

<b>Meier v Douglas Elliman Realty LLC</b>
2013 NY Slip Op 33433(U)
November 19, 2013
Supreme Court, New York County
Docket Number: 111046/09
Judge: Paul Wooten
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## SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN  
JusticePART 7MICHAEL MEIER,

Plaintiff,

INDEX NO. 111046/09

-against-

MOTION SEQ. NO. 007DOUGLAS ELLIMAN REALTY LLC, d/b/a  
PRUDENTIAL DOUGLAS ELLIMAN REAL ESTATE,  
LENNY DANIEL SPORN, MEIR MICKEY ROTH, and  
ROTH SPORN GROUP, LLC.,  
Defendants.

The following papers, numbered 1 to , were read on this motion by plaintiff for summary judgment.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits...

Answering Affidavits — Exhibits (Memo)

Replying Affidavits (Reply Memo)

PAPERS NUMBERED

**FILED**

DEC 02 2013

Cross-Motion: ☒ Yes ☐ No**NEW YORK  
COUNTY CLERK'S OFFICE**

Motion sequence numbers 007 and 008 are consolidated for purposes of disposition.

The plaintiff Michael Meier (Meier) moves for summary judgment, pursuant to CPLR 3212, for judgment on the first, fifth, and sixth causes of action contained in the complaint, and dismissing the first counterclaim (motion sequence 007).

The defendant Douglas Elliman Realty LLC d/b/a Prudential Douglas Elliman Real Estate (Douglas Elliman) moves: pursuant to CPLR 3212, for an order granting summary judgment dismissing the first, second, third, seventh, eighth, and ninth, causes of action contained in the complaint; and pursuant to 22 NYCRR 130-1.1 for an order directing Meier to pay Douglas Elliman's costs, including attorney's fees (motion sequence 008).

## BACKGROUND

Meier is a real estate salesperson and Douglas Elliman is a real estate company. The defendants Meir Mickey Roth (Roth) and Lenny Daniel Sporn (Sporn) are real estate salespersons. The defendant Roth Sporn Group, LLC (Roth Sporn Group), is the entity through which Roth and Sporn currently operate their business.

Meier, and Roth and Sporn, worked together as a sales team for Douglas Elliman. Meier left Douglas Elliman on July 24, 2009. Although the second amended complaint pleads an action to recover the sum of \$91,237.50 reflecting two real estate transactions, Meier's motion papers allege that he is owed the sum of \$150,651.00 as damages for breach of a contract to pay, or split, real estate brokerage commissions, involving 11 separate transactions made by the team.

The second amended complaint sets forth a total of nine causes of action. The first, second and third causes of action asserted against Douglas Elliman are for breach of contract, a permanent injunction, and unjust enrichment. The fourth cause of action, asserted against Roth Sporn Group, is for unjust enrichment. The fifth and sixth causes of action, asserted against Roth and Sporn are for breach of contract and unjust enrichment. The seventh cause of action, asserted against Douglas Elliman, Roth, Sporn, and Roth Sporn Group, is for conversion. The eighth cause of action, also asserted against Douglas Elliman, Roth, Sporn, and Roth Sporn Group is for trover. The ninth, and final cause of action (against Douglas Elliman, Roth, Sporn, and Roth Sporn Group) is for punitive damages.

Sporn, Roth, and Roth Sporn Groups' second amended answers set forth a first counterclaim seeking to recover damages in the sum of \$3,718,000.00 for Meier's alleged conversion of a database of real property listings. It is alleged that the database was a trade secret. Douglas Elliman's second amended answer also pleads a first counterclaim for conversion of the database. However, Douglas Elliman and Meier have entered into a

stipulation settling that aspect of the case, as between them, by Meier returning the database to Douglas Elliman.

In support of his motion, and in opposition to Douglas Elliman's motion, Meier proffers that it is undisputed that Meier and Douglas Elliman, were parties to an agreement dated July 10, 2006, pursuant to which Douglas Elliman was obligated to pay Meier commissions in accordance with a commission schedule. It is also undisputed, Meier states, that Roth, Sporn, and Meier signed an agreement dated October 31, 2006, to pay Meier 55% of the commission for any transaction that he generated. As such, Douglas Elliman, Sporn, and Roth are liable for breach of contract, and Sporn and Roth have been unjustly enriched at Meier's expense. Meier further proffers that the counterclaim should be dismissed as a matter of law because the information in the database is mostly publicly available.

In opposition to Meier's motion, Sporn, Roth, and Roth Sporn Group argue that there are two material issues of fact. The first issue is in regards to what Meier's responsibilities were to the team that entitled him to his split. The second issue is whether Meier violated his responsibilities when he absconded with a valuable database.

In support of its motion, and in opposition to Meier's motion, Douglas Elliman makes the following arguments. Pursuant to Douglas Elliman's policy manual, incorporated by reference into the agreement between Meier and Douglas Elliman, when an agent is a member of a team, all of the commissions earned by that agent are attributed to the team, and not the individual agent. The individual agent forfeits his or her individual financial relationship with Douglas Elliman, in order to form one entity which collectively earns a larger commission split. It is further argued that although Roth and Sporn failed to give Meier his share of commissions, Douglas Elliman was only obligated to send a single commission check to the team.

In reply, Meier argues that Douglas Elliman knew that when it sent commission checks to the team, that Meier would not receive his share.

## STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Smalls v AJI Indus. Inc.*, 10 NY3d 733, 735 [2008]). Once a *prima facie* showing has been made, however, “the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution” (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; see also *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212[b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (see *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (see *Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (see *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

## DISCUSSION

Meier's motion for summary judgment on the first cause of action against the defendant Douglas Elliman, and Douglas Elliman's motion for summary judgment dismissing the first, second, and third causes of action, are both denied. Triable issues of material fact exist,

including whether Douglas Elliman knew when it sent the checks to the team that Meier would not receive his share, and whether Douglas Elliman breached its agreement with Meier when it sent the checks to the team with knowledge of the dispute between Meier and the team.

Furthermore, there is an issue as to whether Douglas Elliman breached the implied covenant of good faith by acting in a manner that would deprive Meier of the right to receive the benefits under their agreement.

Meier's motion for summary judgment on the fifth cause of action for breach of contract against the defendants Roth and Sporn is granted. There are no triable issues of fact as to Meier's present entitlement to payment. Meier is entitled to enforce the agreement dated October 31, 2006 for the payment of his commissions. Roth and Sporn, on the other hand, are unable to point to a contractual provision obligating Meier to turn over the database to them. Rather, by the terms of Douglas Elliman's policy manual, the database is owned by Douglas Elliman, and in any event, has been returned, and is no longer an impediment to Meier being paid his commissions. Furthermore, two of the eleven transactions (for which Meier is owed \$91,237.50) closed weeks before Meier left the team, and took with him the database.

Finally, contrary to Roth and Sporn's assertion, there is no issue of fact concerning Meier's responsibilities to the team that entitled him to his split. On the contrary, the agreement dated October 31, 2006 among Meier, Roth and Sporn, clearly spells out each parties' responsibilities to the team.

Meier's motion for summary judgment on the sixth cause of action for unjust enrichment must be denied. Meier's unjust enrichment causes of action (third, fourth and sixth) against Douglas Elliman, Roth, Sporn, and Roth Sporn Group, must be dismissed, "there being an express contract governing the broker's right to a commission" (*SageGroupAssoc., Inc. v. Dominion Textile (USA)*, 244 AD2d 281, 282 [1st Dept 1997]).

Turning to Douglas Elliman's motion, as discussed above, there are triable issues of

material fact precluding dismissal of the first (breach of contract) and second (injunction) causes of action. Also discussed above, the third cause of action against Douglas Elliman for unjust enrichment must be dismissed as there exists a written contract.

The seventh cause of action for conversion and eighth cause of action for trover asserted against Douglas Elliman must be dismissed as academic. Additionally, there are no technical differences between trover and conversion (*see Thyroff v Nationwide Mut. Ins. Co.*, 8 NY3d 283, 288 [2007]). As discussed above, the database has been returned. The ninth cause of action for punitive damages, asserted against Douglas Elliman, must be dismissed as there is no basis for a claim of punitive damages. Douglas Elliman's conduct did not rise to the level of moral culpability to warrant punitive damages, and this action seeks to rectify an alleged private wrong, not one involving the public at large (*Marinaccio v Town of Clarence*, 20 NY3d 506 [2013]).

Finally, turning to the discrepancy in the amount of money sought between the second amended complaint (\$91,237.50) and the amount alleged in Meier's motion papers (\$150,651.00), it is well settled that summary judgment may be awarded on "unpleaded cause[s] of action if the proof supports such cause and if the opposing part[ies] have not been misled to [their] prejudice" (*Rubenstein v Rosenthal*, 140 AD2d 156, 158 [1st Dept 1988], citing *Costello Assoc. v Standard Metals Corp.*, 99 AD2d 227, 229 [1st Dept 1984]). "As with a trial, the court may deem the pleadings amended to conform to the proof" (*Weinstock v Handler*, 254 AD2d 165, 166 [1st Dept 1998]).

In this case, Meier alleges sufficient facts in the second amended complaint to place the defendants on notice of possible claims arising from additional subsequent real estate sales transactions, and he raised that theory of liability in support of his motion. The defendants Roth and Sporn had an opportunity in their opposition papers to address the merits of the alleged new claims, and they have failed to do so (*Boyle v Marsh & McLennan Cos., Inc.*, 50 AD3d

1587 [4th Dept 2008]). Since there is no showing of prejudice, and the proof submitted is sufficient, the second amended complaint is deemed amended to conform to the proof.

### CONCLUSION

Accordingly, it is

ORDERED that the plaintiff Michael Meier's motion for summary judgment (motion sequence 007) is granted to the extent of granting partial summary judgment in favor of plaintiff and against defendants Lenny Daniel Sporn, Meir Mickey Roth and Roth Sporn Group, LLC, as follows:

1. Plaintiff is granted judgment on the fifth cause of action in the amount of \$150,651.00, together with interest at the rate of 9 % per annum from the date of July 31, 2009, until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs, the first and second causes of action are severed, and the Clerk is directed to enter judgment accordingly;

2. The issue of the defendant Douglas Elliman Realty LLC d/b/a Prudential Douglas Elliman Real Estate's liability to plaintiff on the first and second causes of action shall be determined at the trial herein;

3. The first counterclaims (for conversion) set forth in the defendants' second amended answers are dismissed; and it is further,

ORDERED that the action shall continue as to the first and second causes of action against Douglas Elliman Realty LLC d/b/a Prudential Douglas Elliman Real Estate; and it is further

ORDERED that the defendant Douglas Elliman Realty LLC d/b/a Prudential Douglas Elliman Real Estate's motion for summary judgment (motion sequence 008) is granted to the extent that the third (unjust enrichment), fourth (unjust enrichment), sixth (unjust enrichment),



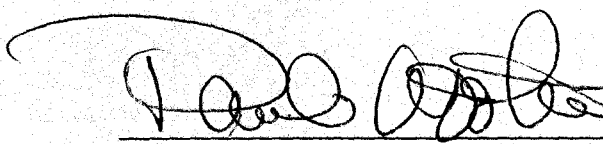
seventh (conversion), eighth (trover), and ninth (punitive damages) causes of action are dismissed; and it is further

ORDERED that counsel for defendant Douglas Elliman Realty LLC d/b/a Prudential Douglas Elliman Real Estate is directed to serve a copy of this Order with Notice of Entry upon all parties and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

M jji

Dated: 11/19/13

  
Paul Wooten J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION  
Check if appropriate: ☐ DO NOT POST

**FILED**  
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