STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

LIBERTY HOME FUNDING, INC.,

Plaintiff

-vs- Index No. 2015/7804

SUSAN KATHERINE MAHER,

Defendant

Special Term
June 14, 2018

APPEARANCES

UNDERBERG & KESSLER, LLP
Jillian K. Farrar, Esq.
Attorneys for Plaintiff

PHILLIPS LYTLE LLP
Chad W. Flansburg, Esq.
Attorneys for Defendant

DECISION

Rosenbaum, J.

Defendant, Susan Katherine Maher, moves for an order granting summary judgment dismissing the Complaint in its entirety with prejudice; granting summary judgment or partial summary judgment finding that Plaintiff is not entitled to compensation for loan brokerage fees for transactions related to these, or any other, properties: 1919 Madison Avenue, New York, New York, East 84th Owner's Corp. New York, New York, 2190 Boston Owner's Corp. New York, New York, 177 East 93rd Street, New York, New York, 8361 Abingdon Road, New York, New York, 225 Park Place, New York, New York, and 29-10 137th Street, Flushing, New York; and granting summary judgment, or partial summary judgment, finding that Defendant did not tortiously interfere with any contract related to the properties listed *supra*, or any other properties.

Plaintiff, Liberty Home Funding, Inc., cross moves for an order denying Defendant's motion in its entirety; granting Plaintiff's motion for summary judgment on the breach of contract claim; and granting an accounting of the commissions for the following loans closed by Defendant: 29-10 137th Street, Flushing, NY, 1919 Madison Avenue, New York, NY, East 84th Owner's Corp., New York, NY, and 8361 Abingdon Road, New York, NY.

Plaintiff filed a Summons and Complaint in this matter on July 15, 2015, alleging four causes of action stemming from a 2013 Compensation Agreement: breach of contract, demand for an accounting, unjust enrichment, and tortious interference. Defendant answered on September 4, 2015. Discovery is complete, and the note of issue has been filed.

Defendant began working for Plaintiff on January 1, 2011 originating commercial mortgages for cooperative apartment buildings. Defendant alleges

that prior to 2013 she was paid a salary for her work with Plaintiff. In 2013, it is alleged that Defendant executed a Compensation Agreement with Plaintiff which outlined her compensation and benefits as an employee. Defendant contends that the parties did not intend for the Compensation Agreement to create obligations or competition restrictions after her employment with Plaintiff terminated. The Compensation Agreement states, in relevant part:

> Should the MLO leave the employment of Liberty Home Funding, the information about individual borrowers is considered property of Liberty Home Funding until the time of employment termination. Thereafter such information will not be shared with non-Liberty Home Funding employees.

Plaintiff's Exhibit A.

According to Defendant, on November 10, 2014 Patrick Lavell informed her that he was shutting down Liberty and that he would be going to work for Guaranteed Rate, a national residential mortgage company. Defendant alleges that she was told she would not have a job at Liberty after December 31, 2014. Defendant's 401k was cancelled before December 31, 2014.

In contrast, on Plaintiff's behalf, Lavell contends that he advised Defendant that he was closing the residential division of Liberty, but that the commercial license would not be surrendered and Liberty would remain an ongoing commercial mortgage business. Lavell states that he was taking a position as a residential loan officer at Guaranteed Rate, but that he had been assured that his employment at Guaranteed Rate would not restrict his ability to offer commercial loans and Liberty could also receive commercial referrals from Guaranteed. Lavell alleges that he never intended to close the commercial side of Liberty and did not tell Defendant that he intended to do so.

After Defendant was informed about the shut down, she and Lavell had some preliminary conversations about partnering a new mortgage brokerage business specializing in the brokerage of commercial mortgages. Defendant

contends that these discussions all involved the termination of her employment with Liberty as of December 31, 2014. Defendant contends that she informed Lavell she was not interested in these proposals prior to her termination.

Defendant submitted a written resignation letter to Liberty on December 31, 2014. Upon her resignation, Defendant states that she deleted electronically stored information, including emails, from the laptop provided to her by Liberty. Defendant states that she had used the laptop for personal communications as well and did not want her personal information to be possessed by Liberty. Defendant further states that her work emails were saved to Plaintiff's computer network or exchange in any event, and her deletion of them from the laptop did not impact that.

