

**Broadway W. Enters., Ltd. v Doral Money, Inc.**

2013 NY Slip Op 32912(U)

November 12, 2013

Supreme Court, New York County

Docket Number: 653638/2011

Judge: O. Peter Sherwood

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD  
*Justice*

PART 49

BROADWAY WEST ENTERPRISES, LTD.,

Plaintiff,

-against-

DORAL MONEY, INC., et al.,

Defendants.

INDEX NO. 653638/2011

MOTION DATE Oct. 25, 2011

MOTION SEQ. NO. 009

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion for leave to amend complaint.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

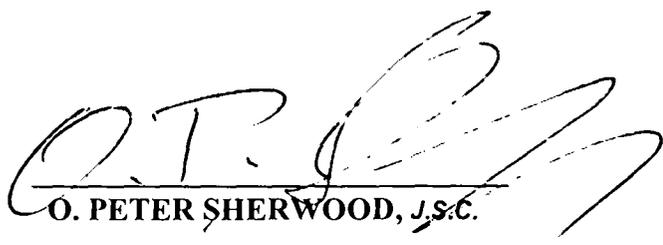
PAPERS NUMBERED

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, plaintiff's motion for leave to serve a Second Amended Verified Complaint is decided in accordance with the accompanying decision and order.

Dated: November 12, 2013

  
O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION  
Check if appropriate: DO NOT POST  
SUBMIT ORDER/ JUDG.

NON-FINAL DISPOSITION  
REFERENCE  
SETTLE ORDER/ JUDG.

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

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 49**

-----X

**BROADWAY WEST ENTERPRISES, LTD.,**

**Plaintiff,**

**-against-**

**DORAL MONEY, INC., NAKAZAWA & SUZUKI  
CAPITAL LLC n/k/a SUZUKI CAPITAL, LLC,  
ELI KASS and SOLOMON KNOPF,**

**Defendants.**

-----X

**O. PETER SHERWOOD, J.:**

**DECISION AND ORDER  
Index No. 653638/2011  
Mot. Seq. No. 009**

In this action, *inter alia*, to recover compensatory damages for breach of contract and related claims arising out of the sale of real property located at 14 53<sup>rd</sup> Street, Brooklyn, New York , plaintiff Broadway West Enterprises, Ltd. (“Broadway West” or “Plaintiff”) moves, pursuant to CPLR § 3025, for an order granting leave to serve a second amended verified complaint to: (1) supplement the material allegations of the first amended complaint; (2) re-join as additional party defendants prior dismissed defendants Whale Realty LLC (“Whale Realty”) and Whale Realty’s sole member, Nissan Perla, (the “Whale Defendants”); (3) add as a new party defendant Whale Realty’s property manager, Thomas Lieberman (“Lieberman”); and (4) remove Eli Kass and Solomon Knopf as party defendants. For the reasons that follow, the motion is denied.

***Background***

Familiarity with the factual background of this action is presumed as relayed in the court’s prior decisions and orders, dated, respectively, September 18, 2012 (NYSCEF Doc. No. 84) and August 9, 2013 (NYSCEF Doc. No. 198), on a motion to dismiss the original complaint and a motion to dismiss the first amended complaint and will be supplemented here only to the extent necessary to the decision.

This action was commenced by Broadway West to recover, *inter alia*, brokerage commissions alleged to be due it in connection with the sale of property located at 14 53<sup>rd</sup> Street, Brooklyn, New York (the “Property”), which was owned by Whale Realty and upon which Doral Money, Inc. held a deed in lieu of foreclosure. The Property was eventually sold to SL Whale

Realty, LLC (“SL Whale”) and Brickell 13 Whale, LLC (“Brickell”) (the “Purchaser Defendants”). Plaintiff contends that it was defrauded out of a 2% brokerage commission allegedly due and owing to Broadway West in connection with the sale.

