

<b>5 E. 59th Realty Holding Co., LLC v Leahey</b>
2020 NY Slip Op 32751(U)
August 24, 2020
Supreme Court, New York County
Docket Number: 452192/2018
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 48EFM

5 EAST 59TH REALTY HOLDING COMPANY, LLC,

Plaintiff,

- v -

KEVIN LEAHEY, THE RENATUS GROUP LLC, LINCOLN
EQUITIES GROUP LLC, MIP 5 EAST 59TH STREET,
LLC, PAULO AGNELO MALZONI,

Defendants.

INDEX NO. 452192/2018

MOTION DATE 02/14/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON
MOTION

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 37, 38, 39, 40, 41,
42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57

were read on this motion to/for DISMISSAL

Upon the foregoing documents, it is

Defendants MIP 5 East 59th Street, LLC (MIP), Paulo Malzoni, Kevin Leahey, The
Renatus Group LLC (Renatus), and Lincoln Equities Group, L.L.C. (Lincoln) move pursuant
to CPLR 3211(a)(1), (a)(5), (a)(7), and 3016(b) to dismiss with prejudice the Amended
Complaint (NYSCEF Doc. No. [NYSCEF] 29) against all defendants based on documentary
evidence, and for failure to state a claim. Defendant Paulo Agnello Malzoni moves pursuant
to CPLR 3211(a) (8) and 306-b to dismiss the Amended Complaint against him for failure to
effect service.<sup>1</sup>

In November 2012, MIP paid plaintiff 5 East 59th Realty Holding Company, LLC
\$37.25 million to acquire the former home of the Playboy Club, a nine-story commercial
building at 5-7 East 59th Street in Manhattan (Building). In prior litigation, plaintiff was held

<sup>1</sup> On consent, Malzoni is dismissed. (NYSCEF 51, Plaintiff's Memo of Law in Opposition, p.
2, footnote 1; NYSCEF 57, Tr. 42:6-9).

liable to pay a commission to Eastern Consolidated Properties (Eastern), a broker plaintiff had hired to market the Building pursuant to a January 2011 written contract. (See *Eastern Consol. Props., Inc. v 5 E. 59 Realty Holding Co., LLC*, Index No. 650503/2013, 2015 WL 3989024, 2015 N.Y. Slip Op. 31124[U] (Sup. Ct. N.Y. Cty., June 29, 2015), *aff'd* 146 AD3d 622 (1st Dept 2017). Eastern introduced plaintiff to Maragogipe Investimentos e Participacoes LTDA (MIP-Brazil) a group from Brazil led by Malzoni (the Brazilian Group) who is also a principal of MIP in this action. (NYSCEF 29, Amended Complaint ¶11; NYSCEF 104 in 650503/2013, June 29, 2015 Decision on Summary Judgment 3). The facts concerning the failed deal between plaintiff and MIP US, a subsidiary of MIP-Brazil, are eloquently detailed in the court's prior decision and will not be repeated here. (NYSCEF 104 in 650503/2013, June 29, 2015 Decision on Summary Judgment). Judgment in the amount of \$820,013.62, including interest, was entered against plaintiff on September 24, 2015. (NYSCEF 116 in 650503/2013, Judgment).

Here, plaintiff seeks indemnification for that judgment, which plaintiff alleges, was caused by defendants concealing the true buyer – Malzoni's Brazilian Group. Plaintiff contends that defendants knew that plaintiff would not have executed the contract of sale if plaintiff had known that the Brazilian Group was the true buyer; plaintiff did not wish to compensate Eastern over \$800,000. (NYSCEF 29, Amended Complaint ¶¶87, ¶28, Exhibit 3). In the Amended Complaint, plaintiff asserts four causes of action: (1) fraud against Leahey, Renatus, and Lincoln; (2) aiding and abetting fraud against Leahey, Renatus, Lincoln, and MIP; (3) breach of contract / contractual Indemnification against MIP; and (4)

breach of implied covenant of good faith and fair dealing against Leahey, Renatus, Lincoln, and MIP.<sup>2</sup> (*Id.*).

In support of these causes of action, plaintiff alleges that in July 2012, Leahey who is the principal of Renatus, in collaboration with Lincoln and MIP, schemed to conceal that Lincoln was a straw buyer disguising Malzoni's Brazilian Group, the true purchaser. (*Id.* ¶24). The scheme allegedly began with a principal of Lincoln who met with plaintiff and the Building's ground lease tenant, which had killed the original deal, and, by April 2012, who had negotiated a price to simultaneously purchase both plaintiff's interest and the ground lease tenant's interest in the property. (*Id.* ¶22). Plaintiff alleges that during a meeting between Lincoln, Leahey, plaintiff, and plaintiff's representatives, defendants represented that "it would be Lincoln, or an entity it set up, that would be purchasing the property." (*Id.* ¶23). Plaintiff alleges that defendants prevented plaintiff from discovering that Malzoni's Brazilian Group as the true purchaser as evidenced by the emails attached to the complaint. (*Id.* ¶25). In a July 16, 2012 email, Lincoln's attorney informed plaintiff that it was representing Lincoln with respect to the purchase of the property. (*Id.* ¶26 and Exhibit 1).<sup>3</sup> By email dated July 17, 2012, Lincoln's principal emailed MIP and Leahey to advise that his attorney "made reference to a 'secret investor,' and referred to you by name to name a few. As you know these are difficult sellers so finesse is critical. Please speak to Kevin [Leahey] for further details. We hope these mistakes don't cause any problems." (*Id.* ¶27, Exhibit 2). In a July 20, 2012 email from MIP advised Lincoln and Leahey that, "We should do the assignment with their consent without naming MIP in the agreement anymore. We would sign the contract and assignment simultaneously so we have no risk the consent will be

