

**Saran v Shanghai Chengtou (USA), LLC**

2018 NY Slip Op 30292(U)

February 20, 2018

Supreme Court, New York County

Docket Number: 650379/2017

Judge: Barry Ostrager

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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 61

-----X  
 AJAYPAL SARAN, AYESHA KHAN,

Plaintiff,

INDEX NO. 650379/2017

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 003

- v -

SHANGHAI CHENGTUO (USA), LLC, SMI USA, INC., KEVIN  
 GAO, TOM GAO, CERUZZI PROPERTIES, LLC, SMI 520  
 FIFTH AVE LLC

Defendant.

**DECISION AND ORDER**

-----X  
 The following e-filed documents, listed by NYSCEF document number 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 80, 81, 82, 83

were read on this application to/for Dismiss

HON. BARRY R. OSTRAGER:

Defendants Shanghai Chengtou (USA), LLC, SMI USA, Inc., and SMI 520 Fifth Ave LLC (together, "SMI") move to dismiss the amended complaint of Plaintiffs Ajaypal Saran ("Saran") and Ayesha Khan ("Khan"). Plaintiffs previously discontinued all claims against Defendants Kevin Gao, Tom Gao, and Ceruzzi Properties, LLC. [See NYSCEF Docs. 39-40]. On February 15, 2018, the Court heard oral argument and reserved decision on SMI's pre-answer motion to dismiss. For the reasons stated herein, SMI's motion is granted in part.

**Background**

This case arises out of SMI's alleged failure to pay a brokerage commission owed to Saran and Khan. It is undisputed that Saran is a commercial real estate salesperson and Khan is a licensed real estate broker. On September 24, 2014, Saran met with SMI, a real estate investment

firm, at SMI's offices to discuss various "off market" real properties, including the Fifth Avenue property (the "Property") that is the subject of this dispute. The amended complaint alleges that Khan secured "special permission" from non-party Thor Equities ("Thor"), the owner and seller of the Property, to offer it to SMI with Thor's condition that Khan and Saran look to SMI to receive their commission, as Thor was required to pay commissions to its exclusive brokerage company, Holiday, Fenoglio & Fowler, LLP ("HFF"). (Amended Complaint, ¶13 [NYSCEF Doc. 31]). Though only Saran was at the September 2014 meeting, it is alleged that Khan acted in association with Saran and that Khan provided Saran with permission to act on her behalf in negotiating a brokerage agreement with SMI concerning the Property. The amended complaint alleges that SMI verbally hired Saran and Khan to broker the Property. (Amended Complaint, ¶45 [NYSCEF Doc. 31]).

Following the September 24, 2014 meeting—the only time Saran ever met with SMI to discuss the Property—the parties exchanged email correspondence concerning the terms of a Brokerage Fee and Non-Circumvention Agreement (the "Agreement"). Khan is not alleged to have ever met SMI and it appears all communication with SMI went through Saran. The amended complaint alleges that SMI required Saran to disclose, within the Agreement, the specific address and seller of the Property. The parties allegedly exchanged drafts of the Agreement, containing information regarding the specific address and seller of the Property, and negotiated the terms of the brokerage commission. Plaintiffs offered as a commission "an amount equal to 1% of gross sale price." (Amended Complaint, ¶56 [NYSCEF Doc. 31]). SMI countered by offering "an amount *up to* 1% of gross sale price." *Id* (emphasis added). Plaintiffs allege that they "agreed" to SMI's counteroffer but, nevertheless, "suggested" in an email response a 0.5% commission. (See Amended Complaint, ¶57 [NYSCEF Doc. 31]).

Approximately one week later, SMI responded by saying that it wanted to “pass” on the Property, effectively rejecting the 0.5% counteroffer. (See Amended Complaint, ¶59 [NYSCEF Doc. 31]). Plaintiffs further allege that SMI ultimately purchased the Property in June 2015, effectively cutting them out of a transaction that plaintiffs orchestrated.

Thus, Saran and Khan allege that SMI, after inducing them to disclose the specific address and owner of the Property, purchased the Property and avoided paying them a brokerage commission. Plaintiffs’ amended complaint alleges fraud, breach of express and implied contract, quantum meruit, unjust enrichment, and tortious interference. SMI moves to dismiss the amended complaint pursuant to RPL 442-a, CPLR 3211(a)(1), (a)(3), (a)(5), and (a)(7).

#### **Saran’s Standing**

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction .... Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). The Court need not accept as true “legal conclusions or [] factual claims which are either inherently incredible or flatly contradicted by documentary evidence.” *W. Branch Conservation Ass’n, Inc. v. Cnty. of Rockland*, 227 A.D.2d 547, 547 (2d Dep’t 1996). Pursuant to CPLR 3211(a)(3), proper standing “ensure[s] that the party seeking relief has a sufficiently cognizable stake in the outcome so as to cast the dispute in a form traditionally capable of judicial resolution.” *Community Bd. 7 of Borough of Manhattan v. Schaffer*, 84 N.Y.2d 148, 154 (1994). Finally, under CPLR 3211(a)(5), “[t]o satisfy the statute of frauds, a writing must identify the parties, describe the subject matter, state the essential terms of an agreement, and be signed by the party to be charged,” though there are significant, relevant exceptions as will be discussed *infra*. *Durso v. Baisch*, 37 A.D.3d 646, 647 (2d Dep’t 2007).

SMI's moving papers assert that Saran must be dismissed as a plaintiff based upon the prohibitions of Real Property Law 442-a:

No real estate salesman in any place in which this article is applicable shall receive or demand compensation of any kind from any person, *other than a duly licensed real estate broker with whom he associated*, for any service rendered or work done by such salesman in the appraising, buying, selling, exchanging, leasing, renting or negotiating of a loan upon any real estate. RPL 442-a (emphasis added).

It is undisputed that Saran is a real estate salesperson and not a licensed broker. The evidence submitted by SMI buttresses this undeniable fact. (Movant's Ex. E [NYSCEF Doc. 53]). Further, the damages Saran seeks cannot reasonably be construed as anything but payment for the brokerage commission he believes he is owed. Saran appears to be attempting to circumvent the clear intent of RPL 442-a, which is to prevent real estate salespersons from bringing claims for commissions against anyone other than the licensed real estate broker with whom such salesperson is associated. *See Conlon v. Teicher*, 8 A.D.3d 606, 607 (2d Dep't 2004) ("The plaintiff's claims concerning tortious interference are essentially claims for broker's commissions that the plaintiff, a real estate salesperson, is statutorily barred from bringing against any party other than a licensed real estate broker with whom she is associated"); *see also Colombo v. Sharmas Realty, Inc.*, 174 A.D.2d 985, 985 (4th Dep't 1991) ("Plaintiff may not contravene the prohibition of Real Property Law § 442-a by characterizing the cause of action against defendants ... as one for conversion. The action remains one to recover compensation for commissions").

On June 4, 2017, however, Khan purportedly assigned to Saran a ten percent interest in her claims against SMI. [See NYSCEF Doc. 65]. Khan's last-minute assignment to Saran of a ten percent stake in her claims necessarily prevents pre-answer dismissal of Saran as a plaintiff. "Defendant is [therefore] incorrect [] in objecting to the assignment of the broker's claim against

defendant to plaintiff.” *Hanley v. Sumitomo Bank, Ltd.*, 1993 WL 362388, at \*6 (S.D.N.Y. September 14, 1993); see *Rocco v. Sortino*, 105 A.D.2d 1063 (4th Dep’t 1984) (“[RPL 442-a], however, does not preclude an assignment of rights by a real estate broker to a real estate salesperson”).

In *Hanley*, the Court held that the assignee-salesperson’s claims could not be dismissed absent a finding that the salesperson’s association with the assignor-broker was invalid. *Hanley*, 1993 WL 362388, at \*6. If the association between the salesperson and the licensed broker was found valid by the trier of fact, the assignment could be found valid as well. *Id.* Here, and as explained more fully *infra*, Khan’s involvement as licensed broker, and her relationship with Saran as salesman, is unclear. To the extent Khan was, in fact, given permission by Thor to negotiate a sale of the Property in association with Saran as salesman, the assignment would appear valid and not contrary to public policy. See *Rocco*, 105 A.D.2d at 1063 (“We can discern no public policy which would be violated by such an assignment”). However, to the extent that this last-minute assignment—executed months after this lawsuit was commenced and roughly a week before the *amended* complaint was filed—is nothing but a “sham to circumvent the law,” Khan’s assignment may indeed be an invalid attempt to give Saran improper standing in this case. See *Hanley v. Sumitomo Bank, Ltd.*, 1993 WL 362388, at \*6 (S.D.N.Y. September 14, 1993). Affording plaintiffs’ pleadings every favorable inference, the Court is presented with issues of fact that prevent dismissal of Saran as a plaintiff on a pre-answer motion to dismiss.

### **Khan’s Standing**

Khan, having acted almost entirely through Saran in all interactions with SMI, can only maintain claims against SMI if she, in fact, had a valid broker-salesperson relationship with Saran such that Saran was essentially acting as her agent. If Saran’s allegations, that she was

acting in association with Khan during the September 2014 meeting, turn out to be false, then Khan would have no discernible involvement in the case and thus no standing to assert the claims alleged herein. Indeed, Khan's connection to Saran and the events alleged appears tenuous. (*But see* Movant's Ex. E [NYSCEF Doc. 53]). Khan herself never met with or negotiated with SMI concerning the Property—only Saran. The amended complaint alleges that Saran was “associated and licensed under” Khan. (Amended Complaint, ¶4 [NYSCEF Doc. 31]). Khan's involvement in the dispute appears limited to the allegation that she “secured special permission” from Thor to offer the Property to SMI, despite the HFF exclusive, on the condition that she look to SMI to receive commissions. (Amended Complaint, ¶13 [NYSCEF Doc. 31]). This allegation is disputed by the parties. [*See* NYSCEF Docs. 78, 82, and 83]. The competing affidavits submitted by the parties present a material dispute of fact as to whether Khan was truly associated with Saran and whether Khan had authority to market the Property. *Id.*

However, whether Khan herself was physically present when the oral agreement was allegedly executed is irrelevant. *See Matusik v. Ward*. 68 A.D.3d 1213, 1214 (3d Dep't 2009) (“Initially, we conclude that plaintiff did have standing. While it is true that plaintiff was not a signatory to the agreement, he was nevertheless entitled to bring this action to seek recovery of the fee claimed by ... his salesperson”). What *is* relevant is whether Khan had a valid broker-salesperson association with Saran such that Saran's communications with SMI can be fairly be said to have been on behalf of himself *and* Khan. While Khan's own involvement appears exceptionally limited based on the amended complaint, she has, if barely, alleged sufficient facts regarding her association with Saran such as to survive a pre-answer motion to dismiss on all but one of her claims.

### Plaintiffs' Claims

Having determined the threshold issue of standing as it relates to both plaintiffs, the Court turns to whether plaintiffs have stated claims upon which relief can be granted. Plaintiffs' fraud claim is premised on their allegation that SMI induced them to enter into the Agreement as a pretext to gain information on the specific location of the Property and the identity of the owner so that SMI could negotiate with the owner directly and avoid paying plaintiffs' commission. (See Amended Complaint, ¶87 [NYSCEF Doc. 31]). "The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 559 (2009). A fraud claim must be pleaded with particularity under CPLR 3016(b). *Id.* Further, a fraud claim will not lie "where the only fraud claimed relates to an alleged breach of contract." *Treeline 990 Steward Partners, LLC v. RAIT Atria, LLC*, 107 A.D.3d 788, 791 (2d Dep't 2013). "[A] general allegation that a party entered into a contract while lacking the intent to perform is insufficient to state a cause of action to recover damages for fraud." *Id.* That is precisely the case here where it is alleged that SMI induced plaintiffs to enter into an oral agreement without any intention of paying plaintiffs' commissions. Plaintiffs' fraud claim is duplicative of the breach of contract claim and is dismissed.

Plaintiffs have also alleged a claim for breach of contract. While it is clear on the pleadings that the parties never entered into a written agreement, plaintiffs have alleged an oral agreement stemming from the September 24, 2014 meeting with SMI. Under New York law, a licensed real estate salesperson generally enjoys exemption from the Statute of Frauds. G.O.L. 5-701(a)(10). To fall under the exemption, a licensed salesperson must operate under the



supervision of a licensed broker. *See Weissman v. Seiyu, Ltd.*, 2000 WL 6663383, at \*2 (S.D.N.Y. May 22, 2000) (adopting holding that the exemption to the Statute of Frauds for licensed real estate salesmen applies only if the salesman is working under the supervision of a licensed real estate broker). As discussed *supra*, whether Saran was truly working under the supervision of Khan is a dispute of material fact precluding pre-answer dismissal. The motion to dismiss plaintiffs' claim for breach of contract is therefore denied.

Finally, while it is well-settled law that the existence of a valid contract ordinarily precludes recovery under a quasi-contract theory, *Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 N.Y.2d 382, 388 (1987), where there is a bona fide dispute as to the existence of a contract, a plaintiff may proceed by pleading in the alternative. *See Sforza v. Health Ins. Plan of Greater N.Y.*, 210 A.D.2d 214, 215 (2d Dep't 1994). Here, there is significant dispute as to the existence of an alleged oral agreement. Therefore, SMI's motion to dismiss plaintiffs' claims for unjust enrichment and quantum meruit is denied.

Accordingly, it is hereby

ORDERED that Defendants' motion to dismiss the first cause of action for fraud is granted with prejudice; it is further

ORDERED that Defendants' motion to dismiss the second, third, and fourth causes of action for breach of contract, quantum meruit, and unjust enrichment, respectively, is denied without prejudice to renew as a motion for summary judgment following discovery; it is further

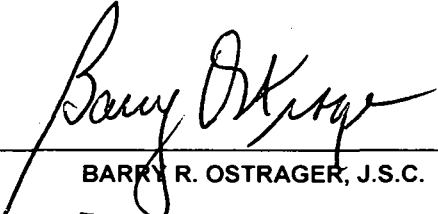
ORDERED that Plaintiffs' fifth cause of action for tortious interference is dismissed on consent as moot; it is further

ORDERED that Defendants file an Answer within twenty days of the filing of this decision and order; it is further

ORDERED that the parties appear for a preliminary conference on March 20, 2018 at 9:30

a.m.

2/20/2018  
DATE

  
BARRY R. OSTRAGER, J.S.C.

**BARRY R. OSTRAGER**  
JSC

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: