

IN THE MATTER OF THE ARBITRATION BETWEEN
DAWN CONCIATORI and PRUDENTIAL DOUGLAS ELLIMAN, LLC

JAMS REF #1425002134

OPINION AND AWARD

The Hearing was held on May 18, 2009. Both parties attended and presented testimony and other evidence.¹ Post-hearing briefs were filed on June 9 and 10, 2009. The Arbitrator has considered the evidence presented and the arguments of the parties.

Dawn Conciatori (Conciatori) was an experienced relocation specialist and was hired by Prudential Douglas Elliman, LLC as head of its Corporate Business Development Department, also known as the Corporate Relocation Department. (Transcript @ 129). A written employment contract was entered into and the interpretation of its commission provision forms the basis of the instant dispute.

In the contract, Conciatori's commission compensation was described as follows:

Commission on New Business: The Company shall pay Employee 10% of the commissions ("Employee Bonus") paid to the Company on all new corporate business developed by the Corporate Business Development Department under direction of

¹While documents were not formally introduced into evidence at the hearing, they were discussed at length during the hearing by witnesses and counsel and in post-hearing briefs. At pages 33-35 of the Transcript, the parties agreed that the documents referred to by counsel are appropriately before the Arbitrator.

Employee in each calendar year of this Agreement, but in no event (1) shall the amount paid to Employee exceed \$100,000 in any calendar year ... Such Employee Bonus shall be paid promptly after the Company receives the commission. Fees generated from any client with a pre-existing relationship with an agent of the Company (including but not limited to Prudential Relocation) who continues to work with that agent shall not be considered in calculating the commission under this provision.

The dispute between the parties centers around the meaning of “new corporate business” and “developed.”

Prior to the institution of this arbitration proceeding, PDE refused to pay anything to Conciatori by way of commission. There is no dispute that she was paid a salary of \$150,000 per year. The contract clearly provides for commissions, as set forth above, in addition to said salary. Conciatori resigned in 2006 because of PDE’s refusal to pay her commissions to which she felt entitled.

The parties have very different views as to the meaning of “new corporate business developed by the Corporate Business Development Department under direction of Employee”. PDE argues, and its former CFO, Daniel Kaplan, testified, that the appropriate test for deciding whether corporate business is “new” is whether a particular client fell within a category of

“...people we had done historical and consistent business with... they were called house accounts...” Transcript @ 214.

If PDE had done business with a client in the past, a transaction with that client was not “new business”, according to Mr. Kaplan and PDE, and no commission was owing to Conciatori. However, Mr. Kaplan had nothing to do with negotiation of the agreement with Conciatori, and his

interpretation of its provisions is of little value.

Unfortunately for PDE, the evidence found within the four corners of the employment agreement and evidence of the parties' negotiations both strongly indicate that PDE's interpretation is not the correct interpretation.

As to the language of the agreement itself, quoted above, it is clear that no commissions are due with respect to a client with a pre-existing relationship with a PDE agent, if that client continues to work with its PDE agent. The proviso relating to the client continuing to work with its PDE agent would be entirely superfluous if (as argued by PDE) no commissions were due in any event because the client had a pre-existing relationship with PDE. The Arbitrator should not interpret an agreement in such a way that any part of the agreement becomes superfluous; every part of the agreement must be given effect if possible. Accordingly, PDE's interpretation is rejected.

In addition, Conciatori has provided undisputed evidence of the history of the negotiations which led to the employment agreement in issue. This evidence is directly on point as to the intention of the parties with respect to the interpretation of the phrase "new business". Claimant's Exhibit 3 is a draft of Conciatori's employment agreement and its Exhibit A deals with compensation. With reference to commissions, Exhibit A states:

"The Company shall pay to Employee 10% of the gross commissions paid to the Company on new relocation-related business generated by Employee from clients not currently working with the company, but in no event shall the amount...paid to Employee exceed \$100,000 in any calendar year." (Emphasis added). Transcript @ 236.

This draft was not signed by Conciatori, because she did not agree to the quoted language. Further negotiations ensued, and the contract in issue herein was signed by both parties. Transcript, @237. The contract in issue added the proviso relating to the client continuing to work with its PDE agent, so that the agreement of the parties disqualified Conciatori from receiving commissions on business with pre-existing clients only if that client continued to work with its PDE agent. This chain of events and this interpretation are supported by Conciatori's testimony on cross-examination on the subject of the negotiations. At page 94 of the Transcript, the following exchange occurred:

Q. ... Did Ms. Herman or anyone else at Douglas Elliman ever tell you that you were going to receive a 10 percent commission for clients that already existed at the firm?

A. Yes.

Q. Someone told you that?

A. Yes.

Q. Who was that?

A. That was in negotiations, before I ever joined the company.

Q. Who told you that?

A. That was Ben Kirschenbaum and myself and Jeff Wharton when we spoke. That was part of the negotiations. It was clearly discussed.

Q. Did Ms. Herman ever tell you that?

A. No. She turned the negotiations over to Ben and Jeff. And I have no idea what conversation she may have had with them.

Ben Kirschenbaum was the General Counsel and Jeff Wharton was the President and CEO of PDE at the time of these negotiations, so there is no question about the authority of these individuals to bind PDE. Neither testified at the Hearing, so Conciatori's quoted testimony is unrebutted by those involved in finalizing the negotiations.

PDE also argues that third-party relocation business, website referrals and broker-to-broker business are also excluded from the commission provisions of the agreement. Neither the draft rejected by Conciatori nor the executed agreement say anything about third-party relocation business, website referrals or broker-to-broker business. Accordingly, the Arbitrator must reject PDE's argument that they are somehow excluded from the commission provisions of the agreement.

Dorothy Herman (CEO, President and part-owner of PDE) recruited Conciatori and did testify on the subject of her discussions with Conciatori. She testified on direct examination that she told Conciatori that she was willing to give her a 10 percent commission on new accounts.² Ms. Herman offered her opinion that "new accounts" meant "we didn't have it." (Transcript @ 119, 145). Her testimony that she "did not offer her a 10

² The agreement between the parties does not refer to "new accounts" - it refers to "new corporate business." As indicated above, "new corporate business" includes new commission-generating transactions with existing customers (unless an existing customer continues to work with a particular PDE agent). In some other context, "new accounts" might very well mean new customers with whom PDE did not have a pre-existing relationship, but the phrase "new accounts" does not appear in the agreement of the parties relating to commissions.

percent bonus on all relocation business” (Transcript @ 118, 127) is not accepted by the Arbitrator since the written agreement between the parties did so, for reasons stated above, except where a pre-existing customer continued to work with a particular PDE agent. Oddly, there is no evidence that Ms. Herman told Ms. Conciatori of PDE’s view of the agreement until mid-2005, and the mid-2005 discussions were quite different (see below). When questioned by Ms. Conciatori about payment of commissions in 2004, Ms. Herman told her not to worry, “go talk to Dan (referring to Dan Kaplan), Dan is taking care of it” (Transcript @ 53-54). It seems clear to the Arbitrator that Ms. Herman did not then have the firm opinion as to the interpretation of the agreement that she now espouses; otherwise, as a professed friend of Ms. Conciatori, she would have told her why PDE was not paying her. Even when she resigned, Conciatori was not given the reason presently espoused for denial of payment. She was asked by Ms. Herman what PDE could do to keep her, and she responded, “pay me the commissions that you owe me.” Ms. Herman replied, “I can’t do that.” (Transcript @ 69-70).

In any event, the Arbitrator has rejected PDE’s interpretation of the agreement, for the reasons stated above.

In response to direct questions on cross-examination, repeated many times (including by the Arbitrator) about conversations she had with Conciatori about how she would be compensated, Ms. Herman testified that she would pay for “new accounts”, that she remembered such a conversation, that she can’t remember specifically, but that she didn’t “remember it the way you’re asking me to remember it” even though the way she was repeatedly asked the question was clear. An example of her unhelpful testimony occurred at pages 146-147 of the Transcript:

“Q. There was some discussion of whether you told Ms. Conciatori that you will pay her 10 percent of all new business. Do you have any memory of having a discussion about 10 percent of all new

business?

A. You can't ask me that question if I can't answer it, because relocation encompasses quite a few things.

Q. I'm not asking you —

MR. ARKIN: Let her answer the question.

A. I can't answer that.

Ms. Herman was also astonishingly uninformed about the terms of the agreement she was testifying about. She testified that she did not offer Conciatori "a 10 percent bonus on all relocation business" because "it could be millions of dollars." (Transcript @ 118-119, 124-125). That reason is of course not genuine because the agreement contained a \$100,000 annual cap on commissions payable to Conciatori. Even more egregious is Ms. Herman's testimony that there was never any discussion of setting a cap because "she would never pay anybody that way." (Transcript @ 149-150) Obviously, PDE did agree to pay Conciatori that way. The Arbitrator is left with the conclusion that Ms. Herman's testimony was not only unhelpful but was disingenuous. To the extent that Ms. Herman argued in her testimony that Conciatori would be overpaid if Conciatori's interpretation of the agreement were accepted, Ms. Herman's own testimony undercuts her argument:

"Q. Do you remember any conversations that you had with Ms. Conciatori about the compensation terms?"

A. Yes

Q. What do you remember?

A. I said to her, I don't know how I'm going to do this, because she wanted a lot of money, more so than we've ever paid anybody or that was normal for that job, but I thought she was good and I liked her and I tried to figure out how we could do it. So we did..."

Transcript @142.

Thus, to summarize, the interpretation now advanced by PDE and its witnesses, Ms. Herman and Mr. Kaplan, is contradicted by the agreement itself, and was specifically rejected by Conciatori during negotiations which led up to the executed employment agreement. Indeed, she was told by PDE's authorized representatives and negotiators (Ben Kirschenbaum and Jeff Wharton) that her interpretation was correct. It is abundantly clear to the Arbitrator that it was the intent of the parties to provide for the payment of commissions even in those situations where the transaction in question involved a client with whom PDE had done business in the past. The only exception to this would be if the fees were generated from a client with a pre-existing relationship with an agent of PDE who continues to work with that agent.

As to that exception, there was no testimony from either party that any such pre-existing relationship existed. The Arbitrator concludes that it was PDE's obligation to present such testimony, since the exception was for its benefit and any facts which might support it would have been within its knowledge. Therefore, the exception is not relevant to the Arbitrator's decision.

It is nonetheless vigorously argued by PDE that the phrase "new business" would be rendered meaningless if the Arbitrator were to agree with Conciatori, and that, given its ordinary meaning, new business does not mean business relating to pre-existing clients of PDE; it means business that is new - new clients found by Conciatori. Brief @1,4. In the abstract, this might be a plausible interpretation of the phrase "new business." But

we are not dealing in the abstract here; we are dealing with a contract where other language in the same paragraph of the contract contradicts that interpretation, and where the history of the negotiation of the contract also clearly contradicts that interpretation. The Arbitrator concludes that, in the context of this commission agreement between the parties, “new corporate business” means any transaction which Conciatori and/or her group brought to fruition and which resulted in income to PDE. The PDE records identified below identify such transactions and support Conciatori’s claim for commissions.

PDE also argues that business subject to commissions must have been “developed” by Conciatori’s group, Brief @ 1, and this is an accurate statement of the language of the agreement. As with the phrase “new business”, PDE argues that business can only be developed from clients who were not existing clients. The Arbitrator disagrees. There is no suggestion that, in PDE’s business, or in any other business, business transactions just happen and revenue flows in, even from existing clients. On the contrary, Conciatori described in detail (Transcript @27-32) the efforts she expended to keep business and revenue flowing into PDE over the period of her employment, including from existing clients. The Arbitrator concludes that business resulting from those efforts was indeed “developed” by Conciatori and her group.

Conciatori and her group were successful during the period of her employment. Total revenue increased substantially from 2003 to 2004. 2003 revenue (including that attributable to January 1-April 15, before Conciatori started her employment with PDE) was \$1,908,045.³ 2004 total revenue was \$3,308,685. From 2004 to 2005, the increase was from \$3,308,685 to \$4,702,900. It is clear that there were substantial increases

³ Of this amount, \$919,281 was received after Conciatori started her employment and Conciatori seeks 10% of \$919,281 for 2003.

in business during Conciatori's employment and under her direction. Indeed, Conciatori was congratulated on her performance by her superior, Ms. Herman, the CEO and part owner of PDE. (Transcript @ 32)

The Arbitrator is troubled by the undisputed fact that Conciatori was never told by PDE that its interpretation of the agreement precluded any commission payments to her. Mr. Kaplan told her, after her inquiry early in her employment, that commissions would not be paid monthly, but only after the end of the year, for the convenience of PDE, even though the agreement required payment promptly after receipt by PDE. (Transcript @ 47) After the end of the year, Mr. Kaplan still did not tell Conciatori that she was not eligible for any commissions, even after reviewing the spreadsheets in evidence. (Transcript @ 48). In mid-2005 and near the end of Conciatori's employment, Ms. Herman told Conciatori that Howard [Lorber], one of Ms. Herman's partners, "won't let us pay you" (Transcript @ 55). Whether this was a self-serving financial decision made by Mr. Lorber (who did not testify) or his interpretation of the agreement, is unknown. Ms. Herman, tellingly, also told Conciatori that their agreement "was a stupid contract, we never should have signed it." (Transcript @65-66). Ms. Herman did not clearly deny making this statement, which would certainly indicate Ms. Herman's displeasure at being bound by an unfavorable agreement.⁴

The Arbitrator has already concluded that PDE's present position is unfounded. Based on Ms. Herman's testimony, including that based on her astonishing ignorance of the provision of the agreement capping PDE's

⁴Ms. Herman's testimony at Transcript 126:12 - 127:3 may or may not be a denial as to the "stupid contract" question. Certainly it was not a clear answer to a clear question. She seems to be saying that a contract would not prevent her from over-paying an employee, which is irrelevant because PDE is charged with under-paying an employee.

commission liability at \$100,000 per year, and her cavalier attitude toward these proceedings (“I don’t even know what she is claiming. You might have told me the other day, but this is the first I really realized this was going on” - Transcript @127), and also based on the weaknesses in PDE’s case pointed out above, Mr. Lorber’s failure to testify, and PDE’s unwillingness for well over one year to explain its position to Conciatori, the Arbitrator concludes that PDE’s violation of the agreement with Conciatori was wilful.

Having concluded that Conciatori is entitled to commissions on all revenue generated by her department during her employment, it remains to calculate her damages for breach of contract. Those damages are calculated in the table at page 12 of Conciatori’s post-hearing brief, and no objection to the calculations has been made by PDE. The calculations appear to be accurate and based on the evidence in the record:

Exhibit 7 (2003 revenue, April 16-Dec. 31) -	\$ 919,281.38
Exhibits 8, 9, 10, 11 (2004 revenue)	\$3,308,685.70
Exhibits 12, 13, 14, 15 (2005 revenue)	\$4,702,900.48
Exhibits 16, 17, 18 (2006 revenue, January)	\$ 94,463.45

The Arbitrator has applied the contractual 10% commission to these revenue figures and has applied the appropriate \$100,000 per year cap, and determines that commission in the amount of \$301,374.48 is due. Interest is properly awarded on breach of contract damages, since PDE has had the use of money for several years which it should have paid to Conciatori. The Arbitrator agrees with the simple (and conservative) calculation of interest which appears at footnote 18 of Conciatori’s post-hearing brief. Because the agreement is governed by New York law, interest at the New York statutory rate of 9% (CPLR Section 5004) is due. This amounts to \$117,369.55, for a total breach of contract damage award of \$418,744.03.

Conciatori has not pressed her claims for *quantum meruit* and unjust

enrichment damages, relying instead on breach of contract. PDE correctly argues that the fact that a contract governs the relationship of the parties precludes *quantum meruit* and unjust enrichment claims.

Conciatori seeks additional compensation pursuant to Section 193 of Article 6 of the New York Labor Law, which applies because the agreement is governed by New York law. PDE argues that nothing is due under the New York Labor Law because the commission payments are not “wages” within the meaning of that Law.

Section 190(1) of the New York Labor Law defines “wages” as including commissions, and this would appear determinative. However, PDE argues that a bonus which is dependent on the employer’s financial success is not within that definition, citing Truelove v. Northeast Capital and Advisory, Inc., 95 N.Y. 2d 220 (2000), which held (at 223-234) that certain forms of “incentive compensation that are more in the nature of a profit-sharing arrangement and are both contingent and dependent, at least in part, on the financial success of the business enterprise” are not “wages”. Applying this definition, PDE’s argument fails, because the commission agreement was neither contingent nor dependent on PDE’s financial success. It is based on revenue, not profits, and commissions are based on the results of Conciatori’s actual work. It does not matter that the agreement (and Ms. Herman) refer to the commission agreement as a “bonus” because it is clearly not a discretionary bonus, if only because a discretionary bonus was separately provided for in the agreement, and paid. Such labels cannot control the substance of an agreement.

The Arbitrator has already determined that PDE’s breach of contract was wilful. This entitles Conciatori to liquidated damages of 25% of the amount of wages withheld, plus attorneys fees and costs, under Section 198 of the New York Labor Law. The Affirmation of Legal Services of David Marek, Esq., a partner of Liddle and Robinson, Esqs., Counsel for Conciatori, is in proper form and details facts relevant to an award of

attorneys fees and costs, and no objection to the calculations therein has been made. It supports an award of attorneys fees and costs of \$69,072.50 and \$9773.50, respectively. Liquidated damages of 25% of the amount withheld (\$301,374.48) is \$75,343.62.

Accordingly, the Arbitrator, after consideration of all of the evidence and the arguments of the parties, makes the following

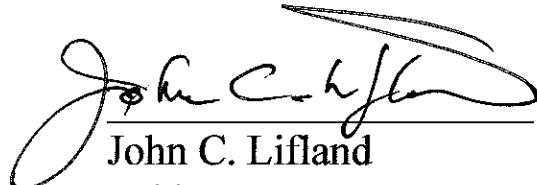
AWARD

For the reasons stated, Prudential Douglas Elliman, LLC shall pay to Dawn Conciatori the sum of \$572, 933.65, which is comprised of

Withheld commissions	\$301,374.48
Interest thereon	\$117,369.55
Liquidated Damages	\$ 75,343.62
Attorneys Fees	\$ 69,072.50
Costs	\$ 9,773.50

It appears that PDE has paid Conciatori \$1,949.50 during the course of these proceedings, for which it is entitled to a credit against the foregoing AWARD, for a net AWARD of \$570,984.15.

July 6, 2009


John C. Lifland
Arbitrator