

**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY**

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 9-23-11
SUBMITTED: 10-13-11
MOTION NO.: 001-MOT D

x
HAMPTON BAY DINER CORP. and MARIA
VLAHADAMIS,

Plaintiffs,

CAMPANELLI & ASSOCIATES, P.C.
Attorneys for Plaintiffs
623 Stewart Avenue, Suite 203
Garden City, New York 11530

-against-

CHAROS PROPERTIES, LLC and THOMAS
CHAROS,

Defendants.

TWOMEY, LATHAM, SHEA, KELLEY,
DUBIN & QUARTARARO, LLP
Attorneys for Defendants
33 West Second Street
Riverhead, New York 11901

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Upon the following papers numbered 1-14 read on this motion for summary judgment ; Notice of Motion and supporting papers 1-11 ; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 12-13 ; Replying Affidavits and supporting papers 14 ; it is,

ORDERED that this motion by the defendants for summary judgment dismissing the complaint is granted to the extent of dismissing the first cause of action; and it is further

ORDERED that the motion is otherwise denied.

The defendants are the owners of a parcel of real property located in Hampton Bays, New York, that they lease to the plaintiffs. The plaintiffs operate a diner on the parcel. Two provisions of the parties' lease are the subject of this action. The first requires the plaintiffs to pay all real estate taxes and assessments that may become due and payable or that may become a lien on the premises. The second, a right of first refusal, provides in pertinent part as follows:

If the landlord shall decide to sell the property during the term of the lease, he must first offer same in writing to the tenant at the same price as offered by a bona fide purchaser and the tenant shall have sixty (60) days within which to accept or refuse to purchase

the said property.

On June 25, 2007, the defendants entered into a contract with Sutphin Management Corp. ("Sutphin") to sell the property for \$2.4 million. The contract of sale provided that it was subject to the rights of the plaintiffs and any leases pursuant to which the plaintiffs occupied the property. On December 21, 2007, the plaintiffs entered into a contract with the defendants to purchase the premises for \$2.4 million and tendered a down payment in the amount of \$50,000. On the same day, the plaintiffs entered into another contract to sell the premises to Kings Point Custom Homes, LLC, for \$2.4 million. Prior to the closing of title, Sutphin commenced an action in this court against Hampton Bay Diner Corp. ("Hampton Bay") and Maria Vlahadamis, the plaintiffs herein, and Charos Properties, LLC ("Charos Properties"), and Thomas Charos, the defendants herein, among others, for specific performance (Index No. 6887-08). Sutphin also filed a lis pendens against the premises. Charos Properties and Charos moved for summary judgment dismissing the complaint and for vacatur of the lis pendens. Hampton Bay and Vlahadamis cross moved for the same relief.

In support of their cross motion, Hampton Bay and Vlahadamis argued that Sutphin did not have a cause of action against them because they had validly exercised their right of first refusal. Hampton Bay and Vlahadamis also argued that Charos Properties and Charos had complied with their contractual obligations under the lease. In her affidavit in support of the cross motion, Vlahadamis averred in pertinent part as follows:

That on or about June 25, 2007, the plaintiff, Sutphin Management Corp. and the co-defendant Charos executed a purchase and sale agreement with the aforementioned annexed lease documents indicating the tenant's right of first refusal in the sum of \$2,400,000.00, which Charos subsequently provided to Hampton Bay as per the lease agreement and its right of first refusal at the same price and under the same terms and conditions....

That on October 26, 2007 and in accordance with the terms of the lease, correspondence along with a purchase and sale agreement in the amount of Two Million Four Hundred Thousand and xx/100 (\$2,400,000.00) was provided to Hampton Bay by virtue of the parties lease agreement and Hampton Bay's right to exercise its right of first refusal....

The defendant, Hampton Bay, within the 60 day time period elected to exercise its publicly recorded right of first refusal and on December 21, 2007 personally tendered executed contracts with a down payment check in the sum of \$50,000.00 payable to Charos....

That the defendant's [sic] have in no manner elected to waive their

right of first refusal as set forth in [Sutphin's] verified complaint and have fully complied with the terms and conditions set forth in our lease agreement. In fact, it is clear that both defendants complied with their contractual obligations and both have fulfilled that which is set forth in the lease agreement, nothing more nor nothing less.

In his affirmation in support of the cross motion, counsel for Hampton Bay and Vlhadamis affirmed, in pertinent part, as follows:

In June 2007, defendant Charos Properties, LLC entered into a contract of sale with the plaintiff, Sutphin Management Corp. for the sale of the aforementioned real property. The Charos to Sutphin contract contained and was in all respects subject to the underlying rights of the lease agreement, which...contained a right of first refusal on behalf of the tenant in possession, to wit.; the co defendant, Hampton Bay Diner....

On October 26, 2007, Charos provided Hampton Bay in accordance with the terms of the lease sixty (60) days to exercise its right of first refusal with the same terms and conditions as provided to plaintiff Sutphin Management Corp. in their contract....

That on December 21, 2007, Hampton Bay properly exercised its right of first refusal and tendered an executed contract with a check in the sum of \$50,000.00 payable to Charos Properties LLC....

It is clear that both the co-defendant's, [sic] Charos and Hampton Bay have properly exercised their contractual right of first refusal....

As previously set forth, the co defendant Charos, entered into a purchase and sale agreement with the plaintiff for the sale of the real property subject to the terms of the lease containing the right of first refusal, thus any contractual obligation with [Sutphin] was contingent upon said lease provision. In the case at bar, the defendant's [sic] have complied with their contractual obligations in all respects and no triable issue of fact exists.

By an order of this court (Costello, J.) dated January 27, 2009, the motion and cross motion were granted; the complaint was dismissed insofar as it was asserted against Charos Properties, Charos, Hampton Bays, and Vlahamis, and the lis pendens was vacated. A judgment was entered on April 7, 2009.

On June 13, 2011, Hampton Bay and Vlahadamis commenced this action against Charos Properties and Charos. The complaint contains two causes of action for breach of contract. The first cause of action alleges that Charos Properties and Charos breached the parties' lease by entering into a contract with Sutphin in violation of the plaintiffs' right of first refusal. The second cause of action alleges that Charos Properties and Charos breached the parties' lease and the covenant of good faith and fair dealing by failing to provide the plaintiffs with tax bills for the property for the 2008/2009 tax year. The defendants, Charos Properties and Charos (the "Charos defendants"), answered and counterclaimed to recover damages for breach of the contract of sale.

The Charos defendants move for summary judgment dismissing the complaint. In support thereof, they argue, inter alia, that Hampton Bay and Vlahadamis may not take a position in this action that is inconsistent with the position they took in the previous litigation with Sutphin. Specifically, the Charos defendants argue that Hampton Bay and Vlahadamis may not argue that the contract with Sutphin violated their right of first refusal when, in the previous litigation with Sutphin, Hampton Bay and Vlahadamis obtained summary judgment on the ground that they and the Charos defendants had fully complied with their contractual obligations under the lease regarding the right of first refusal.

Under the doctrine of judicial estoppel, or estoppel against inconsistent positions, a party is precluded from inequitably adopting a position directly contrary to or inconsistent with an earlier assumed position in the same proceeding or in a prior proceeding (*see*, **Clifton Country Road Assocs. v Vinciguerra**, 252 AD2d 792, 793). Thus, a party who has obtained a judgment in his or her favor by adopting a certain position may not assume a contrary position in another action simply because his or her interests have changed (**Bono v Cucinella**, 298 AD2d 483, 484; *see also*, **Ferreira v Wykoff Heights Medical Center**, 81 AD3d, 587, 588; **Warnecke v Warnecke**, 12 AD3d 502, 503; **South Road Assocs. v International Business Machines Corp.**, 2 AD3d 829, 832, *affd* 4 NY3d 272).

The plaintiffs, Hampton Bay and Vlahadamis, obtained a judgment in their favor in the Sutphin action by arguing that they and the Charos defendants had fully complied with their contractual obligations under the lease regarding the right of first refusal. Thus, the plaintiffs are precluded from alleging in this action that the Charos defendants breached the lease by entering into a contract to sell the property to Sutphin before making a written offer to sell it to the plaintiffs at the same price. Accordingly, the first cause of action is dismissed.

The second cause of action alleges that the Charos defendants breached the lease and the covenant of good faith and fair dealing by failing to provide the plaintiffs with tax bills for the property for the 2008/2009 tax year despite their repeated demands therefor. In support of their motion for summary judgment, the Charos defendants contend that it was the plaintiffs' obligation to pay the real property taxes on the premises and that nothing in the lease required them to provide tax bills to the plaintiffs. In opposition, the plaintiffs contend that the Charos defendants provided them with tax bills for twenty years prior to the 2008/2009 tax year and that their failure to do so in 2008/2009, a year in which the property taxes nearly tripled, resulted in

the plaintiffs being unable to challenge the increase in a tax certiorari proceeding.

Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance (*see*, **Dalton v Educational Testing Service**, 87 NY2d 384, 389). This covenant is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement (*see*, **Aventine Inv. Mgt. v Canadian Imperial Bank of Commerce**, 265 AD2d 513, 514). To state a claim for breach of the applied covenant of good faith and fair dealing, the plaintiff must show that the defendant sought to prevent performance of the contract or to withhold its benefits from the plaintiff (**Id.** at 514).

Construing the evidence in the light most favorable to the party opposing the motion (*see*, **Matter of Benincasa v Garrubbo**, 141 AD2d 636, 637), in this case the plaintiffs, the court finds that there is a triable issue of fact regarding whether the Charos defendants sought to prevent the plaintiffs from paying the real estate taxes for the premises in the 2008/2009 tax year. Accordingly, summary judgment is denied as to the second cause of action.

Dated: January 12, 2012

J.S.C.