

**Newmark & Co. Real Estate, Inc. v Manhattan  
Motorcars, Inc.**

2023 NY Slip Op 33652(U)

September 20, 2023

Supreme Court, Kings County

Docket Number: Index No. 515078/2019

Judge: Leon Ruchelsman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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

Plaintiffs,

Decision and order

- against -

Index No. 515078/2019

MANHATTAN MOTORCARS, INC. and MMC  
BROOKLYN LLC,

Defendants,

September 20, 2023

-----X  
PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #5 & #6

The plaintiff has moved pursuant to CPLR §3212 seeking summary judgement on its claim for breach of contract. The defendants have cross-moved seeking summary judgement dismissing the complaint. The motions have been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded in a prior order the defendant engaged the plaintiff, a real estate brokerage firm, to find them a suitable location for a car dealership. A location was found at 2875 Flatbush Avenue in Kings County which was owned by bankrupt Toys R Us. In February 2018 the plaintiff, acting as broker on behalf of the defendant, made an offer to Toys R Us. That offer was rejected, however, the plaintiff still thought it was prudent to pursue this property on behalf of the defendants. Shortly thereafter Toys R Us announced they had entered bankruptcy and that this property would be included in any liquidation plans.

Indeed, the plaintiff met with an entity called Jenel Management Corp., who expressed interest in purchasing the property and then leasing it to the plaintiff. On March 27, 2018 Jenel proposed terms for the purchase and eventual lease of the property to the defendants. The parties continued to negotiate precise terms until June 2018 when Jenel informed the parties they were no longer interested in purchasing the property. Thereafter the plaintiff continued to pursue the property on behalf of the defendants. Specifically, the plaintiff facilitated the defendants to participate at the bankruptcy auction and ultimately the defendants successfully purchased the property on August 28, 2018 for a price of \$14.150 million. The plaintiff sought its commission which was refused. This lawsuit was then commenced. The parties have now respectively moved seeking summary judgement.

#### Conclusions of Law

Where the material facts at issue in a case are in dispute summary judgment cannot be granted (Zuckerman v. City of New York, 49 NYS2d 557, 427 NYS2d 595 [1980]). Generally, it is for the jury, the trier of fact to determine the legal cause of any injury, however, where only one conclusion may be drawn from the facts then the question of legal cause may be decided by the trial court as a matter of law (Marino v. Jamison, 189 AD3d 1021,

136 NYS3d 324 [2d Dept., 2021]).

It is well settled that for a party to recover real estate brokerage commissions the broker must establish (1) that the broker is duly licensed, (2) that the broker had a contract, express or implied, with the party to be charged with paying the commission, and (3) that the broker was the procuring cause of the sale (see, Friedland Realty Inc., v. Piazza, 273 AD2d 351, 710 NYS2d 97 [2d Dept., 2000]). Admittedly, there is no written agreement between the parties (cf, NRT New York LLC v. Laffey, 103 AD3d 861, 962 NYS2d 266 [2d Dept., 2013]). However, an implied brokerage agreement is likewise enforceable. A brokerage agreement "may be implied where the principal received a benefit from the broker's services under circumstances which, in fairness, preclude the denial of an obligation to pay" (see, Poznanski v. Wang, 84 AD3d 1048, 923 NYS2d 602 [2d Dept., 2011]).

However, a broker is not entitled to a commission merely because he found the property for the purchaser. Rather, "however variable the judicial terminology employed to express the requirement that the broker must be the procuring cause, it has long been recognized that there must be a direct and proximate link, as distinguished from one that is indirect and remote, between the bare introduction and the consummation" (Greene v. Hellman, 51 NY2d 197, 433 NYS2d 75 [1980]). Specifically, the broker must bring together "the minds of the

buyer and the seller" (Sibbald v. Bethlehem Iron Company, 83 NY 378, 38 Sickels 378 [1881]).

In this case, while the broker did introduce the defendants to the property and tried to consummate a deal that would have earned a commission, there are questions of fact whether the broker engaged in sufficient conduct regarding the bankruptcy sale to be entitled to a commission. The plaintiff argues that "it is undisputed that the first time that MMC ever made any effort to pursue the Property was in 2018 after Newmark identified the location as a potentially suitable location for MMC's new Porsche dealership...The decision to pursue the Property was made directly as a result of Newmark's advice, guidance, and hard work. Newmark was involved in negotiating several potential lease transactions with multiple parties on MMC's behalf and Newmark facilitated MMC's participation in the TRU bankruptcy auction during which MMC purchased the Property. It is undisputed that Newmark, as MMC's broker, ushered MMC through attempts to lease the Property, first directly from TRU and then from Jenel, a prospective purchaser of the Property at TRU's bankruptcy auction. The undisputed factual record demonstrates a direct causal link between Newmark identifying the Property for MMC and MMC's purchase of the Property" (see, Memorandum of Law in Support, page 10 [NYSCEF Doc. No. 138]). However, those arguments merely assert the plaintiff located a

property and was unsuccessful with Toys R Us and Jenel and then assisted the defendants to enable them to purchase the property at an auction. While there are no New York cases that discuss this issue a case from another jurisdiction proves instructive. In In re Vegas Management LLC, 576 B.R. 883 [United States Bankruptcy Court Middle District of Florida 2017] the court denied commissions to a broker after the property was ultimately purchased at a bankruptcy auction. In that case the seller hired a broker, Goldberg, to sell property. The broker procured a buyer and a contract for the sale of the property in 2016 was drafted, however, the seller's owners declared bankruptcy and conditions necessary before the contract could be executed could not be satisfied. The contract never closed and the property was sold at a bankruptcy auction to the same buyer that had been the party to the unsuccessful contract. The broker sought commissions from the successful buyer. The bankruptcy court rejected that argument and held that regarding Goldberg "the 2016 Contract was never closed. His efforts did not lead to the ultimate sale. Goldberg did not conduct the auction on behalf of the Trustee. The 2017 Sale was the result of a public auction, not from Goldberg's unsuccessful efforts to close the 2016 Contract" (id). The court further reasoned that "the auction was a competitive process in which some other entity could have been the buyer. Goldberg would also have no claim to the entitlement

if the auction had resulted in a sale of the property to the backup buyer" (id).


Thus, where the sale ultimately takes place because of a public auction and not because of any unsuccessful attempts by the broker then the broker is not entitled to any commission. The plaintiff argues that in this case there are questions of fact whether based upon its facilitation of the bankruptcy auction and the fact the plaintiff was involved in attempting to help with that auction a brokerage relationship existed. The plaintiff insists that "it is undisputed that it was through Newmark's brokerage services and direction that MMC was able to become a qualified bidder at the bankruptcy auction. Without Newmark's facilitation, MMC would not have participated in the bankruptcy auction during which it purchased the Property" (see, Memorandum of Law in Support, page 11 [NYSCEF Doc. No. 138]). Therefore, the plaintiff maintains it acted as a broker during the auction and consequently, there are no questions they are entitled to their fee. However, those contentions are disputed. Indeed, in response to the plaintiff's Statement of Material Facts, wherein the plaintiff asserted they sent an email communication informing the defendant of the auction, the defendant responded that "Defendants dispute that "[i]t was through [the July 10, 2018 email] that MMC was provided with access to information as to how to become a qualified bidder and

access to the due diligence deposition" (see, Response to Plaintiff's Rule 19-A Statement of Undisputed Material Facts, ¶42 [NYSCEF Doc. 198]). Further, the defendant maintains it is "absurd" to hinge an entire brokerage fee upon informing the plaintiff of the time, manner and registration requirements of the auction when such information is readily available to the general public. While that may be true there are questions whether the plaintiff was hired to act as the broker under this scenario. Thus, there is no conclusive presentation the plaintiff is entitled to a brokerage fee. Nor is it conclusive that as a matter of law the plaintiff is surely not entitled to any fee. Rather, as noted, factual questions remain regarding the plaintiff's role in the bankruptcy auction. Those questions foreclose any summary determination. These questions will ultimately need resolution by a trier of fact. Consequently, both motions seeking summary judgement are denied.

So ordered.

ENTER:

DATED: September 20, 2023  
Brooklyn N.Y.

  
\_\_\_\_\_  
Hon. Leon Ruchelsman  
JSC