

Newmark Retail, LLC v 360 W. 55th St., L.P.

2025 NY Slip Op 34824(U)

December 11, 2025

Supreme Court, New York County

Docket Number: Index No. 654051/2024

Judge: Kathleen Waterman-Marshall

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. KATHLEEN WATERMAN-MARSHALL PART 31

Justice

-----X

NEWMARK RETAIL, LLC

Plaintiff,

- v -

360 WEST 55TH STREET, L.P.,

Defendant.

-----X

INDEX NO. 654051/2024

MOTION DATE 11/08/2024

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13

were read on this motion to/for DISMISSAL.

This matter was administratively transferred to Part 31 after the instant motion was fully submitted. Upon the foregoing documents, the motion by 360 West 55th Street, L.P. to dismiss the complaint under CPLR 3211(a)(1) is denied.

Background

Plaintiff Newmark Retail (“Newmark”) is a real estate broker, and 360 West 55th Street LP (“West 55th”) is the owner of the building at 832-838 Ninth Avenue New York, NY (“the Building”). Newmark entered into an exclusive right to lease brokerage agreement (“the Agreement”) with West 55th on July 30, 2020, to market for lease a portion of the ground floor commercial space at the Building.

It is undisputed that Newmark located a tenant for the commercial space, and that the tenant and West 55th entered into a lease agreement on June 2, 2021. West 55th paid Newmark a commission for locating the tenant. Thereafter, on June 2, 2023, without Newmark’s additional involvement or services, the tenant and West 55th entered into an amendment of the tenant’s lease to expand the tenant’s space at the Building. This action and motion arise out of a dispute over whether an additional commission is due Newmark for the increased leased space, under paragraph 1 and Exhibit A of the Agreement.

West 55th contends that paragraph 1 of the Agreement provides for the effective date of the Agreement, and that despite the automatic renewal provision in paragraph 1 (after an initial 6-month period), the Agreement was not renewed because Newmark failed to bring the automatic renewal provision to West 55th’s attention, as required under GOL § 5-903(2). As such, West 55th contends that the Agreement expired after the initial 6-month term set forth in paragraph 1 (i.e., February 1, 2021), and Newmark is not entitled to any further commission. West 55th also contends that Newmark did not provide a list of prospective tenants within 15 days of expiration of the Agreement, as required under paragraph 4, and therefore it does not

owe Newmark any commission. Finally, West 55th contends that because the Agreement expired on February 1, 2021, any agreement between the parties for an additional commission upon renewal or expansion of a lease needed to be performed within one year – by February 1, 2022 – or would violate the statute of frauds. As the commercial tenant’s 2023 expanded lease was executed beyond this one-year period, West 55th contends that any non-written or tacit agreement between the parties for a commission beyond February 1, 2022 violates the statute of frauds.

On the other hand, Newmark contends that paragraph 1 of the Agreement sets forth an exclusivity period for its brokerage, not an effective term for the Agreement. It argues that Exhibit A to the Agreement provides for a commission on any subsequent expansion by the tenant after the exclusive brokerage relationship has ended, and that West 55th’s interpretation of paragraph 1 would inappropriately render Exhibit A superfluous. It further contends that even if paragraph 1 of the Agreement set forth an effective term, and even if Newmark failed to bring the automatic renewal to West 55th’s attention under GOL § 5-903(2), West 55th’s payment of the initial commission for the June 2, 2021 lease constitutes a willingness to ignore any breach of the Agreement by Newmark and an intent by West 55th to continue to perform under the Agreement. Additionally, Newmark contends that courts regularly enforce “tail rights” of brokerage contracts even after the expiration of the exclusive brokerage. Finally, Newmark argues that paragraph 12 of the Agreement functions as a saving clause for all non-violative provisions of the Agreement

Paragraph 1 of the Agreement provides:

Exclusivity: Term. Owner hereby grants NKF [Newmark] the sole and exclusive right as broker to lease to tenants (each, a “Tenant”) the Ground Floor (the “Premises”) in or a part of the building and property known as and located at 832-838 Ninth Avenue, New York, New York (the “Property”). The initial term of this Agreement shall be for a period of Six (6) Months commencing on July 30th, 2020 (the “Initial Term”). After the Initial Term, this Agreement shall continue on a month-to-month basis until the earlier of (i) termination by either party giving to the other thirty (30) days written notice in accordance with the terms of this Agreement, or (ii) the date that is two (2) years after the expiration of the Initial Term (the “Term”). Notwithstanding any rule of law to the contrary, this Agreement shall not be deemed complete by its purpose unless and until all of the Premises has a fully executed Lease with a term of three (3) years or more.

Exhibit A – Commission Rate Schedule states, in pertinent part:¹

In the event of an expansion or leasing of additional space by a Tenant, its affiliates, successors or assigns, in the Premises or the building of which the Premises is a part, or on the same land thereof, pursuant to an option in the Lease or otherwise, Owner

¹ West 55th does not challenge that the “Exhibit A – Commission Rate Schedule” is part of the Agreement.

shall pay [Newmark] an additional commission hereunder calculated by applying the percentage rates on this Commission Rate Schedule to the Base Rent payable for the additional space, commencing with the percentages for year 1 applied to the Base Rent for the additional space, as though it were a new lease for the additional space.

Paragraph 4 of the Agreement states, in relevant part:

Within fifteen (15) days after the expiration or effective date of termination of this agreement, [Newmark] shall provide Owner with a list of prospective Tenants, which shall be limited to prospective Tenants that (i) submitted a written offer, letter of intent or proposal (each an “Offer”), (ii) was sent an Offer by Owner or Broker, the sending of which was authorized by Owner, (iii) sent or received a draft lease, or (iv) toured the Premises and subsequently expressed interest in writing of making an offer; regarding the Premises during the Term of this Agreement (hereinafter the “List”).

Paragraph 12 of the Agreement is a severability clause, which states:

Should any provision contained in this Agreement be deemed unlawful or unenforceable, only that provision will be stricken and the remainder of the Agreement shall remain in full force and effect.

Discussion

On a motion to dismiss, the complaint should be liberally construed, the facts presumed to be true, and the pleading accorded the benefit of every possible favorable inference (*Leon v Martinez*, 84 NY2d 83 [1994]). “Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*id.* at 88 citing *Heaney v Purdy*, 29 NY2d 157 [1971]). “When evidentiary material is considered, the criterion is whether the [plaintiff] has a cause of action, not whether [they] have stated one” (*Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]). Unambiguous contracts constitute documentary evidence for the purposes of dismissal (*Madison Equities, LLC v Serbian Orthodox Cathedral of St. Sava*, 144 AD3d 431 [1st Dept 2016]; *7 Mansion, LLC v Calvano*, 226 AD3d 730 [2d Dept 2024]), and the contract will be construed to give full meaning to the provisions and its general purpose, without rendering any portion meaningless (*Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]; *Matter of Westmoreland Coal Co. v Entech, Inc.*, 100 NY2d 352, 358 [2003]). The elements of a breach of contract claim are: the existence of a

contract; performance by the plaintiff; defendant's breach of the contract; and resulting damages from the breach (*see e.g. 34-06 76, LLC v Seneca Insurance Co.*, 39 NY3d 44 [2022]).²

The terms of paragraph 1, when viewed in context of the entire Agreement, provide that the six-month and two-year expiration periods apply to the exclusivity of the Agreement, not Newmark's ability to recover an additional commission if the tenant increases their leasehold interest (*NRT N.Y., LLC v Morin*, 123 AD3d 590 [1st Dept 2014] [five-month expiration period applied only to exclusive right to rent apartment, not to additional circumstance where renter purchased apartment near end of two-year lease term]). To adopt West 55th's argument that paragraph 1 sets forth the entire effective term of the Agreement would render "Exhibit A – Commission Rate Schedule" meaningless, and contracts are construed to avoid rendering any provision superfluous (*see e.g. Beal Sav. Bank*, 8 NY3d at 324). Exhibit A provides, among other things, a sliding scale commission rate based upon the year of the lease expansion. Notably, Exhibit A expressly considers the commission rate for lease expansions after the exclusivity period provided in paragraph 1. Exhibit A does not contain any time limitation regarding the right to an additional commission upon expansion of a leasehold interest (*NRT N.Y., LLC*, 123 AD3d at 590). Thus, if paragraph 1 set forth the entire effective term of the contract, there would be no need for the sliding scale commissions beyond two years as set forth in Exhibit A. Therefore, West 55th's motion to dismiss based upon expiration of the Agreement is denied.

Nor is dismissal warranted under General Obligations Law § 5-903(2). It is undisputed that Newmark did not bring the automatic extension to West 55th's attention, and thus the exclusivity period did not automatically extend pursuant to General Obligations Law § 5-903(2) (*Healthcare I.Q., LLC v Tsai Chung Chao*, 118 AD3d 98 [1st Dept 2014] [Gische, J.]). It is similarly undisputed that Newmark did not provide a list of potential tenants at the end of the exclusivity period. However, West 55th paid Newmark a commission for locating a commercial tenant after the exclusivity period expired. When faced with a breach of contract, the non-breaching party must "make an election between declaring a breach and terminating the contract or, alternatively, ignoring the breach and continuing to perform under the contract" (*Rebecca Broadway L.P. v Hotton*, 143 AD3d 71, 80 [1st Dept 2016]); a contract may not be treated as both broken and subsisting by a party (*Inter-Power of N.Y. v Niagara Mohawk Power Corp.*, 259 AD2d 932, 934 [3d Dept 1999] *lv denied* 93 NY2d 812 [1999]). Stated differently, a party "may not stop performance and yet continue to take advantage of the benefits of the contract" (*Rebecca Broadway L.P.*, at 81 quoting Restatement [Second] of Contracts § 246 [1] and Comment b thereto; 23 Richard A. Lord, *Williston on Contracts* § 63:33 at 561-562). Having accepted the tenant located by Newmark and paid Newmark's commission for locating the tenant, West 55th accepted the benefit of the contract, despite it now contending that Newmark breached the agreement. Thus, West 55th chose to ignore Newmark's alleged breach and continue to perform under the contract. Consequently, Newmark's failure to bring the automatic

² Although West 55th alleges, in its initial motion papers, that 19 NYCRR § 175.15 prohibits renewal provisions in exclusive brokerage agreements, it does not refute Newmark's opposition that § 175.15 does not form a basis for dismissal. In any event, West 55th does not cite any case in support of its claim, and the Court's own research reveals only two unreported trial decisions have cited 19 NYCRR § 175.15, and neither case found a brokerage contract unenforceable pursuant to § 175.15 (*Sunset 3 Realty, Inc. v Russo*, 7 Misc.3d 1015(A) [Sup Ct Suffolk Cty, 2005]; *Tri-R-Realty and Dev. Co., Inc., v Dispenza*, 17 Misc.3d 1112(A) [Sup Ct Onondaga Cty, 2007]). This Court, therefore, denies the motion to the extent it seeks relief under 19 NYCRR § 175.15.

renewal provision to West 55th's attention, or to submit a list of potential tenants, does not form a basis to dismiss Newmark's breach of contract action.

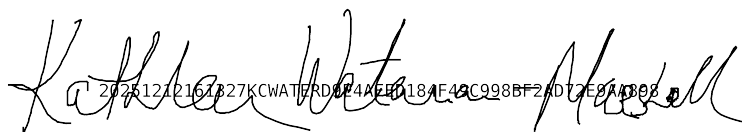
Finally, having determined that paragraph 1 does not set forth an effective term of the Agreement, West 55th's argument that payment of an additional commission violates the statute of frauds necessarily fails.

Accordingly, it is

ORDERED that motion by 360 West 55th Street L.P. is denied; and it is further

ORDERED that defendant 360 West 55th Street L.P. shall file its answer within 20 days of notice of entry of this Decision and Order; and it is further

ORDERED that a preliminary conference is scheduled for **February 26, 2026 at 10:00am** in Part 31. *Counsel are reminded of the Part Rules, including those regarding the submission of a proposed joint conference order in lieu of an in-person appearance on February 26, 2025.*



12/11/2025
DATE

KATHLEEN WATERMAN-MARSHALL,
J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE