

At a Commercial Division Part 1, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 5th day of April, 2010.

P R E S E N T:

HON. CAROLYN E. DEMAREST,
Justice.

----- X
LESTER'S ACTIVEWEAR, INC.

Plaintiffs,

- against -

COMBINE DISTRIBUTING INC.,
Defendants.

**DECISION
AND
ORDER**

Index No. 1350/10

-----X
The following papers numbered 1 to 5 read on this motion:

Papers Numbered

Notice of Motion/Order to Show Cause/Petition/ Cross Motion and Affidavits(Affirmations)Annexed	1, 2
Opposing Affidavits (Affirmations)	3
Reply Affidavits(Affirmations)	4
Affidavits(Affirmations)	
Other Papers (Memoranda of Law)	5

Plaintiff has moved by Order to Show Cause, pursuant to CPLR 6301, for a preliminary injunction enjoining the defendant from selling to a third party the premises at 1111 Avenue U in Brooklyn in which it maintains its clothing store. Pursuant to its lease, plaintiff has a right of first refusal with respect to any sale to a third party of the building which is owned by defendant. By letter dated December 16, 2009, defendant notified plaintiff that it had entered into a contract for the sale of the building with an unidentified third party, annexing a redacted copy of the contract. Paragraph 40 of the

Contract of Sale provided that, in anticipation of an exchange pursuant to Internal Revenue Code §1031 (26 USC §1031), in addition to the sale price of \$1,625,000

Within six (6) months after the closing, Purchaser shall loan Seller an amount which shall not exceed Four Hundred Thousand (\$400,000.00) Dollars by Seller executing and delivering to Purchaser a Note in the mortgage amount loaned to Seller. Seller shall notify Purchaser of the principal amount of the loan not less than three (3) days prior to the closing of Seller's purchase of a replacement property as part of its 1031 Exchange. Repayment of the loan shall be secured by a mortgage on the premises property which Seller elects to purchase as part of the 1031 Exchange. The loan shall be repaid with interest thereon computed at the rate of seven (7%) per cent per annum for a term of ten (10) years in monthly payments which shall commence one month after the closing and continuing on the same day of each consecutive month thereafter during the term of the loan. Seller agrees to pay all recording fees and mortgage taxes associated with the recording of the Mortgage. The seller shall pay for title insurance for the mortgage. The mortgage should be a first mortgage, due on sale with no secondary financing. The mortgage should not represent more than twenty five (25%) percent of the purchase price of the replacement property. Seller is negotiating to purchase a replacement property on Lohr Road, Ann Arbor, Michigan. The amount of the loan from purchaser on this property shall be two hundred seventy five thousand (\$275,000) dollars. The seller shall have six (6) months from closing to purchase a replacement property and use the above loan.

Paragraph 40 of the Rider to plaintiff's lease requires defendant landlord to notify plaintiff of its receipt of any third party offer for the purchase of the demised premises and grants to plaintiff the "privilege of purchasing the demised premises for the same price and upon the same terms as offered by a third party for a period of thirty (30) days after the Notice is sent, time being of the essence against the Tenant." Plaintiff insists that the above-quoted provision is not a valid condition of its exercise of its right of first refusal. On January 14, 2010, within the 30 day period for the

exercise of its right, plaintiff notified defendant of its election to purchase the premises upon the terms set forth “ provided, however, that the provisions of paragraph 40 of the Contract of Sale included with your notice providing for the buyer to provide a loan to the seller are unrelated to the Premises and otherwise improper, invalid, unenforceable and defective and, therefore, are rejected”. Plaintiff demanded a contract of sale in compliance with its position, and cautioned that, if defendant failed to confirm its acceptance of plaintiff’s demand, the instant application would be brought in court. Plaintiff’s letter further stated that: “In the event it is determined by a Court that the provisions of paragraph 40 of the Contract of Sale included with your notice are valid and must be met by the Tenant as a condition of exercising its right of first refusal, then the Tenant hereby accepts such terms as well.”

