

<b>Spinac v Carlton Group, LTD</b>
2011 NY Slip Op 31913(U)
June 29, 2011
Supreme Court, New York County
Docket Number: 114579/2007
Judge: Emily Jane Goodman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

EMILY JANE GOODMAN

PRESENT:

PART 17

Index Number : 114579/2007

SPINAC, LEVERETT J.

vs

CARLTON GROUP, LTD.

Sequence Number : 004

REARGUMENT/ RECONSIDERATION

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

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

MOTION SEQ. NO. \_\_\_\_\_

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

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

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

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

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

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *is decided per*  
*order*

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

FILED

JUL 13 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 6/29/11

*EJG*  
\_\_\_\_\_  
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 17

-----X  
LEVERETT J. SPINAC,

Plaintiff,

-against-

Index No. 114579/07

THE CARLTON GROUP, LTD., CARLTON  
ADVISORY SERVICES, INC., ROBERT GAETA  
and HOWARD MICHAELS,

Defendants.

-----X  
EMILY JANE GOODMAN, J.S.C.:

**FILED**

JUL 13 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Motion sequence numbers 004 and 006 are consolidated for disposition.

This is an action brought by a commission salesperson to recover unpaid commissions.

In motion sequence number 004, defendants move, pursuant to CPLR 2221, for leave to reargue and renew the court's decision and order dated April 9, 2010 (the prior decision), which granted plaintiff partial summary judgment as to defendants' liability on the sixth cause of action (violation of Labor Law § 190 *et seq.*). In motion sequence number 006, plaintiff Leverett J. Spinac (hereinafter, plaintiff or Spinac) moves for an order granting a money judgment for his "origination" commission and directing a hearing on his counsel fees.

**BACKGROUND**

The facts are set forth in detail in the prior decision, and will be repeated here only to the extent necessary to this decision. In this action, Spinac seeks to recover commissions for his work on two transactions for defendants: a real estate development in Hawaii known as "Royal Kunia"<sup>1</sup> (the Royal Kunia Transaction) and the refinancing of the Standard Oil Building in Los

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<sup>1</sup>Defendants refer to this transaction as the "Royal Kunai" transaction.

Angeles, California. Spinac and defendant Carlton Advisory Services, Inc. (CAS) entered into an agreement dated April 17, 2006 (the Employment Agreement), pursuant to which CAS agreed, inter alia, to employ plaintiff in a position having the title of "broker," and to pay him for transactions for his services in "originating" and "placing" financial transactions. Section 4 of the Employment Agreement provides as follows:

**Commissions:** Broker will receive fees and or commissions for consulting and brokerage services to Carlton which Broker procures as outlined below:

- [1] For each brokerage commission earned by Carlton for transactions for which Broker is the sole broker of record for Carlton (the "Carlton Brokerage Commission") and where Howard L. Michaels ("HLM") or no other Carlton broker has significant involvement (if HLM or another Carlton broker plays a material role in said transaction then any fee due Broker will be at HLM's sole discretion and will be determined on a case by case basis), Broker shall be paid as set forth below (the "Broker's Portion"):
- [2] 20% for origination of a transaction (i.e. bringing to Carlton a client who engages Carlton to list an asset for sale or financing) and 20% for placement of a transaction (i.e. finding the appropriate lender and/or investor who provides the necessary capital for said transaction) of the total net commission received by Carlton (net defined as gross commission less direct expenses and/or referral fees or commissions paid to outside brokers or finders). Further, in order to earn the full listing or placement fee, Broker is expected to materially perform all the requisite responsibilities associated with the origination and/or placement.
- [3] Said commission increases to 25% for the origination and 25% for the placement of said transaction when Carlton receives net commissions equal to \$1,000,000 from transactions procured and generated by you . . . .
- [4] Said commission increases to 30% for the origination and 30% for the placement of said transaction when Carlton receives additional net commissions . . . equal to \$1,000,000 from transactions procured and generated by you . . . .
- [5] For purposes of this "step-up" arrangement, net commissions received on the [Royal Kunia Transaction] will count as 75% towards your step-up . . . .

- [6] The basis for calculating commission splits reverts [sic] to 20% for origination and 20% for placement and follows the same split structure outlined above in year two.
- [7] For transactions originated by HLM where Broker is materially involved and play[s] a significant and value added role in assisting HLM with the placement of such transaction, any fee due Broker will be at HLM's sole discretion and will be determined on a case-by-case basis.
- [8] In the event any broker at Carlton in addition to Broker contributes to the earning of the Broker's commission, then Broker shall work out a mutually acceptable fee arrangement with such other broker in writing and Carlton shall have no responsibility or liability therefore (other than the responsibility to pay the normal broker's portion of the commission).

(Michaels Aff., Exh. A [paragraph numbering added]). Spinac also executed a fair competition agreement that same day with defendant The Carlton Group, Ltd. (Carlton).

The sixth cause of action<sup>2</sup> alleges that defendants violated Labor Law §§ 191 and 193, and are liable for attorney's fees, liquidated damages and certain statutory costs pursuant to Labor Law § 198.

Spinac moved, pursuant to CPLR 3212, for partial summary judgment on the issue of defendants' liability on the sixth cause of action for his origination and placement commissions for both transactions. Spinac argued that he was an "employee" as a "commission salesperson" who was due "wages" under Labor Law article 6. Spinac further argued that defendants' withholding of his wages was willful as a matter of law.

Defendants opposed the motion and cross-moved, pursuant to CPLR 3212 and 3211 (a) (7), for an order dismissing the complaint as against defendants Robert Gaeta and Howard Michaels. In opposition to Spinac's motion, defendants argued that: (1) pursuant to the terms of

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<sup>2</sup>The complaint asserts six causes of action. However, only the sixth cause of action is relevant here.

the Employment Agreement, it was within Michaels's sole discretion to determine whether a commission was to be paid; and (2) such a commission was incentive compensation which was exempt from the provisions of the Labor Law. Defendants submitted an affidavit from Robert Gaeta, the controller and vice president of Carlton, who stated that:

plaintiff required substantial assistance in attempting to bring about the two transactions that are the subject of this matter. Indeed, two (2) senior brokers were brought into the deal at plaintiff's request to perform the tasks required to get it done. See Affidavit Leverett[] J. Spinac, sworn to December 11, 2008 ("Spinac Affidavit") ¶¶ 18, 20 and 22. ("Ultimately, the Royal Kunia redemption financing was placed with California Mortgage and Realty, Inc. (CMR), with the participation of Mr. Romano and Snajderman who introduced CMR to the deal I [plaintiff] had originated and forwarded to them for aid in placement")

(Pencu Affirm. in Support, Exh. B [Gaeta Aff., ¶ 13]). Thus, according to defendants, Spinac did not "materially perform all the requisite responsibilities associated with the origination and/or placement" of the Royal Kunia Transaction, as required by the above-quoted paragraph 2 of the Employment Agreement, because two senior brokers were brought into the transaction, at plaintiff's request, "to perform the tasks required to get it done" (*id.*). Yet, this affidavit only speaks to the placement phase of the transaction, and plaintiff did acknowledge the assistance of Romano and Snajderman in the placement phase. Defendants also contended that there was a bona fide dispute as to Spinac's entitlement to his wages, which precluded a finding, as a matter of law, that the failure to pay plaintiff was willful.

On April 9, 2010, the court granted Spinac partial summary judgment on the sixth cause of action only with respect to his claim for origination of the Royal Kunia Transaction as against CAS. Specifically, plaintiff established that he was an "employee" under Labor Law § 190 (2), and more particularly, a "commission salesperson" pursuant to Labor Law § 190 (6).

Furthermore, plaintiff established that the commission for the Royal Kunia Transaction constituted “wages” within the meaning of Labor Law § 190 (1). The court rejected defendants’ urged construction of the Employment Agreement, noting that defendants “appear to concede that Spinac was wholly responsible for the origination of the transaction” (Prior Decision, at 6). The court determined that the contractual provisions indicate an intent to treat the origination commission and placement commission as separable, and that the above-quoted paragraph 2 of the Employment Agreement controlled because it was more specific than the general, introductory paragraph 1. Additionally, the court found that:

