

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ROBERT R. REED
J.S.C. Justice

PART 43

Index Number : 654482/2017
CUSHMAN & WAKEFIELD, INC.
vs
OLIVET UNIVERSITY
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

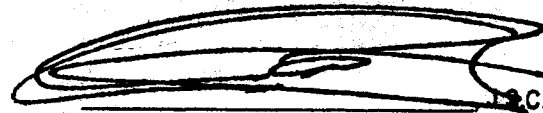
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

decided in accordance with the attached decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 10/3/19



- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 43

CUSHMAN & WAKEFIELD, INC.

Index No.:654482/17

Plaintiff,

- against -

DECISION/ORDER

OLIVET UNIVERSITY,

Defendant.

ROBERT R. REED, J.:

Plaintiff Cushman & Wakefield, Inc. (Cushman or Broker), a licensed real estate brokerage firm, brings this action to recover a commission from defendant Olivet University (Olivet or Purchaser), alleging breach of a written commission agreement. Defendant Olivet moves, pursuant to CPLR 3212 and 3211 (a) (7), for summary judgment dismissing the complaint. Plaintiff Cushman opposes and cross-moves for summary judgment in the amount of \$350,000.

Background

The facts giving rise to this action are largely undisputed. Some time prior to 2013, Olivet, an educational institution incorporated in California, retained Cushman, with which it had a longstanding business relationship, to search for a tract of land on which Olivet could establish a campus in New York. Thomas Kaufman (Kaufman), a licensed broker then employed by Cushman, worked with Olivet to find an appropriate property. In 2013, Kaufman, with assistance from two other real estate brokers, Ed

Fitzsimmons (Fitzsimmons) and Sasso Realty (Sasso) (together, co-brokers), found a suitable property (the property) being sold by Dover Knolls Development Co. II, LLC, Dover Knolls Development Co., LLC and Benroal Realty Associates L.P. (collectively, Dover Knolls or Sellers). The property consisted of approximately 936 acres of land in Dutchess County, New York, known as Dover Knolls, and formerly housed the Harlem Valley Psychiatric Center.

Kaufman submitted an offer on behalf of Olivet to purchase the property for \$20,000,000. A letter of intent was signed on March 18, 2013, and a Purchase and Sale Agreement (Purchase Agreement) was signed by Olivet and Dover Knolls on or about April 9, 2013. See Letter of Intent, Ex. B to Affidavit of Marian Rebro in Support of Olivet's Motion (Rebro Aff.); Purchase Agreement, Ex. D to Rebro Aff.

Pursuant to the Purchase Agreement, Dover Knolls agreed to sell and Olivet agreed to buy the property, identified in the agreement by four tax map section and lot designations, including a five-acre parcel referred to as Haven House, for \$20,000,000. Purchase Agreement, § 1.1. Purchaser agreed to pay a \$1,000,000 deposit at the signing of the Purchase Agreement, and to pay the balance of \$19,000,000 (\$14,000,000 in cash and \$5,000,000 by a note and mortgage) at the closing, to be held "on or about ninety (90) days after the execution of [the Purchase Agreement]." *Id.*, §§ 2.1, 2.2, 3.1.

The Purchase Agreement identified Cushman as the sole real estate broker entitled to a commission for the sale and purchase of the property, and stated that Purchaser would pay the commission pursuant to a separate agreement. *Id.*, § 11.1 The separate Commission Agreement between Cushman and Olivet, dated March 31, 2013, provided that, "in the event of the consummation of" the purchase and sale "of all or any portion of or interest in" the property, Olivet "shall pay to Cushman & Wakefield, Inc., in consideration for your brokerage services rendered, a commission computed and payable in accordance with the annexed Schedule." Commission Agreement, Ex. C to Rebro Aff., at 1. The annexed Schedule indicated that the commission rate was seven percent (7%) of the total purchase price and would be "earned, due and payable in full at the time of the closing or transfer of title to the property." *Id.*, Schedule of Commission Rates & Conditions, at 3.¹

The Purchase Agreement was amended five times between July 2013 and March 2014. The First Amendment, dated July 17, 2013, addressed an issue related to whether Sellers had title to Haven House, provided that Olivet was making an additional deposit of \$4,000,000, and extended the closing date to December 31, 2013.

¹By separate agreement with the co-brokers, Cushman agreed to split the commission, with Cushman to receive fifty percent (50%) of the total commission and each the two co-brokers to receive twenty-five percent (25%). Kaufman Affidavit in Opposition to Defendant's Motion (Kaufman Aff.), ¶ 10.

See First Amendment to Purchase and Sale Agreement, Ex. E to Rebro Aff.

Pursuant to the Second Amendment, dated July 26, 2013, the parties agreed that, as the Sellers did not presently have title to Haven House and as Olivet did not have the entirety of the \$15,000,000 balance due and owing, the transfer of title to the property would be conveyed in three separate conveyances: 1) the Eastern Portion; 2) the Western Portion; and 3) the Haven House Portion. See Second Amendment to Purchase and Sale Agreement, Ex. E to Rebro Aff. The parties further agreed that the purchase price for the property would be allocated as follows: \$8,000,000 for the Eastern Portion; \$11,560,000 for the Western Portion; and \$440,000 for the Haven House Portion. The Second Amendment also stated that the closing for the Eastern Portion shall be held "on the date hereof," and the closing date for the Western Portion and/or the Haven House Portion would be held, jointly or separately, on or before December 31, 2013. *Id.*

In November 2013, the Commission Agreement between Cushman and Olivet also was amended, to reflect that the commission for Olivet's purchase of the Eastern Portion was \$350,000 and would be paid on or before November 30, 2013; and the commission for the purchase of the balance of the property was \$350,000, to be paid "at the time of closing or transfer of title to that portion of the Property." Letter dated November 6, 2013, Ex. H to Rebro

Aff. The sale of the Eastern Portion closed on or around July 26, 2013, for \$8,000,000, and Cushman received its commission for that sale.

The Third, Fourth and Fifth Amendments to the Purchase Agreement, executed, respectively, in January, February, and March 2014, extended the closing date for the Western Portion to January 31, 2014, then to February 28, 2014, then to April 30, 2014. See Third, Fourth, and Fifth Amendments to Purchase and Sale Agreement, Ex. I to Rebro Aff. The closing date for the Haven House Portion was extended, in the Third Amendment, to "within thirty (30) days of receipt of title to the Haven House Portion by the Seller," and later, in the Fourth and Fifth Amendments, to February 28, 2014, and then to April 30, 2014. No closing occurred on April 30, 2014, but the sale of the Haven House Portion closed in or around July 2014. See Quitclaim Deed dated July 25, 2014, Ex. G to Rebro Aff.

By letter dated August 27, 2014, the Sellers notified Olivet that, as the April 30, 2014 closing date had passed, a final closing date for the Western Portion was scheduled for October 15, 2014, "Time Being of the Essence," and the failure of Olivet to close on that date would be deemed a breach of the Purchase Agreement and would terminate the contract. No closing occurred on October 15, 2014, because Olivet did not have the necessary financing to complete the purchase, and the Sellers deemed Olivet

in default and terminated the Purchase Agreement.

About 16 months later, in or around February 2016, Kaufman and Rebro met to discuss the failed Western Portion purchase. Rebro Aff., ¶ 19; Kaufman Aff., ¶ 21. The parties disagree about how that meeting occurred: Kaufman attests that Rebro asked him to get involved again (Kaufman Aff., ¶ 21); Rebro attests that Kaufman reached out to him. Rebro Aff., ¶ 19. According to Rebro, he advised Kaufman that the Purchase Agreement was terminated and the Commission Agreement was no longer in effect, and he and Kaufman began to negotiate a new commission agreement, but no agreement was reached. *Id.*, ¶ 20.

According to Kaufman, after their meeting, Rebro presented several proposals that would provide sufficient cash to purchase the Western Portion, which included reducing Cushman's commission, but Kaufman did not agree to any of the suggested scenarios. Kaufman Aff., ¶¶ 21-22. Kaufman at this time no longer worked for Cushman, having left in February 2014 to work for another real estate brokerage company, and, he asserts, had no authority to renegotiate the existing Commission Agreement between Cushman and Olivet. *Id.*, ¶ 21. Kaufman also attests, however, that he remained involved with the Olivet transaction on behalf of Cushman, and was in contact with Olivet throughout 2014 and 2015, and was informed that Olivet was continuing to raise funds to purchase the Western Portion. *Id.*, ¶¶ 19-20. Rebro

acknowledges that he spoke to Kaufman "sporadically" in 2015, but asserts he had no contact with anyone at Cushman in connection with the Western Portion after Kaufman left the firm. Rebro Aff., ¶ 18; Rebro Reply Aff., ¶ 5.

Kaufman further attests that Rebro, in February 2016, authorized him to make an offer of \$10,000,000 to the Sellers, which offer was conveyed by co-broker Fitzsimmons, and the Sellers responded that they would only consider selling to Olivet for \$15,000,000, all cash. Kaufman Aff., ¶ 22. In an email submitted by plaintiff, Fitzsimmons then responded that "we have the makings of a deal," and the Sellers wrote back that there would be something to talk about only after Olivet agreed to the all cash price. See Emails, dated Feb. 4, 2016, Ex. C to Kaufman Aff. Kaufman asserts that, at Rebro's request, he met with representatives of the Sellers to discuss the sale in February 2016, and continued to work with Rebro to help consummate the deal, including speaking to a bank about financing the purchase. Kaufman Aff., ¶¶ 23-24.

Rebro, on the other hand, attests that months after his February 2016 discussions with Kaufman, in April or May 2016, during which time, he asserts, no broker engaged in any negotiations for the Western Portion, Olivet reached an agreement with the Sellers to purchase the Western Portion for \$15,000,000. Rebro Aff., ¶ 21. A Purchase and Sale Agreement, dated July 21,

2016, was executed by the parties (2016 Purchase Agreement), providing that Olivet would pay a deposit of \$2,000,000 upon signing the agreement and \$3,000,000 on or before July 26, 2016, and the balance of \$10,000,000 at the closing, set for August 24, 2016. See 2016 Purchase Agreement, Ex. L to Rebro Aff. The 2016 Purchase Agreement made no mention of Cushman and stated that the Sellers have not dealt with any broker with respect to the transaction. *Id.*, § 11.1.

Cushman commenced this action in or around June 2017. The complaint alleges that Olivet performed all of its obligations under the Commission Agreement and is entitled to a commission in the amount of \$1,050,000, seven percent (7%) of the \$15,000,000 purchase price for the Western Portion. Complaint, ¶¶ 26-27.

Defendant seeks dismissal of the complaint on the grounds that, under the terms of the Commission Agreement, plaintiff is not entitled to a commission for the Western Portion, and plaintiff has failed to show that it was the procuring cause of the 2016 Purchase Agreement. Defendant contends that plaintiff is not entitled to a commission under the Commission Agreement because it provided that no commission would be paid unless sale of the property was closed, and there was no closing; and the Commission Agreement was terminated when the Purchase Agreement was terminated. Defendant also argues that plaintiff was not entitled to a commission for the sale of the Western Portion in

2016, because Cushman was not the procuring broker for the "dramatically different," higher priced purchase, which, as the 2016 Purchase Agreement indicates, was negotiated by the Sellers and Purchaser without a broker. *Rebro Aff.*, ¶¶ 22-23.

Plaintiff contends that there are issues of fact as to whether it was the procuring cause of the 2016 purchase of the Western Purchase. It also seeks summary judgment on the Commission Agreement for \$350,000, asserting that it met its obligations under the agreement and earned its commission, and that Olivet cannot avoid paying the commission on the ground that the closing did not occur, because the failure to close was the fault of Olivet.

Discussion

It is well settled that, on a motion for summary judgment, the moving party has the initial burden of showing its entitlement to judgment as a matter of law, by submitting evidentiary proof in admissible form sufficient to demonstrate the absence of any material issues of fact. See CPLR 3212 (b); *Stonehill Capital Mgt., LLC v Bank of the West*, 28 NY3d 439, 448 (2016); *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If the movant makes the proper showing, to defeat summary judgment, the opposing party must show, also by producing evidentiary proof in admissible form, that genuine material issues of fact exist which

require a trial of the action. See *Stonehill Capital Mgt.*, 28 NY3d at 448; *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562.

The facts must be viewed in the light most favorable to the nonmoving party (see *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]), and the motion must be denied "where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is even arguable." *Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 527 (1st Dept 2013), citing *Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 (1968). "However, bald, conclusory assertions or speculation and '[a] shadowy semblance of an issue' are insufficient to defeat summary judgment, as are merely conclusory claims." *Stonehill Capital Mgt.*, 28 NY3d at 448 (citations omitted); see *Zuckerman*, 49 NY2d at 562.

Brokers' Commissions

As a general rule, "in the absence of an agreement to the contrary, a real estate broker will be deemed to have earned his [or her] commission when he [or she] produces a buyer who is ready, willing and able to purchase at the terms set by the seller." *Lane--Real Estate Dept. Store v Lawlet Corp.*, 28 NY2d 36, 42 (1971); see *Feinberg Bros. Agency, Inc. v Berted Realty Co.*, 70 NY2d 828, 830 (1987); *SPRE Realty, Ltd. v Dienst*, 119 AD3d 93, 97 (1st Dept 2014); see generally *Sibbald v Bethlehem Iron Co.*, 83 NY 378, 381-382 (1881). Nonetheless, "the parties

to a brokerage agreement are free to add whatever conditions they may wish to their agreement, including a condition that the contract of sale actually be consummated before the broker is deemed to have earned his commission." *Levy v Lacey*, 22 NY2d 271, 274 (1968); see *Srouf v Dwelling Quest Corp.*, 5 NY3d 874, 875 (2005); *Feinberg Bros. Agency*, 70 NY2d at 830; *David Day Realty v Spiegel*, 216 AD2d 241, 242 (1st Dept 1995). "The obligation to pay a broker's commission upon consummation of sale requires a formal act of closing." *Liggett Realtors, Inc. v Gresham*, 38 AD3d 214, 214 (1st Dept 2007).

However, "even where the broker and seller expressly provide that there shall be no right to a commission unless some condition is fulfilled, and the condition is not performed, the seller will nevertheless be liable if he is responsible for the failure to perform the condition." *Lane-Real Estate Dept. Store*, 28 NY2d at 43; see *Levy*, 22 NY2d at 276; *CS Empire Realty, LLC v Hussain*, 150 AD3d 1075, 1077 (2d Dept 2017); *Dagar Group, Ltd. v South Hills Mall, LLC*, 12 AD3d 552, 554-555 (2d Dept 2004). Courts generally apply this exception only when the failure to perform the condition was "wrongfully caused by one of the parties" (*India.com, Inc. v Dalal*, 412 F3d 315, 323 [2d Cir 2005]), or constituted a "willful default." *Donald Yoo (N.Y.) Corp. v Tauber*, 281 AD2d 171, 172 (1st Dept 2001).

"To prevail on a cause of action to recover a commission,

the broker must establish (1) that it is duly licensed, (2) that it had a contract, express or implied, with the party to be charged with paying the commission, and (3) that it was the procuring cause of the sale." *Douglas Elliman, LLC v Silver*, 136 AD3d 658, 660 (2d Dept 2016) (citations omitted). To demonstrate that a broker was the procuring cause, "there must be a direct and proximate link, as distinguished from one that is indirect and remote," between the broker's efforts and the consummated transaction. *Greene v Hellman*, 51 NY2d 197, 206 (1980); see *Sibbald*, 83 NY at 381-382; *Douglas Elliman, LLC*, 136 AD3d at 660 (2d Dept 2016); *SPRE Realty, Ltd.*, 119 AD3d at 98; *Gabay v Esplanade Venture Partnership*, 2019 WL 2027588, *3, 2019 NY Misc LEXIS 2283, *6, 2019 NY Slip Op 31297(U) (Sup Ct, NY County May 7, 2019). This does not mean that "the broker in all instances must have been the dominant force in the conduct of the ensuing negotiations or in the completion of the sale," but there must be some direct causal link. *Greene*, 51 NY2d at 206. Stated another way, a broker may be the procuring cause "where it 'generated a chain of circumstances which proximately led to' a lease [or sale] transaction." *SPRE Realty, Ltd.*, 119 AD3d at 98 (citation omitted).

The Commission Agreement between Cushman and Olivet expressly provided that the commission would be paid "in the event" that the Western Portion transaction closed. There was no

closing because Olivet failed to appear and defaulted on the Purchase Agreement. As the Purchase Agreement then was terminated by the Sellers, there could be no closing and the condition for payment of the commission was not met. Plaintiff, therefore, is not entitled to a commission for the Western Portion sale under the Purchase Agreement, unless it can show that Olivet willfully or wrongfully defaulted. See *Graff v Billet*, 64 NY2d 899 (1985); *Levy*, 22 NY2d at 276; *Donald Yoo (N.Y.) Corp.*, 281 AD2d at 172; *Kassin Sabbagh Realty LLC v Beekman Tower Assoc. LLC*, 2016 WL 6995896, *3, 2016 NY Misc LEXIS 4454, *7-8, 2016 NY Slip Op 32371(U) (Sup Ct, NY County 2016).

While Plaintiff argues that the failure to close on the Western Portion was Olivet's fault, a purchaser's financial inability to close has not been deemed to be a willful default entitling a broker to a commission, at least not when the seller is responsible for paying the broker's commission. See *Insignia Douglas Elliman LLC Retail Group v Merrell*, 11 AD3d 252 (1st Dept 2004); *Dwelling Quest Corp. v Greater N.Y. Sav. Bank*, 246 AD2d 431 (1st Dept 1998); *O'Connor Realty Servs., Inc. v Higgins*, 149 AD2d 492, 492 (2d Dept 1989). Plaintiff submits no legal authority for finding otherwise in this case, notwithstanding that the purchaser was responsible for the broker's fee. Nor does plaintiff show, or even argue, that Olivet's failure to close was done in bad faith or was a "deliberate[] attempt[] to

destroy a potential transaction to avoid paying a brokerage commission." See *Eastern Consol. Props., Inc. v Morrie Golick Living Trust*, 83 AD3d 534, 535 (1st Dept 2011).

Defendant also argues that plaintiff is not entitled to a commission under the Commission Agreement because the agreement was terminated after the Purchase Agreement terminated in October 2014. According to Rebro, when he met with Kaufman in February 2016, Kaufman acknowledged that the Commission Agreement was no longer in effect, and they began to negotiate a new commission agreement, without success. Rebro Aff., ¶¶ 19-20. Kaufman, in opposition, asserts that Rebro never indicated to him, prior to or at the February 2016 meeting, that the Commission Agreement was terminated, and they were not negotiating a new agreement at their meeting, but instead were continuing to work on the same deal. Kaufman Aff., ¶¶ 20-21. Kaufman also contends that, because Cushman had fully performed its obligations under the agreement, Olivet had no power to terminate it. *Id.*, ¶ 28.

The Commission Agreement includes no expiration date, and, as it has long been held, where a contract for services includes no provision as to its duration, the contract is terminable at will by either party. See *Sibbald*, 83 NY at 384; *Timeless Realty Corp. v Connecticut Diversified Holdings, LLC*, 44 AD3d 745, 746 (2d Dept 2007); see also *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 300-301 (1983) (employment at will terminable at any

time for any reason or no reason). "[T]he right of the principal to terminate his [broker's] authority is absolute and unrestricted, except only that he may not do it in bad faith, and as a mere device to escape the payment of the broker's commissions." *Sibbald*, 83 NY at 384; see *Julien J. Studley, Inc. v Coach, Inc.*, 3 AD3d 358, 359 (1st Dept 2004); *Aegis Prop. Servs. Corp. v. Hotel Empire Corp.*, 106 A.D.2d 66, 72 (1st Dept 1985); *Thoens v J. A. Kennedy Realty Corp.*, 279 AD 216, 220 (1st Dept 1951), *affd* 304 NY 753 (1952). While courts have held that such contracts are "terminable at will upon reasonable notice" (*Majestic Farms Supply, Ltd. v Service Riding Apparel, Ltd.*, 137 AD2d 501, 502 [2d Dept 1988] [licensing agreement]), termination of a contract may also be demonstrated by the conduct of the parties. See *Ryan, Beck & Co., LLC v Fakh*, 268 F Supp 2d 210, 225-226 (ED NY 2003) ("words or conduct of a principal which are inconsistent with the continuation of authority" may terminate an agent's authority [citation omitted]).

Defendant contends that following the cancellation of the Purchase Agreement by the Sellers in October 2014, the Commission Agreement was no longer in effect and Kaufman acknowledged that at the meeting with Rebro in February 2016. Rebro also attests that, after Kaufman left Cushman in February 2014, Olivet had no contact with anyone at Cushman in connection with the Western Portion transaction. Rebro Aff., ¶ 20.

Although Kaufman attests that he continued to speak with Rebro about the Western Portion in 2014 and 2015 and was not notified that the Commission Agreement was terminated, he states that he received a copy of the August 27, 2014 letter providing the final October 2014 closing date, and knew that Olivet defaulted in appearing at the closing resulting in the termination of the Purchase Agreement. Kaufman Aff., ¶ 19. Kaufman does not claim, or offer evidence to show, that he sought to recover a commission for the Western Portion at that time, or at any time before the purchase of the Western Portion closed, pursuant to the 2016 Purchase Agreement, in or around August 2016. See 2016 Purchase Agreement, Ex. L to Rebro Aff.

Even assuming, however, that there are disputed issues of fact as to whether and when the Commission Agreement was terminated or whether plaintiff received notice, and whether Kaufman and Rebro discussed a new commission agreement, plaintiff has not submitted sufficient evidence to raise a triable issue of fact as to whether it was the procuring cause of the Western Portion transaction that ultimately was consummated in August 2016.

Rebro attests that, as the 2016 Purchase Agreement states, no broker was involved in Olivet's agreement with the Sellers to purchase the Western Portion for a considerably higher price than the previously agreed-upon price of \$11,560,000. According to

Rebro, although he met with Kaufman in February 2016 to discuss the possibility of resurrecting the deal to purchase the Western Portion, he did not reach any new agreement with Kaufman. Several months later, Rebro attests, when no broker was negotiating for Olivet, Olivet directly negotiated with the Sellers, and the Sellers presented "a take it or leave it offer" of \$15,000,000, which resulted in the sale. Rebro Aff., ¶ 21.

Kaufman attests that, throughout 2014 and 2015, he understood that Olivet was still interested in acquiring the Western Portion and was continuing to seek funds to do so. Kaufman Aff., ¶ 20. He does not show, or assert, however, that he engaged in any negotiations with the Sellers or acted to bring Olivet and Sellers together to reach a new agreement during that time. He attests that, in February 2016, he met with Rebro and was authorized to make an offer of \$10,000,000, which was rejected by the Sellers; and he claims an email exchange in February 2016 between co-broker Fitzsimmons and an officer of the controlling company of the Sellers indicates that a deal for \$15,000,000 was reached. Kaufman Aff., ¶ 22; see Emails dated Feb. 4, 2016, Ex. C to Kaufman Aff. There is no evidence, however, that Cushman, or the co-broker, subsequently engaged in any negotiations or otherwise was involved in the 2016 Purchase Agreement signed in July 2016.

While there is no question that plaintiff originally brought

Olivet and the Sellers together, the transaction plaintiff brokered in 2013 involving the Western Portion was not consummated, and plaintiff has not shown that it was a direct and proximate link to the consummation of the sale of the Western Portion in 2016. See *Greene*, 51 NY2d at 206; *Spre Realty Ltd.*, 119 AD3d at 99; *Jagarnauth v Massey Knakal Realty Servs., Inc.*, 104 AD3d 564, 565 (1st Dept 2013); *Aegis Prop. Servs. Corp.*, 106 AD2d at 72. "It is well established that where negotiations are unproductive and the parties in good faith withdraw, a subsequent renewal of negotiations does not entitle the broker to a commission as the broker was not the procuring cause of the transaction." *RMB Props., LLC v American Capital III, LLC*, 55 Misc 3d 1202(A), 55 NYS3d 694, 2016 NY Slip Op 51874(U), **6-7 (Sup Ct, NY County 2016), *affd* 148 AD3d 585 (1st Dept 2017), citing *Rebenwurz v Swieca*, 50 Misc 3d 1210(A), 36 NYS3d 49, 2016 NY Slip Op 50068(U) (Sup Ct, Kings County 2016); see *Rosenhaus Real Estate, LLC v S.A.C. Capital Mgt., Inc.*, 121 AD3d 409 (1st Dept 2014) (creation of an "amicable atmosphere" between buyer and seller is insufficient to demonstrate that broker was the procuring cause of the ultimate deal) see also *Cushman & Wakefield v 214 E. 49th St. Corp.*, 218 AD2d 464, 467 (1st Dept 1996); *Bashant v Spinella*, 67 AD2d 1100, 1100 (4th Dept 1979).

Defendant seeks attorneys' fees pursuant to the Commission Agreement, which provides that, if litigation is commenced by any

party to enforce rights under the agreement, the prevailing party is entitled to costs and expenses, including reasonable attorneys' fees. Therefore, Olivet, as the prevailing party in this litigation, is entitled to costs and expenses, including reasonable attorneys' fees, to be determined at a hearing as directed below.

It is accordingly

ORDERED and ADJUDGED that defendant's motion is granted and the complaint is dismissed; and it is further

ORDERED that plaintiff's cross motion is denied; and it is further

ORDERED that a hearing is directed to determine the amount of attorneys' fees to which defendant Olivet is entitled; and it is further

ORDERED that the issue of attorneys' fees is referred to the Office of the Referee Clerk, who shall assign this matter to the Special Referee's calendar for a Special Referee to hear and determine the matter.

Dated: October 3, 2019

ENTER:



HON. ROBERT R. REED, J.S.C.