

**Paradigm Funding Group LLC v Hirsch Wolf and Co.  
LLC**

2007 NY Slip Op 30948(U)

April 10, 2007

Supreme Court, New York County

Docket Number: 0108651/2006

Judge: Marcy S. Friedman

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PRESENT: **Hon. Marcy S. Friedman**  
*Justice*

PART **57**

Index Number : 108651/2006  
PARADIGM FUNDING GROUP LLC  
vs  
HIRSCH WOLF & COMPANY LLC  
Sequence Number : 001  
DISMISS ACTION

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

The following papers:

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1, 1a  
2  
3

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*is determined as per accompanying decision/order dated 4/10/07*

**FILED**  
APR 27 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 4/10/07

*M S*  
**Hon. Marcy S. Friedman** *s.c.*

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

FOR THE FOLLOWING REASON(S):

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY - - PART 57

PARADIGM FUNDING GROUP LLC,

*Plaintiff(s),*

*against*

HIRSCH WOLF AND COMPANY LLC,

*Defendant(s).*

Index No.: 108651/06

DECISION/ORDER

**FILED**  
APR 27 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Present: HON. MARCY FRIEDMAN  
Justice, Supreme Court

In this action, plaintiff sues to recover a real estate brokerage commission allegedly due pursuant to an oral agreement in connection with the sale of eleven properties in Brooklyn, New York. The complaint asserts five causes of action for breach of an oral agreement, breach of an "implied agreement," breach of an "implied contract," unjust enrichment, and loss of reputation and good standing in the real estate community. Defendant makes this pre-answer motion to dismiss pursuant to CPLR 3211(a)(7), (5) and (10).

It is well settled that "[o]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (Leon v Martinez, 84 NY2d 83, 87-88 [1994]. See 511 W. 232<sup>nd</sup> Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].) Further, the court may consider a plaintiff's opposing affidavits to amplify the pleadings. (Rovello v Orofino Realty Co., 40 NY2d 633, 635 [1976]; Eastern Consol. Prop., Inc. v Lucas, 285 AD2d 421, 422 [1<sup>st</sup> Dept 2001].)

Here, with respect to the first four causes of action, for breach of an oral agreement,

implied agreement, implied contract, and unjust enrichment, the complaint alleges that plaintiff and defendant entered into an agreement for plaintiff to procure a buyer to purchase the properties at issue and defendant to pay plaintiff a reasonable and customary broker's commission for such procurement. The complaint also alleges that plaintiff procured a ready, willing and able buyer for the properties and that defendant chose not to sell to the buyer procured by plaintiff.

To the extent that defendant claims that there was no agreement for a broker's fee and no fee was due to plaintiff, this argument is based largely on the facts underlying the claim and not on the facial sufficiency of the complaint. Given the parties' sharp dispute as to the facts, the court declines to convert the motion to one for summary judgment on this issue.

Defendant also claims that no agreement can be found as a matter of law because there was no meeting of the minds on an essential term of the agreement – that is, defendant contends that an agreement for reasonable and customary fees is not sufficiently specific to constitute an agreement as to the price term. As defendant appears to acknowledge on the reply, the law is to the contrary. “[A] price term may be sufficiently definite if the amount can be determined objectively without the need for new expressions by the parties; a method for reducing uncertainty to certainty might, for example, be \* \* \* ascertained by reference to an extrinsic event, commercial practice or trade usage.” (Cobble Hill Nursing Home, Inc. v Henry & Warren Corp., 74 NY2d 475, 483 [1989].) In the context of brokerage fees, fair and reasonable compensation may be ascertained based on “the customary rate in the community at the time when the services are rendered.” (Kaplon-Belo Assocs., Inc. v Cheng, 258 AD2d 622 [2d Dept 1999].) On the instant motion, defendant does not demonstrate as a matter of law that reasonable and customary fees cannot be determined by reference to customary industry practice

at the time of the transaction.

As to defendant's assertion that it is an improper party because it did not own the properties at issue, "it has long been held that a party does not have to own the Property in question to employ a broker and to be liable for that broker's commissions." (Sholom & Zuckerbrot Realty Corp. v Citibank, N.A., 205 AD2d 336, 338 [1<sup>st</sup> Dept 1994].)

The court has considered defendant's remaining bases for dismissal of the first cause of action for breach of an oral agreement, and finds them to be without merit. The court accordingly holds that the allegations of this cause of action are sufficient to survive this pre-answer motion to dismiss.

Plaintiff's causes of action for implied agreement and quantum meruit may also be maintained at the pleading stage. The general rule is that "where there is an express contract no recovery can be had on a theory of implied contract." (Hohenberg Co. v Iwai NY, Inc., 6 AD2d 575, 578 [1<sup>st</sup> Dept 1958].) However, where there is a dispute as to the existence or application of a contract, a plaintiff generally is permitted to plead alternate theories. (See Frank v Sobel, \_\_\_ AD3d \_\_\_, 2007 NY Slip Op 1798, 2007 NY App Div Lexis 2536 [1<sup>st</sup> Dept]; Wilmoth v Sandor, 259 AD2d 252, 254 [1<sup>st</sup> Dept 1999].)

Plaintiff's cause of action for implied contract will, however, be dismissed as duplicative of the cause of action for implied agreement. The fifth cause of action for damage to reputation will also be dismissed. This cause of action alleges that plaintiff's reputation in the real estate community was damaged by defendant's failure to compensate plaintiff for the services it provided to defendant. As this claim arises out of the parties' alleged agreement, it is not actionable as an independent tort. (See Dember Constr. Corp. v Staten Isl. Mall, 56 AD2d 768 [1<sup>st</sup> Dept 1977]. See also MacArthur Constr. Corp. v Coleman, 91 AD2d 906 [1<sup>st</sup> Dept 1983].) Nor,

in any event, has plaintiff alleged sufficient facts to establish a "loss of reputation in the real estate community" as a result of any of defendant's acts.

The court has considered defendant's arguments based on CPLR 3211(a)(5) (statute of frauds) and (10) (failure to name indispensable party) and finds them without merit. Contrary to defendant's assertion, General Obligations Law § 5-701(a)(10) expressly excludes contracts to pay compensation to licensed real estate brokers or real estate salespersons from the requirement that the agreement be in writing. Nor does General Obligations Law § 5-701(a)(1) apply to contracts which are capable of being performed within one year. Defendant does not claim that the agreement could not be performed within one year. Defendant also fails to demonstrate that there are indispensable parties which cannot be joined or which otherwise warrant dismissal under CPLR 3211(a)(10).

It is accordingly ORDERED that defendant's motion is granted only to the extent that the third cause of action for implied contract and the fifth cause of action for loss of reputation are dismissed; and it is further

ORDERED that the remaining claims are severed and shall continue; and it is further

ORDERED that the parties shall appear for a preliminary conference in Part 57 of this Court on May 3, 2007 at 11:30 a.m.

This constitutes the decision and order of the court.

Dated: New York, New York  
April 10, 2007

**FILED**  
APR 27 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

  
MARCY FRIEDMAN, J.S.C.