In the original complaint asserted against Doral, SL Whale, Brickell, Whale Realty, and two other brokerage firms, and five individual parties to the sale, Plaintiff asserted six causes of action against all defendants for: (1) scheme to defraud; (2) breach of contract/tortious interference with contractual relations; (3) *quantum meruit*; (4) unjust enrichment; (5) punitive damages; and (6) attorneys’ fees.

Upon a motion by Doral and a separate motion of the Purchaser Defendants, both to dismiss the complaint, this court consolidated the two motions for disposition and, in a decision and order, dated September 18, 2012, dismissed the following claims: scheme to defraud, tortious interference with contract as against Doral; punitive damages and attorneys’ fees. Plaintiff was granted leave to amend the complaint to allege a cause of action against SL Whale and Brickell for tortious interference with contractual relations.

Plaintiff then filed an amended complaint asserting claims for breach of contract against Doral, tortious interference with contract against defendants other than Doral, *quantum meruit* and unjust enrichment. The Purchaser Defendants moved to dismiss the amended complaint for failure to state a cause of action as against them. The Whale Defendants also moved to dismiss the amended complaint as against them. At oral argument on the motions to dismiss the amended complaint, Plaintiff’s attorney acknowledged that the *quantum meruit* and unjust enrichment claims were re-pleaded in error. The court consolidated the two motions for disposition and in a decision and order, dated August 9, 2013, the court dismissed the amended complaint in its entirety as against the Purchaser Defendants and the Whale Defendants and severed and continued the breach of contract claim as against Doral, Eli Kass and Solomon Knopf.<sup>1</sup> A counterclaim by defendants Nakazawa & Suzuki Capital LLC n/k/a Suzuki Capital, LLC also remained.

---

<sup>1</sup>Although Eli Kass and Solomon Knopf are still listed in the caption as party defendants, plaintiff has never pursued any claims against such defendants and they have not appeared in this action. Indeed, on the instant motion for leave to file a second amended complaint, plaintiff is seeking to remove such defendants as party defendants. Accordingly, the action is dismissed as against them.

On August 19, 2013, Broadway West filed a Notice of Appeal from the August 9, 2013 decision and order. Ten days later and with the end date for all discovery looming, Plaintiff filed the instant motion for leave to file a second amended complaint. The proposed Second Amended Verified Complaint attached as Exhibit "A" to Plaintiff's moving papers includes the following causes of action: (1) breach of contract as against Doral; (2) tortious interference with contract as against the re-joined Whale Defendants and proposed added new party defendant Lieberman; (3) *quantum meruit* against Doral; (4) unjust enrichment against Doral; and (5) breach of covenant of good faith and fair dealing against Doral. Broadway West claims that the proposed amendments reflect material factual allegations that it only recently learned about through documentary discovery and depositions.

Doral opposes the motion contending that the proposed claim for breach of covenant of good faith and fair dealing is lacking in merit as it is simply duplicative of the breach of contract cause of action against Doral; the previously abandoned and dismissed claims for *quantum meruit* and unjust enrichment should be considered barred by the doctrine of law of the case and, in any event, are not based upon newly discovered evidence; and plaintiff's additions to the factual allegations are unnecessary and immaterial. Doral contends that Plaintiff's additional factual allegations suggest an unpleaded theory against Doral for fraud and conspiracy.

Non-parties, the Whale Defendants and Lieberman, also oppose Plaintiff's motion for leave to serve a Second Amended Complaint on the ground that it is palpably devoid of merit as the allegations of the proposed Second Amended Verified Complaint fails to state a tortious interference claim against such proposed defendants.

In reply, Broadway West contends that the claim for breach of covenant of good faith and fair dealing is viable separate and apart from the breach of contract claim against Doral. As to its quasi-contract claims of *quantum meruit* and unjust enrichment, Broadway West maintains that it withdrew such claims only as against the Purchaser Defendants and not as against Doral. Plaintiff also contends that the allegations in the complaint sufficiently state facts and circumstances concerning the Whale Defendants' and Lieberman's knowledge of and interference with the agreement it had with Doral and that such interference caused the breach of such agreement with Doral resulting in damages.

### *Discussion*

Leave to amend a pleading pursuant to CPLR § 3025 “shall be freely given”, in the absence of prejudice or surprise (*see e.g. Thompson v Cooper*, 24 AD3d 203, 205 [1<sup>st</sup> Dept 2005]; *Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 354 [1<sup>st</sup> Dept 2005]). However, in order to conserve judicial resources, examination of the underlying merit of the proposed amendment is mandated (*Thompson, supra* at 205; *Zaid, supra* at 355). Leave will be denied where the proposed pleading fails to state a cause of action, or is palpably insufficient as a matter of law (*see Aerolineas Galapagos, S.A. v Sundowner Alexandria*, 74 AD3d 652 [1<sup>st</sup> Dept 2010]; *Thompson, supra* at 205). Prejudice in this context is shown where the nonmoving party is “hindered in the preparation of his case or has been prevented from taking some measure in support of his position” (*Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 [1981]). A delay in seeking leave to amend is not grounds for denial of the motion except where the delay would cause prejudice or surprise (*see Lucido v Mancuso*, 49 AD3d 220, 229 [2d Dept 2008]). Whether to permit amendment is within the sound discretion of the court (*see Pellegrino v NYC Transit Auth.*, 177 AD2d 554, 557 [2d Dept 1991]).

Here, neither Doral nor the Whale Defendants and Lieberman claim that they are surprised or prejudiced by the proposed second amended complaint. The only arguments interposed are that the proposed amendment is insufficiently pleaded and palpably without merit.

Review of the motion papers, together with the proposed Second Amended Verified Complaint, clearly reveal that such amendment is palpably without merit. Contrary to plaintiff’s contentions, this motion constitutes a blatant effort to rescue abandoned claims and to obtain a proverbial additional bite of the apple as to claims that the court previously dismissed. Plaintiff did not seek leave to reargue or renew the court’s August 9, 2013 decision and order dismissing the *quantum meruit* and unjust enrichment claims as against all defendants, including Doral, based upon the affirmative statements of plaintiff’s counsel at oral argument that such claims were re-pleaded in error or to present the court with “newly discovered” evidence as to the dismissed claim for tortious interference with contract against the Whale Defendants. Indeed, given the closeness in time between the court’s issuance of its August 9, 2013 decision and order and plaintiff’s filing of the instant motion, any alleged new evidence certainly would have been available to permit plaintiff to seek leave to renew. In any event, the expanded factual allegations are deemed largely irrelevant

to the newly asserted causes of action as against Doral. In addition, Plaintiff's third attempt to plead a claim for tortious interference with contract has not improved upon the allegations with respect to such claim sufficiently to withstand dismissal. Accordingly, the court concludes that Plaintiff's motion to serve a second amended complaint must be denied.

Any contention not specifically addressed in this decision and order shall be deemed denied.

Based on the foregoing discussion, it is hereby

**ORDERED** that plaintiff's motion for leave to serve a Second Amended Verified Complaint is **GRANTED** to the extent of dismissing the action as against defendants Eli Kass and Solomon Knopf, but, in all other respects, the motion is **DENIED**; and it is further

**ORDERED** that the caption is hereby amended and shall read as follows:

-----x  
**BROADWAY WEST ENTERPRISES, LTD.,**

**Plaintiff,**

**Index No. 653638/2011**

**-against-**

**DORAL MONEY, INC., NAKAZAWA & SUZUKI  
CAPITAL LLC n/k/a SUZUKI CAPITAL LLC,**

**Defendants.**

-----x  
and it is further

**ORDERED** that all future papers filed with the court shall bear the amended caption; and it is further

**ORDERED** that plaintiff's counsel shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Commercial Division Support Office (Room 119A), who are directed to mark the court's records to reflect the change in the caption herein.

This constitutes the decision and order of the Court.

**DATED: November 12, 2013**

**ENTER,**  
  
**O. PETER SHERWOOD**  
**J.S.C.**