Fairmont Equity Inc. v 340 Fae Owner LLC
2021 NY Slip Op 31860(U)
May 25, 2021
Supreme Court, Kings County
Docket Number: 509356/2020
Judge: Reginald A. Boddie
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At an IAS Commercial Term Part 12 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York, on the 25th day of May 2021.

P R E S E N T:
Honorable Reginald A. Boddie, JSC

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FAIRMONT EQUITY INC. d/b/a LEXINGTON AGENCY,

Plaintiff,

-against-

340 FAE OWNER LLC, 9 DEKALB OWNER LLC, 9 DEKALB FEE OWNER LLC, and MICHAEL STERN,

Defendants.

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Index No. 509356/2020
Cal. No. 14 MS 2

DECISION AND ORDER

Papers	Numbered
MS 2	Doc. # 39-48, 50-58

Upon the foregoing cited papers, the decision and order on defendant motion to dismiss is as follows:

Plaintiff Fairmont Equity Inc. d/b/a Lexington Agency (Fairmont) commenced this action on June 5, 2020, for breach of contract, unjust enrichment, conversion, promissory estoppel, and fraud arising from defendants' alleged breach of an oral agreement to pay plaintiff a $500,000 commission for brokering the deal for defendant 340 FAE Owners LLC (340 FAE) to purchase real property located at 340-366 Flatbush Avenue Extension, Brooklyn, New York (the subject property), from non-party seller 340 Flatbush LLC (340 Flatbush). Plaintiff alleged it brokered the sale of the subject property and defendant Michael Stern (Stern) promised, pursuant to their oral agreement, that he, 340 FAE, and/or any other Stern-related entity that ultimately owned the property would pay plaintiff a $500,000 commission upon closing. Plaintiff also alleged Stern

assured plaintiff that it did not have to attend the closing. Plaintiff further alleged that following the closing, it was not paid the commission, despite invoicing defendants, and the property was transferred from one defendant to another in efforts to pay off Stern's investors, while Stern continued to promise plaintiff its commission would be paid.

Defendants moved to dismiss plaintiff's verified amended complaint pursuant to CPLR 3211 (a) (1) (on the basis of documentary evidence), (a) (3) (plaintiff's lack of legal capacity to sue), (a) (5) (applicable statute of limitations has expired), and/or (a) (7) (failure to state a cause of action), and upon the doctrine of the law of the case. Defendants averred 340 FAE entered into a February 4, 2014 sales agreement with 340 Flatbush which provided that it would pay Barry Katz (Katz), a non-party, $500,000 for brokerage services performed in his individual capacity pursuant to a separate agreement that was never entered into.

Defendants also argued for dismissal of the amended complaint on the grounds Justice Martin's October 7, 2020 decision granting dismissal of the complaint is law of case and plaintiff failed to cure the fatal error in its amended complaint. In dismissing the complaint, Justice Martin reasoned, "[t]he documentary evidence establishes that to the extent that the defendants, or any one of them, had an agreement it was with a non-party and not the plaintiff." The documentary evidence proffered in MS 1 was the February 4, 2014 sales agreement.

Defendants further argued for dismissal of the amended complaint on the ground Fairmont was conspicuously absent from the "Brokers and Advisors" provision of the February 4, 2014 sales agreement and therefore defendants have no relationship with or obligation to pay Fairmont. Section 15 of the sales contract, entitled "Brokers and Advisors" provided:

> The parties represent and warrant to each other that they have not dealt or negotiated with, or engaged on their own behalf or for their benefit, any broker, finder, consultant, advisor, or professional in the capacity of a broker or finder in connection with this

> Agreement or the transactions contemplated hereby, except Barry Katz ("Broker") who shall be paid $500,000.00 by Purchaser pursuant to a separate agreement. Seller shall indemnify and hold Purchaser harmless from and against any and all claims for any commission, fee or other compensation by any person or entity who shall claim to have dealt with Seller in connection [with] the transaction contemplated hereunder and for any and all costs incurred by Purchaser in connection with any such claims, including, without imitation, reasonable attorneys' fees and disbursements. Purchaser shall
> commission, fee or other compensation by any person or entity who shall claim to have dealt with Purchaser in connection the transaction contemplated hereunder and for any and all costs incurred by Seller in connection with any such claims, including, without limitation, reasonable attorneys' fees and disbursements.
> The provisions of this Section 15 shall survive the termination of this Agreement or the Closing.

Defendants also argued that Fairmont did not have standing to bring this lawsuit on the ground that it lacks any interest in the commission 340 FAE agreed to pay, the three-year statute of limitations on the conversion claim expired prior to filing, the non-breach of contract claims are duplicative of the breach of contract claims and plaintiff failed to plead the necessary elements of any of its claims. Defendant argued no wrongdoing or legal obligations on the part of defendants DeKalb 9 Owner or DeKalb 9 Fee Owner were pleaded, and no facts sufficient to sustain a claim to pierce the corporate veil were pleaded against Stern, a member of 340 FAE, the LLC which plaintiff alleged has the obligation to pay. Moreover, defendants argued Katz is not a registered broker, licensed real estate agent, or a designated agent of Fairmont.

Katz opposed the motion on the grounds that his father, Charles Katz is a duly licensed real estate broker and Fairmont is his father's company. He averred that he is an employee and an authorized representative of Fairmont, and based on his interactions and long-standing business relationship with Stern during the relevant period, the parties understood Fairmont was owed the commission. Katz alleged the agreement to pay Fairmont the commission was an oral agreement, which Stern explicitly acknowledged several times following the closing.

Katz further averred that the February 4, 2014 sales agreement is not the agreement from which plaintiff's claims in this action arose. Rather, this action is based on the oral agreement between defendants and plaintiff, directly, whereby defendants agreed to pay plaintiff the $500,000 commission. Katz further averred that contrary to defendants' contentions otherwise, the parties always understood that Fairmont, not Katz, was to be paid the commission.

Plaintiff also proffered the affidavit of non-party Abraham Leser (Leser), a long-time business associate of Fairmont. Leser averred, in or around late 2013, he engaged Fairmont to assist him in selling the subject property, whereby Fairmont brokered the deal that resulted in the sales agreement. Leser averred the purpose of the sales agreement, in relevant part, was to memorialize that the seller 340 Flatbush, and not the buyer 340 FAE, would be responsible for paying the broker's commission, and that the buyer 340 FAE was supposed to enter into its own agreement with Fairmont to pay its commission. He averred 340 FAE, lead by Stern, and Fairmont did enter into such agreement whereby 340 FAE promised to pay Fairmont the commission. Leser further averred that Stern, on behalf of defendants, and both Barry and Charles Katz on behalf of plaintiff, confirmed that Stern had agreed to pay the commission at or shortly after the closing, and satisfied with the parties' separate agreement and with the knowledge that Fairmont, his long-time friend and broker, would be paid, he proceeded with the closing on May 28, 2020.

Plaintiff also proffered two invoices dated June 12, 2014, for brokerage fees for 340 Flatbush Avenue Extension, Brooklyn NY. The invoices indicated that checks should be made payable to Lexington Agency, with payment due at closing. The invoice in the amount of $350,000 was addressed to 340 FAE Owner LLC c/o Michael Stern. The invoice in the amount of $150,000 was addressed to non-party JDS Development c/o Michael Stern.

A motion to dismiss on the ground that the action is barred by documentary evidence pursuant to CPLR 3211 (a) (1) may be granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d at 326; *Leon v Martinez*, 84 NY2d at 88). To the extent defendants moved to dismiss the amended complaint based on the February 4, 2014 sales agreement, the motion is denied. Plaintiff plainly alleged its causes of action were based on an oral agreement separate and apart from the February 4th sales agreement. For the same reason, the branch of defendants' motion to dismiss pursuant to CPLR 3211 (a) (3) on the ground Fairmont lacked standing to sue as it was not a party to the February 4, 2014 sales agreement is denied.

The branch of defendants' motion to dismiss plaintiff's third cause of action for conversion based on the expiration of the three-year statute of limitations is granted (*see* CPLR 214). Plaintiff argued the statute of limitations only began to run in 2019. Plaintiff alleged Stern and 340 FAE initially converted the commission by purchasing the property without paying the commission. Plaintiff further alleged on December 17, 2015, 340 FAE transferred the property to defendant Dekalb 9 Owner, another Stern entity, which transferred the property to Dekalb 9 Fee Owner, another Stern entity, on April 22, 2019. Plaintiff argued the initial 2014 conversion continued after the property was transferred in 2015 and 2019, and the commission was still not paid. Defendants argued that any claim for conversion took place no later than December 2015. The court agrees.

In order to succeed on a cause of action to recover damages for conversion, a plaintiff must show (1) legal ownership or an immediate right of possession to a specific identifiable thing and (2) that the defendant exercised an unauthorized dominion over the thing in question to

the exclusion of the plaintiff's right (*Giardini v Settanni*, 159 AD3d 874, [2d Dept 2018], citing *see Mackey Reed Elec., Inc. v Morrone & Assoc., P.C.*, 125 AD3d 822, 824 [2015]; *Zendler Constr. Co., Inc. v First Adj. Group, Inc.*, 59 AD3d 439 [2009]).

