

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. JENNIFER G. SCHECTER
Justice J.S.C.

PART 57

Index Number : 654491/2013
RMB PROPERTIES
vs.
AMERICAN REALTY CAPITAL III
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for Summary Judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1

Answering Affidavits — Exhibits _____ | No(s). 2

Replying Affidavits _____ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is

*decided in accordance with the
accompanying Decision and Judgment*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 8/30/16

[Signature]

HON. JENNIFER G. SCHECTER, J.S.C.
J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

-----x
RMB PROPERTIES, LLC,

Plaintiff,

DECISION AND JUDGMENT

-against-

Index No.654491/13

AMERICAN REALTY CAPITAL III, LLC, and
AMERICAN REALTY CAPITAL NEW YORK
RECOVERY REIT, INC.,

Defendants.

-----x
JENNIFER G. SCHECTER, J.:

Plaintiff RMB Properties, LLC (RMB) commenced this action seeking to recover a brokerage commission from defendants American Realty Capital III, LLC and American Realty Capital New York Recovery Reit, Inc. (collectively ARC). ARC moves for summary judgment dismissal of the action. The motion is granted.

Background

Rama Bassalali (Bassalali) owns RMB, a commercial real estate company. In late 2012, RMB learned that property located at 50 Varick Street in Manhattan (the Property) was available for purchase and sale in an off-market deal (Plaintiff's Memorandum in Opposition [Opp] at 4).

After making a cold call to ARC, on Tuesday February 12, 2013, Bassalali met with Patrick O'Malley (O'Malley), ARC's Managing Director of Acquisitions, for up to an hour to discuss the Property (*id.* at 4; Plaintiff's Memorandum in Support [Supp] at 5).

Bassalali explained to O'Malley that he would be looking to ARC to pay a buyer-side commission (McLaughlin Affirmation [M Aff], Ex 3 [Rama Tr] at 77, 80, 84; Kennedy Affirmation [K Aff], Ex A [Rama Tr], 79-80). According to Bassalali, O'Malley suggested that they "first get into the deal" before discussing numbers and "said that he'll treat me fairly no matter what happens . . . and you're going to get paid [He] said on his own he can't negotiate fees . . . and he has to consult with other members of the company before he can, you know, make any agreement with any brokers" (Rama Tr at 80).

Bassalali arranged for a tour of the Property for the next day and sent ARC a deal summary outlining, among other things, the Property's details and the seller's ownership structure (Opp at 6). Michael Happel (Happel), ARC's Executive Vice President and Chief Investment Officer, accompanied O'Malley on the Property tour. A commission was not discussed with Happel (Opp at 7; Supp at 8-9).

On February 15, 2013, ARC expressed interest in the Property and requested more information, which RMB provided (Opp at 7; Supp at 11). That same day, the seller informed RMB that it was in advanced stages of negotiations with other buyers (Opp at 7).

On February 19, 2013, Bassalali provided ARC with more information at its request. He also informed ARC that another potential buyer, Thor Equities LLC (Thor), was at around \$84,000,000 and was ready to sign a non-binding letter of intent. Bassalali relayed that the seller suggested an \$86,000,000 figure and asked ARC to let him know either way how it would proceed (K Aff, Ex B [O'Malley Tr], Ex 18).

ARC decided to submit a binding letter of intent to the seller (*id.* at Ex 20). On the morning of February 20, 2013, Happel emailed one of ARC's principals William Kahane:

"I have the team drafting [a letter of intent (LOI)] and think we should submit it today to make sure we are 'in the ring' on this one. Latest information is that Thor has made them an offer 'around \$83MM' and they are in term sheet negotiations with Thor.

"I would like to offer \$85MM as a headline number but with them absorbing the \$1.8MM of free rent it nets closer to \$83MM. I see little downside to submitting an LOI. . . . Step two may be to team up with Thor to avoid a bidding war but I think we need a term sheet on the table with seller" (K Aff, Ex C [Happel Tr], at Ex 1).

That afternoon, Bassalali sent an email to ARC that was copied to the seller. The email stated, among other things: "Here are the terms that will guarantee we get the deal: Price \$86,000,000 . . . Closing shall occur by the 31 of July 2013 Please confirm you got my email and you will be sending the offer today!!!" (K Aff, O'Malley Tr, Ex 21 at 2-3). A few hours later, the seller expressed disappointment at

the email because it was unprepared to "guarantee anything" (*id.* at 2). ARC similarly voiced its disappointment and hoped that the email would not "reflect poorly" on ARC (*id.* at 1). ARC and the seller agreed to speak later that day.

That evening, ARC submitted its offer letter to the seller by email. The letter, which was executed by Happel and addressed to Bassalali, outlined the terms and conditions under which ARC would purchase the Property (M Aff, Ex 35). The proposed purchase price was \$86,200,000 and the target closing date was June 30th (*id.*).

Shortly after the LOI was sent, Happel told O'Malley that the letter should not have been addressed to Bassalali (K Aff, O'Malley Tr, Ex 24). O'Malley responded:

"After your call with ownership this afternoon and things were 'smoothed' over I did not think it was necessary [to change the name on the LOI]. Both sides of the table know he is involved for better or worse and we did a solid job of addressing it accordingly with [the seller]" (*id.*).

On February 21, 2013, Bassalali emailed O'Malley:

"The offer looks great. We will hear from them soon. We need to have a commission agreement for 1% of the purchase price paid to [RMB].

"Can you send me a commission agreement or if you prefer I can send you a standard commission agreement. I noticed there was no mention of a broker in the offer letter so we need to have some agreement between us now" (K Aff, O'Malley Tr, Ex 25).

Later in the afternoon, Bassalali emailed O'Malley and Happel with changes that would have to be made "to have a chance to get the deal done" (*id.* at Ex 26). He stated: "This is the last chance to try to make a deal happen and once we get those two changes we will have a much better chance. Also please send me a commission agreement for the 1% of the purchase price we have agreed to upon. Please confirm you got my email" (*id.*). Less than an hour later, Happel emailed Bassalali: "please do not discuss our offer with the seller. You do not speak for us and you are doing more harm than good" (*id.* at Ex 28). Additionally, O'Malley informed Happel: "I just put [Bassalali] in his place in a very big way. I told him to stay out of this transaction and let us handle it" (*id.* at Ex 27).

By that time, however, the seller had already signed a 30-day exclusive letter of intent with Thor (M Aff, Ex 39). The seller honored a "gentleman's agreement" with Thor after there had been a handshake on their deal and, in any event, the seller had concerns over conditions contained in ARC's proposal (K Aff, Ex D [Senise Tr] at 19). ARC's offer was rejected.

After the February 21, 2013 rejection, RMB did not have any involvement with ARC or with the seller or with Thor related to the Property (Supp at 15).

By March 2013, Thor realized that it could suffer adverse tax consequences in acquiring the Property based on how the deal was structured and how it was organized. It appreciated that if the buyer of the property were a real estate investment trust (REIT), which it was not, the consequences could be avoided (M Aff, Ex 1 [Complaint] at ¶¶ 42-43).

On March 15, 2013, Happel emailed O'Malley that he had just gotten an interesting call from the seller and that ARC "may have a shot at the deal" (K Aff, O'Malley Tr, Ex 29). The seller informed ARC that the Thor deal was falling through (*id.* at Ex 31) and that Thor had been difficult (K Aff, Happel Tr, Ex 4). The seller wanted to know if ARC was still interested and Happel responded in the affirmative (*id.*).

On March 20, 2013, O'Malley received an email from Thor asking whether ARC's structure was a REIT (O'Malley Tr, Ex 30). O'Malley forwarded the email to Happel and explained that he "bet [the email] has something to do with Varick" and he was "not going to respond to it nor . . . going to talk to Thor" (*id.*). Happel responded that O'Malley should avoid Thor for now and O'Malley agreed (*id.*).

ARC decided it would submit an updated LOI and on March 22, 2013, it sent the seller an "unsolicited term sheet" for the Property (O'Malley Tr, Ex 34). The proposed purchase price was \$86,500,000 and the target closing date was August

31, 2013 (*id.*). A few hours later, the seller informed ARC that it had tried to cancel its agreement with Thor, which then threatened the seller with a lawsuit. The seller relayed that it was in discussions with Thor to extend the exclusivity period to June 28, 2013 (O'Malley Tr, Ex 35).

In April 2013, Thor contacted ARC about a deal. After ARC signed a confidentiality agreement, Thor informed ARC that it had the Property under contract (O'Malley Tr at 174).

On April 30, 2013, the seller and Thor executed a Sale and Purchase Agreement (SPA), which granted Thor the exclusive option to purchase the Property for about \$83.75 million and other consideration (Opp at 13-14; M Aff, Ex 42).

The following day--May 1, 2013, ARC submitted a LOI to Thor pursuant to which it was willing to negotiate and execute an assignment and assumption of purchase agreement and acquire Thor's interest in the Property for a total of \$90,000,000 (M Aff, Ex 43). Thor and ARC met on May 2, 2013 and their deal almost fell apart when Thor asked for more than \$90,000,000 "and a promote" (K Aff, Ex E [Elbaum Tr], Ex 5). The Thor/ARC LOI was revised and was executed by Thor on May 9, 2013. It provided for the sale of Thor's interest in the SPA for \$6,250,000 (M Aff, Ex 44).

After extensive due diligence that lasted months, a three-way deal between the seller, Thor and ARC was reached.

On June 25, 2013, the seller and Thor executed a second amendment to the SPA, whereby the seller consented to an assignment to ARC of Thor's exclusivity rights as buyer under the SPA (M Aff, Ex 45). On July 5, 2013, Thor and ARC executed the assignment pursuant to which Thor assigned its exclusivity rights to purchase the Property to ARC for \$5,861,500 (*id.*).

In this action, RMB asserts two causes of action against ARC: (1) breach of oral agreement and (2) *quantum meruit* for the reasonable value of services rendered. On each cause of action RMB seeks damages in an amount to be determined at trial "but in no event less than one percent of the purchase price that ARC paid to acquire the property" from the seller (Complaint at 22).

ARC moves for summary judgment dismissing the action urging that RMB's limited efforts over a 10-day period were not the procuring cause of the transaction that was ultimately consummated through Thor months later. In addition, ARC asserts that there was no contract between the parties for a commission. Lastly, ARC maintains that RMB's *quantum meruit* claim fails because there could not have been a reasonable expectation of payment for the failed deal.

RMB opposes the motion. It contends that there are triable issues as to whether there was an enforceable

agreement between the parties based on their conduct and whether RMB was the procuring cause of the transaction. It also submits that a jury could reasonably infer that ARC terminated RMB in bad faith and that it is therefore entitled to recover for the services that it provided.

Analysis

Summary Judgment is a drastic remedy that should not be granted if there is any doubt as to the existence of material triable issues (see *Glick & Dolleck v Tri-Pac Export Corp*, 22 NY2d 439, 441 [1968] [denial of summary judgment appropriate where an issue is "arguable"]; *Sosa v 46th Street Develop. LLC*, 101 AD3d 490, 493 [1st Dept 2012]). The burden is on the movant to make a *prima facie* showing of entitlement to judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any disputed material facts. Once the movant has made this showing, the burden then shifts to the opponent to establish, through competent evidence, that there is a material issue of fact that warrants a trial (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

ARC met its burden of demonstrating that, as a matter of law, RMB was not the procuring cause of the transaction that was consummated and that there was no bad-faith effort to

deprive RMB of any commission. In response, plaintiff failed to show that there is a material issue of fact that requires a trial.

