

**Open Impact Real Estate LLC v Arthur JoyJack  
Holdings LH LLC**

2024 NY Slip Op 33370(U)

September 24, 2024

Supreme Court, New York County

Docket Number: Index No. 653192/2022

Judge: Lori S. Sattler

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. LORI S. SATTLER PART 02M**

*Justice*

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**INDEX NO. 653192/2022**

OPEN IMPACT REAL ESTATE LLC

**MOTION DATE 05/03/2024**

Plaintiff,

**MOTION SEQ. NO. 001**

- v -

ARTHUR JOYJACK HOLDINGS LH LLC,

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

Plaintiff OPEN Impact Real Estate LLC (“Plaintiff”) moves for summary judgment in this action alleging breach of contract. Defendant Arthur JoyJack Holdings LH LLC (“Defendant”) opposes the motion.

In 2021, Defendant sold a property located on Arthur Avenue in the Bronx to non-party Zeta Charter Schools, Inc. (“Zeta”). Non-party Transwestern Commercial Services LLC (“Transwestern”), a real estate broker, represented Zeta. According to an affidavit of Lindsay Ornstein (“Ornstein”), the Transwestern broker handling the deal, Defendant and Zeta executed a purchase and sale agreement, omnibus agreement, and related documents on April 8, 2020 (NYSCEF Doc. No. 23 at 4, “Ornstein Affidavit”). Defendant and Transwestern also entered into a commission agreement on that date, which provides in part:

[I]f (i) a definitive agreement for the sale, lease, leasehold condominium or similar transaction (the “Transaction”), including without limitation, a purchase and sale agreement, lease or omnibus agreement (such agreement, a “PSA”), is fully executed and unconditionally delivered by and between Arthur JoyJack Holdings LH LLC and/or any its affiliates or successors (“Landlord”), and Tenant and/or any of its affiliates (including, without limitation, Zeta Charter Schools- New York City) with respect to the above Premises; . . . then Transwestern

Commercial Services New York, L.L.C. d/b/a Transwestern (“Broker”) will have earned one full commission in the amount of \$1,219,159.65.

(NYSCEF Doc. No. 27, “Commission Agreement”). Per this agreement, Defendant paid \$304,789.91 to Transwestern at the time of the signing, leaving a balance of \$914,369.74.

Prior to closing, Ornstein left Transwestern and started her own firm, Plaintiff in this action. It was agreed that Transwestern would assign its rights to the unpaid commissions to Plaintiff. On November 17, 2021, Plaintiff, Defendant, and Transwestern signed an Amendment to Commission Agreement (NYSCEF Doc. No. 28, “Amendment”), which memorialized the assignment of unpaid commissions to Plaintiff and reduced them by \$230,000, from \$914,369.74 to \$684,269.73. At Defendant’s deposition, Jack Wolcowitz, a member of Defendant, testified that this reduction stemmed from a change in circumstance relating to a build out Defendant was doing for Zeta prior to closing (NYSCEF Doc. No. 31 at 28, “Wolcowitz EBT”). The payment schedule was modified so as to be made in three installments: \$74,789.91 ten business days after closing pursuant to the parties’ purchase and sale agreement, \$304,789.91 on January 1, 2022, and \$304,789.91 on June 1, 2022 (Amendment ¶ 3).

The closing occurred on December 29, 2021 and the deed was recorded on January 24, 2022 (NYSCEF Doc. No. 30). Defendant did not make any of the three remaining commission payments, and on September 2, 2022, Plaintiff commenced this action asserting one cause of action for breach of contract. The parties completed discovery and this motion followed.

On a motion for summary judgment, the moving party “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Should the movant make its prima facie showing, the burden shifts to the opposing party, who must then produce admissible evidentiary proof to establish that material issues of fact exist (*Alvarez v*

*Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “However, bald, conclusory assertions or speculation and ‘[a] shadowy semblance of an issue’ are insufficient to defeat summary judgment” (*Stonehill Capital Mgt. LLC v Bank of the W.*, 28 NY3d 439, 448 [2016], quoting *S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]).

A cause of action for breach of contract requires a plaintiff to demonstrate “the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages” (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010], citing *Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478, 479 [1st Dept 2007]). “When the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and the parties’ reasonable expectations” (*112 West 34th St. Assoc., LLC v 112-1400 Trade Properties LLC*, 95 AD3d 529, 531 [1st Dept 2012], quoting *Franklin Apt. Assoc., Inc. v Westbrook Tenants Corp.*, 43 AD3d 860, 861 [2d Dept 2007]).

By submitting the Ornstein Affidavit, Commission Agreement and Amendment, and the deed of sale (NYSCEF Doc. Nos. 23, 27, 28, 30), Plaintiff has demonstrated that the parties had an agreement that Defendant would pay Plaintiff a commission in connection with the sale of the property from Defendant to Zeta, that the sale occurred, and that Defendant failed to pay the amounts owed, resulting in damages. Plaintiff has therefore made a prima facie showing of entitlement to summary judgment.

Defendant concedes that the closing occurred, but maintains the remaining sums are not owed because condition (i) of the Commission Agreement was not met, i.e., there was no definitive agreement for the sale, lease, or leasehold transaction which was fully executed and unconditionally delivered. At his deposition, Wolcowitz testified that this condition “refers to the delivery of the space that [Defendant] had to deliver to Zeta which was on its own not exactly

what was discussed at the time this agreement was signed. And at the time, the actual delivery that they requested from what we were presented they want was completely not the same” (Wolcowitz EBT at 25-26). In its opposition papers, Defendant argues that the fact that the closing between Defendant and Zeta took place does not prove that the condition (i) was met and maintains that the trier of fact should determine whether the documents signed by Defendant and Zeta satisfy the condition. However, Defendant does not attach the purchase and sale agreement, or any other agreement signed by Defendant and Zeta, does not explain why these agreements do not satisfy condition (i), and does not elaborate on Wolcowitz’s testimony.

Without presenting the Court with the documents it argues fail to satisfy condition (i), Defendant’s only evidence presented to refute Plaintiff’s prima facie case is Wolcowitz’s testimony that the condition was not met. His testimony amounts merely to a conclusory assertion that at best raises a shadowy semblance of an issue (see Stonehill Capital Mgt., 28 NY3d at 448), particularly in light of the fact that the sale did occur, and is insufficient to raise a material issue of fact. Accordingly, it is hereby:

ORDERED that Plaintiff’s motion for summary judgment on its cause of action for breach of contract is granted against Defendant; and it is further

ORDERED that Plaintiff is entitled to judgment against Defendant in the amount of \$684,269.73 together with interest from the date of entry of the judgment. The Clerk shall enter judgment accordingly.

This constitutes the Decision and Order of the Court.

9/24/2024  
DATE

  
LORI S. SATTLER, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE