

Level Group Inc. v Smart Merchants Inc.
2018 NY Slip Op 32259(U)
September 13, 2018
Supreme Court, New York County
Docket Number: 652907/2015
Judge: Saliann Scarpulla
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 39

-----X
 LEVEL GROUP INC.,

Plaintiff,

- v -

SMART MERCHANTS INCORPORATED, CHARLES KIM, H & M
 GROUP, INC., JOHN DOES 1-10,

Defendant.

INDEX NO. 652907/2015

MOTION DATE 7/26/2017

MOTION SEQ. NO. 002

DECISION AND ORDER

-----X
 The following e-filed documents, listed by NYSCEF document number 80, 81, 82, 83, 84, 85, 86, 87, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 103

were read on this application to/for SUMMARY JUDGMENT (AFTER JOINDER)

HON. SALIANN SCARPULLA:

In this action to recover the payment of a real estate broker's fee, plaintiff Level Group Inc. ("Level") moves for summary judgment on its first cause of action and to dismiss defendant Smart Merchants Incorporated's ("SMI") fifth and sixth affirmative defenses and counterclaims.¹ SMI and defendant Charles Kim ("Kim") (collectively, "Defendants") oppose the motion and cross-move for summary judgment dismissing the complaint in its entirety against Kim, dismissing the second, third, fourth, and fifth

¹ Although Level's notice of motion indicates that it is moving for summary judgment on its entire complaint, its moving papers only address the first cause of action.

causes of action against SMI and granting SMI's counterclaim, and for leave to amend SMI's answer and counterclaim.²

Background

Level is a New York corporation and a licensed real estate broker. Kim is the president and a shareholder of SMI, a New York corporation. In December 2014, SMI contracted to sell its sole asset, a building in Brooklyn ("Brooklyn Property"), and then sought to purchase a replacement property in accordance with the requirements of 26 USC §1031 (hereinafter, "1031 Exchange").³ In January 2015, SMI entered into a confidential brokerage agreement with a non-party real estate broker, PD Properties, LLC ("PD"), to purchase a replacement property. SMI contends that during that time and pursuant to that agreement, PD began to negotiate for the purchase of a replacement property located on Mulberry Street in Manhattan ("Mulberry Property").

Thereafter, Hyo Yun Kwon ("Kwon") – a third-party defendant broker and agent of third-party defendant ProStar Properties, LLC ("ProStar") and acquaintance of Kim – recommended to SMI that it use Level to find a replacement property.⁴ Kwon organized

² Defendant H&M Group, Inc. joined in Defendants' opposition and cross-motion, however, Level consented to the dismissal of all claims against it. Level also dismissed its second and third claims in their entirety; those claims will not be discussed in this decision.

³ This statute allows a seller to defer capital gains taxes on the sale of investment property if that seller uses the sale of the proceeds to purchase a similar replacement property within a certain time.

⁴ According to Defendants, Kwon assured Kim that Level Group would not object to SMI working with another real estate broker.

a meeting between Level and SMI, which occurred on February 10, 2015.⁵ Because of this meeting, Level drafted and signed an exclusive brokerage agreement (“Letter Agreement”), which was subsequently sent to SMI.

The Letter Agreement provides that SMI would refer to Level all real estate “inquiries, proposals, and offers that it received, made, or intended to make regarding any property in the City of New York . . . and SMI agrees to conduct all negotiations in connection therewith exclusively through SMI and advise all persons of this exclusive right of Level.” The Letter Agreement defines Level’s commission rate as “three percent (3%) of the purchase price of a Property” (“Agreed Brokerage Fee”), which is “deemed earned by [Level] and shall be paid to [Level], in full, upon the closing of SMI’s acquisition.”

Pursuant to the Letter Agreement, SMI would agree to pay Level its Agreed Brokerage Fee even if “SMI works through another broker or directly with an owner to [Level’s] exclusion during the term of this agreement.” The term of the Letter Agreement was from February 10, 2015 through January 31, 2016, and “[a]ny Property introduced to SMI before January 31, 2016 will be covered by [the Letter Agreement] for one additional year, until January 31, 2017.” (Emphasis added.)

⁵ On or around March 26, 2015, Level and ProStar entered into a referral fee agreement dated February 10, 2015, which stated that Prostar referred Kim and any of his affiliates to Level and if Kim or his affiliates entered into a transaction which earned Level a commission, Level would pay ProStar a 20% referral fee. This agreement was never disclosed to Defendants.

The Letter Agreement further provides that the “agreement contains our entire understanding concerning the matters set forth herein and may not be changed or modified except in a writing signed by both of us,” and that, in the event of litigation between the parties, the losing party “will reimburse the winning party for all of its reasonable out-of-pocket costs and expenses, including all reasonable attorneys’ fees, court costs and expenses.”

On February 19, 2015, SMI sent Level an e-mail stating that SMI had not yet signed the Letter Agreement because it was attempting to purchase a property that it was interested in months before and the “opportunity to purchase [it] became available again.” SMI also reassured Level that if SMI “cannot strike a deal and close, [it] will send the signed [Letter Agreement] to begin [the] work ASAP.”⁶ Level responded to SMI’s email the same day and reassured SMI that Level’s “interest here is not to become involved in that transaction, but rather, just to help if [it] can.”

On March 12, 2015, SMI sent the following email to Level:

We are back to the drawing board. The property we were pursuing did not go through. We are excited to see what your firm has to offer. Would you be so kind as to re-send the [Letter Agreement], we will sign it ASAP and begin our work together.

On or around March 17, 2015, Kim signed the Letter Agreement.

SMI subsequently entered into an agreement to purchase the Mulberry Property for \$20.5 million. On July 21, 2015, SMI closed on the purchase of the Mulberry

⁶ Defendants did not disclose to Level what property it was attempting to purchase, however Defendants maintain that they were referring to the Mulberry Property.

Property, which was the 1031 Exchange replacement property for its Brooklyn Property. See Yi Affirmation, Ex. M (NYSCEF 93). This transaction was brokered by PD, not Level. SMI then refused to pay the Agreed Brokerage Fee for the purchase of the Mulberry Property.

Based on the foregoing, Level commenced this action for, *inter alia*, breach of contract (first claim), quantum meruit (fourth claim), and unjust enrichment (fifth claim). On June 30, 2016, SMI and Kim each filed an answer. Level now moves for summary judgment on its first cause of action for breach of the Letter Agreement against Defendants to recover the commission for the Mulberry Property and to dismiss SMI's fifth affirmative defense for breach of fiduciary duty⁷ and its sixth affirmative defense and first counterclaim for fraudulent inducement. Defendants oppose summary judgment and argue that there is no privity of contract between Kim and Level, that the Letter Agreement does not pertain to the Mulberry Property. In their opposition, Defendants also raise contractual interpretation issues and argue that they preclude summary judgment in Level's favor.

Defendants cross-move for: (1) summary judgment dismissing the complaint in its entirety against Kim; (2) summary judgment dismissing the second, third, fourth, and fifth causes of action against SMI and granting SMI's first counterclaim; and (3) leave to amend SMI's answer and counterclaim. Because SMI's proposed amended answer

⁷ In its motion for summary judgment, Level also seeks the dismissal of SMI's second counterclaim for breach of fiduciary duty. However, SMI voluntarily dismissed this counterclaim by stipulation dated September 6, 2017.

amplifies its original answer's allegations in its fifth and sixth affirmative defenses and first counterclaim, this decision is addressed to both SMI's original and proposed amended answers.

Discussion

The party moving for summary judgment "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case," *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985) (citations omitted). Once the movant has established its *prima facie* entitlement to summary judgment, the burden shifts to the opposing party "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact." *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986) (citations omitted).

Breach of Contract Against Kim

In support of the cross-motion to dismiss the first cause of action against Kim, Defendants rely on the Letter Agreement and argue that Level cannot maintain this claim against Kim because there is no privity of contract between Level and Kim. Defendants argue that, because Kim only signed the Letter Agreement in his corporate capacity on behalf of SMI, he cannot be held personally liable for the purported breach of the Letter Agreement.

"[O]fficers or agents of a company are not personally liable on a contract if they do not purport to bind themselves individually," *Georgia Malone & Co., Inc. v Ralph Rieder*, 86 AD3d 406, 408 (1st Dept 2011), *affd sub nom. Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511 (2012) (citations omitted), which must be shown by some "direct

and explicit evidence of actual intent.” *Salzman Sign Co. v Beck*, 10 NY2d 63, 67 (1961); *accord Savoy Record Co. v Cardinal Export Corp.*, 15 NY2d 1, 4 (1964).

