

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 14 NASSAU COUNTY

PRESENT:

HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: Mot. 1, 1-25-07; Mot. 2,
3-13-07; Mot. 3, 3-23-07

Submission Date: 3-23-07

Motion Sequence No.: 001, 002, 003/
MOT D

LONG BEACH MEDICAL CENTER,

x

Plaintiff,

- against -

COUNSEL FOR PLAINTIFF
June Diamant, Esq.
229 Linwood Avenue
Cedarhurst, New York 11516

249 EAST PARK CORP.

Defendant.

COUNSEL FOR DEFENDANT
Ackerman, Levine, Cullen, Brickman &
Limmer, LLP
1010 Northern Blvd., Suite 400
Great Neck, New York 11021

x

ORDER

The following papers were read on Plaintiff's motion for a preliminary injunction, Defendant's motion to dismiss and Plaintiff's cross-motion for summary judgment:

Motion Sequence No. 1

Order to Show Cause dated January 12, 2007;
Affidavit of Barry Stern sworn to on January 10, 2007;

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Motion Sequence No. 2

Notice of Motion dated February 16, 2007;
Affirmation of Ethan H. Lazar dated February 16, 2007;
Defendant's Memorandum of Law;

Motion Sequence No. 3

Notice of Cross-Motion dated March 7, 2007;
Affidavit of Barry Stern sworn to on March 6, 2007;
Affirmation of June Diamant, Esq. dated March 7, 2007;
Affidavit of Lewis Z. Cohn, Jr. sworn to on March 7, 2007;

Plaintiff's Reply Memorandum of Law;
Defendant's Reply Memorandum of Law.

Plaintiff Long Beach Medical Center ("LBMC") moves, pursuant to CPLR 6301, for a preliminary injunction enjoining Defendant 249 East Park Corp. ("East Park" or "Landlord") from taking any action to terminate a certain Lease Agreement dated July 29, 1996, or Plaintiff's tenancy in the premises known as 249 East Park Avenue, Long Beach, New York.

East Park moves to dismiss the complaint pursuant to CPLR 3212.

LBMC cross-moves, pursuant to CPLR 3212, for summary judgment granting specific performance of the Option to Purchase set forth in the Lease Agreement.

In this action, LBMC seeks specific performance of its Option to Purchase a certain four-story office building and appurtenant parking facilities owned by Defendant located at 249 East Park Avenue, Long Beach, New York. It also seeks a declaration that the Lease Agreement regarding said property, and the Purchase Option therein (§§ 27 [A] and [B]) are in full force and effect.

BACKGROUND

LBMC is the tenant of premises located at 249 East Park Avenue, Long Beach, New York by virtue of a Lease Agreement with East Park, dated July 29, 1996. The Lease Agreement was amended by a Parking Letter Agreement dated July 29, 1996, an Addendum of Lease dated July 29, 1996, a Letter Agreement dated August 29, 1996 and an Amendment to Lease Agreement dated July 15, 1997 (collectively, the "Lease").

As confirmed in the Amended and Restated Memorandum of Lease and Purchase Option, dated July 25, 1997, the initial term of the Lease commenced on May 1, 1997 and expired on May 31, 2007. LBMC had the option to extend the lease term for two consecutive periods of five years commencing after May 31, 2007. In addition, pursuant to ¶ 27(A) of the Lease, LBMC had the option to purchase the premises:

Beginning in the sixth year of the Lease term and upon ninety (90) days notice, Tenant shall have the right (the "Option") to purchase the Leased Premises including Landlord's interest in the Parking Area at the following purchase price figures:

Years 6 through 10	\$1,650,000.00
Years 11 through 15	\$1,815,000.00
Years 16 through 20	\$1,996,500.00

With respect to exercise of this Purchase Option, ¶ 27(B) provides as follows:

