

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

PRESENT: _____

PART _____

Justice

Louis Lasky Memorial MEDICAL

INDEX NO.

603739-2008

MOTION DATE

MOTION SEQ. NO.

005

MOTION CAL. NO.

- v -

63 West 38th, LLC, et al

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

JUN 14 2011

OFFICE CIVIL

is decided in accordance with accompanying memorandum decision and order.

Case disp.

Dated: 5/31/11

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

-----X
LOUIS LASKY MEMORIAL MEDICAL AND
DENTAL CENTER, LLC,

Plaintiff,

Index No.: 603739/08

-against-

63 WEST 38TH, LLC, 63 WEST 38TH STREET
PROPERTY INVESTORS I, LLC and 63 WEST 38TH
STREET DEVELOPMENT, LLC,

Defendants.

-----X
Hon. Charles Edward Ramos, J.S.C.:

In this commercial landlord/tenant proceeding, defendants 63 West 38th, LLC, 63 West 38th Street Property Investors I, LLC and 63 West 38th Street Development, LLC (together "Defendants" or the "Landlord") move for partial summary judgment pursuant to CPLR 3212 (Motion Sequence 005) to dismiss the first cause of action in the Complaint seeking a declaratory judgment.

Plaintiff, Louis Lasky Memorial Medical and Dental Center, LLC ("Plaintiff" or "Lasky") cross-moves for the partial summary judgment in support of its declaratory judgment claim.

On April 7, 2011, this Court heard argument and ruled that Defendants' motion was denied as premature because further discovery is needed in order to adequately address their motion for summary judgment (Transcript, April 7, 2011, pp 6-8). Plaintiff's cross-motion for summary judgment is addressed herein.

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Summary Judgment

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact as to the claim or claims at issue (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]).

Once the prima facie showing has been made, the party opposing a motion for summary judgment bears the burden of "produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact" (*Amatulli v Delhi Construction Corporation*, 77 NY2d 525, 533 [1991]).

Background¹

Lasky is the commercial tenant of the fourth floor and a portion of the fifth floor in a building (the "Building") located at 63 West 38th Street in New York. Defendants are the former and current owners (and landlord) of the Building.

¹ For a more detailed recitation of the factual background, see this Court's prior decision denying preliminary injunctive relief dated December 9, 2010. It should be noted at the outset that a denial of a motion for a preliminary injunction does not constitute law of the case or an adjudication on the merits (*Town of Concord v Duwe*, 4 NY3d 870 [2005]).

Discussion

I. The 2010 Termination Notice

On June 25, 2010, Landlord delivered a termination of lease notice ("2010 Termination Notice") to Lasky purportedly based on Landlord's election to "substantially renovate"² the Building in accordance with Article 64 of the Lease (the "Demolition Clause"). The Demolition Clause³ requires a tenant to vacate the

² It appears from the record that the Landlord seeks to substantially renovate the Building and not completely demolish it. Certainly, a complete demolition would significantly affect every tenant in the building. However, in the case of a substantial renovation, the Demolition Clause contemplates that prior written notice of termination is only required when it "similarly affects" the tenant [Lasky] as a demolition would. Given, among other things, the 2010 Termination Notice, it is undisputed that the substantial renovation here would require a termination of Lasky's Lease, insofar as it "affects" Lasky.

³ Demolition If Owner shall at any time after the tenth (10th) anniversary of the Commencement Date of this Lease decide to demolish or substantially renovate the Building, Owner shall have the right to terminate this Lease as of the last day of any month thereafter upon not less than twelve (12) months prior irrevocable written notice by Owner to Tenant, provided that Owner shall also send termination notices, in the case of a demolition, to all Tenants of the Building or, in the case of a substantial renovation, to those Tenants similarly affected thereby. In the event that Owner shall give such notice, then upon the date specified therein for the termination of this Lease, this Lease and the term and estate granted hereby shall terminate as though such date were the date originally set forth in this Lease for the expiration of the term hereof and tenant shall, on or before such date, vacate and surrender the demised premises in accordance with the provisions of this Lease as if such date of termination was the expiration date of this Lease and Landlord shall, on or before such date that Tenant vacates and surrenders the demised premises as aforesaid, pay to tenant an amount (hereinafter referred to as the "Demolition Payment") equal to the sum of \$250,000.00 plus the then unamortized cost of Tenant's initial installation (i.e., "Tenant's Work") amortized

premises upon twelve months irrevocable written notice of the Landlord, here, June 30, 2011. In its cross-motion for summary judgment, Lasky seeks a declaration invalidating the 2010 Termination Notice on a number of grounds.

A. Good Faith Intent

In order for a termination notice to be valid and effective, it must have been given in good faith (see *Adams Drug Co., Inc. V Knobel*, 64 NY2d 768 [1985]). Here, good faith requires that at the time the Landlord issued the 2010 Termination Notice, it must have had a real intent to carry out a substantial renovation (see i.e. *Leighton's, Inc. v Century Circuit, Inc.*, 95 AD2d 681 [1st Dept 1983])[existence of demolition contract and permission of mortgagee before giving termination notice would evidence landlord's good faith]).