The portion of the Letter Agreement that Kim signed is in the following form:

“Accepted and agreed to,
Smart Merchants Incorporated
By:
Chung Chan Kim, President.”

Kim’s signature follows the word “By.” This signature was made in Kim’s corporate, not individual, capacity. *Salzman Sign Co.*, 10 NY2d at 65; *Warren-Connolly Co. v Saphin*, 283 AD 391, 392-93 (1st Dept 1954). *Cf. Mencher v Weiss*, 306 NY 1 (1953).

Defendants have thus established their entitlement to judgment as a matter of law on the portion of its cross-motion for summary judgment to dismiss Level’s breach of contract claim against Kim individually.

In opposition, Level argues that Kim may be personally liable for the breach of the Letter Agreement because, by signing the Letter Agreement – which defines SMI as “SMI and all entities which whether directly or indirectly, are controlled by SMI or any person or entity with a direct or indirect interest in any of the foregoing” – Kim clearly expressed his intent to be bound individually. This argument is meritless.

Level has not offered any “direct and explicit evidence of actual intent” of Kim’s intent to be bound in his individual capacity to the Letter Agreement, *Salzman Sign Co.*, 10 NY2d at 67 (despite contract containing express personal guaranty against signatory, no intent to be individually bound where signatory only signed the contract in his

corporate capacity); *accord Savoy Record Co.*, 15 NY2d at 4-6.⁸ Therefore, Defendants' cross-motion for summary judgment dismissing the first cause of action against Kim is granted, and Level's motion for summary judgment is denied.

Breach of Contract Against SMI

There is no dispute that Level and SMI entered into the Letter Agreement, that SMI negotiated for and purchased the Mulberry Property without Level while this agreement was in effect, and that Level was not paid commission for this transaction. Rather, the parties disagree as to the scope of the Letter Agreement and whether it pertains to the Mulberry Property transaction.

In support of its first cause of action for breach of the Letter Agreement against SMI, Level argues that, pursuant to its plain terms, the Letter Agreement pertains to any New York City real estate transaction that occurred during the term of the Letter Agreement, regardless of whether SMI learned about the property prior to executing the Letter Agreement, including the Mulberry Property. Level concludes that, because Defendants worked with another broker to purchase the Mulberry Property while the

⁸ Level's reliance on *Mencher v Weiss*, 306 NY 1 (1953) is misplaced. There, the Court found that the defendant had signed an agreement in his individual and corporate capacity where the agreement at issue specified that it was between the defendant and others who comprised the corporation and the plaintiffs, and the contract stated "that it 'shall apply to and bind the parties thereto, their respective members, and if an employer member is a corporation, the individual members thereof.'" *Mencher*, 306 NY at 3. The Court found that this clause adequately notified the defendant "that individual members of a corporation were to be bound by the agreement," and by "affix[ing] his signature to the agreement on a line to the immediate left of which is the printed word 'Member[,] he acquiesced in and accepted the designation of 'Member' of the [corporation]." *Id.* at 5.

Letter Agreement was in effect and failed to pay Level its Agreed Brokerage Fee for that transaction, Defendants breached the Letter Agreement.

In opposition, Defendants argue that no breach occurred because the Mulberry Property was not governed by the Letter Agreement. Defendants rely on deposition testimony and the February 19, 2015 e-mail correspondence between SMI and Level to argue that, prior to executing the Letter Agreement, it received assurances by Level and Kwon that Level would not seek commissions for properties previously introduced to SMI or transactions that SMI was working on prior to the date of the Letter Agreement.

Defendants also point out language in the Letter Agreement which states that “SMI will refer to [Level] all inquiries, proposals and offers that SMI receives, makes or intends to make,” and argue that, because of the Letter Agreement’s use of the present tense and its failure to specifically include the terms “counteroffers, contracts, or closings,” it does not apply to any of deals that were being negotiated before the Letter Agreement was effective. Defendants also argue that, at the very least, this use of the present tense renders the meaning of “Properties” that were not introduced by Level to SMI ambiguous, thereby precluding summary judgment.

Where “a written agreement . . . is complete, clear and unambiguous on its face[, it] must be enforced according to the plain meaning of its terms.” *Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 (2002). “A contract is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion.” *Id.* at 569-70 (citations and quotation marks omitted). “Whether

or not a writing is ambiguous is a question of law to be resolved by the courts.” *W.W.W. Assoc., Inc. v Giancontieri*, 77 NY2d 157, 162 (1990) (citation omitted).

The Letter Agreement at issue contains a straightforward exclusive referral provision, which provides, in pertinent part that:

during the term of this agreement, SMI will refer to [Level] all inquiries, proposals and offers that SMI receives, makes or intends to make regarding any property in the City of New York and SMI agrees to conduct all negotiations in connection therewith exclusively through Level and advise all persons of this exclusive right of Level All such properties shall be covered by this letter agreement and shall be deemed Properties for all purposes.

The Letter Agreement further provides that “if SMI works through another broker or directly with an owner to [Level’s] exclusion during the term of [the Letter Agreement], then SMI shall pay [Level] one full commission at [the Agreed Brokerage Fee].”

The Letter Agreement is clear and unambiguous and therefore, it “must be enforced according to the plain meaning of its terms.” *Greenfield*, 98 NY2d at 569.⁹ A plain reading of the Letter Agreement establishes that: (1) SMI agreed to a broad referral provision; and (2) if SMI – by itself or through another broker – purchased a real estate property in New York City while the Letter Agreement was in effect, SMI would be obligated to pay Level the Agreed Brokerage Fee for that property. The Letter Agreement could have, but does not, contain an exclusion for the Mulberry Property, or any other property SMI had been considering prior to the Letter Agreement’s execution.

⁹ Because the Letter Agreement is unambiguous, I may not consider the extrinsic evidence submitted by Defendants. *See Greenfield*, 98 NY2d at 569; *Non-Linear Trading Co., Inc. v Braddis Assoc., Inc.*, 243 AD2d 107, 114 (1st Dept 1998).

The Mulberry Property – which SMI indisputably negotiated and contracted for through another broker while the Letter Agreement was in effect – is covered by the Letter Agreement and Level is entitled to its Agreed Brokerage Fee for the Mulberry Property transaction. Accordingly, Level’s motion for summary judgment on its first cause of action for breach of contract against SMI is granted.¹⁰

SMI’s Defenses and Counterclaims

Fraudulent Inducement

The allegations underlying SMI’s sixth affirmative defense and first counterclaim for fraudulent inducement is that Level misrepresented to SMI that: (1) Level had substantial experience in representing buyers in 1031 Exchange transactions, although it had no prior experience; and (2) Level would not seek commissions for properties previously introduced to SMI or transactions that SMI had been working on prior to formally retaining Level, and Level caused Kwon to make the same false assurances.

SMI asserts that it believed and relied on these misrepresentations and otherwise would not have executed the Letter Agreement. SMI further argues that, because it was induced by these misrepresentations to execute the Letter Agreement, it was injured and is thus entitled to rescission of the Letter Agreement.

¹⁰ Because the parties’ relationship is governed by a written contract, Level may not maintain its fourth and fifth causes of action for unjust enrichment and quantum meruit, and Defendants’ cross-motion to dismiss these claims is granted. *See MG W. 100 LLC v St. Michael’s Prot. Episcopal Church*, 127 AD3d 624, 626 (1st Dept 2015).

Rescission is an equitable remedy that “is to be invoked only when there is lacking complete and adequate remedy at law and where the *status quo* may be substantially restored.” *Rudman v Cowles Communications*, 30 NY2d 1, 13 (1972) (citation omitted). “Fraud sufficient to support rescission requires only a misrepresentation that induces a party to enter into a contract resulting in some detriment, and unlike a cause of action in damages on the same ground, proof of scienter and pecuniary loss is not needed.” *Board of Mgrs. of Soundings Condominium v Foerster*, 138 AD3d 160, 164 (1st Dept 2016) (citations and quotation marks omitted); *see also Sokolow, Dunaud, Mercadier & Carreras LLP*, 299 AD2d at 70.

Although a showing of pecuniary loss is not required, “[a] false representation does not, without more, give rise to a right of action, either at law or in equity in favor of the person to whom it is addressed. To give rise, under any circumstances, to a cause of action, either in law or equity, reliance of the false representation must result in injury.” *Sager v Friedman*, 270 NY 472, 479 (1936). *Accord Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 (2017).

SMI’s general, vague claim that it relied on Level’s misrepresentation regarding its experience in 1031 Exchange transactions is insufficient to support a fraudulent inducement defense or counterclaim because SMI has failed sufficiently to allege that it was injured by its reliance on this misrepresentation. *Cf. Sokolow, Dunaud, Mercadier & Carreras LLP*, 299 AD2d at 70 (during pre-merger negotiations, law firm actively misrepresented the size, experience, and finances of its firm to fraudulently induce other firm to execute agreement and pursue merger); *Sager*, 270 NY at 479 (misrepresentations

as to financial viability and value of collateral induced plaintiff to make loan to corporation).

SMI's remaining assertion – that it relied on Level's oral misrepresentations that it would not seek commission on properties known to SMI or transactions SMI was working on prior to retaining Level – is equally without merit because the alleged misrepresentation “conflict[s] with the terms of a contract [SMI] executed.” *Jet Acceptance Corp. v Quest Mexicana S.A. de C.V.*, 87 AD3d 850, 855 (1st Dept 2011). “[A] party claiming fraudulent inducement cannot be said to have justifiably relied on a representation when that very representation is negated by the terms of a contract executed by the allegedly defrauded party.” *Perrotti v Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495, 498 (1st Dept 2011) (citations omitted); *see also Old Clinton Corp. v 502 Old Country Rd., LLC*, 5 AD3d 363, 365 (2d Dept 2004).

As SMI has failed to allege facts sufficient to support rescission of the Letter Agreement, I grant Level's motion to dismiss SMI's sixth affirmative defense and first counterclaim.

Breach of Fiduciary Duty

A fiduciary relationship is created “[w]hen one party is under a duty to act for, or give advice for the benefit of, another on matters within the scope of their relationship.” *Dembeck v 220 Cent. Park S., LLC*, 33 AD3d 491, 492 (1st Dept 2006) (citing *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 NY3d 11, 19 (2005)). The elements required to establish a breach of fiduciary duty include: (1) the existence of a fiduciary relationship; (2)

misconduct; and (3) damages directly caused by the misconduct. *Pokoik v Pokoik*, 115 AD3d 428, 429 (1st Dept 2014) (citation omitted).

SMI asserts that the parties had a fiduciary relationship because Level was its real estate broker. Level purportedly breached its fiduciary duties owed to SMI because, while negotiating their future business relationship and prior to executing the Letter Agreement, Level misrepresented that it had experience with 1031 Exchange transactions and that it would not charge commission on certain properties. SMI also asserts that Level breached its fiduciary duty by failing to disclose that it entered into a referral fee agreement with ProStar after SMI executed the Letter Agreement.

SMI's allegations that Level breached its fiduciary duty owed to SMI by misrepresenting its experience and the scope of the Letter Agreement are insufficient to establish a breach of fiduciary duty. No fiduciary relationship existed between the parties in negotiating the terms of their relationship and executing the Letter Agreement – “an arms-length business relationship does not give rise to a fiduciary obligation.” *WIT Holding Corp. v Klein*, 282 AD2d 527, 529 (2d Dept 2001) (citation omitted); *see also V. Ponte and Sons, Inc. v Am. Fibers Intern.*, 222 AD2d 271, 271 (1st Dept 1995) (“The counterclaim sounding in breach of fiduciary duty was properly rejected, as defendants have pleaded only an arm's length business transaction without special circumstances which might give rise to a fiduciary relationship.”) (citation omitted).

SMI's remaining assertion, that Level failed to disclose to SMI that it entered into a fee referral agreement with ProStar after being retained as SMI's real estate broker, is also insufficient to establish a breach of fiduciary duty. Although “a real estate broker is

a fiduciary with a duty of loyalty and an obligation to act in the best interests of the principal,” *Precision Glass Tinting, Inc. v Long*, 293 AD2d 594, 594–95 (2d Dept 2002) (citation omitted), this duty “is not unlimited.” *Reiser Inc. v Roberts Real Estate*, 292 AD2d 726, 729-30 (3d Dept 2002) (citations omitted).

Rather, “a broker’s duty to refrain from taking any action adverse to its principal’s interests is necessarily tied to the transaction that formed the agency relationship in the first instance.” *Id.* (citations omitted); see *Douglas Elliman LLC v Tretter*, 84 AD3d 446, 448 (1st Dept 2011), *affd*, 20 NY3d 875 (2012) (“***During the process of facilitating a real estate transaction***, the broker owes a duty of undivided loyalty to its principal.”) (emphasis added) (citations omitted).¹¹

SMI failed to allege any facts to show that Level’s entering into a referral fee agreement with ProStar was wrongful or an action adverse to SMI’s interests in facilitating the purchase of the Mulberry Property. Further, SMI has failed sufficiently to allege damages arising from the referral fee agreement. Therefore, I grant the motion to dismiss SMI’s fifth affirmative defense for breach of fiduciary duty.

Finally, although SMI seeks leave to amend its answer and counterclaim, it has not demonstrated that it may replead to revive the claims dismissed herein or add new claims that would withstand a motion to dismiss.

¹¹ See also *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 20 (2005) (“However, it is fundamental that fiduciary ‘liability is not dependent solely upon an agreement or contractual relation between the fiduciary and the beneficiary but results from the relation.’”) (quoting Restatement [Second] of Torts § 874, Comment b).

In accordance with the foregoing, it is hereby

ORDERED that the branch of plaintiff Level Group Inc.'s motion that seeks summary judgment on its first cause of action against defendant Smart Merchants Incorporated is granted; and it is further

ORDERED that the branch of plaintiff Level Group Inc.'s motion that seeks summary judgment dismissing defendants Smart Merchants Incorporated's fifth and sixth affirmative defenses and first counterclaim is granted, and such affirmative defenses and counterclaim are dismissed; and it is further

ORDERED that the Clerk shall enter judgment in favor of plaintiff Level Group Inc. and against defendant Smart Merchants Incorporated in the amount of \$615,000.00, together with interest of 9% per annum from the date of July 22, 2015, until the date of the decision on this motion, as calculated by the Clerk; and it is further

ORDERED that the portion of plaintiff Level Group, Inc.'s motion that seeks the recovery of attorneys' fees is severed and the issue of the amount of reasonable attorneys' fees that plaintiff Level Group, Inc. may recover against defendant Smart Merchants Incorporated is referred to a Special Referee for a hearing; and it is further

ORDERED that counsel for plaintiff Level Group, Inc. shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,¹² upon the Special Referee Clerk in the General Clerk's

¹² Available on the Court's website at www.nycourts.gov/suptmanh under the "References" link on the navigation bar.

Office (Room 119, 60 Centre Street), who is directed to place this matter on the calendar of the Special Referee's Part (Part 50R) for the earliest convenient date; and it is further

ORDERED that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that plaintiff Level Group Inc.'s request for reasonable attorneys' fees is held in abeyance pending the receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 to confirm the Special Referee's Report. Upon such motion, I will enter a separate judgment on plaintiff Level Group Inc.'s claim for reasonable attorneys' fees; and it is further

ORDERED that the branch of defendants Smart Merchants Incorporated's, Charles C. Kim's and H&M Group, Inc.'s cross-motion for summary judgment to dismiss the complaint is: (1) granted to the extent that the complaint is dismissed in its entirety as against defendants Charles C. Kim and H&M Group, Inc., with costs and disbursements to those defendants as taxed by the Clerk of the Court; and (2) granted to the extent that the complaint's second, third, fourth, and fifth causes of action are dismissed as against defendant Smart Merchants Incorporated; and it is further

ORDERED that the balance of this action is severed and continued as against the remaining third-party defendants; and it is further

ORDERED that counsel for the remaining third-party plaintiffs and third-party defendants are directed to appear for a status conference in Room 208, 60 Centre Street, New York, New York 10007, on November 14, 2018, at 2:15pm.

This constitutes the decision and order of the Court.

9/13/18
DATE

Saliann Scarpulla
SALIANN SCARPULLA, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
DO NOT POST

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: