

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

CHARUPORN LYNN ROBINSON, )

Plaintiff, )

v. )

RE/MAX AVENUES, INC., )

a Delaware Corporation and )

KAREN S. KIMBLETON, )

an individual, )

Defendants. )

C.A. No. 07C-05-027 JTV

*Submitted: October 28, 2008*

*Decided: January 9, 2009*

Stephen B. Potter, Esq., Potter Carmine & Aaronson, Wilmington, Delaware.  
Attorney for Plaintiff.

Sean M. Lynn, Esq., Hudson, Jones, Jaywork & Fisher, Dover, Delaware.  
Attorney for Defendants.

*Upon Consideration of Plaintiff's  
Motion for Partial Summary Judgment*

**DENIED**

**VAUGHN, President Judge**

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## **ORDER**

Upon consideration of the plaintiff's Motion for Partial Summary Judgment, the defendants' opposition, and the record of the case, it appears that:

1. This case involves a dispute over real estate commissions between a real estate agent (plaintiff Charuporn Lynn Robinson), a real estate brokerage company, (defendant Re/Max Avenues, Inc.), and the owner of the brokerage company, (defendant Karen S. Kimberton). The plaintiff alleges breach of contract, conversion, and bad faith on the part of the defendants. She has filed a Motion for Partial Summary Judgment in which she seeks a judgment concerning her entitlement to commissions. If successful, her motion would leave the bad faith claim for resolution at trial.

2. The plaintiff was a licensed real estate agent for Re/Max. A written agreement between Re/Max and her, which was prepared but not signed when she started, styles her as an independent contractor. Defendant Karen Kimbleton is the owner of Re-Max. The written agreement provided that the plaintiff would be paid commissions where Re/Max received commissions as a result of her efforts. The plaintiff was an active sales agent with Re/Max for a little over a year. She then left to take a full-time job with the Delaware Department of Transportation. When she left, there were a number of pending sales in which the plaintiff had secured the contract while she was with Re/Max, but which had not yet gone to settlement. The commissions in dispute are ones which were collected by Re/Max at settlements which took place after the plaintiff left Re/Max and went with DELDOT, on contracts

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which she secured while she was with Re/Max. Re/Max did not pay any parts of the commissions on such sales to the plaintiff, it being the contention of Re/Max that the plaintiff is not entitled to any commissions on sales which settled after she left. The plaintiff contends she is entitled to commissions on such sales, on the grounds that the commissions were paid to Re/Max as a result of her efforts.

3. After the plaintiff left Re/Max, Ms. Kimbleton placed the plaintiff's real estate license with the Real Estate Commission and allegedly attempted to have it revoked. However, the license was re-instated with another broker within 30 days. The plaintiff contends the parties agreed that she would maintain her license with Re/Max after her departure and continue to receive commissions for the contracts which she secured but which went to settlement after she left. The defendants deny that any such agreement was made.

4. The relevant provision in the unsigned, written agreement, reads as follows:

Broker shall promptly pay to Contractor the difference between one hundred percent (100%) of all fees, commissions or other compensation received by Broker *as a result of the efforts of Contractor*, and (i) amounts, if any, not paid at closing and thus still due to other Sales Associates and/or competing Brokers and Agents (as defined below); and (ii) past due financial obligations owed by Contractor pursuant to Paragraph 5. (emphasis added).

This provision, in conjunction with paragraph five, established the method by which commissions were calculated. The precise amount of commissions in dispute is not

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an issue to this motion.

5. There is no clause which expressly addresses the parties' rights in commissions from sales where the plaintiff secured the contract, but the settlement occurred after she left. The operative language under the unsigned, written agreement would seem to be the italicized language above, namely, that she was entitled to commissions which the broker received "as a result of the efforts of the Contractor."

6. The plaintiff contends that she is entitled to judgment on her claim for commissions on the grounds that commissions paid on contracts she secured were received as a result of her efforts, without regard to whether the settlements occurred while she was still there or after she left. As mentioned, she also contends that the defendants and she agreed, when she left, that she would be entitled to the commissions received after she left on contracts which she secured, a contention denied by defendants. She further contends that there was no contractual requirement that she be with Re/Max on the date of closing in order to receive commissions generated as a result of her efforts.<sup>1</sup>

7. The defendants contend that there is a genuine issue of material fact regarding the terms under which the plaintiff was entitled to receive commissions. They contend that the unsigned, written agreement does not govern the parties' relationship; that although drafted, it was not agreed that it would establish the terms

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<sup>1</sup> As a further line of argument, the plaintiff's Supplemental brief states: "The Defendants [sic] conduct should be judged against Delaware Code § 841(b), as it simply constitutes the crime of theft." Supplemental Brief, at 11. Analyzing this breach of contract case under a criminal statute, it seems to me, is not part of any proper analysis.

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of the parties' legal relationship; that there were other aspects of the parties' relationship while the plaintiff was there that did not conform to the written agreement; that it was company policy that an agent had to attend settlement in order to be entitled to a commission; and that Ms. Kimbleton had to expend various efforts after the plaintiff left to get the contracts in dispute to settlement, and that the commissions were, therefore, not earned as a result of the plaintiff's efforts.

8. Summary judgment should be granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.<sup>2</sup> The moving party bears the burden of establishing the non-existence of material issues of fact.<sup>3</sup> If a motion is properly supported, the burden shifts to the non-moving party to establish the existence of material issues of fact.<sup>4</sup> In considering the motion, the facts must be viewed in the light most favorable to the non-moving party.<sup>5</sup> Summary judgment is inappropriate "when the record reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances."<sup>6</sup>

9. It is well established in Delaware that the interpretation of a contract is a

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<sup>2</sup> Super. Ct. Civ. R. 56(c).

<sup>3</sup> *Gray v. Allstate Ins. Co.*, 2007 WL 1334563, at \*1 (Del. Super. May 2, 2007).

<sup>4</sup> *Id.*

<sup>5</sup> *Pierce v. Int'l Ins. Co. of Ill.*, 671 A.2d 1361, 1363 (Del. 1996).

<sup>6</sup> *Mumford & Miller Concrete, Inc. v. New Castle County*, 2007 WL 404771, at \*1 (Del. Super. Jan 31, 2007).

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matter of law for the judge.<sup>7</sup> However, deciding what the terms of a contract are is a question of fact.<sup>8</sup> Additionally, the application of a term of a contract to disputed facts is a question of fact.

10. Here, I do not interpret the clause “commissions received . . . as a result of the efforts of contractor” as necessarily establishing that the plaintiff is entitled to full commissions on contracts which she secured but which went to settlement after she left. There may be some merit to the defendants’ contention that the commissions in issue, or some of them, were the result of the efforts of others to complete the sale after the plaintiff left, or some commissions may have been received in part due to the plaintiff’s efforts, and in part to the efforts of others. These points involve factual questions which must go to a jury. The plaintiff’s contention that when she left it was agreed that she would receive commissions on the sales in issue is a disputed fact. There is also some dispute as to whether facts outside the unsigned, written contract may be relevant to the plaintiff’s claim, such as the defendants’ alleged policy regarding an agent’s attending settlement. For these reasons, I think the plaintiff’s motion for partial summary judgment must be denied. I see no need to discuss the issues more fully in this order.

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<sup>7</sup> *Hursey Porter & Assocs. v. Bounds*, 1994 WL 762670, at \*4 (Del. Super. Dec. 2, 1994).

<sup>8</sup> *Capital Mgmt. Co. v. Brown* 813 A.2d 1094, 1097 (Del. 2002) (“The very terms of the contract, what they were, not what they meant, were at issue and were, therefore, properly submitted to the jury as a question of fact.”).

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11. Therefore, the plaintiff's motion for partial summary judgment is ***denied***.

**IT IS SO ORDERED.**

/s/ James T. Vaughn, Jr.  
President Judge

oc: Prothonotary  
cc: Order Distribution  
File