During discovery, Defendant states that she learned that Liberty restored all of the previously deleted ESI to her laptop by Liberty. Carbonite was used to restore the ESI.

After submitting her letter of resignation, Defendant commenced working for Barrett Capital in January 2015 and began competing in the commercial brokerage marketplace. Defendant alleges that none of the borrowers or prospective borrowers she spoke with after December 31, 2014 had signed contracts with Defendant or Liberty while Defendant was employed by Liberty.

Plaintiff alleges that after Defendant resigned from Liberty, she originated four commercial loans for clients of Liberty: 29-10 137th Street, Flushing, NY; 1919 Madison Avenue New York, NY; East 84th Owner's Corp., New York, NY; and 8361 Abingdon Road, New York, NY. Plaintiff contends that Defendant would not have known about these business opportunities without the referrals from Lavell.

A party seeking summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Alvarez v. Prospect

Hosp., 68 N.Y.2d 320, 324 (1986). "Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." Id. See also, Qlisanr, LLC v. Hollis Park Manor Nursing Home, Inc., 51 A.D.3d 651, 652 (2d Dept. 2008). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Alvarez, 68 N.Y.2d at 324 , *citing* Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980).

First Cause of Action

Plaintiff alleges that the deals referenced *supra* were originated during Defendant's employment with Plaintiff and are thus covered by the Compensation Agreement. Complaint, ¶14. Plaintiff alleges that Defendant breached the Agreement by retaining and misappropriating the 35% of the brokerage loan fees that were due and owing to Plaintiff and by also refusing to communicate with Plaintiff regarding the loans for which brokerage fees are or will be owed to Plaintiff. Id. at ¶¶15-16.

"'The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent.'" Camuso v. Brooklyn Portfolio, LLC, 164 A.D.3d 739, 741 (2nd Dept. 2018), *quoting* Greenfield v. Philles Records, 98 N.Y.2d 562, 569 (2002). "'The best evidence of what parties to a written agreement intend is what they say in their writing.'" Id., *quoting* Slamow v. Del Col, 79 N.Y.2d 1016, 1018 (1992). "Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." Id.

> A familiar and eminently sensible proposition of law is that, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really

> intended but unstated or misstated is generally inadmissible to add to or vary the writing (see, e.g., Mercury Bay Boating Club v. San Diego Yacht Club, 76 N.Y.2d 256, 269-270, 557 N.Y.S.2d 851, 557 N.E.2d 87; Judnick Realty Corp. v. 32 W. 32nd St. Corp., 61 N.Y.2d 819, 822, 473 N.Y.S.2d 954, 462 N.E.2d 131; Long Is. R.R. Co. v. Northville Indus. Corp., 41 N.Y.2d 455, 393 N.Y.S.2d 925, 362 N.E.2d 558; Oxford Commercial Corp. v. Landau, 12 N.Y.2d 362, 365, 239 N.Y.S.2d 865, 190 N.E.2d 230). That rule imparts "stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses * * * infirmity of memory * * * [and] the fear that the jury will improperly evaluate the extrinsic evidence." (Fisch, New York Evidence § 42, at 22 [2d ed].) Such considerations are all the more compelling . . . where commercial certainty is a paramount concern.

W.W.W. Associates, Inc. v. Giancontieri, 77 N.Y.2d 157, 162 (1990).

"Extrinsic evidence 'may not be considered when the intent of the parties can be gleaned from the face of the instrument.'" Lehman Bros. Intl. (Europe) v. AG Fin. Prods. , Inc., 60 Misc.3d 1214(A) (Sup.Ct. N.Y. Co. 2018), *quoting* Chimart Assocs. v. Paul, 66 N.Y.2d 570, 572-73 (1986). "[A] contract should be 'read as a whole; . . . and if possible it will be so interpreted as to give effect to its general purpose.'" Beal Sav. Bank v. Sommer, 8 N.Y.3d 318, 324-25 (2007), *quoting* Matter of Westmoreland Coal Co. v. Entech, Inc., 100 N.Y.2d 352, 358 (2003). "Whether or not a writing is ambiguous is a question of law to be resolved by the courts." W.W.W. Assoc., 77 N.Y.2d at 162. "Ambiguity exists when, looking within the four corners of the documents, terms are reasonably susceptible of more than one interpretation." AMCC Corp. v. New York City Sch. Constr. Auth., 154 A.D.3d 673, 676 (2nd Dept. 2017).

