

**Newmark & Co. Real Estate, Inc. v Wiesner Prods.  
Inc.**

2025 NY Slip Op 30349(U)

January 21, 2025

Supreme Court, New York County

Docket Number: Index No. 651896/2024

Judge: Margaret A. Chan

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN PART 49M

Justice

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NEWMARK & COMPANY REAL ESTATE, INC.

Plaintiff,

- v -

WIESNER PRODUCTS INC.,

Defendant.

-----X

INDEX NO. 651896/2024

MOTION DATE 06/07/2024

MOTION SEQ. NO. MS 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

were read on this motion to/for DISMISSAL

In this action, real estate broker plaintiff Newmark & Company Real Estate, Inc. alleges that its client, defendant Wiesner Products Inc., breached an exclusive broker engagement agreement by independently finding and leasing premises at 1410 Broadway, New York, NY. Defendant now moves to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7) on the grounds that the parties terminated the engagement agreement ten months before defendant signed the 1410 Broadway lease. Plaintiff opposes. For the reasons below, defendant's motion is denied.

Background

Plaintiff is a New York City-based real estate brokerage firm; defendant is plaintiff's former client (NYSCEF # 1, Complaint, ¶¶ 1, 10-13). The parties signed an agreement in November 2022 on their brokerage engagement (Agreement) (id. ¶ 13; NYSCEF # 2, Agreement). Under the Agreement, defendant agreed to hire plaintiff as its exclusive broker to either renew its soon-to-end lease at 1333 Broadway, New York, NY 10018 (1333 Broadway) or alternatively to find new office space (NYSCEF # 1 ¶¶ 13; NYSCEF # 2). As most relevant to this motion, the term began November 2022 and was to end "the earlier of (i) the date when either party terminates the Agreement upon thirty (30) days prior written notice to the other . . . but no earlier than November 30, 2023, or (ii) November 30, 2024 (the 'Termination Date')" (NYSCEF # 2). In other words, the Agreement could not be terminated before November 30, 2023 (Minimum Term Date) and would automatically terminate on November 30, 2024 (Maximum Term Date).

Additionally, the Agreement provides that defendant will "refer to [plaintiff] any inquiries [defendant] receive[s]" from other buildings during the term of the

Agreement (NYSCEF # 2). For 12 months after Termination Date, defendant was required to recognize plaintiff as its exclusive broker for any location submitted by plaintiff during the term (*id.*). The Agreement was signed by Brian S. Waterman, Executive Vice Chairman, on behalf of the plaintiff, and by Andy Jha, CFO, on behalf of defendant (*id.*).

There is no dispute that after entering the Agreement, plaintiff successfully negotiated an extension to defendant's 1333 Broadway lease (1333 Broadway Extension or Extension) (NYSCEF # 1 ¶ 28).<sup>1</sup> On February 21, 2023—roughly nine months before the Minimum Term Date—Jha sent the following email to Lance Korman, plaintiff's Vice Chairman:

“Lance.

We will be closing the extension of 1333 Broadway . . . soon.

**Once we do that please consider the engagement agreement terminated.** Please prepare new Agreement for our next space search since our extension will expire 11/30/2024.

Thanks & regards  
Andy”

(purported Termination Email) (NYSCEF # 11, Jha-Korman Emails Feb. 2023, at \*2-3 [emphasis added]).<sup>2</sup> Later that day, Korman responded “[u]nderstood and will do. Thank you” (Acceptance Email) (*id.* at \*2).

The Extension closed several days later on March 3, 2023 (NYSCEF # 1 ¶ 28). Korman avers that later that day, Jha texted him “Start looking for next and get the next agreement ready. [*sic*] Because old one expired.” (NYSCEF # 18, March 3 Text Messages).<sup>3</sup> Korman responded “On it Boss! Thank you.” (*id.*). Korman avers that he did not understand Jha to be terminating the Agreement at this time and would not have called Jha “boss” if he thought Jha was prematurely terminating the Agreement (NYSCEF # 17, Korman Aff, ¶ 14). At no point did defendant send a formal termination notice.

Regardless, five days later on March 8, 2023, and roughly 8 months before the Minimum Term Date, Korman emailed Jha an unsigned proposed agreement for defendant's review (Proposed Agreement) (NYSCEF # 11, Korman Email and

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<sup>1</sup> Defendant asserts without any evidence that the Extension extended the 1333 Broadway lease term from November 2023 to November 2024, which are coincidentally the same termination dates in the Agreement (NYSCEF # 14, Def's MOL, at 3). Because there is no support for this assertion in the documentary evidence or the complaint, it will not be considered for the purpose of this motion.

<sup>2</sup> Defendant submits these and other documents through the affirmation of counsel rather than through someone with personal knowledge (*see* NYSCEF # 9, Woller Aff, ¶ 3). However, plaintiff does not appear to challenge the authenticity of defendant's exhibits.

<sup>3</sup> Attached to Lance Korman's Affidavit in opposition to the motion (NYSCEF # 17, Korman Aff).

Proposed Agreement). The Proposed Agreement updated all the dates, changing the effective date to March 2023, and extending the Minimum and Maximum Term Dates to November 30, 2024, and November 30, 2025, respectively (*id.* at \*3). However, plaintiff concedes the Proposed Agreement was never signed, and so it never took effect (NYSCEF # 16, Pltf's Opp at 8).

Based on the documents, it appears that Korman texted Jha at least twice between March 8 and May 18, 2023, but never received a text back (NYSCEF # 18). On May 19, 2023, Korman emailed Jha a draft proposed offer for space at 1440 Broadway, New York, NY 10018 (1440 Broadway) incorporating several changes "as discussed" (NYSCEF # 21, Korman-Jha Email May 19). The parties highlight the fact that the draft proposed offer stated that plaintiff was "authorized by [its] *exclusive client*, [defendant] . . . to submit this non-binding offer" (*id.* at \*3). Later that day, Jha responded "Good. Let it go" (NYSCEF # 22, Jha Response Email). Korman sent the proposed offer to 1440 Broadway and told Jha he would forward any updates (NYSCEF # 23, Korman Response Email, at \*2; *see also* NYSCEF # 12, May 2023 Emails, at \*4-5; NYSCEF # 24, May 2023 Emails, at \*2-3).<sup>4</sup>

Four days later, on May 23, Korman emailed Jha saying that 1440 Broadway needed confirmation that plaintiff represented defendant (NYSCEF # 12 at \*3). Jha responded:

"Please remove the word exclusive. You can add exclusive for 1440 Broadway only. Charles [defendant's CEO] will never allow that."

(*id.*). Korman replied with an amended proposal that updated the language to say plaintiff was "authorized as exclusive broker with regards to 1440 Broadway on behalf of [defendant]" (NYSCEF # 13, Updated 1440 Offer, at 1; NYSCEF # 12 at \*2). Jha appears to have approved, because Korman received a counter-offer from 1440 Broadway on May 25 (NYSCEF # 25, 1440 Counter-Offer Emails, at \*3-4).

Jha ultimately rejected 1440 Broadway's counter-offer, claiming that defendant's CEO had decided to go with the space at 1411 Broadway, another space that plaintiff had shown them (*id.* at \*2; *see also* NYSCEF # 20, Fall 2022 Emails & Space Matrices at \*15-16 [emails showing plaintiff sent space metrics for 1411 Broadway to defendant]).

Yet in December 2023, shortly after the Agreement's Minimum Term but still 11-months before the Agreement's Maximum Term, plaintiff alleges that defendant instead signed a lease with a third building, 1410 Broadway (NYSCEF # 1 ¶ 34). Plaintiff alleges that despite the Agreement's requirements, defendant did not tell plaintiff it was looking at 1410 Broadway and did not involve plaintiff in the negotiation or leasing process (*id.* ¶¶ 35-36; *see* NYSCEF # 2 [defendant "agree[s] to

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<sup>4</sup> Docket entries 12 and 24 contain nearly identical email chains except that docket 12 has one later email than docket 24 (*compare* NYSCEF # 12 and NYSCEF # 24).

refer to [plaintiff] any inquiries you receive” for new spaces during term of Agreement]). Plaintiff therefore never received a commission for 1410 Broadway (*id.* ¶¶ 37, 52).

On April 11, 2024, plaintiff brought this action against defendant alleging breach of contract due to defendant’s failure to refer 1410 Broadway to plaintiff during the term of the Agreement (NYSCEF # 1 ¶¶ 49-58). Plaintiff alleges that the Agreement could not be terminated prior to November 30, 2023, and that defendant failed to send a notice of termination after that date, meaning defendant was required to refer any inquiries from 1410 Broadway to plaintiff.

Defendant now moves to dismiss pursuant to CPLR 3211(a)(1) and (a)(7) based on documentary evidence and for failure to state a claim (NYSCEF # 14, Def’s MOL, at 1-2). Defendant’s primary argument is that Jha’s February 21, 2023 Termination Email terminated the Agreement as soon as the 1330 Broadway Extension closed (*id.*; *see* NYSCEF # 11 at \*3). Defendant further argues that despite the Agreement’s clauses prohibiting termination prior to November 30, 2023, plaintiff unequivocally waived strict compliance with these clauses when Korman responded “understood and will do” to the Termination Email (NYSCEF # 14 at 8-9).<sup>5</sup> Defendant also argues that Jha’s request to change and narrow the “exclusive” language in the 1440 Broadway proposal further solidifies that the Agreement was terminated early (*id.*).

Plaintiff objects on various grounds. Plaintiff first argues that the emails fail to “utterly refute” plaintiff’s allegations or “undeniably establish” that the Agreement was terminated. Plaintiff argues that the purported Termination Email itself did not clearly terminate anything because (a) the Agreement’s text contemplated multiple transactions; (b) Korman did not interpret the Termination Email as a termination because it inconsistently referred both to “termination” of the Agreement and the expiration of the Agreement on the November 30, 2024 deadline; and (c) Korman would not have called Jha “boss” in the March 3 Text Messages if he thought defendant was prematurely ending the Agreement (NYSCEF # 16 at 7-8). Plaintiff also points out that the 1440 Broadway negotiations show plaintiff continued to act as defendant’s broker, even if they did not sign the Proposed Agreement (*id.* at 8-9).

Plaintiff next argues that whether plaintiff waived strict compliance is an issue of fact that should not be resolved on a motion to dismiss (*id.* at 9-11). Plaintiff then argues that Korman did not have authority to terminate the Agreement because he was not the one who signed it, and plaintiff did not take any actions to

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<sup>5</sup> Defendant also mistakenly claims that two cases were decided by the First Department (whose decisions are binding on this court) when, in fact, they were decided by the Second Department (whose decisions are persuasive but not binding) (*see* NYSCEF # 14 at 7, citing *Zachariades v Transcontinental Ins. Co. (CNA)*, 1 AD3d 509 [1st Dept 2003] [mistakenly cited as 1st Dept], and *2M Realty Corp. v Boehm*, 204 AD2d 620, 620-621 [1st Dept 1994] [same]).

suggest Korman had such authority (*id.* at 11-12). Finally, plaintiff argues that plaintiff aided defendant in ultimately selecting 1410 Broadway by showing defendant several other properties in the same area, including 1440 Broadway and 1411 Broadway (*id.* at 12).

Defendant replies that plaintiff cannot seriously dispute that the documentary evidence proves the Agreement was terminated (NYSCEF # 26, Reply). Defendant argues the Termination Email cannot reasonably be read in any way other than terminating the Agreement, and Korman's response cannot be read in any way other than accepting that termination (*id.* at 5). Defendant further argues that plaintiff's evidence—including the March 3rd Text Messages and the unsigned Proposed Agreement—makes no sense unless plaintiff agreed that the Agreement had been terminated (*id.* at 5-7). Defendant next argues that based on the documentary evidence, there are no outstanding issues of fact left (*id.* at 9-11). Finally, defendant argues that Korman at least had apparent authority to accept termination given that his title was Vice Chairman and he took actions that appeared to show he had authority including by preparing and sending defendant the Proposed Agreement (*id.* at 11-12). Defendant asserts that at the very least, plaintiff is estopped from asserting Korman did not have authority (*id.* at 12-13).

### Discussion

On a motion to dismiss pursuant to CPLR 3211 (a)(7), the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference,” and “determine only whether the facts as alleged fit into any cognizable legal theory” (*Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401, 403 [1st Dept 2013]). Significantly, “whether a plaintiff...can ultimately establish its allegations is not taken into consideration in determining a motion to dismiss” (*Phillips S. Beach LLC v ZC Specialty Ins. Co.*, 55 AD3d 493, 497 [1st Dept 2008], *lv denied* 12 NY3d 713 [2009])

At the same time, “[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence they are not presumed to be true or accorded every favorable inference” (*Morgenthau & Latham v Bank of New York Company, Inc.*, 305 AD2d 74, 78 [1st Dept 2003] [internal citation and quotation omitted]). However, dismissal based on documentary evidence under 3211(a)(1) may result “only when it has been shown that a material fact as claimed by the pleader is not a fact at all and no significant dispute exists regarding it” (*Acquista v New York Life Ins. Co.*, 285 AD2d 73, 76 [1st Dept 2001]), quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Moreover, “affidavits, which do no more than assert the inaccuracy of plaintiffs' allegations, may not be considered, in the context of a motion to dismiss, for the purpose of determining whether there is evidentiary support for the complaint ... and do not otherwise conclusively establish a defense to the asserted claims as a matter of law” (*Tsimerman v Janoff*, 40 AD3d 242, 242 [1st Dept 2007]).

On a CPLR 3211(a)(1) motion,<sup>6</sup> the central question is whether the evidence “utterly refutes the plaintiff’s allegations, thereby conclusively establishing a defense as a matter of law” (*Rosenbaum v Myers*, 191 AD3d 445, 446 [1st Dept 2021]). Here, the issue is whether the emails, text messages, and conduct clearly establishes that plaintiff waived strict compliance with the term and termination clauses of the Agreement such that it was terminated upon close of the 1333 Broadway Extension (March 3, 2023).

“Contractual rights may be waived if they are knowingly, voluntarily and intentionally abandoned” (*Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 104 [2006]). Waiver “may be established by affirmative conduct or by failure to act so as to evince an intent not to claim a purported advantage” (*id.*). However, “[w]aiver ‘should not be lightly presumed’ and must be based on ‘a clear manifestation of intent’ to abandon contractual protections” (*Lynch v HUB Intl. Group Northeast Inc.*, 224 AD3d 479, 481 [1st Dept 2024], quoting *Tocqueville*, 7 NY3d at 104). It should not be inferred from “a doubtful or equivocal act” (*Keitel v E\*TRADE Fin. Corp.*, 153 AD3d 1181, 1182 [1st Dept 2017], quoting *Ess & Vee Acoustical & Lathing Contrs. v Prato Verde, Inc.*, 268 AD2d 332 [1st Dept 2000]). “Generally, the existence of an intent to forgo such a right is a question of fact” (*Tocqueville*, 7 NY3d at 104).

Here, under a motion to dismiss standard, the evidence does not conclusively establish that plaintiff waived strict compliance with the term and termination clauses. In particular, there acts or statements of consent to the termination are equivocal (*see Keitel*, 153 AD3d at 1182 [cannot infer waiver from “doubtful or equivocal act(s)”]). It is true that every time Jha said the Agreement would terminate and that Korman should prepare a new one, Korman responded that he understood and would follow Jha’s instructions (*see* NYSCEF # 11 at \*2 [“Understood and will do”]; NYSCEF # 18 [“On it Boss! Thank you”]). It is also true that Korman soon sent a new draft Agreement in the form of the Proposed Agreement (NYSCEF # 19). But none of these acts or statements amounts to a “clear manifestation of intent” to waive strict compliance with the Termination Clause (*Lynch*, 224 AD3d at 481; *see also Condor Funding, LLC v 176 Broadway Owners Corp.*, 147 AD3d 409, 411 [1st Dept 2017] [finding no waiver because “[o]n the one hand, the record is bereft of any objection by plaintiff to defendant’s repeated warnings that the covenant would be terminated. On the other hand, there is likewise no express statement of plaintiff’s consent to that termination.”]). They are at best strong evidence that will benefit from further exploration during discovery.

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<sup>6</sup> Although defendant bring its motion on both CPLR 3211(a)(1) (documentary evidence) and (a)(7) (failure to state a claim), defendant’s only arguments are about the documentary evidence, and therefore the (a)(7) ground is rejected.

Finally, the evidence does not “utterly refute[]” the allegations that defendant breached. The Agreement required defendant to “refer to [plaintiff] any inquiries [defendant] receive[d]” regarding its space search during the term of the Agreement(NYSCEF # 2). While there is no specific allegation stating when defendant first spoke to 1410 Broadway, the implication of the complaint as a whole is that defendant spoke to 1410 Broadway at some point while the Agreement was operative. Even if the Agreement was terminated in March 2023, defendant fails to provide evidence conclusively establishing that it first spoke to 1410 Broadway after that termination. Therefore, there are outstanding material questions of fact that must be addressed through discovery, defeating this motion to dismiss.

**Conclusion**

In view of the above, it is hereby


ORDERED that defendant’s motion to dismiss is denied; and it is further

ORDERED that within 30 days of the e-filing of this order, defendant shall file an answer to the Complaint; and it is further

ORDERED that plaintiff shall serve a copy of this Decision and Order with notice of entry on the Clerk of the Court in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “E-Filing” page and on the court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further

ORDERED that a preliminary conference shall be held via Microsoft Teams on February 26, 2025, at 11:30 AM or at such other time that the parties shall set with the court's law clerk. Prior to the conference, the parties shall first meet and confer to stipulate to a preliminary conference order, available at <https://www.nycourts.gov/LegacyPDFS/courts/comdiv/NY/PDFs/part49-PC-Order-fillable.pdf>. in lieu of a conference; and it is further

ORDERED that that counsel for plaintiff shall serve a copy of this Decision and Order, along with notice of entry, on defendant within ten days of this filing.

<u>1/21/2025</u>					
DATE			MARGARET A. CHAN, J.S.C.		
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER	
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART		
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER		
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE	