To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
COMMERCIAL DIVISION

Present: HON. ALAN D. SCHEINKMAN,
Justice.

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DOUGLAS ELLIMAN OF WESTCHESTER LLC,

Plaintiff,

-against-

LISA PERINI THEISS a/k/a/ LISA HOGAN, WILLIAM RAVEIS REAL ESTATE INC., and WILLIAM RAVEIS-NEW YORK, LLC,

Defendants.

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LISA PERINI THEISS a/k/a/ LISA HOGAN,

Counterclaim Plaintiff,

-against-

DOUGLAS ELLIMAN OF WESTCHESTER LLC and LAURA SCOTT,

Counterclaim Defendants.

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Index No.: 58059/2015
Motion Seq. Nos. 006,007
Motion Date: 10/27/17

DECISION & ORDER

Scheinkman, J.:

Defendant/Counterclaim Plaintiff Lisa Perini Theiss a/k/a Lisa Hogan ("Theiss") and Defendants William Raveis Real Estate Inc. and William Raveis-New York, LLC (the "Raveis Entities", collectively with Theiss "Defendants") move pursuant to CPLR 4404(a) and 5501(c) for an order: (a) setting aside the compensatory damages portions of the verdict herein and directing a new trial on damages unless Plaintiff/Counterclaim Defendant Douglas Elliman of Westchester LLC ("Elliman") stipulates to a reduction in the jury award by $1,575,000; (b) entry of judgment in favor of Defendants notwithstanding the verdict or directing a new trial with respect to

Elliman's cause of action for tortious interference with its relationships; (c) for entry of judgment notwithstanding the verdict as to punitive damages; and (d) entry of a judgment for Theiss on her counterclaim under Labor Law §198(1)-a (Seq. No. 6).

Elliman moves pursuant to CPLR 4404(a) for an order setting aside the verdict in favor of Theiss on the issue of *quantum meruit* and directing judgment be entered in Elliman's favor as a matter of law (Seq. No. 7).

The Court heard oral argument from counsel on September 7, 2017. Thereafter, the motions were adjourned at the request of counsel for the parties pending efforts to resolve the matter. The Court was informed that such efforts were unsuccessful and that a decision was required. Accordingly, the motions were marked submitted for decision on October 27, 2017.

The motions are consolidated for purposes of deliberation and disposition.

RELEVANT FACTS

The Court will not recite the lengthy history of the case, which has been addressed in prior decisions. The relevant facts can be briefly stated, based on a view of the evidence favorable to Plaintiff (*see, e,g., Piro v Demeglio*, 150 AD3d 907 [2d Dept 2017]). Theiss had been employed as the manager of Elliman's Armonk, New York branch office, where her duties included the recruitment and retention of real estate sales agents. No written employment agreement was ever signed by Elliman and Theiss. Theiss had declined to sign an employment agreement proposed by Elliman, which agreement provided that bonuses would be entirely discretionary. Theiss maintained that, despite the fact that Elliman had expressly declined to assume the employment contract made by Holmes & Kennedy (for whom Theiss had worked prior to Elliman's acquisition of Holmes & Kennedy), Elliman subsequently agreed to assume that pre-existing contract and to pay the bonuses called for therein.

On Friday, March 13, 2015, while Theiss was still in Plaintiff's employ but was physically out of the office on vacation, a dozen sales agents announced that they were leaving Elliman to join Raveis, a competing company, which was establishing an Armonk office. Theiss had been aware of the impending shift by the agents; indeed, she herself had arranged to leave for Raveis. The next Monday, March 16, 2015, Elliman terminated Theiss, perceiving that Theiss was involved in a plan by Raveis to recruit agents.

There is no dispute but that Theiss's duties while manager of Plaintiff's Armonk office included the recruitment and retention of sales agents. Elliman offered evidence to the effect that: prior to the events of March 2015, Raveis had tried and failed to recruit a number of Elliman agents; Raveis approached Theiss to recruit her

and have her help recruit others; Theiss identified to Raveis agents who could be recruiting targets and their sales volumes; Theiss set up meetings between Raveis and Elliman agents from both the Armonk and Scarsdale offices; Theiss was offered cash bonuses for recruiting Elliman agents; and Theiss conducted a meeting at her home with four additional agents and asked them to sign a confidentiality agreement, using a form that she had obtained from Raveis. Theiss told one agent that Raveis would eventually take over Elliman's Armonk office and that Raveis would compensate any agent who lost money in relocating to from Elliman to Raveis.

During this time, Theiss remained in her employment with Elliman, at least in part because she wanted to remain until she received a bonus for 2014. However, in an email to Raveis, she expressed concern about remaining with Elliman because she felt "compromised" and because she was concerned that she did not have a contract in place with Raveis and might not get hired if Raveis did not get all of the agents she was seeking to recruit for Raveis. The Raveis executive responded that she should remain inside Elliman so that the plan would have the "biggest impact" (Ex. 31).

Theiss departed on a vacation to Puerto Rico in advance of the resignations, with Theiss having reviewed the draft resignation letter of one agent prior to leaving on her trip. The jury could conclude that she pre-planned the vacation in order to avoid being present when the agents came in to announce their departures. When the series of departures began on March 13, 2015, Theiss received resignation letters from the agents and forwarded them to her superiors at Elliman, with Theiss feigning surprise and disappointment at each resignation. Theiss had not told her superiors that she was aware, prior to the March 13, 2015 resignations, that the agents were negotiating with Raveis or were preparing to leave and did not afford Elliman the opportunity to make counter offers.

This action was tried before the Court and jury over 11 days, commencing on May 31, 2017. The jury returned its special verdict on June 16, 2017.

With respect to Elliman's First Cause of Action for breach of fiduciary duty brought as against Theiss, the jury found that Elliman had proven that Theiss had breached fiduciary duties owed to Elliman and that Elliman had sustained $675,000 in damages by reason of this breach. On Elliman's Second Cause of Action against Raveis for aiding and abetting Theiss' breach of fiduciary duty, the jury found that Raveis had aided and abetting Theiss' breach of fiduciary duty and that Elliman had sustained damages of $450,000 by reason of Raveis' conduct. The jury found that Elliman failed to sustain its burden of proof on its Third Cause of Action against Raveis and Theiss for misuse of confidential information. On the Fourth Cause of Action, the jury found that Elliman had proven that Theiss and Raveis had known about and intentionally interfered with Elliman's business relationship with real estate agents by the use of wrongful means. The jury found that Elliman had sustained damages of $1,125,000 on account of the tortious interference with business relations by the

Defendants. The jury also found that the conduct of Theiss was wanton and reckless but not malicious and that the conduct of Raveis was malicious, wanton and reckless. The jury awarded Elliman $2.5 million in punitive damages as against Raveis but did not impose any punitive damages as against Theiss.

Theiss had presented two counterclaims.

On her First Counterclaim for gender-based employment discrimination due to a hostile work environment, the jury found that Theiss had failed to prove that the incidents complained of had occurred.

On her Second Counterclaim for failure to pay her 2014 bonus, the jury found that Theiss had an employment contract with Elliman but that Theiss had failed to prove her own due performance of the contract. The Court, anticipating the possibility that the jury might find that there was no employment agreement between Theiss and Douglas Elliman[1], allowed (over Elliman's objection) the jury to consider *quantum meruit* and charged the jury on that principle of law. The jury found that Theiss provided services to Elliman and Elliman accepted her services with both parties' understanding that Elliman had an obligation to pay reasonable compensation for the services. The jury found that $39,462 should be paid to Theiss by Elliman as reasonable compensation, with the amount being that calculated pursuant to the formula set forth in the Holmes & Kennedy contract.

ELLIMAN'S POST-TRIAL MOTION
(SEQ NO. 7)

Elliman argues that the verdict in Theiss' favor in *quantum meruit* must be set aside as a matter of law because of the jury finding that Theiss and Elliman had a binding contract governing her compensation. Theiss counters by contending that the jury finding that there was an agreement between the parties did not specify whether such agreement was express or implied and, therefore, the jury could have found, and did find, that Elliman owed a 2014 bonus to Theiss under an implied agreement.

The Court agrees with Elliman. As Elliman points out, the Court had twice instructed the jury that it was consider *quantum meruit* only "if you find that there was

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[1]As previously noted, Elliman had sent Theiss a written employment agreement which Theiss declined to sign. Theiss claimed that Elliman had acted so as to assume her prior agreement with Holmes & Kennedy, though Elliman had expressly declined to assume such types of agreements in its merger agreement. Elliman denied assuming the prior agreement. Hence, it was possible the jury might find that there was never a meeting of the minds between Elliman and Theiss.

no express agreement between the parties as to Ms. Theiss' compensation, including the amount of a bonus". This instruction was not objected to by Theiss and is unquestionably legally correct *(see, e.g., Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 389 [1987]); *Kieran v. Sinetos*, 145 AD3d 987, 988 [2d Dept 2016]). Recovery in *quantum meruit* is precluded where there has been "no agreement or expression of assent, by word or act, on the part of either party involved (*Clark-Fitzpatrick, supra*, 70 NY2d at 388-389).

Question 20 of the special verdict sheet asked whether Theiss had proven that she had an employment agreement with Elliman. The jury responded that she had. Because the jury answered "Yes" to Question 20, the jury was directed to proceed to Question 21 which asked whether Theiss had proven that she performed her obligations under the employment agreement with Elliman. The jury answered that Question "No". However, the instructions in the special verdict sheet following Question 21 told the jury that if their answer to "Question #21 is No, proceed to Question #24", i.e., to consider *quantum meruit*. This instruction was inconsistent with the Court's charge, in which the Court stated that the preliminary to reaching the issue of *quantum meruit* was a finding "that there was no agreement between the parties as to Ms. Theiss' compensation, including the amount of a bonus". While there was no objection to the instruction on the special verdict sheet, the fact remains that the jury verdict that there was an employment agreement between Theiss and Elliman precludes any recovery by Theiss on a theory of *quantum meruit*.

While a jury finding that there was an implied obligation to pay for Theiss' service is not necessarily and inherently inconsistent with its finding that the parties had an employment agreement (after all, Theiss' argument was that Elliman had by its conduct assumed the contract she had made with Holmes & Kennedy), the jury finding that there was such an implied obligation cannot support an award in Theiss' favor given the jury's finding that there was a binding employment agreement in place and that Theiss had breached it. Since the terms of the contract govern the matter in dispute, and Theiss failed to prove her own performance of the contract, she cannot detour around the consequences of her failure to prove her own performance by a recovery in quasi-contract (*see Jim Longo, Inc. v Rutigliano*, 294 AD2d 541 [2d Dept 2002]).

Theiss' claim that the jury's finding of a contract could be limited to a finding of express contract, thus permitting her a recovery in implied contract, is without merit, as an examination of the Court's charge shows. With respect to Theiss' contract claim, the jury was instructed, by the Court's charge, to consider and find that a contract was made by words and/or that a contract made by conduct. But whether the contract they found was express or implied-in-fact does not matter as the jury found there was a contract. Having made that finding, there is no room to argue for imposition of a contract implied by law (*Bello v Cablevision Systems Corp.*, 185 AD2d 262 [2d Dept 1992]).

DOCKET ALARM

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