The tenets of contract interpretation are applied "with even greater force in commercial contracts negotiated at arm's length by sophisticated, counseled businesspeople." Ashwood Capital, Inc. v. OTG Mgt., Inc., 99 A.D.3d 1, 7 (1st

Dept. 2012). "In such cases, 'courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include.'" Id., *quoting* Vermont Teddy Bear Co. v. 538 Madison Realty Co., 1 N.Y.3d 470, 475 (2004). See also, Camperlino v. Bargabos, 96 A.D.3d 1582, 1583 (4th Dept 2012).

Defendant argues that the Compensation Agreement does not require a 35% fee to be paid to Plaintiff and also does not require Defendant to communicate with Plaintiff regarding all of the loans for which brokerage fees are or will be owed to Plaintiff. The Compensation Agreement states, in relevant part:

> Liberty Home Funding, Inc. requires that Mortgage Loan Officers (MLO) adhere to company policies and maintain a valid license for the states in which they will originate loans.

Affirmation of Chad Flansburg, Exhibit B. Defendant argues that despite Plaintiff's assertion to the contrary, this provision does not entitle Plaintiff to commissions for transactions that were complete post-termination or for those it purportedly "originated." Likewise, Defendant notes that the Compensation Agreement terminated when her employment terminated, and that the Compensation Agreement does not contain a promise by Defendant to share with Plaintiff any commissions earned post-termination. To the contrary, Defendant states that the Compensation Agreement provides that Defendant's benefits granted by the Compensation Agreement ended upon her termination.

Moreover, Defendant states that the Compensation Agreement does not provide for a continuing duty to communication with Plaintiff about loans and brokerage fees. The Compensation Agreement states, in relevant part:

> Should the MLO leave the employment of Liberty Home Funding, the information about individual borrowers is considered property of Liberty Home Funding until the time of employment termination. Thereafter such information will not be shared with non-Liberty Home

Funding employees.

Id.

Plaintiff argues that it is entitled to summary judgment on this cause of action because Plaintiff performed under the Compensation Agreement, and Defendant breached by sharing Liberty's borrower information with her new employer. Plaintiff contends that Defendant and her new employer received commissions totaling $219,000 on Liberty's client's loans that would have been closed by Liberty but for Defendant's breach.

Defendant's motion for summary judgment on the first cause of action is granted, and Plaintiff's cross motion for summary judgment on this claim is denied. The alleged unlawful sharing concerns the properties at 1919 Madison Avenue and 8361 Abingdon Road; Defendant has testified that her involvement was limited to an introduction. See Maher Transcript, 72:13, 73:7, 94:22-96:8. Defendant and Barrett both deny that confidential information was shared, and Plaintiff fails to make a factual showing that confidential information was provided by Defendant to Barrett Capital. Plaintiff's allegations on this claim are speculative, and it is further unsubstantiated that Plaintiff possessed confidential information relative to the properties or borrowers at issue in this first cause of action. Proof of Plaintiff's claim has not been laid to bare.

Contacting former customers to set up introductory meeting does not constitute a breach of the confidentiality provisions of the Compensation Agreement. It is undisputed that the Compensation Agreement does not generally restrict Defendant's ability to compete post-employment. Defendant testified that the contact information for the disputed loans closed in 2015 is widely available public information, and nothing to the contrary is offered to rebut that prima facie showing. Finally, as there is no evidence that Defendant possessed confidential information, there is likewise no confidential information that could have been unlawfully revealed. The Court notes in

particular that Defendant's emails were recovered by Plaintiff using Carbonite, yet no evidence is presented to demonstrate that Defendant usurped confidential information.

Second Cause of Action

On the second cause of action, Plaintiff alleges that Defendant failed to provide an accounting for the transactions referenced *supra*, and for any others for which brokerage fees are or will be due to Plaintiff. Complaint, ¶19.

"The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest." Center for Rehabilitation & Nursing at Birchwood, LLC v. S&L Birchwood, LLC, 92 A.D.3d 711, 713 (2nd Dept.), *quoting* Palazzo v. Palazzo, 121 A.D.2d 261, 265 (1st Dept. 1986). "'A fiduciary relationship[,] 'whether formal or informal, is one founded upon trust or confidence reposed by one person in the integrity and fidelity of another . . . [and] might be found to exist, in appropriate circumstances, between close friends . . . or even where confidence is based upon proper business dealings.'" Lawrence v. Kennedy, 95 A.D.3d 955, 958 (2nd Dept. 2012), *quoting* AHA Sales, Inc. v. Creative Bath Prods., Inc., 58 A.D.3d 6, 21 (2nd Dept. 2008). Defendant seeks summary judgment on the accounting cause of action, arguing that Defendant is not a fiduciary and consequently, Plaintiff is not entitled. Defendant states that it is not even alleged in this matter that Defendant is or was a fiduciary of Plaintiff.

Plaintiff contends that Defendant owed a fiduciary duty as an employee of Liberty, including the duty to be loyal and to not act in a manner inconsistent with good faith and loyalty. It is alleged that Defendant breached these duties by destroying Plaintiff's business records and usurping business opportunities belonging to Plaintiff. However, Plaintiff further argues that even if there is no fiduciary relationship between the parties, an accounting should be ordered

based upon the "true character and over-all effect of the transaction between the parties." Kaminsky v. Kahn, 23 A.D.2d 231, 237 (1st Dept. 1965).

Defendant's motion for summary judgment on the second cause of action is granted, and Plaintiff's cross motion for summary judgment on this claim is denied. "[E]mployment relationships do not create fiduciary relationships." Rather v. CBS Corp., 68 A.D.3d 49, 55 (1st Dept. 2009). Defendant was an employee of Plaintiff and was paid on a commission basis. Nothing in the relationship set forth before the Court makes Defendant a fiduciary in these circumstances. The Court finds Plaintiff's citation to *Kaminsky* unpersuasive, noting in particular that *Kaminsky* dealt with a very different set of facts and also that since that case has been decided, New York's Appellate Divisions have consistently stated that a fiduciary relationship is required for an accounting claim. See, e.g., Feldmeier v. Feldmeier Equipment, Inc., 164 A.D.3d 1093 (4th Dept. 2018).

Third Cause of Action

The third cause of action alleges that by retaining the loan brokerage fee on the referenced transactions, Defendant has been unjustly enriched to Plaintiff's detriment, and it would be inequitable for Defendant to retain the fees. Complaint, ¶23.

"A 'quasi contract' only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment." Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co., 70 N.Y.2d 382, 388 (1987). "Unjust enrichment requires the receipt by one party of money or a benefit to which it is not entitled, at another's expense." Shoemaker v. Discovery Communications, LLC, 57 Misc.3d 1203(A) (Sup.Ct. N.Y. Co. 2017). In a sales compensation agreement context, the Second Department found that where the agreement "governs when commissions are earned, and the Plaintiff's cause of action alleging unjust enrichment arises out of the sale

subject matter," a court properly dismissed the unjust enrichment claim. Barker v. Time warner Cable, Inc., 83 A.D.3d 750, 752 (2nd Dept. 2011).

Defendant alleges that there is a written contract that is alleged by Plaintiff to have been breached, and that the damages sought on the breach of contract claim mirror those sought under the claim for unjust enrichment. Plaintiff states that if the Court finds the Compensation Agreement unenforceable, the motion for summary judgment on the unjust enrichment claim should be denied.

Defendant's motion for summary judgment on the third cause of action is granted. An express agreement covers the commissions at issue, and nothing in the record before the Court indicates that Plaintiff assisted or provided work connected to the closing of the loans for which it seeks to receive a commission.

Fourth Cause of Action

The fourth cause of action alleges that Defendant tortiously interfered with Plaintiff's contracts with borrowers. Complaint, ¶26.

"Tortious interference with contract requires the existence of a valid contract between the Plaintiff and a third party, Defendant's knowledge of that contract, Defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom." Lama Holding Co. v. Smith Barney, 88 N.Y.2d 413, 424 (1996). "In order for the Plaintiff to have a cause of action for tortious interference of contract, it is axiomatic that there must be a breach of the contract by the other party." Inselman & Co. v. FNB Fin. Co., 41 N.Y.2d 1078, 1080 (1977). "Furthermore, 'it must be proven, among other things, that the contract would not have been breached but for the Defendant's conduct.'" KAM Constr. Corp. v. Bergey, 151 A.D.3d 1706, 1707 (4th Dept. 2017), *quoting* Lana & Samer v. Goldfine, 7 A.D.3d 300, 301 (1st Dept. 2004).

Defendant argues that there are no contracts at issue in this matter, with the exception of possibly one; there was no breach of the one contract as it is not an exclusive broker contract; Defendant did not intentionally and improperly induce a purported breach; and the one contract at issue is voidable due to fraud.

Defendant contends that the only purported agreement produced in discovery by Plaintiff relates to the Linden Tower transaction. Defendant states that Plaintiff has not provided any other agreement with any other borrower for any other transaction at issue in this lawsuit. Consequently, Defendant states that as a matter of law, she could not have tortiously interfered with the transactions related to the other properties: 1919 Madison Avenue, New York, New York; east 84th Owner's Corp., New York, New York; 2190 Boston Owner's Corp., New York, New York; 177 East 93rd Street, New York, New York; 8361 Abingdon Road, New York, New York; and 225 Park Place, New York, New York.

As to the Linden transaction, the transaction for which Plaintiff presents an alleged contract, Defendant states summary judgment should be granted as to that contract as well. Defendant states that the Linden transaction was signed on January 15, 2015, after Defendant's termination and further contends that the Linden transaction is not a valid contract. The Linden letter states that Defendant was an authorized representative of Plaintiff but, in fact, Defendant was not working for Plaintiff when the letter was emailed to the borrower. Defendant also states that she did not sign that letter.

Moreover, Defendant notes that the Linden letter did not create an exclusive agency or exclusive right to sell broker agreement, and thus there can be no claim for tortious interference. Defendant also notes that Defendant did not intentionally or improperly induce a breach of the Linden letter.

Finally, Defendant argues that the Linden letter contains materially false information: Defendant was not actually an authorized agent of Plaintiff,

Defendant did not send the letter, and the letter was sent without Plaintiff attempting to reflect Defendant's new employment and the fact that she was no longer affiliated with Plaintiff.

Plaintiff opposes, arguing that issues of fact exist. Plaintiff notes that there is evidence in the record that Defendant destroyed Plaintiff's business records, including contracts for the loans at issue. Plaintiff states that the trier of fact should determine whether Defendant destroyed Plaintiff's business records, including contracts for the three deals for which contracts could not be found by Plaintiff.

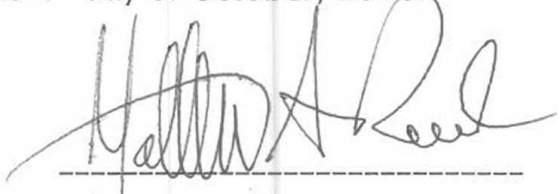
As to the Linden transaction, Plaintiff states that it discovered a broker agreement, contacted the president of Linden Towers, and the president willingly signed and returned the agreement.

As to the transactions for which no contracts are produced by Plaintiff, the motion for summary judgment is granted. Defendant has denied that any such contracts exist, and Plaintiff, who must lay bare proof to demonstrate an issue of fact, only speculates that such contracts ever existed. Defendant aptly notes that Plaintiff could have (but did not) subpoena the owners of those properties seeking copies of such agreements, or others with knowledge of the transactions. Plaintiff's argument in opposition are speculative and unsubstantiated and cannot defeat Defendant's prima facie entitlement to summary judgment as to those transactions.

As to the Linden transaction, even if the language of the letter is sufficient to assume the letter created an exclusive relationship, an exclusive agency relationship that contains "no provisions relating to duration" is "presumed to be terminable at will." Scott v. Health Care Plan, 247 A.D.2d 822, 822 (4th Dept. 1998). The Linden letter does not contain a duration and thus was terminable at will. As a terminable at will contract, the Linden letter was not breached by Linden and a claim cannot be made for tortious interference

with that contract. Because this necessary element is missing with respect to the Linden letter, this aspect of the tortious interference claim must also be dismissed pursuant to CPLR 3212. The motion for summary judgment is also granted as to the Linden transaction.

Signed at Rochester, New York this 4th day of October, 2018.



Matthew A. Rosenbaum
Supreme Court Justice