

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

PROMARK REALTY GROUP, INC.,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	No. 02-CV-1089
v.	:	
	:	
B&W ASSOCIATES and	:	
449 EAST TIOGA STREET,	:	
PHILADELPHIA, PENNSYLVANIA,	:	
	:	
Defendants.	:	

MEMORANDUM

BUCKWALTER, J.

May 1, 2002

Plaintiff Promark Realty Group, Inc. (“Plaintiff”) brings this action to enforce a commercial real estate broker lien and for quantum meruit against Defendants B&W Associates (“B&W”) and 449 East Tioga Street, Philadelphia, Pennsylvania. Presently before the Court is B&W’s Motion to Dismiss pursuant to Rule 12(b)(6). For the reasons stated below, B&W’s Motion is **GRANTED** in part and **DENIED** in part.

I. FACTS

B&W owns commercial real estate located at 449 East Tioga Street, Philadelphia, Pennsylvania (“the property”). Plaintiff is a commercial real estate broker. In 1994, in part due to the efforts of Plaintiff, B&W leased a portion of the property to Case-Wilder, Inc. (“the tenant”). According to the complaint, the lease agreement between B&W and the tenant

provided for a lease term of five years, extending from July 31, 1994 until July 31, 1999.¹ Under the lease agreement, the tenant also possessed an option to renew the lease for an additional consecutive term of five years. According to the lease agreement, “[s]aid option shall be exercised by Tenant by the giving of notice to such effect to [B&W] six (6) months prior to the expiration date of the existing term of this Lease.”

In compensation for its efforts in helping lease the property to the tenant, B&W agreed to pay Plaintiff a commission of “seven hundred fifty (\$750) dollars per month during the initial term of the Lease and the option term contained in the Lease if exercised by the Tenant” pursuant to a brokerage agreement.² The brokerage agreement also provided that:

In the event that [Plaintiff] actively participates in the negotiation of any further extensions or renewals of the Lease (beyond the one option period provided therein) or any leasing of additional space at the Property, then [Plaintiff] shall be entitled to such commission, if any, as shall be negotiated between [B&W] and [Plaintiff]. If [Plaintiff] does not actively participate in such negotiations, then [Plaintiff] shall have no right to any such commissions or other compensation with respect to any such extension, renewal, or expansion and [B&W] shall have no obligations to [Plaintiff] with respect thereto. If Rona Goldstein is not associated with [Plaintiff] at the time of such negotiations, [B&W] shall have no obligation to permit [Plaintiff] to actively participate in such negotiations and shall have no liability whatsoever to [Plaintiff] by reason of its denying such participation to [Plaintiff].

1. The lease agreement is attached to the complaint as exhibit C. In addition to the facts alleged in the complaint, in evaluating a motion to dismiss, a court may consider “a document integral to or explicitly relied upon in the complaint.” In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426, (3d Cir. 1997).

2. The brokerage agreement is attached to the complaint as exhibit B.

According to the complaint, the agreed-to brokerage commissions were paid to Plaintiff through the end of the initial lease term in July 1999. The tenant did not renew the lease by providing notice six months prior to the expiration date of the initial term. However, at some point after the six month renewal deadline – but before the lease terminated in July 1999 – B&W and the tenant entered into negotiations and agreed on a new lease agreement for even more space at the property. According to the complaint, B&W did not give Plaintiff the opportunity to participate in these negotiations. Plaintiff contends that under the brokerage agreement, it was entitled to participate and is therefore owed subsequent commissions contemplated by the brokerage agreement.

In February 2000, Plaintiff filed a notice of lien against the property pursuant to the Pennsylvania’s Commercial Real Estate Broker Lien Act, 68 P.S. § 1051 et seq. (“the Act”).³ The Act provides commercial real estate brokers with the right to a lien in the amount of alleged unpaid compensation due to them pursuant to a written agreement with the broker’s client. On February 8, 2002, Plaintiff filed a complaint in the Philadelphia County Court of Common Pleas. Count I of the complaint seeks to enforce the statutorily-created lien. Count II asserts a claim for quantum meruit. B&W removed the case to this Court on March 1, 2002.

B&W now moves to dismiss 449 East Tioga Street, Philadelphia, Pennsylvania as a party to the action, as well as both counts of the complaint.

3. The notice of lien is attached to the complaint as exhibit A.

II. LEGAL STANDARD

Under Fed. R. Civ. P. 12(b)(6), the party moving for dismissal has the burden of proving that no claim has been stated. Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir.), cert.denied, 501 U.S. 1222 (1991). To prevail, the movant must show “beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Conley v. Gibson, 355 U.S. 41, 45-46, (1957). In considering a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6), the court must only consider those facts alleged in the complaint. See ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994). However, a court may also consider “a document integral to or explicitly relied upon in the complaint.” In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426, (3d Cir. 1997). The reviewing court must take all well pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. See Jenkins v. McKeithen, 395 U.S. 411, 421 (1969). The pleader must provide sufficient information to outline the elements of the claim, or to permit inferences to be drawn that these elements exist. Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir. 1993). A complaint should be dismissed if “it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

III. DISCUSSION

A. 449 East Tioga Street, Philadelphia, Pennsylvania

Plaintiff named the property as a defendant in this lawsuit. B&W argues that the property should be dismissed because Plaintiff’s claim is essentially one for breach of contract,

which is an *in personam* action for damages. Therefore, according to B&W, the Court may not exercise jurisdiction over the property.

Regardless of whether the action at bar proceeds *in personam* or *in rem*,⁴ there does not appear to be any reason for the property itself to be named as a defendant. The Act does not call for the property to be named as a defendant.⁵ Although there are no reported cases specifically construing the Act on this point, a review of Pennsylvania case law reveals that in suits to enforce other liens created by statute, such as mechanic's liens, the property upon which the lien is sought is not usually named as a defendant. Finally, Plaintiff does not articulate any reason why the property should remain a party, and further states that neither it nor B&W would suffer prejudice if the property is dismissed. Therefore, the property will be dismissed as a defendant.

B. Count I - Claim to Enforce the Lien

Count I seeks to enforce the lien under the Act. The right to a lien accrues when a commercial real estate broker is due commissions under a written agreement. See 68 P.S. § 1053. According to the complaint, B&W did not give Plaintiff the opportunity to actively participate in the negotiations for a new lease that took place between B&W and the tenant.

4. There are no reported cases that consider the nature of suits arising under the Act. However, under Pennsylvania law, actions to enforce other liens created by statute are technically *in rem* in nature, and are distinct from related *in personam* actions (for example, suits for breach of a related contract). See Matternas v. Stehman, 642 A.2d 1120, 1123 (Pa. Super. 1994) (action to enforce mechanic's lien is an *in rem* action separate from action for breach of contract); Coudriet v. Benzinger, 411 A.2d 846, 848 (Pa. Commw. 1980) (action to enforce statutory municipal lien is *in rem* action); Rees, Weaver & Co. v. M.B.C. Paper Mill Corp., 406 A.2d 562, 565 (Pa. Super. 1979) (action to enforce mechanic's lien is an *in rem* action separate from action for breach of contract). In this case, the complaint is entitled "Complaint to Foreclose Commercial Real Estate Broker Lien." In fact, the term "breach of contract" is not used in the complaint at all. Therefore, although the Court need not decide the issue, it appears that the case at bar is a suit *in rem*.

5. The Act calls for the plaintiff to make "all interested parties, of whose interest he is notified or has knowledge, defendants to the action." 68 P.S. § 1058(e).

Plaintiff contends that under the brokerage agreement, it was entitled to actively participate and is therefore owed subsequent commissions contemplated by the brokerage agreement.

B&W argues that dismissal is appropriate because Plaintiff specifically failed to plead that: (1) Rona Goldstein was associated with it at the time of the negotiations such that B&W was required to permit it to actively participate in negotiations under the brokerage agreement; (2) Plaintiff either actively participated in negotiations, as required under the brokerage agreement in order for it to receive additional commissions, or else Plaintiff sought to do so but was prevented by B&W; and (3) Plaintiff and B&W agreed on new commissions (again as required by the brokerage agreement) such that sums are owed to Plaintiff.

B&W raises the pleading bar too high. Although Plaintiff did not specifically plead that Rona Goldstein was still associated with it at the time B&W's recent negotiations with tenant began, it clearly alleges that it was entitled to actively participate in the negotiations under the brokerage agreement. B&W has no evidence that Ms. Goldstein was not associated with Plaintiff at that time. As such, B&W cannot show "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley, 355 U.S. at 45-46. In addition, it is clear that Plaintiff did not plead that it actively participated in the negotiations or that new commissions were agreed to by the parties. However, it need not do so, since its theory – which it *did* plead – is that B&W violated the agreement when did not give Plaintiff the opportunity to actively participate in the negotiations and therefore to negotiate with it for additional commissions. Plaintiff need not set out in the complaint more specifically how B&W failed to provide it that opportunity.

B&W's Motion is denied as to Count I.

