

SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

HON. IRA B. WARSHAWSKY,

Justice.

TRIAL/IAS PART 8

SAM FUTERSAK a/k/a SAM OLSHIN,

Plaintiff,

**INDEX NO.: 004825/09
MOTION DATE: 1/4/10
MOTION SEQUENCE: 01, 02**

-against-

**SHELDON PERL a/k/a SHLOIME PERL and
700 ROCKAWAY, LLC,**

Defendants.

The following papers read on this motion:

Defendant's Rule 19(a) Statement	1
Defendant's Motion for Summary Judgment, Affirmation & Exhibits Annexed	2
Plaintiff Rule 19(a) Counterstatement	3
Plaintiff's Cross-Motion for Summary Judgment, Affirmation in Support of Cross-Motion and Opposition to Motion & Exhibits Annexed	4
Defendant's Affirmation in Opposition to Cross-Motion and in Further Support of Motion & Exhibits Annexed	5
Plaintiff's Reply Affirmation & Exhibits Annexed	6

PRELIMINARY STATEMENT

Defendants move for summary judgment dismissing Plaintiff's Complaint in motion sequence no. 1. Defendants argue that Plaintiff provided Defendants with unlicensed real estate brokering services; therefore, section 442-d of the Real Property Law precludes Plaintiff's recovery.

Plaintiff cross-moves for summary judgment on its causes of action for breach of contract and unjust enrichment in motion sequence no. 2. Plaintiff argues that pursuant to a written agreement with Defendants, he is entitled a percentage of the post-expense profits of Defendants' sale of a parcel of commercial real estate for which Plaintiff previously located for Defendants as their real estate finder.

BACKGROUND

Underlying this dispute was the Plaintiff's desire to purchase a parcel of commercial real estate, but not having access to sufficient capital, sought to include another party. Prior to the disputed transaction, Plaintiff Futersak knew Defendant Perl. Plaintiff also knew that Perl had sufficient capital to make the subject purchase. Futersak discussed the prospect of making a purchase and Perl was interested. According to Futersak, the intention of the parties was for him to find and locate a willing seller of real estate, for Perl's corporation to make the purchase and then Futersak would retain an ownership interest. Futersak avers that his job was to find a willing seller to whom he could introduce Defendant, but that his involvement went no further and was limited to that of a finder and not a broker. According to Perl, Futersak's role was that of Defendants' "sales agent" and real estate broker.

Futersak alleges that prior to January 6, 2004, he introduced Perl to a prospective seller of real estate and that he and Perl agreed that he would retain a 15 percent interest in a subsequent sale by Perl. Perl's corporation was to purchase property located at 700 Rockaway Turnpike, Lawrence, New York, which is the only real property underlying this dispute. According to Futersak, the parties agreed that in lieu of Futersak contributing 15 percent of the down payment and maintaining a 15 percent interest in the ownership by Defendants, Futersak would only maintain a 15 percent interest in any profit realized from a subsequent sale of the property by Defendants. According to Perl, it was never the parties' intention for Futersak to have an ownership interest in the purchased real estate and that Plaintiff never paid any money toward the subject transaction at any time.

Around March 2004, Perl formed 700 Rockaway, LLC to purchase the subject property. Defendants purchased the property on March 19, 2007, for \$3,600,000.00 and sold the property 10 days later on March 29, 2007, for \$4,700,000.00, realizing a gross profit of \$1,100,000.00. Pursuant to the terms of the written finder's agreement between the parties, Futersak was entitled to 15

percent of the \$1,100,000.00 gross profit, less expenses. Futersak's specifies damages at \$165,000.00. Futersak alleges that Perl concealed the fact that Defendants sold the property and realized a profit. He demanded payment, but Perl refused.

Perl acknowledges that the written agreement upon which Futersak relies calls for a payment to him of a finder's fee based upon the sale of the subject property. A copy of this agreement was annexed to Defendants' moving papers. Perl said that Futersak was not a licensed real estate broker at any time he rendered services to Defendants regarding the subject property.

Futersak states that he performed certain finding services, which included making Perl aware of the availability of the subject property for sale and presenting some background information related to the property. He says that the intention of the parties was for him to be a part-owner of the property along with Defendants, but that his ownership interest was limited to receiving a 15 percent share of any post-expense profit realized from the subsequent sale of the property by Defendants. He further notes that the written agreement was prepared by Perl. Despite the agreement's description of his entitlement to something as a finder's fee, Futersak states that the rest of the agreement reflects his understanding at the time he signed it that he would be a partner in the purchase of the subject property. Futersak also says that the agreement provides that in lieu of contributing 15 percent of the down payment for the purchase of the property, he would instead receive 15 percent of the net profit realized from a subsequent sale.

Perl states that when contemplating the written agreement with Futersak, he agreed to pay Futersak 15 percent of the post-expense profit of a subsequent sale of the property as a "finder's fee" if Futersak acted as his "sales agent" in obtaining the subject property. According to Perl, Futersak carried out negotiations on his behalf with the seller for the purchase of the property. Complaining ostensibly that Plaintiff violated a fiduciary duty to him, Perl states that Futersak failed to notify Perl of a *lis pendens* on the property. Perl implies that this was a surprise even though he claims to having just spent considerable time and resources performing his own due diligence, prior to the purchase. He fails to explain how his extensive due diligence failed to reveal the existence of the purported *lis pendens*.

Perl made reference to a copy of the Contract of Sale for Defendants' purchase of the property and asserts that this document conclusively establishes that Futersak's services were that

of a broker and not a finder. Futersak was not a party to the Contract of Sale. Section 14.01 of that contract states: "If no broker is specified in Schedule D, the parties acknowledge that this contract was brought about by *direct negotiation between Seller and Purchaser and that neither Seller nor Purchaser knows of any broker entitled to a commission in connection with this transaction*" [emphasis added]. In paragraph 15 of Schedule D, specific reference is made to section 14.01 and it reads "Broker, if any (§14.01): NONE" [capital letters in original]. Paragraph 16 of Schedule D reads "Party to pay broker's commission (§14.01): *10", apparently making reference to paragraph 10 of the Notes to Contract annexed to the contract of sale. Paragraph 10 of the Notes to Contract states: "Buyer shall pay the entire fee owed to Samuel Olshen [sic] or Buyer shall provide Seller with a release from Samuel Olshen [sic] in the form annexed hereto."

Standard for Summary Judgment

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). When presented with a motion for summary judgment, the function of a court is "not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of material issues of fact" (*Quinn v Krumland*, 179 AD2d 448, 449-450 [1st Dept 1992]); see also *S.J. Capelin Assoc., Inc. v. Globe Mfg. Corp.*, 34 NY2d 338, 343 [1974]).

To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Corp.*, 3 NY2d 395, 404 [1957]). It is a drastic remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue (*Moskowitz v Garlock*, 23 AD2d 943 [3d Dept 1965]).

The evidence will be considered in a light most favorable to the opposing party (*Weiss v Garfield*, 21 AD2d 156 [3d Dept 1964]). The proof submitted in opposition will be accepted as true and all reasonable inferences drawn in favor of the opposing party (*Tortorello v Carlin*, 260 AD2d 201, 206 [1st Dept 2003]). The opposing party must come forward with an affidavit of an individual with personal knowledge, or with an attorney's affirmation to which appended material in admissible form, and the failure to do so may lead the Court to believe that there is no triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Defendants' Motion for Summary Judgment

Defendants' motion for summary judgment dismissing Plaintiff's Complaint makes one argument relying upon section 442-d of the Real Property Law, which reads in part:

No person...shall bring or maintain an action in any court of this state for the recovery of compensation for services rendered, and is, in the buying, selling, exchanging, leasing, renting or negotiating a loan upon any real estate without alleging and proving that such person was a duly licensed real estate broker or real estate salesman on the date when the alleged cause of action arose.

A plain-meaning reading of the statute reveals that a real estate broker's license is a prerequisite to recover compensation for real estate brokerage services. Thus, the key question is whether section 442-d applies to the services rendered by Futersak in the underlying transaction. If section 442-d applies to the underlying transaction here, the statute forecloses Futersak's recovery (*Berg v Wilpon*, 271 AD2d 629 [2d Dept 2000]). But for the application of section 442-d, Defendants' motion fails. Because Defendants argue that Futersak acted as a broker and Futersak argues that he was merely a finder, the question of whether section 442-d applies turns on the distinctions, if any, between a broker and a finder. If such distinctions exist, the Court must ascertain what criteria will determine whether the disputed services fall under the ambit of a broker or a finder.

Section 442-d of the Real Property Law is subject to the definitions established in section 440 (1) of the same article. Section 440 (1) defines a real estate broker as anyone who "lists for sale, sells . . . exchanges, buys or rents, or offers or attempts to negotiate a sale . . . or interest in real estate" (*Panarello v Segalla*, 6 AD3d 515, 516 [2d Dept 2004], *appeal dismissed* 4 NY3d 739 [2004], *appeal den* 6 NY3d 706 [2006]). Guided by the language of section 440 (1), the Court must determine whether Plaintiff listed for sale, sold, exchanged, bought, rented, offered to negotiate a sale, or attempted to negotiate a sale, or interest in real estate. As discussed *supra*, whether or not Plaintiff's activities come within the definition of section 440 (1) determines whether section 442-d applies to Plaintiff. In answering this question, the Court ostensibly endeavors to ascertain the differences between brokers and finders, and determine whether Plaintiff is a finder or a broker.

Distinguishing Brokers and Finders

While they perform some related functions, finders and brokers are different (*Northeast Gen. Corp. v Wellington Advertising*, 82 NY2d 158, 163 [1993]; 11 NY Jur 2d, Brokers § 3). New York courts distinguish between finders and brokers. Finders find potential buyers or sellers, stimulate interest and bring parties together, while brokers bring the parties to an agreement on particular terms (*Train v Ardshiel Associates, Inc.*, 635 F Supp. 274, 279 [SDNY 1986]). Distinguishing between a broker and finder involves an evaluation of the quality and quantity of services rendered (*Northeast Gen. Corp. v Wellington Advertising*, 82 NY2d at 163; 11 NY Jur 2d, Brokers § 3).

Quality and Quantity of Services

A broker is an agent who, for a commission or brokerage fee, bargains or carries on negotiations in behalf of his principal as an intermediary between the latter and third persons in transacting business relative to the acquisition of real property. (*Gerstein v 532 Broad Hollow Road Co.*, 75 AD2d 292, 296 [1st Dept 1980]; 11 NY Jur 2d, Brokers § 1). He acts as an intermediary between two parties in bringing about a contractual meeting of minds (*Polo v Lordi*, 261 NY 221, 224 [1933]).

Brokers must bring parties to a completed agreement, but finders have no such responsibility (*Northeast Gen. Corp. v Wellington Advertising*, 82 N.Y.2d at 163; 11 NY Jur 2d, Brokers § 3). That is because finders have far less involvement in the ultimate transaction quantitatively and qualitatively, and thus have significantly fewer and different responsibilities than brokers. *Id.* For example, finders may accomplish work in as little as two phone calls and, if the parties later conclude a deal, he is entitled to his commission (*Minichiello v Royal Bus. Funds Corp.*, 18 NY2d 521, 527 [1966], *cert denied* 389 US 820 [1967]). It is not necessary for a finder to literally bring the parties together—the introduction can consist of facilitating the exchange of information which results in a deal. (*Bankers Trust Co. v Publicker Indus., Inc.*, 641 F2d 1361, 1367 [2d Cir 1981]), citing *Minichiello v Royal Bus. Funds Corp.*, 18 NY2d at 527.

Finders must introduce and bring the parties together, but without any obligation or power to negotiate the transaction, in order to earn the finder's fee. (*Northeast Gen. Corp.* 82 N.Y.2d at 163, citing *Ames v Ideal Cement Co.*, 37 Misc 2d 883, 886 [Sup Ct, NY County 1962]). Significantly, following the finder's bringing together of interested parties, it is the parties who

themselves negotiate and consummate the transaction (*Ames v Ideal Cement Co.*, 37 Misc 2d at 886).