Tenant shall have the right to exercise the Option at any time after the expiration of the fifth Lease Year and prior to the expiration or termination of this Lease (including any renewal term thereof) by notice (the "Exercise Notice") to Landlord, which shall be given at least ninety (90) days prior [to] the closing date, and shall be accompanied by (i) Tenant's check payable to an attorney trust account in an amount equal to five percent (5%) of the Purchase Price, and (ii) four

executed counterparts of the Contract of Sale in the form attached hereto as Exhibit D, and incorporated herein by reference. Within ten (10) business days after Owner's receipt of Tenant's notice exercising the Option, Owner shall, with respect to all four original counterparts of the Contract of Sale, sign each counterpart and have Seller's Attorney sign each counterpart, as escrowee, and return two full [sic] executed counterparts of the Contract of Sale to the Tenant. Prior to executing the counterparts of the Contract of Sale, Tenant may complete those portions of the Contract of Sale which are dependent upon knowing the date on which the Option is exercised. Owner and Tenant shall execute, deliver and record such other documents as shall be necessary to protect [sic] effectuate the purposes hereof, including, without limitation, a memorandum of lease which gives notice of Tenant's Option and such transfer tax returns as may be required in connection with the recording of such memorandum.

In addition to the Purchase Option, ¶ 27(C) afforded LBMC the right of first refusal, in the event the Landlord received a *bona fide* offer:

“to purchase the Leased Premises which the Landlord desires to accept at any time after the Fifth Lease Year while Tenant is still occupying the Building pursuant to the Lease and provided Tenant is not in default under the Lease following notice thereof and opportunity to cure.”

Although East Park notified LBMC in October, 2004 that it had received an offer to purchase the subject premises in the amount of \$2,000,000, LBMC declined to exercise its right of first refusal and expressly reserved its right to purchase in accordance with the Option to Purchase contained in ¶¶ 27(A) and (B).

When a dispute arose as to whether LBMC could retain its Purchase Option after having failed to exercise its right of first refusal, a declaratory judgment action, bearing Index No. 17903/04, was commenced in this Court by LBMC.

By order of this Court granted on June 15, 2005, that action was dismissed without prejudice. The Court found that since East Park had not, in fact, received a *bona fide* offer from a third-party to purchase the premises, and had not presented LBMC with such an offer, Plaintiff's right of first refusal had not been triggered. The Court's decision referenced a "So Ordered" Stipulation dated December 23, 2004 pursuant to which LBMC and East Park agreed that the 60 day period during which LBMC could exercise its right of first refusal would not begin to run until it was furnished with a complete copy of the proposed contract of sale referenced in East Park's October 27, 2004 letter and with evidence that the contract deposit had been paid. Since East Park failed to comply with the terms of the "So Ordered" Stipulation, the Court found that LBMC's time to exercise its right of first refusal had not begun to run.

Thereafter, by letter dated December 7, 2006, LBMC sought to exercise its Purchase Option by transmitting therewith four duly executed copies of a contract of sale and a down payment check in the amount of \$82,500 (5% of the \$1,650,000 purchase price) pursuant to ¶ 27(A) of the lease. East Park rejected LBMC's attempt to exercise its Purchase Option by returning the check and purported contracts of sale unsigned and advising Plaintiff:

"We do not interpret the lease to give Long Beach Medical Center * * * any right to purchase the Premises at this time. Any such claim * * * is unenforceable, untimely, and/or has been previously waived."

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The parties have stipulated the East Park's motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7) and CPLR 3211(c) is deemed to be a summary judgment motion pursuant to CPLR 3212 wherein East Park seeks dismissal of the complaint predicated on LBMC's purported breach of its principal obligation under the Lease with regard to the timely payment of rent.

As a result, East Park argues that LBMC is precluded from exercising its Purchase Option. In this regard, East Park asserts that LBMC's "unclean hands" precludes equitable relief and is indicative of "bad faith." According to East Park, LBMC's history of late payments [between one and seven days late, 40 times; between eight and fourteen days late, 24 times; and more than fourteen days late, 48 times] interfered with or jeopardized its ability to meet its monthly mortgage obligation on the property on a timely basis.

DISCUSSION

It is a fundamental principle of contract interpretation that "when parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms. Henrich v Phazar Antenna Corp., 33 A.D.3d 864 (2nd Dept. 2006). The interpretation of an unambiguous contract term or provision is a matter for the court, and circumstances extrinsic to the agreement will not be considered when the parties' intent may be gleaned from the four corners of their agreement. Greenfield v. Philles Records, Inc., 98 N.Y. 2d 562, 569 (2002); and Katina, Inc. v. Familglietti, 306

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A.D. 2d 440 (2nd Dept. 2003); and Tikotzky v. New York City Transit Auth., 286 A.D. 2d 493 (2nd Dept. 2001).