Generally, short of a trial to ascertain the credibility of the parties, good faith intent to demolish or substantially renovate can be shown by evidence of objective steps representing meaningful progression toward that end. This conclusion is consistent with the court's analysis in *Leighton's Inc.*, 95 AD2d

on a straight line basis over twenty (20) years. Tenant shall provide landlord with evidence of the total cost of said Tenant's Work no later than one (1) year from the Commencement Date, together with proof of payment reasonably satisfactory to Landlord. In the event that Tenant fails to provide such evidence and proof of payment as aforesaid, landlord shall have no obligation to make the Demolition Payment (Lease, Article 64).

681. There, the court, in conjunction with ordering a trial to ascertain the contractual intent of the parties, did not disagree with plaintiff's position that a binding demolition contract, which inherently required the mortgagee's permission, was evidence of a landlord's good faith intent to demolish the building.

Here, over a year prior to the issuance of the 2010 Termination Notice, the Landlord hired an architectural firm to draft plans to substantially renovate the Building. On June 29, 2009, an application was filed with Department of Buildings ("DOB") seeking approval of the plans on behalf of the Landlord. The DOB subsequently rejected those plans. Eight months later, in May 2010, a new application, prepared by a different architectural firm, was filed with the DOB incorporating a different set of plans. Ten days prior to delivery of the 2010 Termination Notice, the DOB rejected those plans.

Notwithstanding a potential allegation by Lasky that the Landlord was filing sham applications with the DOB in bad faith for the purpose of removing Lasky from the Building (an untenable position at this point given that the architectural plans upon which the applications are based had not been produced in discovery at the time this motion was filed), the objective acts of retaining architects to design substantial renovation plans and filing them with the DOB, notwithstanding their declination,

can be viewed as meaningful progression, and some evidence of the Landlord's good faith intent to substantially renovate the Building at the time the 2010 Termination Notice was delivered to Lasky.

Lasky argues that "good faith requires that a plan to build under a demolition notice be imminent when notice is given" (see Lasky Memo of Law at 25). This argument is not supported by a fair reading of the relevant case law cited in support. In *Oriburger, Inc. v B.W.H.N.V. Assocs.*, 305 AD2d 275 (1st Dept 2003), the First Department rejected the trial court's conclusion that the developer's plans for demolition were imminent, and contrarily determined that the plans were "in their infancy, at best" (*id.* at 279).⁴ In doing so, the appellate court did not hold that demolition plans must be imminent at the time when notice is tendered.

Furthermore, in *Donohue v New York*, 54 Misc. 415 (Sup Ct, NY County, 1907), a case cited by Lasky, the court ruled that at the time a termination notice is tendered, "tentative" plans to demolish do not satisfy the good faith requirement. However, in

⁴ The First Department's reasoning was supported by the defendant developer's testimony elicited at the trial level. The appellate court opined that he "has not entered into any contracts to draw up plans or submit applications for the demolition of the building...[and] has not notified one of the other tenants of its intention to demolish the building, as the tenant lease requires, because [quoting developer] '[w]e're not at that stage'" (*id.* at 279).

that case, there was no required notice period. The ruling took into consideration, by no small measure, that it was unfair and inequitable for the defendant Commissioner to seek to terminate the lease immediately, when in fact the city was not in a position to promptly commence the demolition. Nonetheless, the record here reflects that the Landlord's plans could be found to be more than "tentative" when the 2010 Termination Notice was delivered.

Lasky further argues that because the Demolition Clause of the Lease requires the Landlord to tender an "irrevocable written notice" to Lasky for substantial renovation, it "undisputably establishes the intent of the parties that Landlord was required to have an unconditional right to substantially renovate the Building when it gave the 2010 Termination Notice...[and] [t]he purpose of a requirement for an irrevocable notice was plainly to ensure that Landlord's plans to build be finalized, including the fact that Landlord would know that its plans could be legally achieved and the Landlord would have obtained all required governmental consents...this is not an expression of good faith" (Lasky Memo of Law at 28-29).

This Court cannot as a matter of law, under the guise of contract interpretation, read such a requirement into the Lease. A factual issue exists as to the intent of the parties and summary judgment must be denied (see *American Express Bank, Ltd.*

v *Uniroyal, Inc.*, 164 AD2d 275 [1st Dept 1990], app denied, 77 NY2d 807 [1991]).⁵

B. Clear, Unambiguous, and Unequivocal

The First Department has held that a notice of termination of a lease must be clear, unambiguous, and unequivocal in order to serve as the catalyst which terminates a leasehold (*Ellivkroy Realty Corp. v HDP 86 Sponsor Corp.*, 162 AD2d 238 [1st Dept 1990]).

Based on this principle, Lasky argues in the alternative that the 2010 Termination Notice is inconsistent with the Landlord's Answer to the Complaint (served two weeks subsequent), and thus, not clear, unambiguous, and unequivocal, compelling its invalidation. In the 2010 Termination Notice, the Landlord seeks to exercise its right under the Demolition Clause for early termination of Lasky's Lease. Lasky argues, however, that in Landlord's Answer, it purports to reserve a right or place an option on evoking its right to early termination under a strict

⁵As guided by the First Department in *American Express Bank, