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

RESIDENTIAL REALTY ADVISORS, INC., Plaintiff, vs. COMPASS INC. f/k/a/ URBAN COMPASS, INC., Defendant.	Index No. 651515/2019

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED AND AS BARRED BY THE STATUTE OF LIMITATIONS

Defendant Compass, Inc.[1] ("Compass") by and through its undersigned attorneys, hereby respectfully submits this Memorandum of Law in support of its motion to dismiss in its entirety the complaint pursuant to CPLR 3211(a)(1), (5), and for failure to state a claim upon which relief may be granted and because any claim based on plaintiff's allegations is barred by the statute of limitations.

PRELIMINARY STATEMENT

This is a case brought against the wrong defendant, in the wrong court, at least eight years too late. Plaintiff Residential Realty Advisors, Inc. ("RRA" or "Plaintiff") seeks reformation of a contract and then breach of that reformed agreement by Compass. Most obviously, this matter must be dismissed because defendant Compass has nothing to do with the subject contract in either its original or (proposed) reformed state. Rather, the party with whom RRA contracted is The Mark Company ("TMC"), and any claims must be brought against TMC. TMC, however, is not even named in the complaint. Compass – the sole named defendant – is neither a party nor a signatory to the contract at issue and no facts are alleged creating privity of contract between Compass and RRA.

Plaintiff's motive in suing Compass rather than TMC is readily apparent. TMC is a California corporation. The contract at issue involved the sale of property located in California. Plaintiff alleges that its work on the contract occurred in California. This case belongs in California if it belongs anywhere. But

[1] Defendant has been improperly sued here as Compass, Inc.; we assume that Plaintiff intended to sue Urban Compass, Inc. d/b/a/ Compass.

California's three- and four-year statutes of limitations bars this action in California, so plaintiff attempted to forum shop and bring the case in New York to take advantage of its six-year statute of limitations. As explained below, plaintiff is still almost a decade too late.

FACTS[2]

The Agreements Between TMC and the Plaintiff

Over a period of many years, Steven Rockmore, the principal of plaintiff RRA, worked with TMC in the development, marketing and sale of numerous condominium projects in San Francisco. *Cmpl.* ¶3. These projects required Mr. Rockmore to undertake regular travel to San Francisco where the properties were located. *Cmpl.* ¶4. In fact, the key meeting that led to the subject deal that is the subject of the complaint was itself held in San Francisco. *Id.* ¶¶5-6.

In the "spring of 2013," Mr. Rockmore met with TMC's principals to discuss RRA working on a real-estate development project at 181 Freemont Street in San Francisco. *Cmpl.* ¶ 5-6. When TMC asked Mr. Rockmore what he wanted for his work on the 181 Freemont project, Mr. Rockmore replied that:

> he would accept the same compensation arrangement that he and TMC had agreed to for, ***and which was set forth in RRA's contract in connection with,*** the services performed on the 300 Spear Street Condominium project ("300 Spear Street")…

Cmpl. ¶7 (emphasis added).

[2] The facts are taken from the complaint, which for purposes of this motion only are presumed as true.

The letter agreement governing the 300 Spear Street project is in the form of a letter written *by Mr. Rockmore on RRA's letterhead* to Alan Mark of TMC, dated September 21, 2005, and "agreed to and accepted" by TMC on September 22, 2005 *(the "300 Spear Street Agreement").* A true and correct copy of the 300 Spear Street Agreement is attached as Ex. 1 to the accompanying May 28, 2019 Affirmation of Emily Kirsch ("Kirsch Aff.").[3] The 300 Spear Street Agreement set forth material terms of the agreement, including among other things, the services that RRA was to provide, the timing of the services, the fees to be paid, and the timing of the payment of the fees. *Id.* Among the material terms proposed by RRA and accepted by TMC is that RRA is to receive a .1625% commission on the sale of condominium units in the building. *Id.* There is no allegation that Mr. Rockmore ever sought a correction of any mistake or reformation with respect to the fourteen (14) year-old 300 Spear Street Agreement – which he himself drafted.

To the contrary, after first orally agreeing to adopt the terms of the 300 Spear Street Agreement for RRA's work on the 181 Freemont project, in August 2013 RRA and TMC doubled down and produced a written document that plaintiff alleges was to incorporate the same terms as the 300 Spear Street Agreement (the "181 Freemont Letter"). *Compl. ¶ 9.* A true and correct copy of the 181 Freemont

[3] Although not attached to the complaint, the 300 Spear Street Agreement is expressly referred to in the complaint, and thus may be considered on a motion to dismiss. *See, e.g. Lore v. New York Racing Ass'n, Inc.,* 12 Misc. 3d 1159(A) (2006) (dismissing claims), *citing Pisani v. Westchester County Health Care Corp.,* 424 F.Supp.2d 10 (S.D.N.Y. 2006) ("In assessing the legal sufficiency of a claim, the Court may consider those facts alleged int eh complaint, documents attached as an exhibit therefor or incorporated by reference … and documents that are integral to the plaintiff's claims even if not explicitly incorporated by reference").

Letter, which was omitted from the Complaint, is attached as Ex. 2 to the Kirsch Aff. The Complaint specifically alleges that in the 181 Freemont Letter, TMC agreed that it "would pay to RRA . . . the same percentage of the commissions that were in the 300 Spear Street Agreement . . . ." *Compl. ¶ 9.* In fact, the 181 Freemont Letter (again, not attached to the Complaint), expressly states that RRA "will receive .162500% of all base commissions earned by TMC." *Kirsch Aff. Ex. 2.*

The 181 Freemont Letter provides only two terms, both of which are payments flowing from TMC to Plaintiff RRA. The 181 Freemont Letter sets forth no specifics regarding any services Plaintiff was supposed to provide in exchange for those payments (*i.e.,* no consideration for those payments), or when or how either the services would be provided or when or how the commissions payments should be made. Plaintiff alleges that this one-sided letter contains a scrivener's error and in fact, the unsupported payments owed to it should be in fact 100 times what the short letter itself sets out. Moreover, Plaintiff, by his own allegation, has not only been aware of this so-called error which has been in writing since 2005, but Plaintiff's Mr. Rockmore himself drafted it. Plaintiff does not allege that he complained about this mistake that he himself made at any time in the past fourteen years.

The Complaint's Allegations Against Compass

The Complaint's sole allegation against Compass is the entirely unsupported conclusory allegation that, upon information and belief, Compass is the successor-in-interest to the 181 Freemont Letter. *Cmpl. ¶¶13-14.* In fact, the

Complaint makes the unsupported allegations upon information and belief that (a) Pacific Union International is the successor-in-interest to TMC, and (b) Compass is the successor-in-interest to Pacific Union International. *Cmpl. ¶¶13-14.* In making these unsupported, conclusory allegations, the Complaint conveniently fails to acknowledge that both TMC and Pacific Union International continue to be and at all times relevant to the facts alleged in the Complaint have been, active corporations in the State of California with ongoing operations. *See Kirsch Aff., Exs. 3 and 4.* The Complaint does not allege – nor could it – a single fact to support any legal theory that would hold Compass liable for any alleged breach of any purported agreement by TMC. In sum, the Complaint does not allege a single fact linking Compass to the 181 Freemont Letter.

ARGUMENT

I. Legal Standard

On a motion to dismiss a complaint, the Court must accept as true the facts alleged in the pleading as well as all reasonable inferences that may be gleaned from those facts. *Amaro v. Gami Realty Corp.* 60 A.d.3d 491, 492 (1st Dept. 2009), *Skillgames, LLC v. Brody*, 1 A.D.3d 247, 250 (1st Dept. 2003). The court, on a motion to dismiss, is not permitted to assess the complaint's merits or factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *Skillgames,* 1 A.D.3d at 250. However, factual allegations that do not state a viable cause of action, that consist of bare legal

conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration. *Id.* Where dismissal is sought based on documentary evidence under CPLR 3211(a)(1), the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegation, conclusively establishing a defense as a matter of law." *Goshen v. Mutual Life Ins., Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002).

II. The Complaint Fails to State a Claim Because Defendant Compass Is Not a Party To The Agreement and Has Not Assumed Liability

In order to state a claim for breach of contract, plaintiff must allege the existence of a contract, the performance of one party under the contract, a breach by the other party, and resulting damages. *Noise in the Attic Prods., Inc. v. London Records,* 10 A.D.3d 303 (1st Dep't 2004). To state a claim for reformation, a plaintiff must allege the mutual mistake or fraud, as well as the written instrument to be reformed. *Warburg Opportunistic Trading Fund L.P. v. GeoResources, Inc.,* 151 A.D.3d 465 (1st Dep't 2017).

Even if plaintiff has properly alleged a contract, which it has not,[4] the "contract" is alleged to be between RRA on the one hand and TMC on the other hand. There is no allegation – nor could there be – that Compass is, was or should be a party to the contract. For this reason alone, both the claims for reformation and for breach of the 181 Freemont Letter as against Compass must necessarily fail as a matter of law. *Lenox Hill Hosp. v. American Intern. Group, Inc.,* 932 N.Y.S.2d 761

[4] The 181 Freemont Letter leaves out many material terms and as such, does not appear to be an enforceable contract.

(Sup. Ct., N.Y. Co. 2011) (dismissing complaint against holding company that owns signatory's parent company); *Dember Constr. Corp. v. Staten Island Mall,* 56 A.D.2d 768 (1st Dep't 1977) ("Since the [defendant] was not a party to the contract, the complaint against it must be dismissed."); *Blank v. Noumair,* 239 A.D.2d 534 (2d Dep't 1997) (plaintiff's breach of contract action properly dismissed inasmuch as the defendant was not a party to the agreements in question"). Nor does the Complaint allege any facts to suggest Compass is a true successor to the 181 Freemont Agreement. *Perrotti v. Beck, Glynn,* 82 A.D.3d 495 (1st Dep't 2011) (affirming dismissal denial of motion for leave to amend where purported defendants were not alleged to be in contractual privity and plaintiff failed to allege any elements creating other successor liability).

III. The Complaint is Barred by the Statute of Limitations

The Complaint does not allege – nor could it – that either TMC or Pacific Union International has been subsumed or "merged into" Compass. Both those entities continue to exist and do business. All that business is in California, and any proper lawsuit should be sited in California. The attempt to sue Compass is an attempt to forum shop and avoid the California statutes of limitations, three years for reformation and four years for a breach of contract. Cal. Civ. Proc. Code §338(d) and §337, respectively. That attempt should be denied.

But even here, the claims are too late. In New York, the statute of limitations for both breach of contract and for reformation by reason of mistake are six years. *CPLR 213(2), (6).* Plaintiff alleges that the deal agreed to between RRA

and TMC agreed that deal terms for 181 Freemont would precisely mirror the 300 Spear Street Agreement. That 300 Spear Street Agreement, proposed and drafted by RRA and countersigned by TMC in September 2005, almost fourteen years prior to the filing of the Complaint, provided that plaintiff would receive .1625% interest on commissions received by TMC. *Kirsch Aff. Ex. 1.* And, the "shorthand" 181 Freemont Street Letter reflected the precise same economic term – that plaintiff would receive .1625% on commissions received by TMC. *Kirsch Aff. Ex. 2.* If there ever was a scrivener's error, as plaintiff complains, then *RRA itself* made the scrivener's error fourteen years ago, in 2005. The reformation claim (if there ever were such a claim, which would not have been against Compass) therefore accrued on September 22, 2005 – more than fourteen years ago. *National Amusements, Inc. v. South Bronx Dev. Corp.,* 253 A.D.2d 358 (1st Dep't 1998) (contract claim based on mistake accrued when the subject contract was executed); *Zavaglia v. Garner,* 666 N.Y.S.2d 671 (2d Dep't 1997) (contract action based on mistake is six years and begins to run when the alleged mistake or wrong occurred); *First Nat'l Bank of Rochester v. Volpe,* 217 A.D.2d 967 (4th Dep't 1995) (actions based on mistake begin to run when the alleged mistake occurred, that is, when the contract was executed). No breach of contract claim will lie unless the reformation claim first lies because Plaintiff has alleged that it was paid precisely what the 181 Freemont Letter provided for. *Compl. ¶¶15-16.*

CONCLUSION

For all of the reasons stated above, the Plaintiff's Complaint should be dismissed in its entirety as a matter of law for failure to state a claim upon which relief can be granted and because it is, in any event, barred by the statute of limitations.

Dated: New York, New York
May 28, 2019

KIRSCH & NIEHAUS PLLC

/s/ Emily Kirsch

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