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<sup>2</sup> Plaintiff withdrew the fourth cause of action for breach of implied covenant of good faith and fair dealing which is thus dismissed. (NYSCEF 51, Plaintiff's Memo of Law in Opposition, footnote 2).

<sup>3</sup> Exhibits to the Amended Complaint are not separately filed in NYSCEF.

denied, as we are going hard right away. I guess this would prevent any claim from the previous broker." (*Id.* ¶28, Exhibit 3). On July 23, 2012, Leahey explained in an email to MIP and its attorney that "[t]he issue with the broker rep is that they were introduced to the property through another broker who was not hired on an exclusive basis by the seller. So we have no idea whether they have any agreement with that person or for how long it is. That has been why Lincoln was supposed to sign and bring them in as capital." (*Id.* ¶29, Exhibit 4). MIP's counsel replied to Leahey, Lincoln and MIP that "[j]ust to be clear, the broker rep in the fee contract (it was the fee owner who engaged Eastern) is still mutual. The issue is on the leasehold." (*Id.* ¶30, Exhibit 4). On July 23, 2012, Leahey emailed Lincoln, MIP and MIP's counsel that "[t]hat's because the fee [plaintiff] is not aware that Malzoni [MIP] is the capital yet just the leasehold. I am more than happy to call the Fee now and let him know but he just called me looking for the contract and I'd like to tell him it's coming." (*Id.* ¶31, Exhibit 4). Plaintiff signed the contract for the sale on August 1, 2012, with MIP listed as the buyer, but Malzoni's name did not appear on the contract plaintiff signed. (*Id.* ¶32, Exhibit 5). In Article 11 of the contract, MIP warranted that it had dealt with no other broker other than Renatus Group. (*Id.* ¶33). Plaintiff insists that MIP's warranty was a continuation of the concealment. (*Id.* ¶34). Plaintiff alleges that "prior to the November, 2012 closing, the Brazilian Group decided to purchase the property without participation from Lincoln which was a mere straw buyer for the Brazilian Group. (*Id.* ¶¶35, 36). Plaintiff denies having any knowledge when it signed the contract that Malzoni's Brazilian Group was the ultimate purchaser. (*Id.* 38). "Plaintiff paid a brokerage fee to Renatus Group, on reliance that it had independently secured a purchaser for the property." (*Id.* ¶39). Plaintiff accuses defendants of intentionally hiding the fact that the Brazilian Group was the intended purchaser all along. (*Id.* ¶40).

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]).

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]). Their content must be “essentially undeniable.” (*VXI Lux 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. Grp., LLC v Marshall-Alan Assocs., Inc.*, 120 AD3d 431, 432 [1st Dept 2014]). In addition to contracts and other legal instruments, “emails can qualify as documentary evidence if they meet the ‘essentially undeniable’ test.” (*Id.* at 433).

Plaintiff’s third cause of action is based on §11.01 of the Contract of Sale which provides:

(a) Purchaser [i.e., MIP] represents and warrants to Seller that it has **not hired, retained or dealt with any broker, finder, consultant or intermediary in connection with the negotiation, execution or delivery of this Agreement or the transactions contemplated hereby other than the Renatus Group** [of which Kevin Leahey is principal] (“Broker”). Purchaser will indemnify Seller against liability **arising out of any breach of the aforesaid representation and warranty.** (Emphasis added).

MIP argues that the breach of contract claim should be dismissed because MIP’s representation that it had not “hired, retained or dealt with” Eastern “in connection with the negotiation, execution or delivery of [the Contract of Sale] or the transactions contemplated [t]hereby” was accurate. Moreover, even if MIP’s representation were not accurate, the judgment plaintiff paid to Eastern does not “aris[e] out of,” MIP’s alleged breach of its representation. Finally, defendants argue that plaintiff waived this claim by electing to close after MIP disclosed its identity to plaintiff.

“The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant’s failure to perform, and resulting damage.” (*Flomenbaum v New York Univ.*, 71 AD3d 80, 91 [1st Dept 2009], *aff’d* 14 NY3d 901 [2010]). Plaintiff has stated a claim for breach of the warranty against MIP. (See e.g. *Cassetta Frank, Inc. v P.G.C. Assoc.*, 264 AD2d 375 [2d Dept 1999] (property owner entitled to indemnification for broker fee from property purchaser under terms of contract after nonjury trial). MIP warranted that it had dealt with no other broker other than Renatus. Plaintiff’s identical promise that it had not dealt with a broker other than Renatus for this deal is not meaningful since plaintiff claims it was not aware of MIP’s actual identity while defendants did. Whether the prior failed deal involving Eastern is covered by the contract term “or the transactions contemplated hereby” is not an issue that can be determined on a motion to dismiss.

