SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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LHWS LLC,

Plaintiff,

- v -

S.L. GREEN REALTY CORP.,

Defendant.

INDEX NO. 653401/2020

MOTION DATE _____

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 42, 43

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

In motion sequence number 001, defendant S.L. Green Realty Corp. (SLG) moves to dismiss the Verified Complaint [VC] pursuant to CPLR 3211(a) (1), (5), and (7). In the VC, plaintiff LHWS LLC alleges (1) breach of contract in relation to 710 Madison Avenue (710); (2) breach of contract in relation to 712 Madison Avenue (712); and (3) quantum meruit and unjust enrichment. Plaintiff also seeks a declaratory judgment (4) declaring its entitlement to a commission of 1.75% of the amount ultimately paid for the option to acquire 712, if the option is exercised. (NYSCEF Doc. No. [NYSCEF] 1, VC at 15-21.)

Background

Unless indicated otherwise, the following facts are taken from the VC and, for the purposes of this motion, are accepted as true. Plaintiff is a New York licensed real estate broker, whose principal is Lori Shabtai. (*Id.* ¶¶ 2, 6.) Plaintiff alleges to have

previously been engaged by and worked with defendant as a broker for the sale of real property and the procurement of commercial tenants. (*Id.* ¶ 8.) Plaintiff alleges that plaintiff and defendant have previously entered into oral brokerage agreements that are formalized in writing upon consummation of the underlying transaction. (*Id.* ¶ 9.)

This action concerns two properties, located at 710 and 712 Madison Avenue (collectively the Properties), for which defendant was the holder of loans. (*Id.* ¶¶ 10, 13, and 35.) Plaintiff alleges an exclusive agency to assist defendant in selling or disposing of various assets related to the Properties. (*Id.* ¶ 2.) In 2018, defendant held a mezzanine loan in the amount of $22,000,000 for 710. (*Id.* ¶¶ 11, 13). In July 2018, Harrison Sitomer, defendant's Vice President, contacted plaintiff about selling the 710 mezzanine loan (710 Loan). (*Id.* ¶¶ 14, 15.) Sitomer gave plaintiff a week-long exclusivity period to pursue a buyer of the 710 Loan before the 710 Loan was publicly marketed. (*Id.* ¶ 16.) Plaintiff alleges to have had a relationship with Graff, a tenant at 710, who had allegedly attempted to acquire the building in the past. (*Id.* ¶¶ 17-18.)

On July 24, 2018, Sitomer emailed Shabtai with a description of the 710 Loan. (*Id.* ¶ 21.) On July 26, 2018, plaintiff emailed Sitomer suggesting that plaintiff be paid a 2% commission should Graff buy the 710 Loan, and 1.75% on the remaining purchase price should Graff buy 710 at a later date[1]. (*Id.* ¶¶ 22-23.) In the same email, plaintiff also addressed the possibility of the owner of 710 selling the building to Graff directly. (*Id.* ¶ 23.) However, plaintiff alleges that Graff was disinclined to purchase the 710 Loan, but plaintiff remained involved as an intermediary between Graff and defendant regarding the acquisition of 710. (*Id.* ¶¶ 26-27.) On July 31, 2018, plaintiff emailed

[1] Implicit in plaintiff's proposal is that S.L. Green's loan would be extinguished upon a sale of the building because the loan would be repaid from the proceeds of the sale.

Sitomer stating that Graff had an interest in purchasing the building for less than $60,000,000. (*Id.* ¶ 30.) Plaintiff alleges that defendant agreed to have plaintiff pursue an alternative deal structure where defendant would retain the 710 Loan and would continue to receive payments on it, in addition to plaintiff continuing its efforts to sell the 710 Loan. (*Id.* ¶ 31.) On July 31, 2018, plaintiff alleges to have coordinated a conference call between Graff and defendant's President, Andrew Mathias. (*Id.* ¶ 33.) Plaintiff contends that it remained involved for months and spurred discussions between defendant and Graff. (*Id.* ¶ 34.)

As to the 712 property, plaintiff alleges that defendant also held a mezzanine loan for 712 (712 Loan), and that Graff was also interested in that space. (*Id.* ¶¶ 35-36.) Plaintiff claims to have formulated the concept where Graff acquired the 712 Loan as leverage to take ownership of the property. (*Id.* ¶ 37.) Plaintiff alleges that it proposed the idea of combining the Properties into one transaction. (*Id.* ¶ 40.) On August 1, 2018, Sitomer emailed Shabtai to thank her for setting up a telephone call with Graff. (*Id.* ¶ 42.) Plaintiff alleges that on August 2, 2018 Sitomer hand delivered a document to plaintiff entitled "summary of a conceptual transaction" for the acquisition of 710 and 712. (*Id.* ¶ 43.) Plaintiff alleges defendant and Graff negotiated using plaintiff's template transaction. (*Id.* ¶ 52.)

Graff allegedly purchased 710 from its original owner for $66,500,000. (*Id.* ¶ 53.) Consequently, defendant's 710 Loan of $22 million was paid off by the proceeds from the sale. Plaintiff asserts it is entitled to a 2% commission on the transaction. (*Id.* ¶¶ 54-58.)

Plaintiff alleges that defendant took title to 712 in December 2018 by "leveraging"[2] the 712 Loan. (*Id.* ¶ 59.) Plaintiff alleges that defendant and Graff entered a 25-year ground lease at 712 for $12,400,000. (*Id.* ¶ 60.) Further, defendant allegedly agreed to give Graff the option to buy 712 for $43,000,000 between January 1, 2021 and March 1, 2023, a transaction that plaintiff had allegedly formulated. (*Id.* ¶¶ 62-63.) Plaintiff claims responsibility for the lease and potential sale of 712 Madison Avenue from defendant to Graff for which it is entitled to a 1.75% commission on the lease and option sale. (*Id.* ¶¶ 64-67.)

Defendant moves to dismiss the complaint, pursuant to CPLR 3211(a) (1), (5), and (7). Defendant challenges whether plaintiff was the procuring cause for the transactions at issue.

Discussion

To prevail on a CPLR 3211(a)(1) motion to dismiss, the movant has the "burden of showing that the relied upon documentary evidence 'resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim.'" (*Fortis Fin. Servs. v Filmat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002] [citation omitted].) "A cause of action may be dismissed under CPLR 3211(a)(1) 'only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law.'" (*Art and Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014] [citation omitted].) "The documents submitted must be explicit and unambiguous." (*Dixon v 105 West 75th St. LLC*, 148 AD3d 623, 626 [1st Dept 2017] [citation omitted].) Their content must be "'essentially undeniable.'" (*VXI Lux*

[2] On December 2018, S.L. Green took ownership of 712 Madison after payment of $5,000,000 to the first mortgagee (Wells Fargo) after the owner's default. (NYSCEF 13, December 2018 Agreement.)

Holdco S.A.R.L. v SIC Holdings, LLC, 171 AD3d 189, 193 [1st Dept 2019] [citation omitted].) The authenticity of documentary evidence must not be subject to genuine dispute, and it must be enough to "'support the ground on which the motion is based.'" (*Amsterdam Hosp. Group., LLC v Marshall-Alan Assocs., Inc.*, 120 AD3d 431, 432 [1st Dept 2014] [citation omitted].)

Defendant moves to dismiss pursuant to CPLR 3211(a)(5) because plaintiff failed to satisfy the Statute of Frauds. "The Statute of Frauds is designed to protect the parties and preserve the integrity of contractual agreements." (*William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 476 [2013].) The Statute of Frauds is codified in General Obligations Law § 5-701. (*Lebedev v Blavatnik*, 49 Misc 3d 1218(A) [Sup Ct, NY County 2015], *affd,* 144 AD3d 24 [1st Dept 2016].) GOL § 5-701(a)(1) bars enforcement of oral agreements that have no possibility of full performance within one year. (*Gural v Drasner*, 114 AD3d 25, 28 [1st Dept 2013].)

On a motion to dismiss pursuant to CPLR 3211(a)(7), 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].) "[B]are legal conclusions, as well as factual claims which are either inherently incredible or flatly contradicted by documentary evidence" cannot survive a motion to dismiss. (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995] [citation omitted].) The court may consider affidavits submitted by the plaintiff to remedy defects in the complaint, and if considered, the facts alleged in the affidavit must be assumed true. (*Canzona v Atanasio*, 118 AD3d 837, 838 [2d Dept 2014] [citations omitted].)

Breach of Contract in Relation to 710 Madison Avenue and 712 Madison Avenue

A real estate broker earns their commission when they produce a buyer prepared and capable to purchase the desired property at the terms set by the seller. (*SPRE Realty, Ltd. v Dienst*, 119 AD3d 93, 97 [1st Dept 2014] [citations omitted].) The broker must be the procuring cause of the transaction to earn the commission. (*Id.*) The procuring cause is a direct and proximate link between the introduction by the broker to completion of the transaction. (*Id.*, at 98.) A broker does not need to be the dominant force in the transaction, but they must do more than call the property to the attention of the buyer. (*Id.*) The procuring cause goes beyond an amicable atmosphere or frame of mind. (*Id.*) However, the broker need not negotiate the final terms of the transaction. (*Sholom & Zuckerbrot Realty Corp. v Citibank, N.A.*, 205 AD2d 336, 339 [1st Dept 1994] [citations omitted].) Whether the broker is the procuring cause of a transaction is a factual inquiry to be determined by evidence. (*Gregory v Universal Certificate Group LLC*, 32 AD3d 777, 778 [1st Dept 2006] [citations omitted].)

With regard to both buildings, defendant argues that plaintiff was not the procuring cause of the transactions, and thus has failed to allege facts sufficient to satisfy the element. Instead, plaintiff was engaged as an exclusive agent to sell the 710 Loan for one week and failed to do so. The transactions at issue are different than that for which plaintiff was retained. Defendant contends that the agreement upon which plaintiff relies was to sell the Loan, but that sale never happened. Rather, different transactions occurred resulting in incidental benefits to defendant (the Loan being paid in full upon the sale of the building), but those transactions did not directly involve plaintiff.

Plaintiff's opposition demonstrates that this procuring cause inquiry is fact specific. Plaintiff alleges that the transactions at issue all involve Graff and stem from plaintiff's relationship with Graff. Defendant allegedly followed plaintiff's proposed transaction structure. Sitomer initially contacted plaintiff, allegedly because of plaintiff's unique relationship with Graff, a tenant at 710. (NYSCEF 1, VC, ¶¶ 14-17, 18.) Plaintiff claims that defendant knew that plaintiff could credibly present this opportunity as a viable prospect to Graff. (*Id.* ¶ 20.) Plaintiff insists that it engaged with Graff on behalf of defendant and participated in the evolution of the deal structure to include a scenario where Graff purchased the entire property, not just the 710 Loan. (*Id.* ¶¶ 22-31.) By email to Sitomer, plaintiff suggested a 2% commission if Graff were to buy the 710 Loan, and an additional 1.75% on the remaining purchase price of the building if Graff were to eventually buy it. (*Id.* ¶ 23.) Plaintiff emailed Sitomer to set up a meeting with Graff and remained involved as an intermediary for months. (*Id.* ¶¶ 32-34.)

Plaintiff claims it formulated and proposed the concept of Graff acquiring the 712 Loan from defendant. (*Id.* ¶ 37-38.) Plaintiff further alleges that it came up with the idea to combine the transactions for 710 and 712. (*Id.* ¶ 40.) Indeed, Sitomer sent plaintiff a thank you email after a telephone call with Graff. (*Id.* ¶¶ 41-42.) Plaintiff claims that Sitomer kept plaintiff informed regarding discussions with Graff. (*Id.* ¶ 42-43.) For example, Sitomer sent plaintiff a document that contained a summary of a concept transaction for the acquisition of the Properties. (*Id.* ¶¶ 43-51.) Plaintiff asserts this document closely followed plaintiff's proposals. (*Id.* ¶ 44.)

Plaintiff concedes that the original sale of the 710 Loan did not occur. Instead, Graff purchased 710, which plaintiff maintains was its concept and resulted in the 710 Loan being paid in full, thereby accomplishing defendant's goal. (*Id.* ¶¶ 53-57.) In

sum, plaintiff alleges that it is directly responsible for the introduction, formulation and consummation of the transactions relating to the Properties that involved defendant and Graff. (*Id.* ¶¶ 64-66.)

Whether plaintiff was the procuring cause is a question of fact. (*Gregory*, 32 AD3d at 778.) Defendant relies on *Vasiliu v Miller*, 2018 N.Y. Slip Op. 32487[U] *4 [Sup Ct, New York County 2018], where the court dismissed a plaintiff broker's claim because the allegations were based solely on the conveyance of non-public information about the availability of a property and a walk through, which the plaintiff did not attend. The court found that these facts fell short as a procuring cause as a matter of law on a motion to dismiss. (*Id.* at 22.) Here, plaintiff has sufficiently alleged more involvement with the defendant and eventual buyer than in *Vasiliu*. Plaintiff alleges a relationship with defendant, connecting the defendant with Graff, serving as an intermediary in that relationship, and formulating the idea for the transactions that were eventually consummated.

Therefore, plaintiff has sufficiently pled a direct and proximate link to the defendant's transactions at the Properties concerning Graff to survive a motion to dismiss.

Defendant also argues that plaintiff's exclusive agency to sell the 710 Loan does not preclude defendant from negotiating directly with the other party because it is not an exclusive right to deal. Rather, defendant argues that exclusive agency protects the broker from a defendant engaging multiple brokers. Defendant relies on *Rosenhaus Real Estate, LLC v S.A.C. Capital Mgt., Inc.,* 121 AD3d 409 [1st Dept 2014] to distinguish an exclusive agency and an exclusive right to deal. However, discovery had been completed in *Rosenhaus* and the motion before the court was for summary

judgment, while here defendant has yet to answer. Plaintiff has sufficiently pled that it procured Graff as the buyer here.

Defendant's motion to dismiss the first and second causes of action is denied.

Quantum Meruit and Unjust Enrichment

"[T]o establish a claim in quantum meruit, a claimant must establish (1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services." (*Caribbean Direct, Inc. v Dubset, LLC*, 100 AD3d 510, 511 [1st Dept 2012] [internal quotation marks and citations omitted].)

To state a claim for unjust enrichment, plaintiff must allege: (1) the defendant was enriched, (2) the enrichment was at the plaintiff's expense, and (3) it is against equity and good conscience to permit the defendant to retain what plaintiff seeks to recover. (*Schroeder v Pinterest Inc.,* 133 AD3d 12, 26 [1st Dept 2015] [citations omitted].)

Defendant attacks the third cause of action arguing, again, that plaintiff was not the procuring cause of the transactions relating to 710 and 712. Defendant opines that since plaintiff is not entitled to compensation, then, defendant could not have been unjustly enriched. As discussed above, plaintiff has sufficiently pled that plaintiff was the procuring cause for the transactions at issue. Therefore, plaintiff sufficiently alleged an ongoing relationship with defendant, Graff, and the Properties.

Defendant also argues that even if plaintiff did facilitate the purchase of 710, it was an indirect or incidental benefit because the original owner of 710 repaid defendant per the terms of the 710 Loan. Defendant relies on *Azad Prop. Group, LLC v HFZ W. 40th LLC*, 2015 WL 413809 [Sup Ct, New York County 2015] for the proposition that a

broker has no claim for a commission under these circumstances. However, again, defendant's reliance is misplaced. In *Azad*, on a summary judgment motion, the court found that the broker plaintiff failed to raise an issue of fact regarding the direct and proximate link between the buyer and seller. (*Id.*) Here, plaintiff has sufficiently pled a direct and proximate link between defendant and Graff.

Defendant's motion to dismiss the third cause of action is denied.

Statute of Frauds

"[A]n agreement will not be recognized or enforceable if it is not in writing and 'subscribed by the party to be charged therewith' when the agreement "[b]y its terms is not to be performed within one year from the making thereof." (*Cron v Hargro Fabrics, Inc.,* 91 NY2d 362, 366 [1998], quoting GOL § 5–701[a][1].) The Statute of Frauds precludes contract claims that have no possibility of full performance within one year. (*Id.* [citation omitted].) If the contract can be "reasonably interpreted" to be performed within one year, the Statute of Frauds is not a bar to enforcement of the agreement, "however unexpected, unlikely, or even improbable." (*Id.* [citation omitted].) "Wherever an agreement has been found to be susceptible of fulfillment within that time, in whatever manner and however impractical, this court has held the one-year provision of the Statute to be inapplicable, a writing unnecessary, and the agreement not barred." (*D & N Boening, Inc. v Kirsch Beverages, Inc.,* 63 NY2d 449, 455 [1984].) A broker must produce a buyer who is ready, willing, and able to make a purchase at the terms set by the seller, within one year. (*See Kassis Mgt., Inc. v Milstein*, 198 AD2d 51, 51 [1st Dept 1993].)

In the VC, plaintiff alleges:

> "98. The lease entered into by Defendant and Graff included an option by which Graff would be entitled to purchase the fee interest of 712 Madison Avenue for the sum of $43,000,000, subject to adjustments.
>
> 99. If Graff exercises the purchase option, the sale of 712 Madison Avenue would be, like the lease itself, the direct result of Plaintiff's efforts as the procuring cause of the transaction."

Relying on an abbreviated copy of the lease with Graff, defendant argues that plaintiff is not entitled to a future commission on the purchase of 712 because the option to purchase the property may be exercised between January 1, 2021 and March 1, 2023, more than two years after plaintiff's initial engagement in July 2018. (NYSCEF 15, 2019 Ground Lease §14.01(a).) Thus, defendant insists plaintiff's purported oral agreement must be in writing; otherwise it is unenforable.

Plaintiff counters that the oral agreement is enforceable since it is possible for the option to be exercised before January 1, 2021 based on the 712 lease submitted by defendant. (NYSCEF 15, 2019 Ground Lease at 3.) Section 14.01(a) of the 712 lease provides: "Notwithstanding the foregoing, if Lessor delivers a Termination Notice pursuant to Section 15.03, then Lessee shall have the right to deliver a Lessee's Purchase Notice on or before the Cut-Off Date in order to timely exercise the Purchase Option in accordance with Section 15.15(a)." In the absence of Section 15, plaintiff infers that defendant could default before January 2021 and exercise its option to purchase within one year of the initial date of the 2019 lease. Further, plaintiff demands that defendant's failure to include Article 15 in its moving papers should be interpreted against defendant.

Plaintiff's focus on Graff's ability to exercise the option before January 2021 is misplaced. The 712 lease is dated October 2, 2019, more than one year after July 2018, when defendant allegedly retained plaintiff. Under no circumstances could Graff

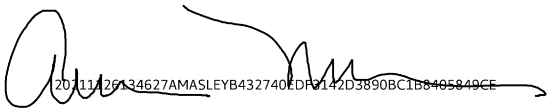
exercise the option to purchase within one year of plaintiff's purported July 2018 oral agreement at issue here. Therefore, defendant's motion to dismiss the fourth cause of action is granted.

The court has considered the parties' remaining arguments and finds them unavailing without merit or otherwise not requiring an alternate result.

Accordingly, it is

ORDERED that defendant S.L. Green's motion to dismiss the Verified Complaint is granted in part as to the fourth cause of action for a declaratory judgment and the motion is otherwise denied; and it is further

ORDERED that defendant shall file an answer within 10 days of the date of this decision and the parties shall submit a proposed PC order on consent or competing PC orders within 20 days of the date of this decision.



11/26/2021
DATE

ANDREA MASLEY, J.S.C.

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