American Arbitration Association
Commercial Arbitration Tribunal

The Ackman-Ziff Real Estate Group, LLC
[Claimant]

-vs-

Moishe Mana and John Doe Entities
[Respondents]

Case Number: 01-20-0000-4152

FINAL AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into between the above-named parties and dated October 30, 2018, having been duly sworn, and having duly heard the proofs and allegations of the Parties, at the virtual hearings held on April 20-22, 2021 – Kenneth Sussmane, *Esq*., represented Claimant; Michael B. Weitman, *Esq*., represented Respondents, hereby, **AWARD,** as follows:

I. BACKGROUND

Claimant filed a Demand for Arbitration, describing the dispute as:

> This Arbitration is commenced by a financing brokerage company (The Ackman-Ziff Real Estate Group, LLC) against a former client (Moishe Mana and John Doe Entities) for amounts due totaling $965,000.00 for services rendered in connection with a refinancing of a portfolio of properties of the client in Miami, Florida.

The parties had entered into a written Exclusivity Agreement which retained Claimant as Respondents' "advisor with the exclusive right to arrange Debt financing for the

Properties." The initial term within which Claimant was required to accomplish this task was 30 days. There is disagreement as to when the 30 days commenced.

During the initial term, Claimant contacted various lenders and obtained potential interest from some to provide financing. One such lender was Fortress. Claimant maintains that it "received a proposal for the Miami Properties from Fortress on November 28, 2018[1] but after Respondents rejected it, they [Respondents] "surreptitiously signed a Proposal with Fortress on June 10, 2019."[2] Claimant contends that the two proposals were significantly similar, while Respondents maintain that they contained considerable, critical differences and that the consummation of financing on June 10, 2019 occurred outside the parties' agreed upon timetable; thus, Claimant is not entitled to a commission.

Contrarily, Claimant urges that the circumstances enumerated in the Agreement occurred which automatically extended the term of Claimant's exclusivity and, thus, Respondents breached the contract by not providing Claimant with the broker's fee to which it was entitled.

In the alternative, Claimant asks for *quantum meruit* for the work it performed if Respondents are not found to be in breach of the contract.

Furthermore, Claimant seeks to hold Moishe Mana individually liable as agent for a "partially disclosed principal."

On the contrary, Respondents argue that there was not a valid automatic extension; therefore, nothing is owed Claimant, as it had not secured the desired financing by the end of the 30 days, and that *quantum meruit* is not legally available to Claimant because the parties had a valid contract.

II. DISCUSSION AND FINDINGS

[1] J-10.
[2] J-50.

Breach of Contract

The threshold issue for determining if Respondents breached the agreement rests on whether the initial term was automatically extended. The parties' Exclusivity Agreement provides, in pertinent part:

> 3. Term.
>
> (a) Initial Term. The term of this Agreement shall commence on the date hereof and **shall expire** thirty (30) days following the date (the "Effective Date"), which Ackman-Ziff's has received all of the information reasonably required for it to submit a Capital Request on behalf [*sic*] the Client, unless extended pursuant to paragraph 3(b). (Emphasis added.)
>
> (b) Automatic Extension. In the event there are active discussions ongoing or indications of interest from lender(s) which Client is interested in potentially pursuing, than [*sic*] this Agreement shall be extended for an additional thirty (30) days. If Ackman-Ziff and Client continue to work together beyond the expiration of the term of this Agreement, this Agreement shall automatically be extended. Furthermore, this Agreement shall also be automatically extended for a period sufficient to close the Financing if Ackman-Ziff has delivered to Client a Financing Proposal, on terms and conditions which are acceptable to Client.

Respondents presented evidence that prove that the 30 days initial term ended on November 29, 2018 and that both parties acknowledged and believed that to be the case. Namely, on November 29, 2018, Marc Sznajderman (Claimant's Senior Managing Director) sent an email to Amyn Maskati (Respondents' former CFO), copying Romano Tio (Claimant's Senior Managing Director), stating, in pertinent part:

> When we looked at the engagement letter we realized **today is the end of the initial 30-day term**. We wanted to let you know that we have received expressions of interest in writing from three groups so far (Fortress, Starwood and Mack) and continue to have productive discussions with a number of others that could **potentially** bid on the deal on their own or that would be interested in holding the senior position in the financing. . . . We are happy to share the

> feedback we have from the three lenders at your convenience – two of which we believe are worth pursuing further. . . . (Emphasis added.)
>
> Under the terms of the agreement, "If Ackman-Ziff and Client continue to work together beyond the term of this Agreement, this Agreement shall be automatically extended."
>
> We look forward to hearing back from you and **determining <u>if</u> you would like to continue to work together**, thereby extending the term of the Agreement. (Emphasis added.)[3]

Accordingly, Claimant acknowledged that, at this point, Respondents had a choice of whether to continue working with Respondents, exclusively, per the agreement.

The following day – November 30, 2018 – Ms. Leslie Sharpe (Respondents' General Counsel) responded to Mr. Tio, copying Misters Amyn Maskati, Marc Sznajderman, and Pui Kin Yuo, essentially, advising that **Respondents did not want to continue to work together on an <u>exclusive</u> basis** while offering Claimant a choice for another arrangement; *i.e*., to continue to work with Claimant, but only, on a non-exclusive basis. Otherwise, there would be no relationship. Specifically, she stated:

> I note that our **Agreement is expired** per 3(a). To the extent there are discussions that may take place in the future, **we would consider those discussions to be non-exclusive**.[4] (Emphasis added.)

Claimant did not object or decline the offer. In fact, the evidence shows that they implicitly accepted the offer, agreed to the new arrangement, worked on a non-exclusive basis thereafter, and advised potential lenders of their non-exclusive relationship. Now, however, Claimant argues that the 3(b) automatic extension provision was activated, keeping the exclusive relationship operative because the parties had ongoing discussions and Respondents had not

[3] J-13.
[4] J-14.

complied with Article 10 of the Agreement, which required, in pertinent part, that the Agreement:

> may not be altered, modified or canceled except by an instrument in writing duly executed by both parties hereto.

Notwithstanding, Claimant ignores the self-executing language of 3(a) – the agreement "**SHALL** expire," which means that Respondents did not cancel or alter the contract nor did they need to by declining to employ the automatic extension provision or by offering Claimant an opportunity to work with them under a different arrangement and without a written contract. The Exclusivity Agreement expired on its own which negates the necessity for any further action or the application of Article 10. Thus, Article 3(b) was never triggered. This was both parties' expressed, unequivocal understanding, exemplified by their actions and written communications.

For example, in March 27, 2019, Mr. Tio confirmed, in writing, his understanding of the parties' non-exclusive working relationship to a potential lender from which he was attempting to secure financing on Respondents' behalf. He stated that Claimant was "no longer under exclusive on this deal (referencing the Miami Properties),"[5] demonstrating that Claimant had agreed to work and was working on that basis.

Respondents have met their burden of proof that they did not breach the parties' agreement by failing to pay Claimant a commission on the ultimate procured Fortress financing.

Quantum Meruit

Claimant argues, in the alternative of a breach of contract, "to avoid unjust enrichment," it is still entitled to a commission because "A broker is properly awarded recovery based on a theory of *quantum meruit* where it is deemed to be the procuring cause of the transaction."[6]

[5] J-46.

[6] Claimant's Post-Hearing Brief, citing *Edward S. Gordon Co. v. Peninsula N.Y. Pshp.*, 245 A.D.2d 189 (1st Dept. 1997); and *Garrick-Aug Assocs. Store Leasing, Inc. v. Shefa Land Corp.*, 289 A.D.2d 67 (1st Dept. 2001).

Respondents counter that:

> . . . it is well-settled under New York law that where the parties have a written agreement that covers the dispute at issue, a quasi-contract claim cannot lie.[7] ("A claim for unjust enrichment will not stand when the matter is controlled by a governing contract, as is the case here."); ((*APF Mgmt. Co*.) affirming dismissal of unjust enrichment and quantum meruit claims as duplicative of breach of contract claim).[8] The question in this case is whether the Agreement's exclusive term was extended past November 29, 2018. If, as the evidence established, the Agreement's exclusive term was ***not*** extended past November 29, 2018, then the term sheet Respondents signed with Fortress on June 10, 2019 fell outside the Agreement's six-month tail, and Claimant is ***not*** entitled to a commission. Claimant cannot overcome its failure to prove its contract claim by repackaging it as a quasi-contract claim. For this reason alone, Claimant's quasi-contract claims fail. (Footnote omitted.)[9]

Respondents are correct. *The Goldman v. Metropolitan Life* Court[10] explained that:

> . . . . The theory of unjust enrichment lies as a quasi-contract claim. **It is an obligation the law creates in the absence of any agreement**.[11] Here, in each case, there was no unjust enrichment because the matter is controlled by contract[12] ["(t)he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter"]). Given that the disputed terms and conditions fall entirely within the insurance contract, there is no valid claim for unjust enrichment. (Emphasis added.)

Likewise, Claimant's claim for *quantum meruit* in the instant matter has no legal basis and is, hereby, denied.

The parties' agreement specifies that each party is responsible for its own arbitration costs; therefore, the administrative fees of the American Arbitration Association, totaling

[7] *Bd.of Managers of Honto Condo. v. Red Apple Child Dev. Ctr.*, 160 A.D.3d 580, 581-82 (1st Dep't 2018).
[8] *APF Mgmt. Co., LLC v. Munn*, 151 A.D.3d 668 (2d Dept. 2017).
[9] Respondents' Post-Hearing Brief.
[10] 841 NE 2d 742 – NY: Court of Appeals 2005.
[11] *State of New York v Barclays Bank of N.Y.,* 76 NY2d 533, 540 [1990].
[12] *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.,* 70 NY2d 382, 388 [1987].

$16,175.00, shall be borne as incurred, and the compensation of the arbitrator, totaling $25,612.00, shall be borne as incurred.

The above sums are to be paid on or before ten (10) business days from the date of this Award.

This Award is in full settlement of all claims submitted to this Arbitration. All claims not expressly granted herein are, hereby, denied.

9/3/2021

DocuSigned by:
Billie Colombaro
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Date **Hon. Billie Colombaro (ret.), Arbitrator**

I, Hon. Billie Colombaro, do hereby affirm upon my oath as Arbitrator that I am the individual described in andwho executed this instrument which is my Final Award.

9/3/2021

DocuSigned by:
Billie Colombaro
9D026FC4B83845E...

Date **Hon. Billie Colombaro (ret.), Arbitrator**