

**Collins v 628 West End LLC**

2014 NY Slip Op 30285(U)

January 30, 2014

Sup Ct, New York County

Docket Number: 152320/13

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN
J.S.C. Justice

PART

Index Number : 152320/2013
COLLINS, PATRICIA JULIETTE
vs.
628 WEST END LLC
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).

Answering Affidavits — Exhibits No(s).

Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

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

Dated: 1/30/14

CYNTHIA S. KERN
J.S.C.

- 1. CHECK ONE: CASE DISPOSED
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----x  
PATRICIA JULIETTE COLLINS

Plaintiff,

Index No.152320/13

-against-

**DECISION/ORDER**

628 WEST END LLC,

Defendant.

-----x  
**HON. CYNTHIA S. KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Cross-Motion and Affidavits Annexed.....	_____
Answering Affidavits to Cross-Motion.....	_____
Replying Affidavits.....	3
Exhibits.....	_____

Plaintiff Patricia Juliette Collins has brought the present motion for summary judgment. The court had previously granted her motion for a preliminary injunction enjoining defendant 628 West End LLC and any of its agents from renting the premises known as Apartment 1B at 628 West End Avenue to any person other than plaintiff during the pendency of this action. She now seeks, inter alia, a mandatory injunction directing defendant's specific performance of its obligations under the surrender agreement entered into between plaintiff and defendant's predecessor. As will be explained more fully below, her motion is denied.

The relevant facts are as follows. Plaintiff previously resided at 153 West 57<sup>th</sup> Street. When her landlord at the time wanted to tear down that building, it entered into a surrender

agreement with plaintiff whereby plaintiff agreed to move from her apartment to apartment 3A at 628 West End Avenue. Defendant is the current owner and landlord of 628 West End Avenue. The terms of the surrender agreement were incorporated into a rent stabilized lease for plaintiff's current apartment by a lease rider. As part of the surrender agreement, plaintiff has been granted a right of first refusal to rent various apartments at the building in the event any of them become vacant, including apartment 1B. Paragraph 21 (A) and (C) of the surrender agreement provides that the tenant:

shall have and retain a first right of refusal to lease any one of the following apartments at the Relocation Building: (I) Studio apartment on the first floor (one flight of stairs) [Apartment 1B]....In connection therewith and after execution of this Surrender Agreement, [Landlord] shall provide Tenant with written notice of any availability or prospective availability of [Apartment 1B] and shall not offer any such apartment to any third party until it has complied with the terms of Tenant's right of first refusal. Tenant shall have fifteen business days after receipt of 626-628 Apartment's notice to elect to accept, in writing, such apartment as a substitution apartment (hereafter, "Substitution Apartment"). In the event Tenant does not accept the offered Substitution Apartment within fifteen (15) business days, or respond to 626-628 Apartments notice within fifteen (15) days, tenant's right to accept the offered Substitution Apartment shall, automatically and without further notice, be deemed terminated and 626-628 Apartments may convey, lease or otherwise transfer same without any further notice to Tenant....

In the event Tenant does accept a Substitution Apartment pursuant to this provision, the parties agree that the Substitution Apartment will be renovated at the sole cost and expense of the [landlord] so as to be reasonably comparable to the Replacement Apartment as of the vacate Date.

The agreement also provides that plaintiff cannot exercise her right of first refusal if she is in default under any provision of her lease.

In 2011, Apartment 1B became vacant. Without offering plaintiff the opportunity to move into the apartment or notifying plaintiff of the availability of the apartment, defendant entered into an eighteen month lease for the apartment, commencing on February 1, 2012 and

ending on May 31, 2013. Plaintiff commenced the present action in March 2013 when she learned that the apartment was going to become available again. At the time she commenced the action, she also sought a temporary restraining order and a preliminary injunction to restrain defendant from renting apartment 1B to a third party in violation of the surrender agreement. In April of 2013, this court granted plaintiff's motion for a preliminary injunction enjoining defendant from renting apartment 1B to a third party. By letter dated July 24, 2013 sent from defendant's counsel to plaintiff's counsel, defendant provided written notice to plaintiff of the availability of Apartment 1B for plaintiff to lease or to otherwise exercise her right of first refusal pursuant to paragraph 21(A) of the surrender agreement. The letter requested that plaintiff notify defendant in writing within fifteen days whether plaintiff elects to accept apartment 1B as a substitution apartment pursuant to the surrender agreement. The letter further provided that if defendant did not receive a written acceptance of the offer to lease the apartment within fifteen days, plaintiff's right to lease apartment 1B as a substitution apartment would be deemed terminated without further notice. Plaintiff's counsel responded to this letter by a letter dated August 13, 2013 in which he stated that plaintiff found the apartment not to be in conformance with the requirements provided for in paragraph 21 ( C) of the surrender agreement and requested that defendant inform plaintiff whether the landlord intended to agree to the terms of a proposed settlement agreement. Plaintiff did not accept the offer to lease the apartment contained in the letter sent by defendant's counsel.

Plaintiff has brought the present motion for summary judgment on her claims for a declaratory judgment that she is the rightful tenant of Apartment 1B, that she is entitled to a mandatory injunction directing defendant's specific performance of all of its obligations under

the surrender agreement and for attorneys fees. Initially, plaintiff has established as a matter of law that she is entitled to summary judgment on her claim that she was entitled to exercise her right of first refusal to rent apartment 1B when it became available after the expiration of the lease in June 2013. Defendant was required to allow plaintiff to rent Apartment 1B when it became vacant in June 2013 pursuant to the surrender agreement which has been incorporated into her rent stabilized lease. The surrender agreement is unambiguous and provides that plaintiff is entitled to exercise her right of first refusal when Apartment 1B becomes vacant.

In opposition to plaintiff's motion for summary judgment, defendant has failed to establish that there are any disputed issues of fact with respect to defendant's obligation to offer plaintiff the vacant apartment. The defendant argues that it is not required to offer plaintiff the vacant apartment pursuant to the surrender agreement because plaintiff has breached two provisions of her lease—the provision which provides that the apartment must be used only as a private apartment to live in as the primary residence and for no other reason and the provision which provides that it is a default under the lease for plaintiff to commit "Improper conduct...annoying other tenants." To support its position that plaintiff is in default of the lease by operating a business in her residence or by engaging in improper conduct, the defendant has submitted an affidavit of its building manager, who references emails of tenants making complaints about plaintiff and makes allegations that there have been verbal complaints from tenants. It also states that it has received complaints that plaintiff operates a massage business in the apartment despite the fact that the lease only allows the apartment to be used for living purposes. These hearsay allegations, unsupported by any affidavits from any tenants, are insufficient to establish an issue of fact with respect to whether plaintiff is in default of her lease

as they consist solely of conclusory hearsay allegations.

Defendant's argument that plaintiff is not entitled to summary judgment on the ground that plaintiff's motion is premature as discovery has not yet taken place is without merit. "A determination of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence." *Ruttore & Sons Constr. Co. v. Petrocelli Constr.*, 257 A.D.2d 614 (2d Dept 1999). Defendant argues that it requires discovery to establish that plaintiff is not entitled to exercise her right of first refusal because she is not in compliance with her lease. However, defendant has failed to establish that further discovery would lead to relevant evidence with respect to plaintiff's default under the lease. In the absence of defendant ever serving plaintiff with any written notice of default pursuant to the lease provision requiring the defendant to provide a written notice of any default, there is no basis for defendant to claim that it is not required to offer plaintiff the apartment which is currently vacant. The relevant lease provision states that the "Landlord must give Tenant written notice of default stating the type of default." Since this notice had never been provided as of the current date, defendant cannot establish that plaintiff is currently in default under her lease as a matter of law.

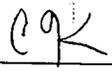
However, plaintiff is not entitled to summary judgment in this action based on the events that took place with respect to defendant offering plaintiff the opportunity to lease apartment 1B. It is undisputed that defendant's counsel sent plaintiff a letter in July 2013 offering to lease apartment 1B to her pursuant to the terms of the surrender agreement. However, this letter was not sent until the apartment had been available for almost two months. Pursuant to the terms of the surrender agreement, plaintiff had fifteen days to accept the surrender agreement and if she

did not accept the apartment her right to accept the apartment was to be deemed terminated. If plaintiff accepted the apartment, the defendant was then obligated to renovate the apartment in accordance with the terms of the surrender agreement. Instead of accepting the apartment subject to the defendant's obligation to renovate the apartment in accordance with the surrender agreement, plaintiff's counsel sent defendant a letter in which he stated that the apartment was not in conformance with the requirements provided for in the surrender agreement with respect to the renovations of the apartment. Based on the foregoing, the court finds that plaintiff has failed to establish that she is entitled to summary judgment ordering defendant to turn over the apartment to her.

Finally, plaintiff's argument that she was not required to make a determination whether to accept the apartment when it was offered to her based on defendant's failure to offer the apartment to her when it became available in 2011 is without merit. The fact that defendant may not have offered the apartment to her on a prior occasion does not provide an independent basis for her to not respond to a subsequent offer by defendant to rent her apartment 1B when it once again became available.

Accordingly, plaintiff's motion for summary judgment is denied. This constitutes the decision and order of the court.

Dated: 1/30/14

  
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J.S.C.

**CYNTHIA S. KERN**  
J.S.C.