

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

PRESENT: MELVIN L. SCHWEITZER  
J.S.C. Justice

PART 45

Provident Loan Society of New York,  
Plaintiff,  
- v -  
190 East 72nd Corporation,  
Defendant.

INDEX NO. 114195/2008  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
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 \_\_\_\_\_

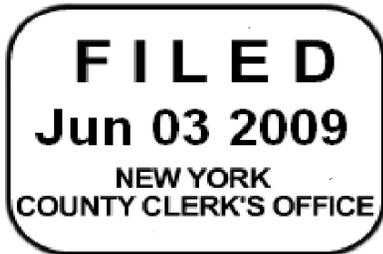
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion to dismiss the  
complaint is granted per the  
attached Decision and Order.

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



Dated: June 2, 2009

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 45

-----X  
PROVIDENT LOAN SOCIETY OF NEW YORK,

Plaintiff,

Index No. 114195/2008

-against-

DECISION AND ORDER

190 EAST 72<sup>nd</sup> CORPORATION,

Motion Sequence: 001

Defendant.

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MELVIN L. SCHWEITZER, J.:

In this declaratory judgment action, defendant 190 East 72<sup>nd</sup> Corporation, (defendant or the Corporation), a cooperative housing corporation, moves pursuant to CPLR 3211(a)(7) to dismiss the complaint for failure to state a cause of action.

The facts of this case are not in dispute. In 1960, plaintiff, Provident Loan Society of New York (plaintiff or Provident), the fee owner of the land and building located at 180 East 72<sup>nd</sup> Street (the Property) in New York City, and the Corporation entered into a 75-year lease whereby Provident, as Landlord, leased the Property to the Corporation, as Tenant. The lease provides for the Corporation to pay a fixed annual rental for the first 15 years and sets forth a procedure for periodic reappraisals of the value of the land and for rent adjustments based on the reappraisals. Specifically, Section III(B)(2) of the lease provides, in pertinent part, “[e]ither party shall have the right, by giving written notice to the other, not earlier than six (6) months prior to the expiration of the first fifteen (15) full years . . . and not later than three months prior to [May 1], to demand a re-appraisal of the value of the land . . . and a readjustment of the Fixed Rental in conformance with the re-appraisal.” If the parties are unable to agree on the reappraisal

value of the land, the party seeking the reappraisal will appoint a real estate appraiser and “[w]ithin twenty (20) days thereafter, the other party shall by written notice to the other party requesting the reappraisal appoint a second . . . appraiser . . . as [an] appraiser in its behalf.” Then the appraisers appointed by the parties appoint a third appraiser and the three appraisers will thereafter make a determination of the value of the land. “If the second appraiser shall not have been appointed as aforesaid, the first appraiser shall proceed to determine such matter.” (Complaint, Ex. A)

Section III(B)(3) of the lease states “[e]ither party shall have identical re-appraisal rights, exercisable successively at the end of each tenth (10<sup>th</sup>) year of the remaining term of this lease, to request an adjustment of the annual Fixed Rental reserved hereunder . . . in the same manner and upon the same time schedule as hereinabove provided.” (Complaint, Ex. A)

Section III(B)(4) of the lease provides:

“If neither party shall have made timely request for a reappraisal pursuant to the foregoing provision of this Article, then the annual Fixed Rental then in effect shall continue without change to and including the date upon which the same shall become subject to the next succeeding right of reappraisal.”

(Complaint, Ex. A)

Reappraisals and rent adjustments of the Property occurred on May 1, 1977 and May 1, 1987. In 1997, Provident made a timely request for reappraisal and adjustment of the Fixed Rental amount for the period from May 1, 1997 through April 30, 2007. Provident appointed one appraiser but the Corporation failed to appoint its appraiser within 20 days, as specified in the lease. Even though the Corporation failed to make a timely appointment, Provident permitted

the Corporation to hire a second appraiser. The parties then split the difference between the two appraisals to obtain the annual fixed rent of \$135,000 for that ten-year period.

The Fixed Rental was scheduled for readjustment for the fourth time on May 1, 2007. By letter dated April 26, 2007, Provident purported to invoke the reappraisal and rent adjustment process outlined in Section III(B) of the lease. Provident then appointed an appraiser who assessed the value of the Property at \$4,400,000. If accepted, that reappraisal would result in a Fixed Rental of \$366,520 per year for 2007-2017. Provident admits, however, that its demand for reappraisal was not timely because it was not made within the required Section III(B)(2) time window. (Complaint, para. 38) Although the Corporation received the April 26 letter, it did not accept the appraisal nor did it hire a second appraiser. Instead, by letter dated September 12, 2007, the Corporation took the position that Provident's time for demanding a reappraisal expired on January 31, 2007. Because the demand was untimely, the Corporation invoked Section III(B)(4) of the lease which provides that "[i]f neither party makes a timely request for a reappraisal," the annual Fixed Rent shall remain unchanged until the next right of reappraisal. (Complaint, Ex. A, § III(B)(4))

This lawsuit followed. Provident's complaint seeks a declaratory judgment that its demand for reappraisal is effective; and asserts causes of action for equitable estoppel, breach of the implied contractual duty of good faith and fair dealing, specific performance and unjust enrichment.

In support of the motion to dismiss the complaint, the Corporation argues that the unambiguous lease requires timely notice for a reappraisal and that Provident failed to provide such notice. The Corporation also contends Provident's waiver of the time provision in 1977 to

permit the Corporation to hire an appraiser does not create a course of dealing between the parties sufficient to supplant the clear language of the contract; that the implied covenant of good faith and fair dealing does not modify the express terms of the contract and that the unjust enrichment cause is not available because there is a valid agreement governing the dispute between the parties.

In opposition to the motion, Provident counters that its failure to timely demand reappraisal was an inadvertent error, it would suffer a substantial forfeiture if the rent was not increased and the Corporation would not be prejudiced by the reappraisal. It argues the appraisal provision is not a “time of the essence” provision and that the Corporation is thus equitably estopped from arguing to the contrary, and/or that the Corporation’s insistence on strict observance of the notice requirement is a breach of the implied covenant of good faith and fair dealing. It also points to the fact that in 1997 it permitted the Corporation to hire an appraiser despite the latter’s untimely demand.

### **Discussion**

On a motion addressed to the sufficiency of the pleadings, the court must accept every factual allegation as true, and liberally construe the allegations in a light most favorable to the pleading party. (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; see CPLR 3211[a][7]) “We . . . determine only whether the facts as alleged fit within any cognizable legal theory.” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]) “The motion must be denied if from the pleadings’ four corners ‘factual allegations are discerned which taken together manifest any cause of action cognizable at law.’” (*511 West 232<sup>nd</sup> Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002][internal citations omitted]) Allegations consisting of bare legal

conclusions and factual claims that are inherently incredible, or those that are contradicted by documentary evidence, are not entitled to such presumption, however. (*Ullman v Norma Kamali, Inc.*, 207 AD2d 691 [1st Dept 1994])

It is well settled that “the interpretation of an unambiguous contract is a question of law for the court, and the provisions of the contract delineating the rights of the parties prevail over the allegations set forth in the complaint.” (*Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 [1st Dept 2001] citing *805 Third Ave. Co. v M.W. Realty Assoc.*, 58 NY2d 447, 451 [1983])

“[W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing. That rule imparts ‘stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses . . . infirmity of memory . . . [and] the fear that the jury will improperly evaluate extrinsic evidence. Such considerations are all the more compelling in the context of real property transactions, where commercial certainty is a paramount concern.”

(*W.W.W. Assoc., Inc. v Giancontieri*, 77 NY2d 157, 162 [1990])

In this case, the parties are sophisticated business entities, who set down their agreement regarding reappraisals and rent adjustments in clear, unambiguous terms. The lease states that either party has the option of requesting a reappraisal by giving notice to the other party no more than six months, and no less than three, before the end of each ten-year term; and if neither party makes a timely request, then the annual fixed rent continues unchanged. Here, Provident made its request for reappraisal less than ten days before the end of the term. This request was

untimely because, “[i]t is ‘a settled principle of law that notice exercising an option is ineffective if it is not given within the time specified.’” (*Kunze v Arito*, 48 AD3d 272, 273 [1st Dept 2008] citing *J.N.A. Realty Corp. v Cross Bay Chelsea*, 42 NY2d 392, 396 [1977])

Even though Provident did not timely exercise its option, it relies on *J.N.A Realty Corp. v Cross Bay Chelsea*, 42 NY2d at 395-399 (1977) for the proposition that this court may exercise its equity jurisdiction to approve its late request for reappraisal. In *J.N.A. Realty*, the court recognized the tenant’s equity interest to renew a lease where: (1) the tenant’s failure to exercise the option to renew in a timely fashion resulted from an honest mistake or inadvertence; (2) the failure to exercise the option would result in a substantial forfeiture and (3) the landlord would not be prejudiced by the belated exercise of the option to renew. (*Id.*) Here, however, Provident’s reliance on *J.N.A. Realty* and its progeny is unavailing. The landlord in *J.N.A. Realty* sought to recover possession of the premises where the tenant’s exercise of an option to renew the lease was untimely. The court held the tenant would suffer a forfeiture if the timing provisions in the lease were strictly enforced because the tenant would lose the value of the money it recently had invested in renovating the premises and also would lose the value of customer goodwill. The court noted, however, that in the usual case involving the failure to exercise an option, equity will *not* intervene because default on an option usually does not result in a forfeiture. The court explained such an option does not itself create any interest in the Property, and “no rights accrue until the condition precedent has been met by giving notice within the time specified. Thus, equity will not intervene because the loss of the option does not

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<sup>1</sup> Provident does not dispute that the reappraisal/rent adjustment provision is an option. (Plntf’s Memo in Opp., p. 10)

ordinarily result in the forfeiture of any vested rights.” (*J.N.A. Realty Corp. v Cross Bay Chelsea*, 42 NY2d at 397) In *Kunze v Arito*, 48 AD3d at 274, the court rejected the plaintiff’s argument that his inadvertent failure to renew would result in forfeiture, finding that “[p]laintiff now seeks to enforce the renewal option to enable him to exercise the purchase option, thus gaining a windfall from the greatly increased value of the property. This is not that type of loss . . . that equity envisions.” And in *Soho Dev. Corp. v Dean & DeLuca Inc.*, 131 AD2d 385, 386-387 [1st Dept 1987] the court denied plaintiff’s demand for equitable relief holding that where the cost of improvements made by the tenant had been amortized over the life of the lease, there was “insufficient evidence to establish that the tenant [would] suffer a forfeiture within the meaning of *J.N.A. Realty* if it is denied equitable relief from the consequences of its own neglect.”

Here, Provident’s lease specifically provided that the landlord’s right to a reappraisal and increase in the Fixed Rental accrued only when it gave timely notice of its request for a reappraisal. Equity will not intervene where Provident’s failure to obtain an increase in the amount of its rent does not constitute the forfeiture of a vested right. The lease explicitly contemplates what will occur in the event neither party makes a timely request for reappraisal. Section III(B)(4) states, “[i]f neither party shall have made *timely* request for reappraisal, . . . then the annual Fixed Rental then in effect shall continue without change.” (Emphasis added) (Complaint, Ex. A)

Provident’s argument that the reappraisal provision is not a “time of the essence” procedure is without merit. The reappraisal clause is triggered at the landlord’s option and, as Williston observes, “whether the question arises either at law or in equity, it is well settled that time is of the essence of an option. No express provision making time of the essence is required

in an option contract for it to be so, since an option by its very terms must be exercised within a specified time and otherwise in accordance with specified conditions.” (15 Williston on Contracts Section 46:12 [4th ed.] [citations omitted]) This rule has been applied with regularity in New York. (*Maxton Bldrs., Inc. v Lo Galbo*, 68 NY2d 373, 378 [1986] [when a contract requires written notice to be given within a specific period of time, the notice is ineffective unless the writing is actually received within the time period]; *Kunze v Arito*, 48 AD3d at 273 [notice exercising an option is ineffective if it is not given within the time specified]; *Swan Prods. Co. v 130-30 Bldg. Corp.*, 35 AD2d 789, 790 [1st Dept 1970][where notice to exercise an option was untimely, defendant was within its rights in not accepting the option]) The deadline for exercising the reappraisal option here need not be expressly labeled “time of the essence” for it to be strictly enforced. Where a “time limitation on [an] option . . . is prominently displayed . . . and is uncontradicted by any other clause found in the lease or in any other contemporaneous agreement which was entered into by the parties, . . . the time limitation clause cannot be eliminated by the court based upon an inference as to the intention of the parties that was not reflected in the lease.” (*95 East Main Street Service Station, Inc. v H & D All Type Auto Repair, Inc.*, 162 AD2d 440 [2d Dept 1990])<sup>2</sup>

Because the court has determined Provident failed to timely exercise its Section III(B) option, the claim for specific performance is unavailable in that the option was not exercised

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<sup>2</sup> *Lusker v Tannen*, 90 AD2d 118, 124 [1st Dept], the case upon which Provident relies, states “[t]he equitable rule that absent a contrary intent time is not of the essence is invoked usually, but not exclusively, in matters involving the sale of real property.” While this rule will be applied to contracts for sale, it does not apply where an option is involved. (See e.g. *Swan Prods. Co. v 130-30 Building Corp.*, 35 AD2d at 790; *ASM Financial Funding v K-Sher Corp.*, 2008 WL 4303104, \* 7 [Sup Ct, Nassau County])

according to its terms. (*LKE Family Limited Partnership v Gillen Living Trust*, 59 AD3d 602 [2d Dept. 2009]; *Zafrani v Gluck*, 40 AD3d 1082 [2d Dept 2007])

Nor does equitable estoppel provide a basis for relief. “An estoppel ‘rests upon the word or deed of one party upon which another rightfully relies and so relying changes his position to his injury.’” (*Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 184 [1982] (internal citations omitted)) Provident argues that its own waiver of the time limitations in 1997, which allowed the Corporation to hire an appraiser, established a course of dealing between the parties. Yet it is a settled principle that a single instance of conduct between the parties does not establish a “course of dealing”. (See e.g. *G.M. Acceptance Corp. v Clifton-Fine Central School Dist.*, 85 NY2d 232, 237 [1995]; *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 230 [1978]). Provident thus cannot use its own conduct in 1997 to impute a waiver by the Corporation in 2007. Provident also does not cite any conduct by the Corporation itself, either in 1997, 2007, or at any other time, which demonstrates the Corporation intended to waive its right to enforce the time provisions of the lease. The complaint does not allege, nor is there any evidence to establish, that the Corporation voluntarily abandoned the reappraisal time provisions or that it intended to relinquish the right to enforce those time provisions. (See *Hadden v Cord*, 45 NY2d 466 [1978]; *Santamaria v 1125 Park Ave. Corp.*, 238 AD2d 259 [1st Dept 1997]) Even if the Corporation was alleged to have done something, Provident could not have reasonably relied on such conduct as having altered the express terms of the lease. (See *Hollinger Digital, Inc. v LookSmart, Inc.*, 267 AD2d 77 [1st Dept 1999]; *Chadirjian v Kanian*, 123 AD2d 596 [2d Dept 1986])

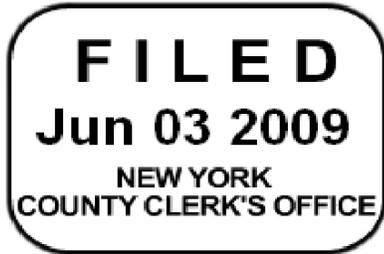
Provident's claim for breach of the implied covenant of good faith and fair dealing inherent in every contract also fails because this implied covenant does not modify the express terms of the contract. While this covenant "embraces a pledge that 'neither party will do anything which will have the effect of destroying or injuring the right of the other party to receive the fruit of the contract,'" (511 W. 232<sup>nd</sup> Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 153 [2002] [internal citations omitted]) "the implied covenant of good faith and fair dealing will be enforced only to the extent it is consistent with the provisions of the contract" because, to do otherwise would "unjustifiably frustrate the expectations of the parties as made explicit in the contract." (Phoenix Capital Invs., LLC v Ellington Mgmt. Group, L.L.C., 51 AD3d 549, 550 [1st Dept 2008])

Provident's claim for unjust enrichment likewise is barred by the existence of the valid written contract here which covers the dispute between these parties. (Clark-Patrick, Inc. v Long Island Rail Road Co., 70 NY2d 382, 389 [1987]; Fortune Limousine Serv., Inc. v Nextel Communication, 35 AD3d 350, 353 [2d Dept 2006], [a "cause of action predicated on unjust enrichment should have been dismissed since the relationship between the parties was defined by a valid written contract, which detailed the applicable terms and conditions for renewing or continuing the contract after the expiration of the initial . . . term."]; see also Goldstein v CIBC World Mkts. Corp., 6 AD3d 295, 296 [1st Dept 2004])

Accordingly, it is ORDERED that defendant Corporation's motion to dismiss the complaint is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DATE: June 2, 2009



*Michael A. Adams*  
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J.S.C.