

**Newmark & Co. Real Estate, Inc. v 1523 Avenue M,  
LLC**

2011 NY Slip Op 33453(U)

December 22, 2011

Sup Ct, NY County

Docket Number: 601175/10

Judge: Judith J. Gische

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

JUDITH J. GISCHE, J.S.C.

PRESENT:

PART 10

Index Number : 601175/2010

NEWMARK & COMPANY REAL ESTATE

vs  
1523 AVENUE M, LLC

Sequence Number : 004

DISMISS

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

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

MOTION SEQ. NO. 004

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

MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.

FILED

DEC 27 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: Dec 22, 2011

Jp  
JUDITH J. GISCHE, J.S.C.

Check one: ☐ FINAL DISPOSITION

☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

☐ REFERENCE

☐ SUBMIT ORDER/ JUDG.

☐ SETTLE ORDER/ JUDG.

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

Supreme Court of the State of New York  
County of New York: IAS Part 10

-----X  
NEWMARK & COMPANY REAL ESTATE, INC.,  
d/b/a NEWMARK KNIGHT FRANK,

Plaintiff,

**-against-**

1523 AVENUE M, LLC,

Defendant.

-----X  
1523 AVENUE M, LLC,

Third-Party Plaintiff,

**-against-**

SELFHELP COMMUNITY SERVICES, INC.,  
MICHAEL MOORIN and PAUL DAVIDSON,

Third-Party Defendants

**Decision/ Order**

Index No.: 601175/10

Seq. No.: 004

**Present:**

Hon. Judith J. Gische  
J.S.C.

Third Party

Index No.: 590541/10

**FILED**

**DEC 27 2011**

**NEW YORK  
COUNTY CLERK'S OFFICE**

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

| Papers                                                  | Numbered |
|---------------------------------------------------------|----------|
| 3PDef MM, MP n/m w/LAB affirm, MM, MP affid, exhs ..... | 1        |
| 3PPltf affid in opp w/ AP affirm .....                  | 2        |
| Newmark in support w/LAB affirm, exhs .....             | 3        |

Hon Judith J. Gische:

Upon the foregoing papers, the court's decision and order is as follows:

This is an action by plaintiff, Newmark & Company Real Estate, Inc. d/b/a Newmark  
Knight Frank ("Newmark"), to recover a broker's commission from defendant, 1523 Avenue M,

LLC ("1523 M"), for a lease entered into between 1523 M and third-party defendant, Selfhelp Community Services, Inc. ("Selfhelp").

By decision and order dated February 16, 2011 ("prior order"), this Court previously granted summary judgment in favor of Newmark against 1523 M and denied 1523 M's cross motion for summary judgment. This Court also granted Selfhelp's motion to dismiss 1523 M's third-party complaint against it for indemnification and attorney's fees. The reader is presumed familiar with the facts and circumstances of the prior order which is incorporated herein by reference.

Michael Moorin ("Moorin") and Paul Davidson ("Davidson") only appeared after the first motion for summary judgment had already been made. Moorin and Davidson now move for summary judgment and/or to dismiss the third party complaint as to them. CPLR § 3212, CPLR § 3211 (a)(1), (7). Since issue has been joined on the third party complaint, summary judgment relief is available and this motion will be decided on the merits (CPLR § 3212 Myung Chun v. North American Mortgage Co., 285 AD2d 42 [1<sup>st</sup> Dept 2001]).

In its third party complaint, 1523 M asserts only two causes of action against Moorin and Davidson. The third cause of action alleges that Moorin and Davidson "breached their fiduciary duties to 1523 M" by "offering to reduce Newmark's commission and kick back the difference of the reduction to Self-help as a rent credit." (Third party complaint ¶ 29). In the fourth cause of action Moorin and Davidson "breached their fiduciary duties to 1523 M "by threatening 1523 M to pay its commission or they would prevent 1523 M from leasing the Premises to Selfhelp and then actively negotiating against 1523 M, Moorin and Davidson breached their fiduciary duties to 1523 M." ( Third party complaint ¶34). A fair reading of the third party complaint is that the only claims asserted against Moorin and Davidson are for breach of fiduciary duty.