The services performed by finders may vary from case to case. *Id.* But their distinction from the status of brokers, if the circumstances of the particular case require such a distinction to be drawn, lies in their bringing the parties together with no involvement on their part in negotiating the price or any of the other terms of the transaction. *Id.* Finders are merely required to find, interest, introduce and bring parties together for a deal which they themselves negotiate and consummate, while a broker is required to bring the parties to a completed agreement (*FTC v Metropolitan Communications Corp.*, 1995 US Dist LEXIS 14083,*8-9 [SDNY 1995], citing *Ames v Ideal Cement Co.*, 37 Misc 2d at 886).

Fiduciary Duty

Although brokers perform that same introduction task, they must ordinarily also bring the parties to a completed agreement by negotiating on behalf of their principals (*Northeast Gen. Corp. v Wellington Advertising*, 82 NY2d at 163). By virtue of this responsibility to negotiate on behalf of their principal, brokers in New York, unlike finders, carry a fiduciary duty to act in the best and more involved interests of the principal. *Id.* ; 11 NY Jur 2d, Brokers §§ 3, 27).

However, where the relationship between two parties is such that one merely finds prospective business opportunities for the other in exchange for a finder's fee is not inherently one of trust and confidence. (*J.O.P. Consulting Group, L.L.C. v McCawley Precision Mach. Corp.*, 272 AD2d 82, 82 [1st Dept 2000]). A party who does no more than enter into an agreement to perform the services of a finder, such as introducing a party looking to buy real estate to certain sellers of same, does not enter into a fiduciary relationship with that person (*Trump v Corcoran Group*, 240 AD2d 159, 159 [1st Dept 1997]). Thus, where a plaintiff is not called upon by a defendant to carry on negotiations, that plaintiff is merely a finder and not a broker (*Simon v Electrospace Corp.*, 28 NY2d 136, 141 [1971]).

But, where a plaintiff engages in negotiations on behalf of his principal, he cannot evade the proscriptions of section 442-d by merely characterizing himself as something less than a fiduciary (*Horin v EMI Progressive Equities, Inc.*, 16 Misc 3d 1139[A], 2007 NY Slip Op 51749[U], *7 [Sup Ct, Kings County 2007] [plaintiffs argued that they were nothing more than finders but testified at

their depositions that they negotiated on behalf of defendant, brought about the meeting of the minds between the buyers and sellers, and sold the subject properties]; *see also Myles v Litas Investing Co.*, 152 AD2d 731 [2d Dept 1989]). The dispositive issue of fiduciary-like duty or no such duty is determined not by the nomenclature “finder” or “broker” or even “agent,” but instead by the services agreed to under the contract between the parties (*Northeast Gen. Corp. v Wellington Advertising*, 82 NY2d at 163).

Any question as to whether a plaintiff negotiated on behalf of his principal is a question of fact (*Seckendorff v Halsey, Stuart & Co.*, 229 AD 318, 320 [1st Dept 1930]).

Differences in Entitlement to Fee

There are also differences in how courts determine a broker’s or finder’s entitlement to his fee. Finders must demonstrate that the final deal which was carried through flowed directly from his introduction of the matter to be entitled to collect his fee (*Seckendorff v Halsey, Stuart & Co.*, 234 AD 61, 71 [1st Dept 1931], *rev’d on other grounds* 259 NY 353 [1932]; *cf. Bendell v De Dominicis*, 251 NY 305, 311 [1929] [brokerage commissions ordinarily become due when the broker produces to his principal a party ready, willing and able to purchase on the terms of sale authorized or accepted by such principal]). While a finder may be entitled to his fee in a special business situation for merely introducing and bringing the parties together to conduct their own negotiations, if that is his agreement with his principal, a licensed real estate broker, however, cannot recover unless he brings the parties to an agreement (*Lehman v Arlen Operating Co.*, 54 Misc 2d 372, 375 [Sup Ct, NY County 1967]).

Statutory Distinctions

The New York Legislature, like the courts, also distinguishes brokers from finders and treats them differently. New York’s Statute of Frauds applies to finders and their agreements to provide finding services, which means that finders must memorialize their agreements to find in writing to be enforceable (General Obligations Law § 5-701 [a] [10]; *see generally Minichiello v Royal Business Funds Corp.*, 18 NY2d 521 [1966]). But, “a duly licensed real estate broker or real estate salesman” is explicitly exempted from this writing requirement when contracting to provide brokering services (General Obligations Law § 5-701 [a] [10]).

