

**Soho Holding Corp. v 413 W. Broadway Corp.**

2007 NY Slip Op 32169(U)

July 18, 2007

Supreme Court, New York County

Docket Number: 0604505/2005

Judge: Bernard J. Fried

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BERNARD J. FRIED  
*Justice*

PART 60

SOHO Holdings  
PLAINTIFF

INDEX NO. #604505-2005

MOTION DATE #001

MOTION SEQ. NO. \_\_\_\_\_

- v -

413 West Broadway

MOTION CAL. NO. \_\_\_\_\_

DEFENDANT

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

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED


Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the attached memorandum decision.

SO ORDERED

**FILED**  
JUL 19 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 7/18/07

Bernard J. Fried  
**BERNARD J. FRIED**  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 60

-----x  
SOHO HOLDING CORP. d/b/a TARTER STATS  
REALTY, GRUBB & ELLIS NEW YORK, INC.,  
WINNICK REALTY GROUP, and JEFFREY  
NISSANI doing business as JSN PROPERTIES,

Index No.: 604505/05

Plaintiffs,

Motion Seq. No.: 001

-against-

413 WEST BROADWAY CORP.,

Defendant.  
-----x

**FILED**  
JUL 19 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

APPEARANCES:

For Plaintiffs:

For Defendant:

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New York, New York 10022  
(Lionel A. Barasch, Esq.)

Edward Gasthalter, P.C.  
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New York, New York 10022  
(Edward Gasthalter, Esq.)

FRIED, J.:

In this action, plaintiffs Soho Holding Corp. d/b/a Tarter Stats Realty (TSR), Grubb & Ellis New York, Inc. (G&E), Winnick Realty Group (WRG), and Jeffrey Nissani, doing business as JSN Properties (JSN) (collectively, plaintiffs), seek to recover for real estate brokerage commissions purportedly owed by defendant 413 West Broadway Corp. (defendant, or 413 Corp.).

Plaintiffs now move, *inter alia*, for summary judgment in their favor. For the reasons stated below, plaintiffs' motion is granted.

Defendant is the owner of the building located at 413-415 West Broadway, New York County (the building). Lene Kochendorfer (Kochendorfer) is the president and sole stockholder of defendant (Kochendorfer Examination Before Trial (EBT) Transcript (Tr.), annexed as Exh 1 to Motion, at 5, l. 18; at 6, l. 17). It is undisputed that plaintiffs are licensed real estate brokers who procured three separate tenants, viz., U&I Import, Inc. (U&I), BAM Architecture Studio, PLLC (BAM) and Iced Media (collectively, the tenants), that entered into three separate leases with defendant. TSR served as a broker in connection with procuring all of the tenants, WRG, G&E, and JSN served as co-brokers in connection with procuring, respectively, U&I, BAM, and Iced Media.

It is well-established that, “[t]o obtain summary judgment it is necessary that the movant establish his cause of action or defense ‘sufficiently to warrant the court as a matter of law in directing judgment’ in his favor.” *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 (1979) quoting CPLR 3212 (b). Thus, the movant has the initial burden of proving his/her entitlement to summary judgment. *Winegrad v New York University Medical Center*, 64 NY2d 851(1985). Once such proof has been offered, in order to defeat a summary judgment motion, the opposing party must “show facts sufficient to require a trial of any issue of fact.” CPLR 3212 (b); *Alvarez v Prospect Hospital*, 68 NY2d 320 (1986); *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, *supra*. The party “opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact.” *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

#### The U&I Transaction

TSR and WRG now seek the remaining \$113,540.42 in outstanding payments due - \$55,104.42 for TSR and \$58,346.00 for WRG. They assert, in relevant part, that defendant's admitted receipt of the U&I commission bill, its failure to protest same and its partial payment thereunder render this invoice an account stated.

Defendant's opposition to this motion is premised solely on Kochendorfer's "bare bones" affidavit in opposition. Kochendorfer's affidavit merely highlights the absence of any "signed commission agreements," and asserts that such agreements do not exist because she "refused to sign the fee arrangements when they were tendered . . . at the time that [the plaintiffs] started searching for tenants because [she] did not agree to the amounts request[ed], . . . the percentages they sought, and . . . the immediate payment of commission[s] as they demanded" (Kochendorfer Aff. In Opposition, at 1-2). Said affidavit contains no information that even attempts to controvert the specific factual assertions underlying TSR and WRG's account stated claim. Instead, defendant asserts that there are outstanding issues of fact as to the reasonableness and fairness of plaintiffs' brokerage commission schedules.

"An account stated has long been defined as an 'account balanced and rendered, with an assent to the balance express or implied; so that the demand is essentially the same as if a promissory note had been given for the balance' " *Morrison Cohen Singer & Weinstein, L.L.P. v Ackerman*, 280 AD2d 355 (1<sup>st</sup> Dept 2001), quoting *Interman Indus. Prods., Ltd. v R.S.M. Electron Power*, 37 NY2d 151, 153, (1975) quoting *Volkering v De Graaf*, 81 NY 268, 270 (1880). An agreement to pay may be implied if a party receiving a statement of account keeps it without objecting to it within a reasonable time because the party receiving

In opposing a motion for summary judgment, after a prima facie showing has been made, a defendant must come forward with matters of an evidentiary nature to demonstrate the presence of triable issues. CPLR 3212 (b); *Alvarez v Prospect Hospital*, 68 NY2d 320 (1986); *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d at 1065. “It is incumbent upon a defendant who opposes a motion for summary judgment to assemble, lay bare and reveal his proofs, in order to show that the matters set up in his answer are real and are capable of being established upon a trial.” *Di Sabato v Soffes*, 9 AD2d 297, 301 (1<sup>st</sup> Dept 1959).

As defendant did not protest following its receipt of the U&I commission bill and, in fact, made a partial payment thereunder, defendant’s contentions that Kochendorfer never consented to the commission bill rates and/or the payment schedule detailed in the commission bill are insufficient to defeat plaintiffs’ motion for summary judgment.

At her EBT, Kochendorfer asserted, on behalf of defendant, that she sought a 60-month payout on the commissions due for all three leases (Tr., at 52). It is undisputed that no such agreement was reached. “The general rule is that a broker who ‘produces a person ready and willing to enter into a contract upon his employer’s terms . . . has earned his commissions [internal citations omitted].’ ” *Feinberg Bros. Agency, Inc. v Berted Realty Co., Inc.*, 70 NY2d 828 (1987). In the absence of some provision to the contrary, broker’s commissions become due and payable upon the completion of the services the broker undertook to perform (11 NY Jur 2d, Broker’s Right to Compensation and Reimbursement § 111). And, Kochendorfer acknowledged that she only sought said payout after the U&I lease was executed. (Tr., at 56 l. 19 - 57, l. 7).

Equally unavailing is defendant’s assertion, also made at Kochendorfer’s EBT, that

because U&I sought to terminate its lease after only one year in the building, it is entitled to a reduction in the commission owed. Absent an agreement to the contrary, a broker's right to a commission "is not dependent upon performance of the real estate contract." *Mecox Realty Corp. v Rose*, 202 AD2d 404 (2<sup>nd</sup> Dept 1994).

Defendant has presented absolutely no evidence that controverts the facts presented by TSR and WRG in support of their account stated claim. In the face of TSR and WRG's presentation of a prima facie case, defendant has failed to demonstrate the existence of a material issue of triable fact. Accordingly, TSR and WRG are granted summary judgment on their account stated claims for commissions arising from the U&I transaction. *See also Shea & Gould v Burr*, 194 AD2d 369, 370-71 (1<sup>st</sup> Dept 1993) (after protesting amounts charged, defendant made partial payment resulting in account stated, even though defendant never executed or returned the promissory note embodying payment terms).

#### BAM

By a lease dated September 12, 2005 (BAM Lease, annexed as Exh 9 to Motion), defendant and BAM entered into a lease for "Unit 2 South" of the Building, for a term of five years with rent commencing at \$81,000.00 per year with annual increases reaching \$91,166.29 in the final year. The BAM Lease contains the following provision: "(e)ach party represents and warrants that it has not dealt with any broker in connection with this [ ]lease other than Grub & Ellis and Tarter Stats . . . . Owner shall be responsible for all commissions earned by such brokers . . ." (BAM Lease, ¶ 61.01).

TSR and G&E seek a total commission of \$24,657.33 in connection with the BAM transaction consisting of a "full commission" of \$16,438.22 for G&E and a "50% override

never agreed to by defendant and are unreasonable.

In addition, the lack of specificity on these points is no bar to a cause of action. As brokerage agreements are not subject to the statute of frauds, they are often oral. And, it is usually sufficient that there be employment and performance, with no inference that the broker is an unpaid volunteer (11 NY Jur 2d, Broker's Right to Compensation and Reimbursements § 111). In the instant action, it is undisputed that these essential elements have been met.

Even assuming, arguendo, that as it relates to the Iced Media transaction, TSR and JSN may recover their commissions solely on the basis of quantum meruit, they are still entitled to the recovery sought. Quantum meruit rests upon a showing of:

(1) good faith performance, (2) acceptance of service, (3) expectation of compensation, and (4) reasonable value. *Martin H. Bauman Associates, Inc. v H & M Intl. Transport, Inc.*, 171 AD2d 479 (1<sup>st</sup> Dept 1991). Defendant's sole issue in this regard relates to the "reasonable value" of TSR and JSN's services. These brokers have established that in two other brokerage transactions in the building, viz., U&I and BAM, defendant tacitly agreed to the broker's commission schedules, leading to the ineluctable conclusion that, under these given circumstances, the fees charge were reasonable. In opposition to TSR and JSN's motion, defendant has offered Kochendorfer's affidavit, that asserts, in a conclusory manner, that the requested commissions are neither fair or reasonable. Under these facts and circumstances, the commissions sought by TRS and JSN, which amount to a full commission at TSR's rates to be divided equally by both brokers, are found to be both fair and reasonable.

Defendant having raised no further objection to the amounts sought by plaintiffs


and/or the calculations of the commissions as detailed in plaintiffs' supporting papers, it is hereby

ORDERED that the branch of plaintiffs' motion which seeks an award of summary judgment in favor of TSR and WRG as to the first cause of action in the complaint for \$113,451.00, together with interest from April 6, 2005, is granted; and it is further

ORDERED that the branch of plaintiffs' motion which seeks an award of summary judgment in favor of TSR and G&E as to the third cause of action in the complaint for \$24,657.33, together with interest from July 15, 2005, is granted; and it is further

ORDERED that the branch of plaintiffs' motion which seeks an award of summary judgment in favor of TSR and JSN as to the fifth cause of action in the complaint for \$18,822.22 together with interest from June 27, 2005, is granted.

Dated: New York, New York  
July 18, 2007

Enter:   
J.S.C.

**BERNARD J. FRIED**

**FILED**  
JUL 19 2007  
NEW YORK  
COUNTY CLERK'S OFFICE