[* 1]

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

PRESENT: HON. DORIS LING-COHAN Justice

PART 36

NEW MARK Company

- v -

TOP NOTCH

INDEX NO. 603765/05

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

FILED
JUN 06 2007
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is disposed of as per attached decision of 5/23/07 in that summary judgment granted as to liability only; damages referred to Special Referee as per attached decision + order.

NYS SUPREME COURT
RECEIVED
JUN - 4 2007
MOTION SUPPORT OFFICE

Dated: 5/23/07

HON. DORIS LING-COHAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☒ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 36

----------x

NEWMARK & COMPANY REAL ESTATE, INC.,
Plaintiff,

Index No. 603765/05

-against-

Motion Seq. No. 001

TOP NOTCH REPRO COLOR SERVICES, INC. d/b/a TOP NOTCH GRAPHICS,
Defendant.

DECISION/ORDER

Ling-Cohan, J.:

This action arises from defendant Top Notch Repro Color Service, Inc. d/b/a Top Notch Graphic's (Top Notch) alleged breach of a brokerage agreement. Plaintiff Newmark & Company Real Estate, Inc. (Newmark) contends that Top Notch breached the brokerage agreement by executing a renewal lease for its existing premises and not recognizing Newmark as its sole broker or providing it with a commission for the transaction. Newmark moves pursuant to CPLR 3212 to dismiss five affirmative defenses alleged in Top Notch's answer. Newmark also moves pursuant to CPLR 3212, for an order granting summary judgment.

FACTUAL ALLEGATIONS

On March 8, 2004, Newmark, a real estate broker, and Top Notch, a digital imaging and photographic services company, entered into a brokerage agreement (the Agreement), whereby Newmark was to act as Top Notch's sole broker and find a location for Top Notch's business operations. At the time the agreement was entered into, Top Notch occupied space on the 11th floor of 39 West 19th Street, New York City, New York.

The Agreement provides:

> We [Top Notch] hereby appoint Newmark & Company Real Estate Inc. ("**Newmark**") as our sole broker granted with the exclusive right to perform the following assignment (the "**Assignment**") on our behalf: (i) to negotiate and procure a renewal, recasting or extension of our existing lease ("**Lease Renewal**"); or (ii) if we choose to relocate, to negotiate and procure a new lease,

sublease, assignment, license or purchase ("**New Premises**").

The term of this Agreement shall commence on the date hereof and may be terminated by either party upon thirty (30) days prior written notice sent to the other party by certified mail, return receipt requested, but no earlier than five (5) months from the date that this Agreement is executed. Subsequent to the termination of this Agreement, we shall continue to recognize you as our exclusive broker, in accordance with the provision hereof, with respect to (i) any prospective locations submitted by you during the term hereof and (ii) any offers made or received by you on our behalf regarding the Assignment (including the Lease Renewal), which have been submitted to us and which appear on a list furnished by you within thirty (30) days of the termination of this Agreement.

* * * We will refer to you all inquiries and offerings received by us, regardless of the source of such inquiries and offerings, and all negotiations shall be conducted solely by you or under your direction, subject to our review and final approval, which may be withheld or withdrawn for any or no reason.

(Grabiner Aff., ex. A).

On March 9, 2004, Steve Collins (Collins), president of Top Notch, sent a letter to Perry R. Mesmer (Mesmer), the leasing agent of 39 West 19th Street, which confirmed that Top Notch retained Newmark to serve as its real estate representative in connection with the lease expiration of the subject location. The letter further advised Mesmer to direct all communications concerning the premises to Newmark.

On May 26, 2004, Douglas A. Grabiner (Grabiner), Newmark's Managing Director, drafted an offer for a renewal of Top Notch's existing premises. The proposal was forwarded to Collins for his approval. Collins avers that he was not yet ready to give up his search for new quarters, and this proposal was never sent to the landlord of 39 West 19th Street. In addition, between May of 2004 and June of 2004, Newmark showed Top Notch ten other rental spaces.

On July 13, 2004, Top Notch notified Newmark by letter that it was terminating the Agreement in thirty days. Prior to the August 13, 2004 termination date, Newmark continued to work on behalf of Top Notch. Newmark submitted a lease renewal to Top Notch for its existing

premises. Newmark also showed Top Notch space available for a sublease and prepared a proposal for the property which was located at 245 West 17th Street. By letter dated August 23, 2004, and in accordance with the terms of the Agreement, Newmark's counsel wrote to the defendant and included a list of 15 properties which Newmark had shown to Top Notch including its existing leased space at 39 West 19th Street. In the letter, Newmark's counsel further advised Top Notch that if the terms of the Agreement were breached, Newmark would seek payment from Top Notch for its commission based upon Newmark's standard rate schedule on the date a lease for any of the premises on the list was executed.

