of New York (NYSCEF Doc. 3). Defendants have failed to claim that they found that plaintiff is not licensed. Therefore, defendants are estopped from disputing that plaintiff was/is licensed. Defendants fail to assert what they might have done differently had plaintiff e-field a copy of its license with its original moving papers (rather than with its reply papers as it has done). In any event, there is, at present, no dispute as to whether or not plaintiff possesses a real estate broker's license (NYSCEF Doc. 22).

As plaintiff notes, the parties acted as though the CORE Exclusive was in full force and effect through the Unit's Closing.

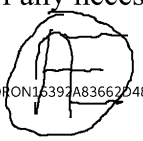
However, plaintiff is not entitled to summary judgment as against defendant 132 Cloud Nine LLC, as said defendant is not a signatory to the CORE Exclusive. The Appellate Division, First Department has held that "there can be no quasi-contract claim against a third-party non-signatory to a contract that covers the subject matter of the claim" (NYSCEF Doc. 20, at 5).

This Court has considered defendants' other arguments and finds them to be unavailing and/or non-dispositive.

Conclusion

Thus, for the reasons stated hereinabove, the instant motion by plaintiff, CORE Group Marketing LLC, pursuant to CPLR 3212, for summary judgment is hereby granted as against defendants Claire Oliver and Ian Rubinstein, jointly and severally, in the amount of $53,000.00, plus pre-judgment interest from August 21, 2019 (the date of breach) on plaintiff's first cause of action, for breach of contract, and is hereby denied as against defendant 132 Cloud Nine LLC. This Court hereby dismisses plaintiff's second and third causes of action, for quantum meruit and unjust enrichment, without prejudice solely as duplicative of plaintiff's first cause of action. Plaintiff's request for attorney's fees (plaintiff's fourth cause of action) is hereby severed, and plaintiff may obtain an inquest into said fees by presenting the Clerk with a Note of Issue with

Notice of Inquest, a copy of this Decision and Order, and the payment of any necessary fees. The Clerk is hereby directed to enter judgment accordingly.



4/7/2021
DATE

ARTHUR F. ENGORON, J.S.C.

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