The parties' agreement speaks for itself. The terms of the Purchase Option between LBMC and East Park are clear and unambiguous. Paragraphs 27(A) and (B) explicitly define the nature and terms of the Option LBMC received. The provision is devoid of any language which might be read to condition LBMC's Option upon a history of timely rental payments. In this regard, ¶ 27(C) specifically conditions LBMC's right of first refusal on its not being in default "under the Lease following notice thereof and opportunity to cure," Paragraphs 27(A) and 27(B) contain no such condition *vis-a-vis* LBMC's exercise of the Purchase Option. Even if it had, the clear meaning of ¶ 27 (c) defines default as the failure to comply with the terms of the Lease after notice and the failure to cure. Here, while LBMC has clearly been late in making its lease payments, all payments have been made or "cured".

At the time LBMC attempted to exercise the Purchase Option, there was no accrued rental delinquency outstanding. It was not in default under the Lease, as defined therein. A summary proceeding which had been brought by Landlord against LBMC alleging rent arrears due and owing for March and April 2006 was discontinued as a result of rent payments made and accepted contemporaneously with, or prior to, LBMC's receipt of the summary proceeding papers.

When Plaintiff commenced this action, Plaintiff sought a Yellowstone injunction. See, First National Stores, Inc. v. Yellowstone Shopping Center, Inc., 21 N.Y.2d 630

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(1968). The application was premised upon LBMC receipt on December 27, 2006 of a Thirty Day Notice of Termination (“Notice”) which indicated that East Park was terminating LBMC’s month-to-month tenancy. The Notice required LBMC to deliver possession on or before January 31, 2007.

The Notice is the one required to terminate a month-to-month tenancy so that the landlord can commence a holdover proceeding. See, Real Property Law §232-b; and Real Property Actions and Proceedings Law §711. The lease for the premises was for a term commencing on May 1, 1997 and terminating on May 31, 2007.

A holdover proceeding may be commenced by a landlord against a tenant who has continued in possession after the expiration of the term of the lease. Real Property Actions and Proceedings Law §711 (1). See, N.Y. Prac, *Landlord and Tenant Practice in New York* §15.8. Since the term of LBMC’s lease had not yet expired, its tenancy could not be terminated by a holdover proceedings.

Furthermore, since the Court has found that LBMC has properly exercised its option to purchase the premises and is directing the sale of the premise to LBMC, a Yellowstone injunction is unnecessary.

“An option contract is an agreement to hold an offer open; it confers upon the optionee, for consideration paid, the right to purchase at a later date.’ ” Kaplan v. Lippman, 75 N.Y. 2d 320, 324 (1990), *quoting* Leonard v. Ickovic, 79 A.D. 2d 603 (2nd Dept. 1980) , *aff’d.*, 55 N.Y. 2d 727 (1981). Once an optionee gives notice of its intent to exercise its option in accordance with the parties’ agreement, the unilateral option

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agreement ripens into a fully enforceable bilateral contract. Jarecki v. Shung Moon Louie, 95 N.Y. 2d 665, 668 (2001); and Broadwall America, Inc. v Bram Will-EI LLC, 32 A.D. 3d 748, 751 (1st Dept. 2006).

The most significant aspect of an option is that it grants the holder the power to compel the owner of the property to sell whether the owner is willing to part with ownership or not. Metropolitan Transp. Auth. v. Brucken Realty Corp., 67 N.Y. 2d 156, 163 (1986). It has been defined as an irrevocable contract given for consideration, unilateral in form and nature, by which the owner of real property agrees that another shall have the right to buy the property at a certain price and within a stipulated time. Rottkamp v. Eger, 74 Misc.2d 858, 862 (Sup. Ct. Suffolk Co. 1973).

In order to validly exercise an option to purchase, however, the optionee must, as LBMC has done, strictly adhere to the terms and conditions of the option agreement by notifying the grantor of the option of its intent to exercise the option in the manner prescribed by the option. Raanan v. Tom's Triangle, Inc., 303 A.D. 2d 668, 669 (2nd Dept. 2003).

