

Reverse and Remand; Opinion Filed May 2, 2018.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-17-00920-CV

**JOHN SHEPARD, Appellant
V.
MQ PROSPER RETAIL, LLC AND GAMBIT REALTY & INVESTMENTS, INC.,
Appellees**

**On Appeal from the 193rd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-16-15823**

MEMORANDUM OPINION

Before Justices Francis, Myers, and Stoddart
Opinion by Justice Myers

John Shepard appeals the judgment in favor of MQ Prosper Retail, LLC and Gambit Realty & Investments, Inc. The trial court granted appellees' motion for summary judgment on their claim against Shepard and awarded them damages of \$380,000. Shepard brings four issues on appeal contending the trial court erred by granting appellees' motion for summary judgment because there were genuine issues of material fact concerning whether (1) the payments Shepard received were for real estate brokerage services, (2) appellees were aggrieved parties having standing to bring suit, and (3) Shepard acted as a real estate broker or was paid real estate commissions for a real estate transaction. Shepard also contends (4) the trial court erred by granting appellees' objections to Shepard's summary judgment evidence. We reverse the trial court's judgment and remand for further proceedings.

BACKGROUND

John Shepard and Donald Silverman are involved in commercial real estate. Shepard is a licensed real estate sales associate in Florida, but he does not have a real estate license in Texas. Silverman is a real estate developer in Texas and Florida. They met at a Florida convention in 2012. In April 2013, Shepard came to Dallas and contacted Silverman to renew his acquaintance with him. They met for drinks and discussed real estate developments in Texas. During the conversation, Silverman mentioned that he was interested in purchasing a large tract of land in Prosper, Texas owned by former Dallas Cowboys football player Deion Sanders. Shepard said he knew Sanders, had his telephone number, and could get in touch with him. Shepard called Sanders, and that phone call led to Sanders agreeing to sell his home.¹

On May 13, 2013, Sanders signed a contract to sell his property to “MQ Realty, LLC or assigns” for \$19 million. The contract called for Sanders to pay a three-percent commission to “Gambit Realty,” the broker for MQ Realty. When the sale closed, MQ Realty transferred the property to MQ Prosper Retail LLC (“Prosper Retail”). Prosper Retail’s manager was MQ Prosper Preston LLC (“Prosper Preston”), whose purpose was to cause Prosper Retail to “operate, improve, develop,” etc. the Sanders property. Shepard was a member of Prosper Preston. At some point, Shepard was made a “Senior Vice President & Director of Acquisitions/Florida & Partner” for MQ Development Partners.

On September 4, 2014, Shepard and Silverman (as manager of the MQ entities) signed a memorandum agreement. In the agreement, the MQ entities agreed to pay Shepard commissions for the acquisition, sale, and leasing of property. The agreement also provided that Shepard would be paid an “Acquisition Fee” concerning the Sanders property. According to the agreement, at the

¹ The evidence is disputed concerning the telephone call. Shepard said he was the only one who spoke to Sanders. Silverman said Shepard placed the call and then “put me on the telephone with Sanders.”

time of the acquisition of the property, Shepard would be paid “\$250,000 (from the Seller) and \$125,000 (from Buyer).” Silverman stated in his affidavit that Prosper Realty paid Shepard \$255,000 on August 29, 2014 and Gambit Realty paid Shepard \$125,000 on September 9, 2014, “all as real estate commissions related to the Sanders transaction.”

In 2016, appellees brought suit against Shepard alleging he violated the Texas Real Estate License Act by accepting real estate brokerage commissions when he was not a licensed real estate broker in Texas. *See* TEX. OCC. CODE ANN. § 1101.754 (West Supp. 2017). They sought as damages the \$380,000 they paid him plus twice that amount as a statutory penalty under the Act. *See id.* Appellees also alleged Shepard committed fraud and negligent misrepresentation. Appellees moved for summary judgment on their claim under the Texas Real Estate License Act, which the trial court granted, awarding them \$380,000 actual damages but not awarding the additional penalty amounts. Appellees then nonsuited their remaining claims.

STANDARD OF REVIEW

The standard for reviewing a traditional summary judgment is well established. *See Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985); *McAfee, Inc. v. Agilysys, Inc.*, 316 S.W.3d 820, 825 (Tex. App.—Dallas 2010, no pet.). The movant has the burden of showing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). In deciding whether a disputed material fact issue exists precluding summary judgment, evidence favorable to the nonmovant will be taken as true. *Nixon*, 690 S.W.2d at 549; *In re Estate of Berry*, 280 S.W.3d 478, 480 (Tex. App.—Dallas 2009, no pet.). Every reasonable inference must be indulged in favor of the nonmovant and any doubts resolved in its favor. *City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005). We review a summary judgment de novo to determine whether a party’s right to prevail is established as a matter of law. *Dickey v. Club Corp.*, 12 S.W.3d 172, 175 (Tex. App.—Dallas 2000, pet. denied).

REAL ESTATE BROKERS

In his first issue, Shepard contends the trial court erred by granting appellees' motion for summary judgment because appellees failed to prove as a matter of law that the payments Shepard received were for real estate brokerage services.

The Texas Real Estate License Act provides, "A person who receives a commission or other consideration as a result of acting as a broker or sales agent without holding a license or certificate of registration under this chapter is liable to an aggrieved person for a penalty of not less than the amount of money received or more than three times the amount of money received."

OCC. § 1101.754(a). The Act defines "Broker" as:

a person who, in exchange for a commission or other valuable consideration or with the expectation of receiving a commission or other valuable consideration, performs for another person one of the following acts: . . .

(vii) aids or offers or attempts to aid in locating or obtaining real estate for purchase or lease;

(viii) procures or assists in procuring a prospect to effect the sale, exchange, or lease of real estate;

(ix) procures or assists in procuring property to effect the sale, exchange, or lease of real estate

Id. § 1101.002(1)(A)(vii)–(ix) (West Supp. 2017). The Act also states, "A person is not engaged in real estate brokerage, regardless of whether the person is licensed under this chapter, based solely on engaging in the following activities: . . . sponsoring, promoting, or managing, or otherwise participating as a principal, partner, or financial manager of, an investment in real estate" *Id.* § 1101.004(b)(2) (West Supp. 2017).

To prevail on their cause of action, appellees had to establish as a matter of law that Shepard received the payments "as a result of acting as a broker or sales agent" and that he did not hold a broker's license. Shepard conceded he did not have a real estate license in Texas. We must

determine whether appellees conclusively established the \$380,000 payments to Shepard were “as a result of acting as a broker.”

Silverman testified in his affidavit that appellees’ payments to Shepard were “real estate commissions related to the Sanders transaction.” Shepard controverted that statement by stating in his affidavit, “the \$380,000 was not paid to me by Silverman or his business entities as a commission on any transaction.” Shepard also stated in his affidavit,

Any compensation that I received was due to my role as a “principal” in the project because of my direct or indirect equity ownership interest in the Sanders property and my work on the development of that property as a “principal” and member of the development team. Silverman expressly told me that I was receiving compensation because I was a “principal” and not as a broker or sales agent.

Appellees also assert Shepard stated in his deposition he received the money for providing access to Sanders. Shepard testified in his deposition as follows:

Q. But ultimately what you’re saying is the money you got was for you helping to procure the access and deal to Mr. Sanders and that real estate transaction?

. . . .

A. I would say that that was the agreement that Don Silverman had made with me for being a partner in that transaction.

Q. That’s what you brought to the table, though, right, the access to Mr. Sanders?

A. That’s what he had asked for. . . . Yes.

Q. Did you do anything else, other than act as someone who brought access to the owner of real property, as part of what you did to earn any money out of that deal?

A. I met with Don and he was going to describe and help me learn the commercial process of how retail developments were done and he showed me all the engineering work that was being done in order to do this project, and I helped facilitate, with Don, on all the steps necessary during that process.

This testimony does not conclusively establish that Shepard received the \$380,000 for providing access to Sanders. Instead, Shepard’s providing access had to do with him “being a partner in that transaction” and that some of the money was paid to Shepard for meeting with Silverman to “learn the commercial process of how retail developments were done” and to “help[] facilitate, with

At Acquisition:	\$125,000 (from Buyer)
Upon commencement of Construction:	\$75,000 (from loan)
During Construction:	\$50,000 (from loan)

Even if the agreement and the exhibit show Shepard was to be paid a fee of \$375,000 at acquisition of the Sanders property,² it does not describe the actions by Shepard, if any, for which he was to be paid the fee. Therefore, the agreement does not show Shepard was paid \$375,000 (or \$380,000) for an action listed in section 1101.002(1) that would show he was acting as a broker.

Even if the evidence is uncontroverted that Shepard took an action constituting acting as a broker and that appellees paid Shepard \$380,000, appellees were not entitled to summary judgment on their cause of action under section 1101.754 unless they proved as a matter of law that he received the payments “as a result of acting as a broker.” Instead, a genuine issue of material fact remains regarding whether the payments were the result of Shepard’s acting as a broker or whether they were the result of other acts. We sustain Shepard’s first issue. We need not address Shepard’s remaining issues.

CONCLUSION

We reverse the trial court’s judgment and remand the cause for further proceedings.

/Lana Myers/
LANA MYERS
JUSTICE

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² The exhibit states the amount of the acquisition fee, and the memorandum agreement states it was for “the specific transaction of the Prosper, Texas deal,” but neither the exhibit nor the memorandum agreement states the acquisition fee was to be paid to Shepard, nor do they state the acts by him that resulted in the promise to pay the fee. Other parts of the memorandum agreement state that specific percentages of commissions for other transactions were to be paid “to Shepard.”



**Court of Appeals
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JUDGMENT

JOHN SHEPARD, Appellant

No. 05-17-00920-CV V.

MQ PROSPER RETAIL, LLC AND
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Opinion delivered by Justice Myers.
Justices Francis and Stoddart participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and this cause is **REMANDED** to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that appellant JOHN SHEPARD recover his costs of this appeal from appellees MQ PROSPER RETAIL, LLC AND GAMBIT REALTY & INVESTMENTS, INC.

Judgment entered this 2nd day of May, 2018.