Without notifying Newmark, Top Notch contacted the agents for the owner of 39 West 19th Street and entered into a ten-year extension of its current lease. The new lease was signed on February 25, 2005. On April 12, 2005, Newmark learned via a real estate industry website that Top Notch had executed the lease renewal for its existing premises. Newmark subsequently filed a summons and complaint on October 25, 2005, and filed an amended complaint on November 4, 2005. The amended complaint alleges that Top Notch breached the Agreement by failing to recognize that Newmark was its sole broker and by executing a renewal lease for the premises at 39 West 19th Street. Newmark argues that in accordance with the terms of the Agreement, Top Notch is indebted to Newmark for a commission of $57,137.77.

Top Notch filed an answer on January 26, 2006, which includes five affirmative defenses. The affirmative defenses allege that Newmark's complaint fails to state a cause of action, that the court lacks personal jurisdiction because the summons and complaint was not properly served, that necessary parties have not been joined, that Newmark can not look to Top Notch for compensation, and that the Agreement is incomplete and unenforceable.

DISCUSSION

Summary judgment is a drastic remedy which is granted only when the party seeking summary judgment has established that there are no triable issues of fact. *Andre v Pomeroy*, 35 NY2d 361 (1974). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006). "In considering a summary judgment motion, evidence should be analyzed in the light most favorable to the party opposing the motion." *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997).

Newmark argues that the motion for summary judgment should be granted as Top Notch breached the Agreement by failing to recognize Newmark as the sole broker for the lease renewal of the subject premises. The Agreement clearly states that Top Notch employed Newmark "with the exclusive right to . . . negotiate and procure a renewal, recasting or extension of Top Notch's existing lease" (Grabiner Aff., ex. A). Furthermore, the Agreement provides that following its termination, Top Notch would continue to recognize Newmark as its exclusive broker for locations which were previously submitted by Newmark and which were included on a list submitted to Top Notch within thirty days of the termination of the Agreement.

The submitted evidence demonstrates that Newmark complied with the Agreement. After being notified of Top Notch's termination of the Agreement, Newmark's associate counsel, Matthew Tomback, promptly provided Top Notch with a list of the locations which Newmark had previously submitted to Top Notch. The letter dated August 23, 2004, which accompanied the list states:

> [A]s per the terms of the Agreement, Newmark expects to be recognized as the Principal's [Top Notch's] exclusive broker and paid a full commission with respect to any locations where Newmark drafted, submitted or received offers on Principal's behalf, including 39 West 19th Street, New York, New York and 245 West 17th Street, New York, New York.

(Grabiner Aff., ex. L).

As Newmark's list and accompanying letter prove, Top Notch was aware that Newmark had drafted proposals for the property at 39 West 19th Street. Therefore, Newmark has presented a prima face case that Top Notch breached the Agreement when it entered into a lease for the subject premises without utilizing the services of or providing a commission to Newmark.

In opposition to summary judgment, Top Notch argues that, based upon the Agreement, the only party against which Newmark could seek damages from is the landlord of 39 West 19th Street. The Agreement states: "[b]ased upon our [Top Notch's] compliance with this Agreement and our agreement to cooperate with you in your dealings with others, you will look only to the landlord or seller, as the situation may be, for your commission" (Grabiner Aff., ex. A).

While Newmark could generally look to the landlord for a commission, such commission is predicated upon Top Notch's compliance with the Agreement. When a broker's entitlement to "compensation is conditioned on its right to represent defendants' interests with a third party, defendants are precluded from taking any action which would defeat that condition." *Curtis Props. Corp. v Greif Cos.*, 212 AD2d 259, 264 (1st Dept 1995). Here, Top Notch failed to recognize Newmark as its exclusive broker of the subject property and breached the Agreement. Therefore, as the Agreement was not complied with, Top Notch, rather than the landlord, is the party to whom Newmark must look to be compensated. *See D'Angelo, Forrest & Co., Inc. v Franklin United Life Ins. Co.*, et al, 65 AD2d 766 (2nd Dept 1978)(since defendant may have breached the contract, defendant, the prospective lessee may be liable for the commission lost by the plaintiff, as a result of the breach)

Newmark also argues that the five affirmative defenses which Top Notch raises are without merit. Top Notch first alleges that the complaint fails to state a valid cause of action for

which relief may be granted. However, Newmark clearly sets forth the elements necessary to establish a breach of contract claim. The amended complaint describes the brokerage agreement entered into by Newmark and Top Notch. The amended complaint further alleges that Top Notch breached those obligations and suffered damages as a result. Therefore, as the elements of a breach of contract claim are present, the first affirmative defense must be dismissed.

The second affirmative defense alleges that the Court has no jurisdiction over Newmark as process was not served in a manner prescribed by law. This affirmative defense is waived when the defendant fails to move on this ground within sixty days after serving its answer. CPLR 3211 (e); *see also Worldcom, Inc. v Dialing Loving Care, Inc.*, 269 AD2d 159 (1st Dept 2000). Here, Top Notch filed an answer on January 26, 2006 and has not provided an explanation as to why it did not move to dismiss the action for lack of jurisdiction. Therefore, Top Notch's second affirmative defense is also without merit.

The third affirmative defense alleges that a necessary party has not been joined. CPLR 1001 (a) defines necessary parties as "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action ... ." "In making the determination whether an absentee need be joined as a party, it must be decided if the proposed party has such an interest in the litigation that the court cannot settle the controversy without necessarily considering the interests of the proposed party." *Joanne S. v Carey*, 115 AD2d 4, 7 (1st Dept 1986).

Here, the only necessary parties to the Agreement are Newmark and Top Notch. Due to Top Notch's breach of the Agreement, Newmark was prevented from concluding a transaction for the subject premises which would entitle it to negotiate a commission; the proper party for which damages should be sought is Top Notch. Therefore, the argument that the landlord is a

necessary party is without merit.

Top Notch's fourth affirmative defense alleges that Newmark is not able to look to Top Notch for the commission. As previously stated above, since Top Notch failed to comply with the Agreement, Newmark can look to Top Notch to receive the commission. Therefore, the fourth affirmative defense is dismissed.

Top Notch's fifth affirmative defense alleges that the Agreement is incomplete and unenforceable as there is no set price term for Newmark's commission. Top Notch contends that Newmark is not entitled to its brokerage commission as the complaint did not set forth the exact amount of damages nor include a formula for calculating a commission. However, at the time which the complaint was drafted, Newmark did not have a copy of the lease and only obtained a copy after discovery commenced. According to Grabiner's affidavit, the $57,137.77 commission which Newmark claims it is entitled to was based upon the schedule of rates which Newmark uses to calculate commissions due for retail, office and industrial leases (Grabiner Reply Aff., ¶ 3).

The First Department has held that when an exclusive agency agreement has been breached, a plaintiff is entitled to a "fair and reasonable commission" which it would have been entitled to had the agreement not been breached. *Harper-Lawrence v Intershoe, Inc.*, 270 AD2d 8, 12 (1st Dept 2000). Here, although the Agreement did not include a specific provision as to how Newmark's commission was to be calculated, Newmark is still entitled to damages. For example, in *Kaplon-Belo Assocs. Inc. v Cheng* (258 AD2d 622 [2d Dept 1999]), the court held that where a brokerage agreement is silent as to the specific amount of a broker's commission, the broker is entitled to an amount which is fair and reasonable, usually "the customary rate in the community at the time when the services are rendered." *Id.* at 622. Therefore, although there

is no set price term for Newmark's commission, the Agreement is enforceable and the fifth affirmative defense must be dismissed.

As Top Notch breached the Agreement and has failed to prove that a genuine issue of fact is in dispute, Newmark's motion for summary judgment must be granted on liability. Furthermore, since the Agreement did not specifically provide a method of calculation for damages, a hearing shall be held to determine the amount which Newmark is entitled to as its commission.

CONCLUSION AND ORDER

Accordingly, it is

ORDERED that the motion for summary judgment in favor of Newmark & Company is granted as to liability only; damages are to be determined before a Special Referree who shall hear and report with recommendation, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR §4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the issue of damages and a judgment entered accordingly; it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy of this order with notice of entry upon all parties as well as upon the Special Referee Clerk(Room 119M) for the placement of this matter on the Referee's calendar for a hearing in accordance with this decision/order.

Dated: May 23, 2007

Hon. Doris Ling-Cohan, J.S.C.

G:\Supreme Court\REFEREE\language.refer issue to referree.wpd