Defendants have submitted a number of documents that were provided to plaintiff prior to the closing which link the purchaser MIP and Malzoni's Brazilian Group. (See e.g. NYSCEF 20, Closing Checklist; NYSCEF 21, MIP's Operating Agreement; NYSCEF 23, email between plaintiff and Eastern after publication of Real Deal article disclosing Malzoni as purchaser of the Building). However, Mark E. McDonald, Esq. an associate of Cleary Gottlieb Steen & Hamilton LLP, defendants' attorney, is not qualified to attest to authenticity or whether the documents were given to plaintiff and when. MIP contends that the true buyer was disclosed to plaintiff when on July 23, 2012 it sent the contract to plaintiff with MIP listed as the buyer. Whether this disclosure was sufficient to put plaintiff on notice that Malzoni's Brazilian Group was the true buyer is not an issue that can be determined on this motion. An issue of fact exists as to whether Malzoni's signature page accompanied the contract that was sent on July 23, 2012 to plaintiff for signature or whether the principals were simultaneously signing signature pages. (NYSCEF 57, Tr. 2:25-6:2; NYSCEF 29, Amended Complaint ¶32). Defendants' documentary evidence is not admissible and thus not determinative, conclusive, undeniable, or utterly refutes plaintiff's allegations.

Defendants argue for dismissal of the fraud claim because it is duplicative of the breach of contract claim, as both seek identical damages. Alternatively, defendants argue that the fraud claim separately fails because plaintiff fails to plead with the requisite detail *any* misrepresentation by defendants on which plaintiff reasonably relied, and which caused plaintiff's damages. Defendants challenge plaintiff's allegations of concealment relying on a July 23, 2012 email from defendants' attorney to plaintiff's counsel attaching a draft contract identifying MIP, and not Lincoln, as the buyer. Moreover, Rodrigo Moscoso, an employee of MIP US, was copied on that email. Defendants insist plaintiff knew from the failed 2011 negotiations that Moscoso was an employee of MIP.



“To state a cause of action for fraud, a plaintiff must allege a representation of material fact, the falsity of the representation, knowledge by the party making the representation that it was false when made, justifiable reliance by the plaintiff and resulting injury.” (*Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003][internal quotation marks and citation omitted].) “[A] fraud claim that arises from the same facts as an accompanying contract claims, seeks identical damages and does not allege a breach of any duty collateral to or independent of the parties’ agreements is subject to dismissal as redundant of the contract claim.” (*Cronos Group Ltd. v XComIP, LLC*, 156 AD3d 54, 62-63 [1st Dept 2017] [internal quotation marks and citations omitted].)

Plaintiff’s fraud claim must be dismissed as duplicative of the contract claim against MIP. Evidence that the claims are duplicative includes identical damages. (*MBIA Ins. Corp. v Credit Suisse Sec. (USA) LLC*, 165 AD3d 108, 114 [1st Dept 2018]). That MIP is excluded from the fraud claim is not dispositive. (*Triad Int’l Corp. v Cameron Indus., Inc.*, 122 AD 3d 531, 531-32 (1st Dept 2014). Clearly, this issue of whether other brokers were involved in the transaction was contemplated and addressed in the contract.

As to aiding and abetting fraud against Leahey Renatus, Lincoln, and MIP, without a fraud claim this claim must be dismissed as well. (*Weinberg v Sultan*, 142 AD3d 767, 769<sup>P</sup> [1st Dept 2016]).

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 defendants motion is granted to the extent that the first, second and fourth causes of action are dismissed leaving the third cause of action for breach of contract.

ORDERED that all defendants are dismissed except MIP 5 East 59<sup>th</sup> Street, LLC which shall answer the complaint within 30 days.

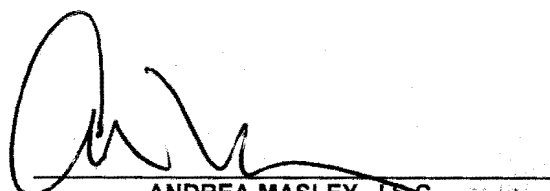
ORDERED that remaining parties shall submit a preliminary conference order within 45 days. Parties are scheduled for a PC conference on October 9, 2020 at 10 a.m. which may be adjourned if a PC order on consent is submitted before that date.

ORDERED that the action is severed and continued against the remaining defendant; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that movants are directed to serve a copy of this decision and order on the Clerk of the Court and General Clerk's Office, in accordance with the proper protocols, who are directed to amend the caption.

Motion Seq. No. 02  
8/24/2020  
DATE

  
ANDREA MASLEY, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED			<input checked="" type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:  
CHECK IF APPROPRIATE: