

<b>Douglas Elliman LLC v 21-45 44th Dr. LLC</b>
2013 NY Slip Op 30798(U)
April 17, 2013
Supreme Court, New York County
Docket Number: 112636/2011
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

DOUGLAS ELLIMAN LLC,  
Plaintiff,

Index No.: 112636/2011

Motion Date: 07/13/12

- v -

Motion Seq. No.: 01

21-45 44<sup>th</sup> DRIVE LLC and THE INDUSTRY LIC  
CONDOMINIUM as successor in interest,  
Defendants.

Motion Cal. No.: \_\_\_\_\_

The following papers, numbered 1 to 3 were read on this motion for summary judgment.

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

PAPERS NUMBERED	
_____	1
_____	2
_____	3

**UNFILED JUDGMENT**

Cross-Motion:  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 1403).

Upon the foregoing papers, The court shall deny defendants' motion for summary judgment dismissing the complaint and grant defendants' motion seeking a declaration of the parties' rights under Section 15(b) of an Exclusive Sales Agreement dated May 9, 2006 (the "Agreement").

This dispute between the plaintiff real estate brokerage firm and defendant condominium concerns the commissions due and owing as well as reimbursable advances payable under an exclusive brokerage sales agreement between the parties dated May 9, 2006 (the "Agreement"). In relevant part the Agreement provided that

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  
 SETTLE/SUBMIT ORDER/JUDG.

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

during the one-year term of the Agreement the plaintiff would market and sell residential units in the condominium and the condominium agreed to provide the plaintiff with space for use as an on-site sales office. As to the allocation of the expense for this office, Section 15 (b) of the parties' agreement provides

DE will be responsible to select the personnel to staff the Sales Office and shall be responsible for all the costs of staffing the Sales Office. However, Owner shall advance the costs of any salaried personnel (salary plus benefits) up to a maximum \$15,000 at the Sales Office on a monthly basis. Such advances shall be fully reimbursed by DE from the Commission paid by Owner at the closing, at a rate of twenty percent (20%) percent [sic] of DE's portion (particularly in the case of when a co-broker is involved) of each Commission payable to DE until Owner is fully reimbursed.

It is undisputed that based upon the clause above defendants made advances to the plaintiff.

Defendants are withholding commission payments to the plaintiff on the grounds that plaintiff breached the Agreement by failing to perform thereunder and that no commission is due plaintiff until the advances defendants made for the costs of the sales office are recouped in full. Plaintiff argues that it is due all earned commissions less twenty-percent for the reimbursement of the sales office advances.

Defendants now move for summary judgment dismissing plaintiff's claims and for judgment on their counter-claims seeking to retain plaintiff's commissions in reimbursement of the advances made by defendants.

Defendants' argument that they are entitled to full reimbursement of their advances and that plaintiff is entitled only to the net commissions thereafter is contrary to the express terms of the agreement. As stated by the Court with respect to the applicable principles of contract interpretation

It has long been the rule of this State that parol evidence is inadmissible to vary or modify the terms of a written instrument even though ambiguous. Where it is ambiguous, oral testimony is admissible but only for the purpose of explaining an ambiguity appearing on the face of the writing. Such explanatory testimony, however, must be consistent with the contract, otherwise it is inadmissible. Where the contract is complete and unambiguous it is to be construed as it is written because it is not the real intent but the intent expressed or apparent in the writing which is sought.

Goldstein v Frances Emblems, Inc., 269 AD 345, 347 (1<sup>st</sup> Dept 1945) (citations and internal quotations omitted).

To the extent that the Agreement states that the defendants are to be "fully reimbursed," that clause is qualified by the limitation that reimbursement is limited to twenty percent of plaintiff's commissions until reimbursement is made in full. The limitation is plainly spelled out in the language of the agreement and is enforceable. See e.g., Goldstein, supra at 348 (plain language of contract limits commissions payable). Accordingly, defendants are entitled to be reimbursed for the advances at a rate of twenty percent of the commissions set forth in the Agreement until the advances are repaid but are not

entitled to otherwise withhold commissions due under the Agreement.

Therefore with respect to defendants' second counterclaim seeking declaratory relief, the court shall declare that under Section 15(b) of the Agreement, defendants are entitled to reimbursement for the advances at a rate of twenty percent of the commissions until the advances are repaid but is not entitled to otherwise withhold commissions due under the Agreement. The court denies defendants' motion to dismiss plaintiff's complaint. No party has moved with respect to plaintiff's claims. Nor have defendants come forward with admissible proof establishing prima facie their first counterclaim alleging that plaintiff breached the Agreement. In short, there are still issues of fact as to whether and which party may have breached the terms of the Agreement.

Accordingly, it is

ORDERED that defendants' motion for summary judgment on its first counterclaim for breach of contract is denied; and it is further

ORDERED and DECLARED that with respect to defendants' motion for summary judgment on its second counterclaim, pursuant Section 15(b) of the Agreement defendants are entitled to reimbursement for the advances at a rate of twenty percent of the commissions

until the advances are repaid but is not entitled to otherwise withhold commissions due under the Agreement; and it is further

ORDERED that the parties shall appear for a preliminary conference on May 7, 2013 at the Courthouse, Room 103, 71 Thomas Street, New York, NY 10013 at 9:30 A.M.

This is the decision and order of the court.

Dated: April 17, 2013

ENTER:

~~Handwritten signature~~  
**DEBRA A. JAMES** J.S.C.

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