

**McAlister v Newmark Retail, LLC**

2011 NY Slip Op 31032(U)

April 20, 2011

Sup Ct, NY County

Docket Number: 114761/10

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHÉ

PART 10

*Justice*

Index Number : 114761/2010

**MCALISTER, SHANON**

vs.

**NEWMARK RETAIL, LLC**

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

his motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

**FILED**

APR 21 2011

NEW YORK COUNTY CLERK'S OFFICE

APR 20 2011

Dated: 4/20/11

[Signature]  
HON. JUDITH J. GISCHÉ *J.S.C.*

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 10**

-----x  
Shanon McAlister,  
Plaintiff (s),

**-against-**

Newmark Retail, LLC d/b/a  
Newmark Frank Knight Retail,

And

92 Equities LLC % YMY Management,  
Defendant (s).  
-----x

**DECISION/ ORDER**  
Index No.: 114761/10  
Seq. No.: 001

**PRESENT:**  
Hon. Judith J. Gische  
J.S.C.

**FILED**

**APR 21 2011**

**NEW YORK  
COUNTY CLERK'S OFFICE**

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

<b>Papers</b>	<b>Numbered</b>
Plaintiff's n/m (3212) w/SM affid, exhs . . . . .	1
Defs' opp w/ IC affirm, exhs . . . . .	2

*Upon the foregoing papers, the decision and order of the court is as follows:*

**GISCHE J.:**

This is an action by Shanon McAlister, a licensed real estate broker for real estate commissions she claims are owed to her and have not been paid. This motion, for summary judgment, was brought after issue was joined but pre-note of issue. Defendant 92 Equities has filed opposition with the court. Although the motion was scheduled for oral argument on April 7, 2011, only plaintiff appeared ready for oral argument. None of the defendants appeared. Since summary judgment relief is

available once issue has been joined, this motion will be decided on the merits (CPLR § 3212 [a]; Myung Chun v. North American Mortgage Co., 285 AD2d 42 [1<sup>st</sup> Dept 2001]).

### Arguments

Plaintiff and the Newmark defendants are real estate brokers. Defendant 92 Equities % YMY Management<sup>1</sup> is the owner and landlord (“landlord”) of the subject premises located at 656-676 Amsterdam Avenue, New York, New York (“premises”). Newmark Retail, LLC d/b/a Newmark, Knight Frank Retail as agent for 92 Equities, LLC and plaintiff entered into a co-brokerage agreement dated August 27, 2009 with respect to a proposed lease between the landlord and non-party SRISI, LLC (“SRISI”) for commercial space at the premises. The co-brokerage agreement defines the “Broker” as plaintiff Shannon (*sic*) McAlister. In relevant part, the co-brokerage agreement provides as follows:

“WHEREAS, Newmark is the exclusive leasing agent for the retail portions of the property known as and located at 201 West 92<sup>nd</sup> Street,<sup>2</sup> New York, New York . . .

WHEREAS, other than Newmark, Broker is the sole broker who brought about the leasing (hereinafter referred to as the “Lease”) of the ground floor retail space (hereinafter referred to as the “Premises”) at the Building to SRISI, LLC (hereinafter referred to as the “Proposed Tenant”) and the sole broker, other than Newmark, entitled to receive a commission to be paid in accordance with the terms hereinafter provided.”

The co-brokerage agreement addresses the issue of compensation:

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<sup>1</sup>Presumably the “%” symbol is intended to mean “in care of.”

<sup>2</sup>This is apparently an alternate address for the premises.

"2. Compensation:

a. in the event a Lease is fully executed by the parties thereto and delivered, Newmark shall pay to Broker and Broker agrees to accept as compensation for its services rendered in connection with such Lease commission in the amount of \$32,357.60. The commission shall be paid to Broker as follows: one-third (1/3) upon execution and delivery of the Lease; one (1/3) upon receipt by Landlord of the third month's rent and one third (1/3) upon receipt by Landlord of the sixth month's rent."

Pursuant to article 44.01 of the SRISI lease which was eventually signed, the landlord and SRISI agreed:

"that they have had no dealings or negotiations with any broker, finder or agent with respect to this Lease or the negotiation thereof, other than Shanon McAlister [plaintiff] and Newmark Knight Frank (collectively, the "Broker"), and Landlord agrees to pay the Broker pursuant to a separate agreement. The parties agree to defend, hold harmless and indemnify each other from and against any and all cost, expense (including reasonable attorneys' fees) arising from any breach of their respective representations contained in this paragraph."

Plaintiff received the first installment but not the second or third. She has provided proof that SRISI paid eight (8) months worth of rent payments (cancelled checks) and demanded payment from the defendants. Newmark replied that because the tenant had defaulted under the lease and not paid rent "since December 2009," plaintiff was not entitled to the balance of the payments, based upon paragraph 2 [c] of the co-brokerage agreement. That paragraph provides that:

"Broker shall receive payment of its commission, if any, due hereunder only at such time that Newmark has

collected good funds for the commission from the Landlord. However, nothing herein shall preclude Broker from proceeding directly against Landlord in the event that Newmark fails to receive the commission due Broker hereunder in a timely manner, provided that the terms and conditions entitling Broker to a commission are satisfied."

Newmark has not opposed the motion and the landlord's sole opposition to the motion is that pursuant to the co-brokerage agreement, Newmark is obligated to pay the brokerage commission to plaintiff, not the landlord. The landlord, appearing as "92 Equities, LLC," relies upon section 2 [d] of the brokerage agreement which provides that: "...in the event that the proposed tenant is in monetary default under the Lease at the time any installment of commission is due, then in such event, the Landlord and Newmark are not responsible for any unpaid commissions until such monetary default is cured." The landlord states further that plaintiff has discontinued her claims against Newmark. No copy of that discontinuance has been provided to the court and plaintiff did not address this on the day oral argument was scheduled. The court's electronic files, however, show a stipulation of discontinuance was filed on February 10, 2011, after plaintiff brought her motion.

### **Discussion**

The purpose of contract interpretation is to give effect to the intention of the parties (AGCO Corp. v. Northrop Grumman Space & Mission Systems Corp., 61 A.D.3d 562 [1<sup>st</sup> Dept. 2009]). In adjudicating the rights of parties to a contract, the court may not fashion a new contract under the guise of contract construction (Morlee Sales Corp. v. Manufacturers Trust Co., 9 N.Y.2d 16 [1961]). Thus, where the intention of the parties is clearly and unambiguously set forth, effect must be given to the intent as

indicated by the language used.

The co-brokerage agreement is clear: Newmark is the leasing agent and plaintiff is the broker. Newmark is responsible for paying the plaintiff her brokerage fees, conditioned on the landlord receiving certain rent payments. Although there is ongoing litigation between SRISI and the landlord about the usability of the premises, it appears that the tenant made payments to the landlord through September 2010 which were apparently cashed.

Under the co-brokerage agreement nothing "preclude[s] the Broker from proceeding directly against Landlord in the event that Newmark fails to receive the commission due Broker hereunder in a timely manner . . ." (Lease paragraph 2 [c]). Although not a signatory to the co-brokerage agreement, this argument is not raised by landlord who simply states that it is Newmark's responsibility to pay the commission and since the tenant has defaulted under the lease, plaintiff's claims are premature. These statements are made by the landlord's attorney who states that the tenant has not paid rent since December 2009. There is proof, however, that the tenant made payments through September 2010. Although the attorney refers to statements made by Newmark in its letter to plaintiff's attorney dated September 21, 2010, not only is that letter not in admissible form (it is unsworn) it is hearsay because Newmark is only reiterating what it heard. Furthermore, the statements by the landlord are belied by the copies of the cancelled checks plaintiff has provided proving payments were, in fact, made to 92 Equities LLC which were cashed. The dismissal of Newmark is of no moment, given the relief available to plaintiff under paragraph 2 [c] of the co-brokerage agreement.

A movant seeking summary judgment in its favor must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case " (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). Plaintiff has met that burden because it is unrefuted that two of the installment payments she is owed were not paid, the time within which they should have been paid has passed, and there is proof the tenant made eight (8) months worth of rent payments to the landlord.

In opposition, the landlord has not come forth with any evidence, let alone in admissible form, that those payments were not received and cashed. Landlord, by failing to demonstrate the existence of a triable issue of fact, has not defeated plaintiff's motion (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]). Therefore, plaintiff is entitled to summary judgment in her favor on her claims against 92 Equities, LLC. The clerk shall enter a money judgment in favor of plaintiff Shanon McAlister against defendant 92 Equities, LLC in the principal sum of \$21,571.72 with interest to run the commencement date of this action (November 10, 2010), together with the costs and disbursements of the this action as taxed by the Clerk of the Court.

**Conclusion**

In accordance with the following,

**IT IS HEREBY**

**ORDERED** that the motion by plaintiff for summary judgment against defendant 92 Equities, LLC is granted; and it is further

ORDERED that the clerk shall enter judgment against 92 Equities, LLC s/h/a 92 Equities, LLC % ("care of") YMY Management in the principal sum of Twenty One Thousand Five Hundred Seventy One and 72/100 Dollars (\$21,571.72), with interest from November 10, 2010, together with the costs and disbursements of the this action as taxed by the Clerk of the Court; and it is further

ORDERED that plaintiff's motion insofar as it seeks summary judgment against the Newmark defendants is denied as moot since plaintiff has filed a discontinuance as to those defendants; and it is further

ORDERED that any relief not expressly addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York  
April 20, 2011

So Ordered;

  
\_\_\_\_\_  
Hon. Judith J. Gische, JSC

**FILED**  
**APR 21 2011**  
**NEW YORK**  
**COUNTY CLERK'S OFFICE**