Upon the application for the Order to Show Cause on January 19, 2010, both parties appeared by counsel, as did a representative for the contract vendees who are not parties to this action. The Court granted a temporary restraining order pending the argument on the OSC.. In response to the OSC, defendant has moved for dismissal, contending that, like a Yellowstone injunction, the instant application must be denied because plaintiff did not obtain an extension of its right of first refusal in order to bring this action and its failure to execute the proffered contract and submit a down payment by January 16, 2010, within the 30 days of notice from defendant, time being of the essence, divests this Court of the power to order the injunction.

The Court rejects this argument as there is no reasonable analogy to the Yellowstone context. The instant application does not affect plaintiff’s tenancy, which, all agree, would continue to 2012 under the terms of plaintiff’s lease even if the building were sold to third parties. The stay application was brought prior to the contractual closing date of January 25, 2010 , and promptly following plaintiff’s notice of election to purchase, to which defendant apparently did not respond.

Under the circumstances presented, the failure to grant injunctive relief would be error. Moreover, there is no basis for defendant's cross-motion to dismiss this action seeking an interpretation of plaintiff's contractual rights. See *South Amherst, Ltd., v H. B. Singer, LLC*, 13 AD3d 515, 516 (2d Dept., 2004). The cross-motion to dismiss is denied.

In seeking a preliminary injunction, plaintiff must establish, in addition to irreparable injury as a consequence of the failure to grant such injunction and a balancing of the equities in its favor, the probability of its success on the merits. *Brenner v Hart Systems, Inc.*, 114 AD2d 363, 366 (2d Dept, 1985). Thus, in ruling on plaintiff's application under CPLR 6301, the Court must evaluate the merits of plaintiff's claim. In its cross-motion to dismiss, defendant set forth, by affidavit of the parties, the factual context, as did plaintiff in its own motion. The relevant facts are not disputed. and the substance of the disagreement between the parties turns entirely on a legal issue and the interpretation of the contracts. As it is the Court's duty to interpret a written contract as a matter of law where it is unambiguous and the intent of the parties is discernable from the four corners of the document (see *Matter of Wallace v 600 Partners Co.*, 86 NY2d 543, 548 (1995); *R/S Assoc. v New York Job Dev. Auth.*, 98 NY2d 29, 32 (2002)), this Court finds it appropriate to summarily determine the legal issues from the papers filed upon the respective motions. See CPLR 3211(c).

There is no disagreement that plaintiff's lease contains an enforceable right of first refusal to purchase the premises on the same terms as those offered and accepted from a third party. As plaintiff asserts, it is entitled to specific performance where a valid election has been made. *Yudell Trust I v API Westchester Associates*, 227 AD2d 472 (2d Dept, 1996). Notwithstanding the present dispute regarding the terms, there was a valid, timely election by plaintiff to purchase. In reliance on *397 West 12th Street Corp. v Zupa*, 20 AD3d 335 (1st Dept, 2005), *South Amherst*, and *H. G.*

Fabric Discount, Inc. v Pomerantz, 130 AD2d 712 (2d Dept, 1987), plaintiff argues, however, that the provision requiring purchaser to loan up to \$400,000 to seller within six months of closing constitutes an unenforceable, arbitrary condition unrelated to the purchase of the subject premises.

The cases upon which plaintiff relies are inapposite in that, in each of those cases, the purchase of a second property, in addition to the property to which the right of first refusal related, was at issue. In 397, the purchaser itself was actually seeking to acquire the second property for which the third party purchaser had also contracted as a part of the third party sale. The issue cited by plaintiff here, that the price of the subject premises had been inflated to discourage the exercise of the tenant's right of first refusal, does not appear to have been relevant to the appellate decision which notes that the tenant had "agreed to match the terms of the [third party] offer" for the subject premises (20 AD3d at 336). In *South Amherst*, the proposed sale included a larger parcel than the subject property and the Court held that the right of first refusal attached only to the subject property so that the right of first refusal could not be deemed waived by the failure to elect to purchase the larger parcel. And, in *H. G.*, the third party offer contained a condition that the premises be delivered unoccupied. Since the plaintiff tenant refused to vacate, and was in control of such condition, the condition was impossible for the defendant to meet. Thus there was no bona fide third party offer which would require plaintiff to exercise its right of first refusal and such right was not waived by plaintiff's declining to meet the proposed purchase price. "It is well settled that lessees are not obligated to exercise an option of first refusal or suffer its forfeiture until the lessor has received a bona fide offer from a third party at terms which the lessor is willing to accept" (130 AD2d at 713).

As explained in the affidavit of defendant's president, Jay Miller, and reflected in the Contract of Sale, in order to avoid a substantial tax liability for the

increase in value of the subject property over the 38 years it has been owned by defendant, defendant decided to take advantage of Section 1031 of the Internal Revenue Code which defers such tax consequences on capital gains when the proceeds of a sale are invested in like property within six months (180 days) of the sale of the exchanged property (26 USC §1031(a)(3)). In order to assure the availability of financing for a more expensive property in Michigan which it desired to purchase as a replacement for the subject property, as a term of purchase for the subject premises, defendant required that the purchaser provide the loan set forth in paragraph 40 of the Contract of Sale. The Court finds this provision to be entirely rational and to constitute an element of the consideration for the sale of the property for which plaintiff holds the right of first refusal. The fact that there is a signed contract incorporating this term renders the Contract of Sale a bona fide contract and requires plaintiff to accept such loan condition as a term of the contract it must match in electing to purchase pursuant to its right of first refusal. There is nothing about this clearly defined and detailed loan provision that suggests that it was intended to discourage plaintiff's exercise of its rights. The interest rate is generous in today's market and the ten-year term and loan to value relationship set forth are not unreasonable. The Court takes note of the commercial nature of the property and the business purposes of the parties. An arms-length agreement between sophisticated business entities should not be disturbed but should be enforced in accordance with its terms. Plaintiff retains the right to decline to exercise its right to purchase upon the terms stated, and accepted by the third party purchaser, if the loan provision is unacceptable to it.

Plaintiff's complaint contains three causes of action: one for declaratory judgment that plaintiff has exercised its right of first refusal without accepting the "Objectionable Provision"; a second seeking a direction for specific performance; and the third for injunctive relief. Upon its review and construction of the documents

submitted, this Court finds that plaintiff has validly exercised its right of first refusal, but that the loan provision to which plaintiff objects is a binding element of the compensation provided in the Contract of Sale that must be met by plaintiff. Plaintiff has submitted evidence that it is ready, willing and able to close on the purchase of the subject premises under the terms set forth in the Contract of Sale and is, therefore, entitled to specific performance. Injunctive relief is warranted. However, in order to avail itself of its rights, without unreasonably prejudicing defendant if it should fail to perform, plaintiff shall forthwith execute the proffered Contract of Sale and provide a ten percent down payment. The Contract of Sale provided for a closing date of January 25, 2010, forty days following execution of the contract. Plaintiff must similarly perform in accordance with the terms of the Contract of Sale, closing within forty days, on May 10, 2010.¹

Plaintiff's motion for injunctive relief is granted upon the foregoing conditions and it is granted summary judgment on its complaint as indicated above. Defendant's cross motion to dismiss is denied.. The case will appear on the calendar on May 12, 2010 as a control. If the transaction is concluded in accordance with the above provisions, the parties may so notify the Court by stipulation and the case will be marked disposed.

This constitutes the decision and order of the Court.

E N T E R :

Carolyn E. Demarest, JSC

¹This decision was originally rendered from the bench following oral argument on March 31, 2010.