the failure to pay was “willful” – in light of, inter alia: (a) the Employment Agreement’s statement that, for purposes of the “step up” arrangement provided for therein, 75% of Carlton’s net commissions on the Royal Kunia Transaction would be credited towards Spinac’s “step-up”; (b) Carlton’s failure to pay Spinac any commission in connection with the Royal Kunia Transaction despite Spinac’s counsel’s demand for such payment by letter dated August 29, 2007; and (c) defendants’ failure to argue, on this motion, that any other broker besides Spinac was involved in the origination (as opposed to the placement of the placement) of the Royal Kunia Transaction (*see P & L Group v Garfinkel*, 150 AD2d 663, 664 [2d Dept 1989]; *see also Ayres v 127 Res. Corp.*, 12 F Supp 2d 305, 309 [SD NY 1998]). Accordingly, pursuant to Labor Law 198 (1-a), Spinac is entitled to liquidated damages of 25% of the unpaid origination commission.

(Prior Decision, at 8). The court also rejected defendants’ contention that the existence of a bona fide dispute precluded a finding of willfulness as a matter of law:

Defendants evidently concede that Spinac was owed at least \$175,000 in commissions for the Royal Kunia Transaction, and it has been held that, where there is a dispute between an employee and an employer as to the amount of wages actually owed, the employer “must pay the employee the undisputed portion of wages claimed in order to avoid a finding that failure to pay was willful” (*In re CIS Corp., Monaco v CIS Corp.*, 206 BR 680, 689-690 [Bankr Ct, SD NY 1997]). Defendants do not assert that they actually tendered the undisputed amount of \$175,000 to Spinac, or that they offered to pay him that amount without condition. Accordingly, inasmuch as [Labor Law] § 191 (1) (c) required Carlton to pay the amount of the origination commission for the Royal Kunia Transaction to Spinac within the time prescribed by

the statute, and to do so without condition – and inasmuch as defendants do not claim to have tendered even the undisputed amount to Spinac without condition during the requisite time period – a finding of willfulness is not precluded by the existence of a bona fide dispute.

(*id.* at 8-9).

## DISCUSSION

### A. Defendants' Motion for Leave to Renew and Reargue the Prior Decision

A motion for leave to renew a prior motion must be based upon “new facts not offered on the prior motion that would change the prior determination” or must show that “there has been a change in the law that would change the prior determination” (CPLR 2221 [e] [2]; *see also Friedman, Harfenist, Langer & Kraut v Rosenthal*, 79 AD3d 798, 800 [2d Dept 2010]). Furthermore, the papers must contain a “reasonable justification for the failure to present such facts on the prior motion” (CPLR 2221 [e] [3]). As noted by the First Department in *Henry v Peguero* (72 AD3d 600, 602 [1st Dept], *appeal dismissed* 15 NY3d 820 [2010], *reconsideration denied* 16 NY3d 726 [2011]),

Renewal is granted sparingly . . . ; it is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation . . . . While the statutory prescription to present new evidence need not be applied to defeat substantive fairness, such treatment is available only in a rare case . . . , and then only where the movant presents a reasonable excuse for the failure to provide the evidence in the first instance.

(internal citations and quotation marks omitted).

A motion for leave to reargue, addressed to the sound discretion of the court, may be granted upon a showing that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law (CPLR 2221 [d] [2]; *Spectrum Painting Contrs., Inc. v Kreisler Borg Florman Gen. Constr. Co., Inc.*, 54 AD3d 748, 749 [2d Dept 2008]; *William P.*

*Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept], *lv dismissed in part and denied in part* 80 NY2d 1005 [1992], *rearg denied* 81 NY2d 782 [1993]; *Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]). Reargument is “not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented” (*McGill v Goldman*, 261 AD2d 593, 594 [2d Dept 1999]; *see also Levi v Utica First Ins. Co.*, 12 AD3d 256, 258 [1st Dept 2004]).

CPLR 2221 (f) states that “[a] combined motion for leave to reargue and leave to renew shall identify separately and support separately each item of relief sought. The court, in determining a combined motion for leave to reargue and leave to renew, shall decide each part of the motion as if it were separately made.” Here, contrary to Spinac’s contention, defendants’ motion does separately support each item of relief sought. Thus, the court shall consider each type of relief as it they had been made separately.

1. Renewal

Defendants move for leave to renew the prior decision, and submit two affidavits from Howard Michaels, the chairman of Carlton, and Robert Gaeta, the vice president of Carlton, to show that plaintiff did not exclusively originate the Royal Kunia Transaction, and, thus, that CAS did not willfully violate the Labor Law. Defendants have submitted evidence which was admittedly available to them when the original motions were decided. Assuming arguendo that defendants have provided a reasonable justification for their failure to present these facts on the prior motion, the court is not persuaded that these facts would change the prior decision. In fact, the affidavits actually support the court’s decision.

Gaeta now states that he “found it inconceivable that Plaintiff would claim that he was the sole originator of the Royal Kunia deal” (Gaeta Aff., ¶ 5). Michaels states that “Plaintiff did not exclusively originate the Royal Kunia deal. To the contrary, but for the involvement of two other CAS brokers in the origination process, Romano Tio and Marc Sznajderman, CAS would not have moved forward with the Royal Kunia transaction” (Michaels Aff., ¶ 5). Although plaintiff attempted to negotiate an agency agreement with the client for the Royal Kunia deal, Herbert Horita, Carlton found the proposed agency agreement that plaintiff drafted to be unacceptable (*id.*, ¶ 10). “Ultimately, Romano Tio was able to negotiate a mutually acceptable exclusive agency agreement . . . on April 18, 2006 which both Horita and CAS executed” (*id.*, ¶ 16). Michaels further states that CAS’s course of conduct, customary practice and policy is that a deal is “originated” when an executed agreement is actually produced by the broker (*id.*, ¶ 22).<sup>3</sup>

“[W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms” (*Signature Realty, Inc. v Tallman*, 2 NY3d 810, 811 [2004], quoting *R/S Assoc. v New York Job Dev. Auth.*, 98 NY2d 29, 32, *rearg denied* 98 NY2d 693 [2002]; see also *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). Whether a contract provision is ambiguous is a question of law for the court to decide (*W.W.W. Assoc.*, 77 NY2d at 162). Generally, a contract provision is unambiguous if “on its face [it] is reasonably susceptible of only one meaning” (*Greenfield v Philles Records*, 98 NY2d 562, 570

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<sup>3</sup>Defendants also submit a vague memorandum dated July 5, 2006, which states that “Everybody’s eye is on the Royal Kunia deal in Hawaii because if this happens, it could generate \$2.4 million in gross commission. Romano and Leverett get the credit here” (Michaels Aff., Exh. D).

[2002]). Extrinsic evidence may not be considered unless the court first determines that the agreement is ambiguous (*South Rd. Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272, 278 [2005]; *Greenfield*, 98 NY2d at 569; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]).

Here, the Employment Agreement defines “origination” as “bringing to Carlton a client who engages Carlton to list an asset for sale or financing” (Michaels Aff., Exh. A). “Placing a transaction” is defined as “finding the appropriate lender and/or investor who provides the necessary capital for said transaction” (*id.*). The court finds the term “origination” to be clear and unambiguous. “Origination” means (1) introducing a client to Carlton (2) who subsequently hires Carlton to list an asset for sale or financing. The definition says nothing about procuring an agency agreement but speaks of “bringing to Carlton a client” who ultimately “engages Carlton.” In fact, defendants concede “it is true that Plaintiff possessed the original relationship with one of Herbert Horita’s consultants” (Pencu Affirm. in Support, pg 18). Although defendants have submitted affidavits from employees of Carlton indicating that “origination” does not occur until an agency agreement is procured, this parol evidence is inadmissible to vary the terms of the Employment Agreement (*see 767 Third Ave. LLC v ORIX Capital Mkts., LLC*, 26 AD3d 216, 218 [1st Dept 2006], *lv denied* 8 NY3d 803 [2007] [current industry practice or custom was inadmissible to construe unambiguous contract]; *News Am. Mktg., Inc. v Lepage Bakeries, Inc.*, 16 AD3d 146, 148 [1st Dept 2005] [custom and use in trade was inadmissible where contract was not ambiguous]). Accordingly, that portion of defendants’ motion seeking renewal of the prior decision is denied.

## 2. Reargument

Defendants also move to reargue the prior decision, asserting that: (1) the court overlooked Gaeta's affidavit submitted in opposition to Spinac's motion; and (2) the court misapprehended the law concerning willful violations of the Labor Law, particularly where there is a bona fide dispute as to the plaintiff's entitlement to wages.

Reargument is granted, but upon reargument, the court adheres to its prior determinations. Contrary to defendants' contention, the court did not overlook Gaeta's affidavit in deciding the prior motions. In fact, the court cited to Gaeta's affidavit in finding that defendants apparently conceded that plaintiff originated the Royal Kunia Transaction (Prior Decision, at 6). Gaeta stated in his affidavit that "two (2) senior brokers were brought into the deal at plaintiff's request to perform the tasks required to get it done" (Pencu Affirm. in Support, Exh. B [Gaeta Aff., ¶ 13]). However, Gaeta did not deny that Spinac originated the Royal Kunia Transaction, as that term is defined in the agreement. It is undisputed that plaintiff introduced the Royal Kunia client to CAS, and defendants' attorneys in fact conceded it (Pencu Affirm. in Support, pg 18 ["it is true that Plaintiff possessed the original relationship with one of Herbert Horita's consultants"]), and, that the client engaged CAS to secure financing for the Royal Kunia development.

Nor did the court misapprehend the law on willful violations of the Labor Law. Before Labor Law § 198 (1-a) was amended effective November 29, 2009, the statute provided in relevant part that:

[i]n any action instituted upon a wage claim by an employee . . . in which the employee prevails, the court shall allow such employee reasonable attorney's fees and, upon a finding that the employer's failure to pay the wage required by this article was willful, an additional amount as liquidated damages equal to twenty-five percent of the total amount of the wages found to be due.

A violation of the Labor Law is, "willful" where the employer "knowingly, deliberately,

[or] voluntarily” disregards its obligation to pay wages (*P & L Group*, 150 AD2d at 664; *see also Ayres*, 12 F Supp 2d at 309). The plaintiff need not show malice or bad faith (*id.*). Generally, courts have found “willfulness” to be an issue of fact (*Bailey v American Bur. of Shipping*, 208 AD2d 412 [1st Dept 1994]; *Maggione v Bero Constr. Corp.*, 106 Misc 2d 384, 387 [Sup Ct, Seneca County 1980]; *see also Epelbaum v Nefesh Achath B’Yisrael*, 237 AD2d 327, 330 [2d Dept 1997] [mere conclusory allegations of willfulness were insufficient to award liquidated damages on summary judgment]).

Some courts have held that the presence of a bona fide dispute over the employee’s entitlement to wages precludes a finding of willfulness (*see Bigda v Fischbach Corp.*, 849 F Supp 895, 905 [SD NY 1994]; *see also Berardi v Fundamental Brokers, Inc.*, 1990 WL 129174, \*8-\*9, 1990 US Dist LEXIS 11388, \*25 [SD NY 1990]). However, in *In re CIS Corp., Monaco v CIS Corp.* (206 BR 680, 689-690 [Bankr Ct, SD NY 1997]), the court held that, even where there is a dispute as to some of the plaintiff’s wages, “an employer must pay the employee the undisputed portion of wages claimed in order to avoid a finding that the failure to pay was willful. This would best promote the policy of the statute by discouraging employers from placing leverage on employees with respect to the disputed portion by withholding the undisputed portion.”

Here, the Employment Agreement dated April 17, 2006 states that “net commissions received on the [Royal Kunia Transaction] will count as 75% towards [Spinac’s] step up” (Michaels Aff., Exh. A). There is no dispute that the Royal Kunia Transaction did not close until a year later in March 2007 (Gaeta Aff., ¶ 19; Michaels Aff., ¶ 18). Thus, in the Employment Agreement itself, defendants acknowledged that Spinac originated the Royal Kunia Transaction.

In opposition to Spinac's motion, defendants previously submitted an affidavit from Gaeta in which he stated that Carlton offered Spinac \$175,000 for his services on the Royal Kunai Transaction, but did not state that defendants ever tendered that amount to plaintiff, or that they offered to pay him that amount without condition (Pencu Affirm. in Support, Exh. B [Gaeta Aff., ¶ 18]). Defendants now complain that the court, on the prior motion, considered plaintiff's argument, on reply, that the \$175,000 was only offered on the condition that he execute a release and forfeit any future claim to monies owed; however, the court's prior decision merely noted that defendants never stated that the \$175,000 was unconditionally offered. Although Gaeta now denies conditioning the payment on plaintiff executing a release, it is unbelievable to conclude that plaintiff would have rejected the \$175,000, had it been clear that it was offered without condition, and without prejudice to seeking a larger amount, and, in any event a check was never forwarded to plaintiff, even to this date. Moreover, based on the language of the agreement, there was no bona fide dispute, and defendants' arguments, raised for the first time on this renewal/reargument motion, appear to be a further attempt to avoid payment. Accordingly, there is no issue of fact as to whether Carlton voluntarily and deliberately disregarded its obligation to pay Spinac the origination commission for the Royal Kunia Transaction. Therefore, Spinac was also entitled to summary judgment on the issue of willfulness for the origination commission and liquidated damages in the amount of 25% of the total amount due for the origination commission. Liquidated damages under the Labor Law "constitute a penalty" to deter an employer's willful withholding of wages due (*Carter v Frito-Lay, Inc.*, 74 AD2d 550, 551 [1st Dept 1980], *aff'd* 52 NY2d 994 [1981]).

**B. Plaintiff's Motion for an Order Granting a Money Judgment for his "Origination"**

### Commission and Directing a Hearing on Counsel Fees

Spinac moves for an order granting a money judgment consistent with the prior decision, which found that he was entitled to his origination commission on the Royal Kunia Transaction and liquidated damages in the amount of 25% of the total amount due. Spinac points to the affidavits submitted by Michaels and Gaeta in support of the motion to renew and reargue, which state that CAS received a net commission of \$1,909,908 on the Royal Kunia Transaction (Michaels Aff., Exh. E; Gaeta Aff., Exh. C). Thus, according to Spinac, he is entitled to judgment in the amount of \$596,846.25, plus interest.

Defendants argue that there are substantial uncertainties as to Spinac's entitlement to the origination commission on the Royal Kunia Transaction which preclude a money judgment. According to defendants, liquidated damages should be assessed on a portion of the \$175,000 offered by CAS to Spinac. Defendants assert that this amount represented the commission for Spinac's role in originating and placing the Royal Kunia Transaction. Defendants, thus, maintain that because Spinac has not been granted summary judgment for his role in placing the Royal Kunia Transaction, Spinac's motion for a money judgment should be denied.

Defendants' arguments are unpersuasive. The court has awarded Spinac partial summary judgment for his origination commission for the Royal Kunia Transaction, and has determined that plaintiff is entitled to liquidated damages in the amount of 25% of the *total amount due* (Labor Law § 198 [1-a]), not what defendants offered to pay him.

Pursuant to the Employment Agreement, Spinac's entitlement to a commission is based upon the net commission received by CAS. "Net commission" is defined in the Employment Agreement as "gross commission less direct expenses and/or referral fees or commissions paid to

outside brokers or finders” (Michaels Aff., Exh. A). Defendants have submitted an invoice dated April 12, 2007 indicating that CAS’s net fee after expenses for the Royal Kunia Transaction was in the amount of \$1,909,908<sup>4</sup> (*id.*, Exh. E; Gaeta Aff., Exh. C). Accordingly, pursuant to paragraph 3 of the Employment Agreement, Spinac is entitled to 25% of this sum or \$477,477 (Michaels Aff., Exh. A). Additionally, Spinac is entitled to liquidated damages, i.e., 25% of \$477,477 or \$119,369.25, for a total of \$596,846.25.

Spinac is also entitled to prejudgment interest (*see Reilly v Natwest Mkts. Group, Inc.*, 181 F3d 253, 265 [2d Cir 1999], *cert denied* 528 US 1119 [2000] [employee was entitled to prejudgment interest and liquidated damages on his Labor Law claim for unpaid wages]). CPLR 5004 provides an interest rate of nine percent per annum (*see also Ting Yao Lin v Hayashi Ya II, Inc.*, 2009 WL 289653, \*6, 2009 US Dist LEXIS 12963, \*21 [SD NY], *adopted* 2009 WL 513371, 2009 US Dist LEXIS 15513 [SD NY 2009] [awarding nine percent interest for Labor Law violation]; *Doo Nam Yang v ACBL Corp.*, 427 F Supp 2d 327, 342 [SD NY 2005] [same]). CPLR 5001 (b) provides that interest “shall be computed from the earliest ascertainable date the cause of action existed.” Pursuant to Labor Law § 191 (c), a “commission salesperson” “shall be paid the wages, . . . commissions and all other monies earned or payable in accordance with the agreed terms of employment.” The Employment Agreement states that “Broker’s Portion of the commission will not be due and payable to Broker unless and until [CAS] receives and collects its full commission and/or compensation for the subject transaction” (Michaels Aff., Exh. A). Therefore, Spinac’s commission for originating the Royal Kunia Transaction became due and payable upon CAS’s collection of the fees and commissions. According to the evidence

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<sup>4</sup>Tio and Sznajderman were CAS brokers (Gaeta Aff, ¶ 16; Michaels Aff., ¶ 5).

submitted by defendants, on March 14, 2007, the Royal Kunia Transaction closed and CAS was paid its commission for the transaction (Gaeta Aff., ¶ 19; Michaels Aff., ¶ 18). In light of the above, Spinac is therefore entitled to prejudgment interest at the rate of nine percent per annum from March 14, 2007.

Labor Law § 198 (1-a) allows a successful plaintiff to recover reasonable attorney's fees. The reasonableness of those fees shall be referred to a Special Referee to hear and report with recommendations.

Accordingly, it is

**ORDERED** that defendants' motion (sequence number 004) for leave to reargue and renew the court's decision and order dated April 9, 2010 is granted to the extent of granting leave to reargue and renew, but upon reargument and renewal, the court adheres to its original determination; and it is further

**ORDERED** that plaintiff's motion (sequence number 006) for a money judgment is granted and the sixth cause of action (violation of Labor Law § 190 *et seq.*) is severed and, upon service of a copy of this Decision and Order, with Notice of Entry, the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant Carlton Advisory Services, Inc. in the amount of \$596,846.25, together with interest as prayed for allowable by law at the rate of 9% per annum from March 14, 2007, until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

**ORDERED** that the issue of plaintiff's attorney's fees shall be referred to a Special Referee to hear and report with recommendations on the amount of reasonable attorney's fees,

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 aforesaid issue; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the parties email [afield@courts.state.ny.us](mailto:afield@courts.state.ny.us) for a date for another settlement conference.

**This Constitutes the Decision and Order of the Court.**

Dated: June 29, 2011

ENTER:

**FILED**

JUL 13 2011

NEW YORK  
COUNTY CLERK'S OFFICE

  
J.S.C.  
**EMILY JANE GOODMAN**

SUPREME COURT OF THE STATE OF NEW YORK- NEW YORK COUNTY  
PRESENT: Hon. DORIS LING-COHAN, Justice

PART 36

O'neil  
- against -  
Urban Express, LLC  
et al

*Order + 90 Day Warning*

INDEX NO. 102912/2010  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 002  
MOTION CAL.NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to: AMEND PLEADINGS

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	<u>1,2</u>
Answering Affidavits - Exhibits (Memo)	_____
Replying Affidavits (Reply Memo)	_____

Cross-Motion: [ ] Yes [X] No

**FILED**

JUL 13 2011

Upon the foregoing papers submitted without opposition, it is  
NEW YORK  
COUNTY  
ORDERED that plaintiff's motion to amend the summons and complaint to reflect

the addition of Delivery Mgmt Services Corp.  
as a defendant

is granted, provided movant serves and files the amended papers upon all parties within 10 days pursuant to the CPLR, together with a copy of this order with notice of entry, and it is further

ORDERED that defendants shall serve answers to the amended complaint within 20 days from the date of said service, and it is further ordered that within 5 days of receipt of

This constitutes the decision and order of the Court. the answer, all previously exchanged discovery shall be supplied.

All remaining discovery shall be credited as it is over one year  
Dated 7/21/11  
Since the filing of a request for judicial intervention on July 21, 2010.  
Doris Ling-Cohan, JSC

Check One: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

Check if Appropriate: [ ] DO NOT POST  
WARNING  
90 Day  
effective 7/21/11  
It is ordered that a NOI shall be filed within 90 days of 7/21/11 or the case will be dismissed.  
SO ORDERED