Generally, a broker may demand a commission upon bringing a buyer and seller to an agreement. "This implies and involves the agreement of buyer and seller, the meeting of their minds, produced by the agency of the broker" (*Sibbald v Bethlehem Iron Co.*, 38 Sickles 378, 381 [1881]). This does not imply that the "broker must of necessity be present and an active participator in the agreement of buyer and seller when the agreement is actually concluded. . . . [The] fundamental and correct doctrine is, that the duty assumed by the broker is to bring the minds of the buyer and seller to an agreement for sale, and the price and terms on which it is to be made, and until that is done [the] right to commissions does not accrue" (*id.* at 382). "It follows, as a necessary deduction from the established rule, that a broker is never entitled to commissions for unsuccessful efforts" (*id.* at 383). The broker may have introduced the buyer and seller who would otherwise never have met, may have created impressions which under different circumstances lead to and materially assist in the consummation of a sale and may have "planted the very seeds from which others reap the harvest; but all that gives [the broker] no claim" (*id.*).

"It has long been recognized that a broker, save when he enjoys the benefit of a special agreement to the contrary, does not automatically and without more make out a case for commissions simply because he initially called the property to the attention of the ultimate purchaser. If that were enough, given the enterprise which our competitive society prizes in its brokers and salesmen, a veritable morass of claims to proprietary rights in their prospects would result. That is not to say that, in order to qualify for a commission, the broker in all instances must have been the dominant force in the conduct of the ensuing negotiations or in the completion of the sale. But, however variable the judicial terminology employed to express the requirement that the broker must be the procuring cause, it has long been recognized that there must be a direct and proximate link, as distinguished from one that is indirect and remote, between the bare introduction and the consummation" (*Greene v Hellman*, 51 NY2d 197, 205-206 [1980][citations omitted]; see also *SPRE Realty, Ltd. v Dienst*, 119 AD3d 93, 99 [1st Dept 2014]).

It is undisputed that RMB introduced ARC and the seller. Over a 10-day period, RMB gave ARC a tour of the Property and forwarded important information to ARC at ARC's request. RMB gave ARC advice about how it could successfully complete a deal with the seller and, on that basis, ARC submitted a LOI. The seller, however, rejected the LOI and the deal that RMB began working toward terminated. The seller and ARC never even discussed terms for a deal. There were no negotiations between them because the seller chose Thor from the get go. In fact, based on the final emails between Bassalali and ARC, the parties never reached an agreement on a commission nor did they have occasion to do so. Once the deal was dead, the

issue was moot. The transaction that RMB attempted to bring about was abandoned (*Garrick-Aug Assoc. Store Leasing v Hirschfeld Realty Club Corp.*, 3 AD3d 406 [1st Dept 2004]; *Mollyann, Inc. v Demetriades*, 206 AD2d 415 [2d Dept 1994]).

It is well established that where negotiations are unproductive and the parties in good faith withdraw, a subsequent renewal of negotiations does not entitle the broker to a commission as the broker was not the procuring cause of the transaction (*Rebenwurz v Swieca*, 50 Misc 3d 1210[A] [Sup Ct, Kings County Jan 20, 2016]; see also *Cushman & Wakefield v 214 E. 49th St. Corp.*, 218 AD2d 464, 466 [1st Dept 1996] ["It is not enough simply to open negotiations between parties"], *lv denied* 88 NY2d 816 [1996]). Creation of an "amicable atmosphere" between ARC and the seller prior to the seller's rejection of ARC's February 2013 LOI "is insufficient to demonstrate that plaintiff was the procuring cause of the [ultimate] deal" (*Rosenhaus Real Estate, LLC v S.A.C. Capital Mgt., Inc.*, 121 AD3d 409 [1st Dept 2014]; *Williams Real Estate Co. v Ann Taylor, Inc.*, 251 AD2d 230, 232 [1st Dept 1998] [defendant entitled to summary judgment despite plaintiff's overtures because there was no evidence that plaintiff was the procuring cause of the transaction or that it "brought the parties together on mutually agreeable terms"], *lv denied* 93 NY2d 805 [1999]).

ARC and RMB's relationship ended when the seller entered into an exclusive agreement with Thor. RMB's efforts were not "plainly and evidently" approaching success and "were not 'about to prove effectual' at the time they ceased" (*Rosenhaus Real Estate, LLC*, 121 AD3d at 409-410; *Helmsley-Spear, Inc. v 150 Broadway N.Y. Assocs., L.P.*, 251 AD2d 185, 186 [1st Dept 1998]).

There is no evidence, moreover, that ARC did anything to defeat an agreement with the seller (contrast *New Spectrum Realty Servs., Inc. v Weiser*, 273 AD2d 172, 173 [1st Dept 2000] [summary judgment denied because of unresolved issues including whether it was defendant's unilateral efforts that defeated the sale]). To the contrary, the evidence only supports the conclusion that ARC was disappointed that its letters of intent were rejected without negotiations with the seller.

In addition, RMB played no role in the negotiations between Thor and ARC, the due diligence that was conducted to facilitate the purchase of the Property or the ultimate agreements that were reached. There is absolutely no evidence that RMB was the catalyst that brought about the final transaction. That the seller may have suggested to Thor that ARC would be interested in buying Thor's rights does not alter the analysis. The seller rejected the deal that RMB

purportedly brokered, rejected all of ARC's letters of intent and was exclusively committed to Thor. RMB's efforts to broker a deal between ARC and the seller were unsuccessful (see *Jagarnauth v Massey Knakal Realty Servs., Inc.*, 104 AD3d 564, 565 [1st Dept 2013] [introduction of buyer and seller insufficient to establish entitlement to commission based on consummated transaction after initial contract of sale that broker worked on had been properly cancelled]; *Orenstein v Brum*, 27 AD3d 352, 353 [1st Dept 2006] [a "broker is not entitled to a commission for unsuccessful efforts"]; *Don Leipham, Inc. v Grosodonia*, 21 AD2d 847 [4th Dept 1964] [brokerage agreement terminated when property owner rejected defendant's offers]).

Nor can it be argued based on the evidence that ARC's termination of its relationship with RMB or that any other action by ARC was taken in bad faith to deprive RMB of its commission (*Williams Real Estate Co.*, 251 AD2d at 232 [summary judgment affirmed where there was no evidence that defendant acted in any manner to deprive plaintiff of a rightful commission]; *Sibbald*, 38 Sickels at 384-385 [unless termination was mere device to escape paying a commission, a broker may not "thereafter claim compensation for a sale made by the principal, even though it be to a customer with whom the broker unsuccessfully negotiated, and even though, to some

extent, the (buyer) might justly be said to have availed himself of the fruits of the broker's labor"]. Although at some point early on ARC thought that it might "team up" with Thor, there is no evidence that ARC and Thor were ever a team.

Finally, because RMB was not the procuring cause of the transaction, it follows that RMB's quantum meruit claim also fails (see *Retail Advisors, Inc. v SLG 625 Lessee LLC*, 138 AD3d 425, 425 [1st Dept 2016] [summary judgment proper as plaintiff's efforts were not successful when negotiations ceased]; *Jagarnauth*, 104 AD3d at 565 [unsuccessful efforts do not support recovery under a theory of unjust enrichment]). It is not unjust under the circumstances that RMB goes uncompensated because it did nothing more than bring ARC and the seller together for what was an ultimately unsuccessful transaction.

Accordingly, it is ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed with costs; and it is further ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Judgment of the Court.

Dated: August 30, 2016



HON. JENNIFER G. SCHECTER