In the prior order, the court found that Newmark could not be sued by 1523 M for breach of fiduciary duty because there was no fiduciary relationship between such parties. The court expressly stated:

“The primary reason why breach of fiduciary duty will not lie is because 1523 Ave and Newmark did not have a fiduciary relationship. The undisputed facts are that Newmark was acting as an agent for and negotiating with 1523 Ave on behalf of Selfhelp. While Newmark may have had fiduciary obligations to Selfhelp, there were no duties owed to 1523 Ave. Rivkin v. Century 21 Teran Realty LLC, 10 N.Y.3d 344 (2008).”

This finding is law of the case.

On this motion, Moorin and Davidson have affirmatively established that they were acting as employees of Newmark in connection with Selfhelp’s lease with 1523 M. Since Newmark had no fiduciary relationship with 1523 M, neither could Moorin and Davidson, as Newmark’s employee and agents, have any fiduciary obligations to 1523 M.

1523 M argues, without a scintilla of evidence, that there are issues of fact regarding whether Moorin and Davidson were acting outside the scope of their employment in connection with the negotiation of the lease. Not only is there no basis for this bald proposition, but even were it true, it does not change the fact that neither Moorin or Davidson had any fiduciary relationship with 1523 M. In the absence of such a relationship, there can be no cause of action for breach of fiduciary duty. Barrett v. Freifeld, 64 A.D.3d 736, 739 (2d Dept. 2009). Thus this issue is simply a red herring.

1523 M argues, in its memorandum of law, that summary judgment should be denied because “Moorin and Davidson tortiously interfered with the prospective business advantage.” The problem with this argument is that there is no cause of action asserted in the third party complaint against Moorin and Davison for tortious interference with prospective business

advantage. Neither of the causes of action asserted against movants indicates that it is seeking damages for tortious interference with prospective economic advantage.

Even if the court liberally construes all the facts in the pleadings, there are insufficient factual allegations to support such a claim. Intentional interference with prospective business advantage applies to those situations where a third party would have entered into, or extended a contractual relationship with, plaintiff but for the wrongful and intentional acts of the defendant. Carvel Corp. v. Noonan, 3 NY3d 182 (2004). The elements are: [1] business relations with a third party; [2] the defendants interference with those business relations; [3] the defendant acting with the sole purpose of harming the plaintiff or using wrongful means and [4] injury to the business relationship. Guard-Life Corp. V. S. Parker hardware MFG. Corp., 50 NY2d 183 (1990). There needs to be a specific claim that the plaintiff was actually and wrongfully prevented from entering into or continuing in a specific business relationship. White v. Ivy, 63 AD3d 1236 (3<sup>rd</sup> dept. 2009). Other than bald conclusory language, there are no facts alleged from which a finder of fact could conclude that either Moorin and/or Davidson were acting solely to harm 1523 M or otherwise using wrongful means sufficient to support such a cause of action.

The motion for summary judgment dismissing the third party complaint against Moorin and Davidson is, therefore, granted.

Moorin and Davidson also move for sanctions and attorney's fees. Pursuant to 22 NYCRR §130-1, sanctions can be imposed when conduct complained of is "frivolous." The Rules define frivolous conduct as follows:

Conduct is frivolous within the meaning of Part 130 if:

- (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material factual statements that are false.

The motion for imposition of sanctions against 1523 M and/or its attorney is denied.

While the court did not ultimately agree with 1523 M's position in this action, that alone, is not a sufficient basis for the imposition of sanctions. See: Ross & Cohen v. Kurtz Steel Corp., 237 A.D.2d 172 (1<sup>st</sup> Dept 1997).

### Conclusion

In accordance herewith it is hereby:

**Ordered** that third party defendants, Michael Mooring and Paul Davidson's motion for summary judgment dismissing the third party complaint as to them is granted, and it is further

**Ordered** that third party defendants Moorin and Davidson's request for sanctions and attorney's fees, is hereby denied, and it is further

**Ordered** that any requested relief not expressly addressed herein has nonetheless been considered by the court and is hereby expressly denied; and it is further

**Ordered** that this shall constitute the decision and order of the Court.

Dated: New York, New York  
December 22, 2011

So Ordered:

  
HON. JUDITH J. GISCHE, J.S.C.

**FILED**

DEC 27 2011

NEW YORK  
COUNTY CLERK'S OFFICE