

**Solomons v Doulgas Elliman LLC**

2013 NY Slip Op 32576(U)

October 17, 2013

Sup Ct, New York County

Docket Number: 110636-2010

Judge: George J. Silver

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: Hon. George J. Silver

PART 10

SOLOMONS, PAUL

- v -

DOUGLAS ELLIMAN LLC, et al.

*Justice*  
**FILED**

OCT 22 2013

COUNTY CLERK'S OFFICE  
NEW YORK

INDEX NO. 110636-2010

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 016

The following papers, numbered 1 to 5, were read on this motion for \_\_\_\_\_

Notice of Motion/ Order to Show Cause – Affirmation – Affidavit(s) – Exhibits –Memorandum of Law----- No(s). 1, 2, 3

Answering Affirmation(s) – Affidavit(s) – Exhibits ----- No(s). 4

Replying Affirmation – Affidavit(s) – Exhibits ----- No(s). 5

Upon the foregoing papers, the motion is decided as follows:

In this action for housing discrimination based upon a lawful source of income in violation of the New York City Human Rights Law, defendants City Connections Realty, Inc. (“City Connections”) and Randy Baruh (“Baruh”) (collectively “movants”) move to dismiss the cross-claim of defendants 23 Manhattan Valley North, LLC (“23 Manhattan”) and Baruch Singer (“Singer”). 23 Manhattan and Singer oppose the motion.

Plaintiff Paul Solomons (“plaintiff”) alleges in his first amended complaint that City Connections is in the business of brokering the rental of apartments in New York City. The complaint alleges that Baruh is an employee of City Connections, that 23 Manhattan is the owner of 241 West 113<sup>th</sup> Street and utilized the real estate brokering services of City Connections. Singer is alleged to be a principal of 23 Manhattan. Plaintiff alleges that on or about March 25, 2010 he placed a call to Baruh in response to a craigslist.org advertisement for an apartment located at 241 West 13<sup>th</sup> Street in Manhattan. The complaint alleges that Baruh, as an employee of City Connections was the broker handling the lease negotiations on behalf of 23 Manhattan and Singer. Baruh allegedly told plaintiff that the apartment was available and plaintiff told Baruh that he would like to see it. Baruh then allegedly asked plaintiff is he was working. Plaintiff responded that he was a recipient of a Section 8 housing voucher. Baruh allegedly refused to work with plaintiff, explained that he did not work with tenants who receive Section 8 vouchers and refused to negotiate for the apartment. Both plaintiff’s complaint and his third amended complaint allege that an agency relationship exists City Connections and 23 Manhattan, between City Connections and Baruh, between Baruh and 23 Manhattan, between 23 Manhattan and Singer and between Singer and Baruh. As part of their verified answer, 23 Manhattan and Singer assert a cross-claim alleging that “if plaintiff’s claim is upheld in any way, they are entitled to recover over and against City Connections and Randy Baruh if they in any way discriminated against anyone without the

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

- 1. Check one: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. Check as appropriate: MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. Check as appropriate: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

knowledge and consent” of 23 Manhattan and Singer. City Connections and Baruh claim that plaintiff has settled his action against them.

### Motion to Dismiss

In moving to dismiss the cross-claim for common law indemnification, movants contend that there are three possible outcomes with respect to plaintiff’s claims against 23 Manhattan and Singer: (1) plaintiff fails to meet his burden of proving a violation of the New York City Human Rights Law based upon Baruh and City Connections’ alleged discrimination, in which case, there would be no underlying liability to form the basis of a common law indemnification claim; (2) there is a finding that 23 Manhattan and Singer were not guilty of any active wrongdoing in causing or contributing to the discrimination, in which case, even if City Connections and Baruh did discriminate, 23 Manhattan and Singer would not have liability under the Human Rights Law either directly or an employer; and (3) there is a finding that 23 Manhattan and Singer were participants in the alleged discrimination engage din by City Connections and Baruh because 23 Manhattan and Singer acquiesced in, encouraged, condoned or otherwise caused or contributed to such discrimination, in which case, 23 Manhattan and Singer’s active wrongdoing would preclude them from asserting a common law indemnification claim. Movants also argue that because they settled with plaintiff, a claim for contribution cannot be maintained.

In opposition, 23 Manhattan and Singer argue that, viewed in the light most favorable to them, their cross-claim more than adequately states an enforceable claim recognized at law. They also contend that it possible that a jury could find them vicariously liable for discriminatory actions by Baruh pursuant to Administrative Code § 8-107 (13) and that dismissal is inappropriate because discovery is needed to determine if baruh was acting as 23 Manhattan and Singer’s agent.

### Plaintiff’s Complaint

Plaintiff’s complaint and third amended complaint assert three causes of action against each of the various defendants. Plaintiff’s the first cause of action alleges that the defendants, by refusing to accept plaintiff’s Section 8 voucher as payment for rent, violated section 8-107 (5) (a) (1) and section 8-107 (5) (a) (2) of the Administrative Code of the City of New York. These sections make it

an unlawful discriminatory practice for the owner, lessor, lessee, sublessee, assignee or managing agent of, or other person having the right to sell, rent or lease or approve the sale, rental or lease of a housing accommodation . . . or any agent or employee thereof:

(1) to refuse to sell, rent, lease, approve the sale, rental or lease or otherwise deny to or withhold from any person having the right to sell, rent or lease or approve the sale, rental or lease of a housing accommodation or an interest because of the actual or perceived race, creed, color, national origin, gender, age, disability, sexual orientation, marital status, partnership status, or alienage or citizenship status of such person or persons, or because of any lawful source of income of such person or persons, or because children are, may be or would be residing with such persons.

(2) To discriminate against any person because of such person’s actual or perceived race, creed, color, national origin, gender, age, disability, sexual orientation, marital status, partnership status, or alienage or citizenship status, or because of any lawful source of income of such person, or because children are, may be or would be residing with such person, in the terms, conditions or privileges of the sale, rental or lease of any such housing accommodation or an interest therein or in the furnishing of facilities or services in connection therewith.

Plaintiff further alleges that the defendants acted directly, in concert with and via their agents to discriminate against him.

Plaintiff's second cause of action alleges that defendants' refusal to negotiate for the rental of an apartment and their denial of housing accommodations because of plaintiff's Section 8 status violated sections 8-107 (5) (c) (1) and (2) of the Administrative Code of the City of New York. These sections make it

an unlawful discriminatory practice for any real estate broker, real estate salesperson or employee or agent thereof:

(1) to refuse to sell, rent or lease any housing accommodation, land or commercial space or an interest therein to any person or group of persons or to refuse to negotiate for the sale, rental or lease, of any housing accommodation, land or commercial space or an interest therein to any person or group of persons because of the actual or perceived race, creed, color, national origin, gender, age, disability, sexual orientation, marital status, partnership status, or alienage or citizenship status of such person or persons, or because of any lawful source of income of such person or persons, or because children are, may be or would be residing with such person or persons, or to represent that any housing accommodation, land or commercial space or an interest therein is not available for inspection, sale, rental or lease when in fact it is so available, or otherwise to deny or withhold any housing accommodation, land or commercial space or an interest therein or any facilities of any housing accommodation, land or commercial space or an interest therein from any person or group of persons because of the actual or perceived race, creed, color, national origin, gender, age, disability, sexual orientation, marital status, partnership status, or alienage or citizenship status of such person or persons, or because of any lawful source of income of such person or persons, or because children are, may be or would be residing with such person or persons.

(2) To declare, print or circulate or cause to be declared, printed or circulated any statement, advertisement or publication, or to use any form of application for the purchase, rental or lease of any housing accommodation, land or commercial space or an interest therein or to make any record or inquiry in connection with the prospective purchase, rental or lease of any housing accommodation, land or commercial space or an interest therein which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, gender, age, disability, sexual orientation, marital status, partnership status, or alienage or citizenship status, or any lawful source of income, or to whether children are, may be or would be residing with a person, or any intent to make such limitation, specification or discrimination.

Plaintiff's third cause of action, as asserted in the third amended complaint, alleges that defendants violated section 8-107 (6) of the Administrative Code, which makes it "an unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter, or to attempt to do so."

#### Analysis

It is well established that in determining whether to grant a motion to dismiss based upon a failure to state a cause of action pursuant to CPLR § 3211 [a] [7], the pleading is to be afforded a liberal construction (CPLR § 3026), and the court should accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118 [1<sup>st</sup> Dept 2002]).

Stated another way, the court's role in a motion to dismiss is limited to determining whether a cause of action is stated within the four corners of the complaint, and not whether there is evidentiary support for the complaint (*id.*).

Common-law indemnification is available to one who has committed no wrong but is held liable to the injured party because of some relationship with the tortfeasor or obligation imposed by law (*Elkman v Southgate Owners Corp.*, 246 AD2d 314 [1<sup>st</sup> Dept 1998]). Common-law indemnification requires proof not only that the proposed indemnitor's negligence contributed to the causation of the accident, but also that the party seeking indemnity was free from negligence (*Correia v Professional Data Mgmt.*, 259 AD2d 60 [1<sup>st</sup> Dept 1999]).

It is apparent, based upon the express statutory language of sections 8-107 (5) (a) (1) and 8-107 (5) (a) (2) of the Administrative Code, that plaintiff must establish that 23 Manhattan and Singer actively discriminated against him based upon his alleged status as a Section 8 recipient in order to prevail on his cause of action. In the event plaintiff were able to do so, 23 Manhattan and Singer would clearly not be entitled to common law indemnification from Baruh and City Connection. Similarly, if plaintiff is successful in establishing that 23 Manhattan and Singer aided, abetted, incited compelled or coerced Baruh and City Connections in their alleged discrimination against plaintiff, as alleged in the third cause of action, 23 Manhattan and Singer, as active wrongdoers, would not be entitled to common law indemnification<sup>1</sup>.

Section 8-107 (13) of the Administrative Code provides that an employer can be found liable for an unlawful discriminatory practice based upon the conduct of an employee or agent where (1) the employee or agent exercised managerial or supervisory responsibility; or (2) the employer knew of the employee's or agent's discriminatory conduct and acquiesced in such conduct or failed to take immediate and appropriate corrective action; or (3) should have known of the employee's or agent's discriminatory conduct and failed to exercise reasonable diligence to prevent such conduct (Administrative Code § 18-107 (13) (b) (1) (2) and (3)). As movants correctly point out, plaintiff's complaint does not allege a violation of the employer's liability section of the Human Rights Law by any of the defendants. However, plaintiff's complaint does contain an allegation that an agency relationship existed among City Connections, Baruh, 23 Manhattan and Singer and courts freely permits pleadings to be amended to conform to the evidence produced at trial so long as no party can claim surprise or prejudice (*Weinstein Enters. v Cappelletti*, 217 AD2d 616 [2d Dept 1995]). While it is true that 23 Manhattan and Singer would be not be entitled to common law indemnification if they knew of an agent's discriminatory conduct and acquiesced in it or should have known of such conduct but failed to exercise reasonable diligence, 23 Manhattan and Singer may be found liable under the Human Rights Law, even if they did not engage in any wrongdoing, if City Connections and Baruh discriminated against plaintiff while acting as agents and exercising managerial or supervisory responsibility (Administrative Code § 18-107 (13) (b) (3)). In the absence of affidavits or deposition testimony, it cannot be said, at this stage of the litigation, that City Connections and Baruh were not agents of 23 Manhattan and Singer and did not have such managerial or supervisory control. While City Connections and Baruh's attorney contends that the court should find that the movants are independent contractors as a matter of law<sup>2</sup>, counsel's affirmation is of no probative weight on the issue. Therefore, dismissal of the cross-claim for indemnification would, at this point, be premature.

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<sup>1</sup> As neither the complaint nor the third amended complaint allege that 23 Manhattan and Singer are real estate brokers, salesperson or employees or agents thereof, any finding of liability against them cannot be predicated on section 8-107 (5) (c) (1) and (2) of the Administrative Code, as alleged in plaintiff's second cause of action.

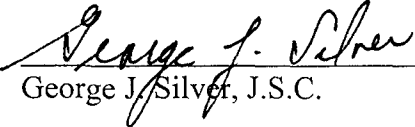
<sup>2</sup> 23 Manhattan and Singer would also not be entitled to common law indemnification if City Connections and Baruh engaged in discriminatory conduct as independent contractors since an employer may be liable for such conduct only if it had actual knowledge of and acquiesced in the conduct (Administrative Code § 8-107 (13) (c)). Such knowledge and acquiescence would constitute wrongdoing on the part of 23 Manhattan and Singer.

Accordingly, it is hereby

ORDERED that City Connections Realty, Inc. and Randy Baruh's motion to dismiss the cross-claim of defendants 23 Manhattan Valley North, LLC and Baruch Singer is denied; and it is further

ORDERED that movants are to serve a copy of this order, with notice of entry, upon all parties within 20 days of entry.

Dated: **OCT 17 2013**  
New York County

  
George J. Silver, J.S.C.

**HON. GEORGE J. SILVER**

**FILED**  
**OCT 22 2013**  
COUNTY CLERK'S OFFICE  
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