The record establishes that LBMC properly exercised its Purchase Option by advising East Park of its intention to exercise its option to purchase the subject premises in accordance with the terms and conditions set forth in ¶¶ 27(A) and 27(B). No valid issue has been raised with regard to LBMC's readiness or willingness to perform. Nor has it been demonstrated that LBMC's time to exercise the Option had expired. Any claim that LBMC is foreclosed from exercising its Purchase Option

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because it declined to exercise its right of first refusal is meritless based upon this Court's order of June 15, 2005.

Specific performance is a discretionary remedy which is an alternative to the award of damages as a means of enforcing a contract. See, Hadcock Motors, Inc. v. Metzger, 92 A.D. 2d 1 (4th Dept. 1983). It is an equitable remedy, available in the court's discretion when the remedy at law is inadequate, which requires that the litigant come into court with "clean hands." See, Mc Glone v. Mc Glone, 17 A.D. 3d 549 (2nd Dept. 2005); and Pecorella v. Greater Buffalo Press, Inc., 107 A.D. 2d 1064 (4th Dept. 1985). "The doctrine of unclean hands is only applicable where the conduct relied on is directly related to the subject matter in litigation and where the party seeking to invoke the doctrine was injured by such conduct." Rooney v Slomowitz, 11 A.D.3d 864, 868 (3rd Dept. 2004) (internal citations omitted), *quoting* Mehlman v. Avrech, 146 A.D. 2d 753 (2nd Dept. 1989). Here, East Park has failed to identify any concrete injury flowing from LBMC's late rental payments beyond the conclusory assertion that its ability to make mortgage payments on the subject premises was jeopardized.

A fair reading of the Purchase Option, construing the language used therein in its usual and ordinary sense, does not support the conclusion that LBMC is precluded either by "unclean hands" or "bad faith" from exercising the Purchase Option as set forth the Lease. The record does not support a conclusion of either "unclean hands" or "bad faith." The implied covenant of good faith and fair dealing in the course of performance "embraces a pledge that 'neither party shall do anything which will have the effect of

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destroying or injuring the right of the other party to receive the funds of the contract.’ ”
511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 N.Y.2d 144, 153 (2002), *quoting*
Dalton v. Educational Testing Service, 87 N.Y. 2d 384, 389 (1995). Under the
circumstances presented, there is no basis to conclude that LBMC acted in bad faith
during the course of the Lease or that it should be denied the opportunity to exercise its
rights under the Lease.

The Lease herein is fair and equitable in all its terms and based upon good
consideration. LBMC has substantially complied with all of its obligations. East Park
signed the lease and is bound by its terms absent any showing of fraud or other
wrongful act by the Plaintiff. DaSilva v. Musso, 53 N.Y. 2d 543, 550 (1981). While it is
true that where parties to a lease have expressly agreed by the language embodied in
the Lease to include a non-waiver clause which insures that receipt of rent by the
landlord, with knowledge of the breach of any covenant of the Lease, will not be
deemed a waiver of the breach (La Lanterna, Inc. v Fareri Enterprises, Inc., 37 A.D. 3d
420, 423 [2nd Dept. 2007]; Jefpaul Garage Corp. v Presbyterian Hosp. in City of New
York, 61 N.Y. 2d 442, 446 [1984]), the Lease in this case does not contain a specific
non-waiver clause and requires notice in the event of any default, rent or otherwise. No
such notice was outstanding when LBMC attempted to exercise its Purchase Option.
Curry Road Ltd. v Rotterdam Realties, Inc., 195 A.D. 2d 780 (3rd Dept. 1993). There
has been no failure of consideration. Thus, LBMC is entitled to judgment directing
specific performance of

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the Purchase Option contained in the Lease between the parties and a declaration that the subject Lease remains in full force and effect.

Accordingly, it is,

ORDERED, that Defendant's motion to dismiss the complaint is **denied**; and it is further,

ORDERED, that Plaintiff's motion for a preliminary injunction is **denied** as moot; and it is further,

ORDERED, that Plaintiff's cross-motion for summary judgment is **granted**.

Counsel for the parties are directed to appear for a conference on June 22, 2007 at 9:30 a.m. for the purpose of scheduling the closing of the premises in accordance herewith.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
May 17, 2007

Hon. LEONARD B. AUSTIN, J.S.C.