

**JDF Realty, Inc. v Sartiano**

2010 NY Slip Op 32080(U)

July 29, 2010

Supreme Court, New York County

Docket Number: 117897/2009

Judge: Saliann Scarpulla

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

PRESENT: Sartiano SC Appoint  
Justice

PART 19

Index Number : 117897/2009  
JDF REALTY, INC.  
vs.  
SARTIANO, SCOTT  
SEQUENCE NUMBER : 002  
SUMMARY JUDGMENT

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

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

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

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

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion is

~~motion and cross-motion are~~ decided in accordance with accompanying memorandum decision.

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 115).

Dated: 9/30/10

Saliann Scarpulla  
SALIANN SCARPULLA J.S.C.

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

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X  
JDF REALTY, INC.,

Plaintiff,

- against-

SCOTT SARTIANO, RICHARD AKIVA,  
and 244 WEST 14<sup>TH</sup> LLC,

Defendants.

-----X

For Plaintiff:  
Wender Law Group, PLLC  
One Penn Plaza, Suite 2527  
New York, NY 10119

For Defendants:  
McCue, Sussmane & Zapfel, P.C.  
521 Fifth Avenue, 28<sup>th</sup> Floor  
New York NY 10175

Index No.: 117897/2009

Submission Date: 6/23/2010

**DECISION AND ORDER**

Papers considered in review of motion for summary judgment:

- Notice of Motion ..... 1
- Aff in Support ..... 2
- Mem of Law ..... 3
- Aff in Opp ..... 4
- Mem of Law ..... 5
- Reply Mem of Law ..... 6

**UNFILED JUDGMENT**  
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HON. SALIANN SCARPULLA, J.:

In this action for breach of contract and unjust enrichment to recover a real estate commission, plaintiff JDF Realty, Inc. ("JDF") moves pursuant to CPLR 3212(e)(1) for summary judgment on its breach of contract claim against defendant 244 West 14<sup>th</sup> LLC ("244 LLC").<sup>1</sup>

<sup>1</sup>JDF also moves, to sever its claims against 244 LLC from its claims against defendants Scott Sartiano ("Sartiano") and Richard Akiva ("Akiva"). However, on June 23, 2010 this Court granted Sartiano's and Akiva's motion to dismiss, making this portion of JDF's motion moot.

JDF, a real estate broker, commenced this action on around December 18, 2009, by service of a summons and complaint. JDF alleges in its complaint that through Benjamin Kahr, a licensed real estate salesperson working with JDF, it introduced Sartiano to a commercial space located at 244-6 West 14<sup>th</sup> Street, New York, NY (the “premises”) which was available for rent. JDF further alleges that at the request of defendants, it negotiated the terms of a lease on defendants’ behalf, including submitting defendants’ offer to the premises’ managing agent. JDF further alleges that the draft and final offer sheets, which were provided to Sartiano for review and approval, included a provision that JDF would receive commission equal to one month’s rent from the landlord and two months’ rent from the defendants. On or about May 28, 2009, 244 LLC entered into a lease for the premises. JDF does not assert that it entered into a written brokerage agreement with any of the defendants.

On or around February 9, 2010, 244 LLC answered the complaint, denying all material allegations. 244 LLC also asserted two affirmative defenses: (1) that the causes of action are barred by the statute of frauds and/or the parole evidence rule; and (2) that the complaint fails to state a cause of action and is not sufficiently particular to put the defendants on notice.

Defendants Sartiano and Akiva moved to dismiss the action as against them. On June 23, 2010, the Court granted their motion to dismiss, leaving 244 LLC as the only remaining defendant.

JDF argues that it is entitled to summary judgment on its breach of contract claims against 244 LLC because Sartiano acted as 244 LLC's agent to procure a lease for the premises, and 244 LLC then entered into a lease for the premises which JDF had introduced to it. While JDF does not specifically allege that the parties entered into a either a written or oral agreement for 244 LLC to pay JDF's commission, JDF argues that the written communications between the parties reflect the "documented agreement of the parties, including 244 LLC, to pay JDF its two months' commission upon execution of the lease. . . ."

In opposition to JDF's motion, 244 LLC argues that there was no oral contract between it and JDF. Further, 244 LLC notes that this motion is premature, as discovery has not yet begun in this action.

### **Discussion**

A party moving for summary judgment must make a *prima facie* showing that it is entitled to judgment as a matter of law. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986). Once a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

Through its submissions, JDF has met its initial burden of showing the existence of an oral agreement with 244 LLC for payment of brokerage fees. "As a practical matter,

for all but the simplest of transactions, the burden of establishing the terms of the verbal contact – which falls to the proponent – presents a formidable obstacle to its enforcement. Before a court will impose [a] contractual obligation, it must ascertain that a contract was made and that its terms are definite.” *Charles Hyman, Inc. v. Olden Industries, Inc.*, 227 A.D. 2d 270, 275 (1<sup>st</sup> Dep’t 1996) (internal citations omitted).

JDF asserts that the parties agreed that upon execution of a lease for the premises, defendants would pay JDF a commission in the amount of two months’ rent, and the landlord would pay commission to JDF in the amount of one month’s rent. In support of this claim, JDF submits both email exchanges between Sartiano and Kahr, as well as draft offer sheets prepared by JDF and submitted to the landlord.

Turning to the email messages first, JDF submits a string of email messages, beginning with an April 15, 2009 message from Kahr in which he notifies Sartiano that the premises are available for lease, as well as the terms at which the premises are being presented. This email message provides in pertinent part, that “The asking rent is \$40,000 per month, the key is \$100,000 and the tenant needs to pay 2 months of rent to JDF for the commission.” In response, Sartiano’s email message reads, “Only 100K key money? Let’s look at it. Would have to file for a new license.” In the entire exchange submitted, including a total fourteen (14) messages exchanged back and forth between Sartiano and Kahr discussing visiting the premises and negotiating rental terms with the landlord, there is not another mention of JDF’s commission by either party.

JDF also submits the offer sheets it submitted on defendants' behalf to the landlord as evidence of the agreement that 244 LLC would pay two months' commission upon execution of a lease for the premises. JDF submits three draft offer sheets,<sup>2</sup> each of which contain the following provision: "Brokerage: JDF will receive one month by owner and two months by Messrs. Sartiano and Akiva." Kahr states in his affidavit that Sartiano reviewed and approved the drafts, and the email messages submitted along with the offer sheets do not show Sartiano objecting to that term contained in the offer sheets.

Kahr's affidavit, along with the supporting documents, support JDF's claim that there was an agreement for 244 LLC to pay JDF two months' commission upon execution of the lease. However, in opposition, 244 LLC has submitted sufficient evidence to raise an issue of material fact as to whether, at the end of the negotiations, the parties actually and finally agreed upon 244 LLC paying JDF a commission.

244 LLC submits an affidavit by Sartiano, as Vice Present of 244 LLC, in which Sartiano states that at the time JDF contacted him about the availability of the premises, it was "unclear . . . whether [JDF] was representing tenant or landlord," and that it was his understanding that the terms of JDF's commission were one subject to ongoing negotiations. Sartiano also states that he "never agreed orally or in writing that 244 LLC

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<sup>2</sup> JDF asserts that it submits two draft offer sheets, and one final offer sheet. However, none if the three offer sheets submitted are signed or show any other indicia of finality.

\* 7]

would be responsible for payment of any commissions to Plaintiff and never agreed on the amount of commission, if any, that plaintiff would be paid.”

Further, Sartiano states in his affirmation that JDF’s submissions are incomplete. In particular, he notes that JDF fails to include the terms of the final offer sheet, which was accepted by the landlord. Sartiano states that the terms of the final, accepted offer were reflected in the executed lease, and provided, in pertinent part: “Brokerage Commission: All paid by Landlord.” This is the provision also contained in ¶48 of the lease.

Sartiano’s affidavit and the accompanying documents raise an issue of fact as to whether, at the end of the negotiations for the lease, the parties ever agreed that 244 LLC would pay a brokerage commission to JDF, and on what terms. *See Coldwell Banker Hunk Kennedy v. Wolfson*, 69 A.D.3d 492 (1<sup>st</sup> Dep’t 2010) (plaintiff’s motion for summary judgment on commission denied where defendant’s affidavit raises issues of fact as to “whether e-mail exchanges relied on by plaintiff . . . were intended by the parties to constitute entire brokerage agreement” and whether parties had an oral agreement). “Where, as here, there are conflicting contentions between the parties as to the existence or terms of an oral agreement, issues of credibility arise which it is not the court’s role to resolve on a motion for summary judgment.” *Thoranco Real Estate II, LLC v. Lalwani*, 2008 NY Slip Op 32614U, 3 (Sup. Ct. N.Y. Co. 2008) (citing *Mirel v. RMJ Sec. Corp.*, 205 A.D.2d 388 (1<sup>st</sup> Dep’t 1994)).

In accordance with the foregoing, it is hereby

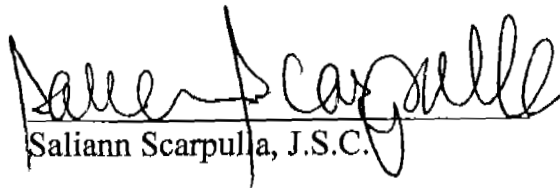
ORDERED that the motion by plaintiff JDF Realty, Inc. for summary judgment on its complaint against defendant 244 west 14<sup>th</sup> LLC is denied; and it is further

ORDERED that the parties are to appear before this court for a preliminary conference on October 13, 2010 at 2:15 pm.

This constitutes the decision, order and judgment of the Court.

Dated: New York, New York  
July 29, 2010

ENTER:

  
Saliann Scarpulla, J.S.C.

**UNFILED JUDGMENT**  
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