The amended complaint alleged Stern transferred the subject property from one entity to another and continued to promise plaintiff that it would soon be paid its commission. It further alleged Dekalb 9 Owner and Dekalb 9 Fee Owner were "Stern entities" that converted plaintiff's commission after the property was transferred to them and plaintiff was still not paid its commission. However, plaintiff failed to plead facts sufficient to establish that these entities exercised an unauthorized dominion over the commission it alleged Stern and 340 FAE owed it (*see Giardini v Settanni*, 159 AD3d 874, [2d Dept 2018]).

Therefore, the Court finds that the statute of limitations began running in December 2015, at the latest. Accordingly, plaintiff's claim for conversion is dismissed as barred by the statute of limitations (*see* CPLR 214). Moreover, although plaintiff alleged Stern obligated himself or any other Stern-entity to pay the commission, the amended complaint failed to plead facts sufficient to support its claims against Dekalb 9 Owner and Dekalb 9 Fee Owner. Accordingly, the motion to dismiss the amended complaint as against these two defendants is granted.

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the pleading must be afforded a liberal construction and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Qureshi v Vital Transp., Inc.*, 173 AD3d 1076, 1077 [2d Dept 2019]).

Here, the amended complaint alleged plaintiff and defendants entered into an oral agreement for brokerage services related to the sale of the subject property in exchange for a $500,000 commission. Plaintiff further alleged the parties had a long-standing relationship and it was understood that Fairmont would be paid the commission upon closing, which it was not. Accepting the facts in the amended complaint as true, defendants have failed to establish their entitlement to dismissal of plaintiff's first cause of action for breach of contract.

In its second cause of action, plaintiff alleged unjust enrichment. Plaintiff alleged it provided brokerage services for the sale of the subject property, which defendants accepted by closing, and failed to pay for despite plaintiff's repeated demands for payment and Stern's promises to pay. "The elements of unjust enrichment are that the defendants were enriched, at the plaintiff's expense, and that it is against equity and good conscience to permit the defendants to retain what is sought to be recovered" (*see County of Nassau v Expedia, Inc.*, 120 AD3d 1178, 1180 [2d Dept 2014] [citations omitted]). However, "[a]n unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract . . . claim" (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012] [citations omitted]). Here, plaintiff alleged the parties had an oral contract which defendants breached. Accordingly, this branch of defendants' motion is granted and plaintiff's second cause of action for unjust enrichment is dismissed.

"The elements of [equitable] estoppel are, with respect to the party estopped, (1) conduct which amounts to a false representation or concealment of material facts; (2) intention that such conduct will be acted upon by the other party; and (3) knowledge of the real facts. The party asserting estoppel must show with respect to [itself]: (1) lack of knowledge of the true facts; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change in [its] position" (*Wallace v BSD-M Realty, LLC*, 142 AD3d 701, 703 [2d Dept 2016] [internal quotations and

citations omitted]). Here, plaintiff alleged it reasonably relied on defendants promises while providing brokerage services and waiting to be paid its commission. It further alleged it was duly prejudiced as a result of its reliance on defendants' promises, "for example, [p]laintiff lost its opportunity to attend the closing, lien the [p]roperty, and/or sue the seller of the property." These factual allegations are insufficient to sustain a cause of action for estoppel. Accordingly, defendants' motion to dismiss plaintiff's fourth cause of action is granted.

The required elements of a common-law fraud claim are "a misrepresentation or a material omission of fact which was false and known to be false by [the] defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 827 [2016] [citations and internal quotation marks omitted]). Here, plaintiff's factual allegations regarding its fraud claim are both duplicative of its breach of contract claim and insufficient to sustain its fraud claim. Accordingly, plaintiff's fifth cause of action is dismissed.

As to dismissal of the amended complaint against Stern, individually, defendants' motion is denied. The amended complaint alleged Stern was the owner of all defendants and promised that he or and/or any other Stern-related entity would pay plaintiff's commission. Accordingly, dismissal of Stern is premature at this time, but may be renewed upon completion of discovery.

It is therefore ordered MS 2 is granted to the extent:

Plaintiff's second cause of action for unjust enrichment is dismissed.
Plaintiff's third cause of action for conversion is dismissed.
Plaintiff's fourth cause of action for estoppel is dismissed.
Plaintiff's fifth cause of action for fraud is dismissed.
The amended complaint against Dekalb 9 Owner and Dekalb 9 Fee Owner is dismissed.
The remainder of the motion is denied.

ENTER:

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Honorable Reginald A. Boddie
Justice, Supreme Court

HON. REGINALD A. BODDIE
J.S.C.