C. Count II - Quantum Meruit Claim

Count II asserts an alternative claim for quantum meruit, or unjust enrichment.

B&W seeks dismissal of this count due to the presence of a written contract between the parties in the form of the brokerage agreement. Under Pennsylvania law, a claim for quantum meruit is “inapplicable when the relationship between the parties is founded on a written agreement or express contract.” Benefit Trust Life Ins. Co. v. Union Nat’l Bank, 776 F.2d 1174, 1177 (3d Cir. 1985) (quoting Schott v. Westinghouse Electric Corp., 259 A.2d 443, 448 (Pa. 1969)). Indeed, “the essence of the doctrine of unjust enrichment is that there is no direct relationship between the parties.” Id. (quoting Gee v. Eberle, 420 A.2d 1050, 1060 (Pa. Super. 1980)). Courts may dismiss quantum meruit claims upon a motion to dismiss due the presence of a contract between the parties. See Constar, Inc. v. National Distribution Ctrs., Inc., 101 F. Supp. 2d 319, 324 (E.D. Pa. 2000) (dismissing claim for unjust enrichment due to contract between the parties). See also Emtec, Inc. v. Condor Tech. Solutions, Inc., No. 97-6652, 1998 U.S. Dist. LEXIS 18846 at *7-*8 (E.D. Pa. Nov. 24, 1998) (denying motion to amend complaint to include unjust enrichment claim due to contract between the parties).

In this case, neither party disputes that Plaintiff and B&W had a direct relationship through the brokerage agreement. This agreement governs the question of Plaintiff’s right to compensation for its efforts in bringing B&W and the tenant together: the dispute at the heart of the case at bar. In fact, the right to a lien is premised on such an agreement. See 68 P.S. § 1053.

Plaintiff attempts to save this claim by arguing that it is permitted to plead unjust enrichment as an alternative to its contract-based claim. Plaintiff states that if, as B&W suggests,

the brokerage agreement between the parties was terminated upon expiration of the tenant's lease at the end of July 1999, then no contract exists for any compensation owed after that point. As a result, it argues, it may still recover under a theory of quantum meruit. However, Plaintiff is ultimately unpersuasive on this point.

The doctrine of unjust enrichment consists of the following elements: "benefits conferred on one party by another, appreciation of such benefits by the recipient, and acceptance and retention of these benefits under such circumstances that it would be inequitable for the recipient to retain the benefits without payment of value." 16 Summary of Pa. Jur. 2d Commercial Law § 2.2 (1994) (citing various cases). However, as pled in the complaint, all the benefits Plaintiff could possibly have conferred on B&W – as well as all the benefits to which Plaintiff believes it was entitled an opportunity to confer – were to be provided pursuant to the contract between the parties. Under these circumstances, it is "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley, 355 U.S. at 45-46.

Certainly, in general, parties are permitted to plead in the alternative. Courts have, however, dismissed quantum meruit claims due to the presence of a valid contract, despite acknowledging this general rule. See Armstrong World Indus., Inc. v. Robert Levin Carpet Co., No. 98-5884, 1999 U.S. Dist. LEXIS 7743 at *25-*26 (E.D. Pa. May 19, 1999). Under the circumstances here, dismissal of Count II is also warranted.

As a result, B&W's Motion will be granted as to Count II, and this count will be dismissed.

IV. CONCLUSION

For the reasons stated above, the property is dismissed as a defendant in this action, and Count II of the complaint asserting a theory of quantum meruit is dismissed.

However, B&W's Motion to Dismiss is denied as to Count I.

An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

PROMARK REALTY GROUP, INC.,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	No. 02-CV-1089
v.	:	
	:	
B&W ASSOCIATES and	:	
449 EAST TIOGA STREET,	:	
PHILADELPHIA, PENNSYLVANIA,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 1st day of May, 2002, upon consideration of Defendant B&W Associates' Motion to Dismiss (Docket No. 2), Plaintiff's response thereto (Docket No. 3), Defendant's Reply (Docket No. 4), and Plaintiff's Counter-Reply (Docket No. 5), it is hereby **ORDERED** that Defendant's Motion is **GRANTED** in part and **DENIED** in part.

1. Defendant's Motion is **GRANTED** as to Defendant 449 East Tioga Street, Philadelphia, Pennsylvania. 449 East Tioga Street, Philadelphia, Pennsylvania is **DISMISSED** as a defendant in this case.
2. Defendant's Motion is **DENIED** as to Count I of the complaint.
3. Defendant's Motion is **GRANTED** as to Count II of the complaint.

BY THE COURT:

RONALD L. BUCKWALTER, J.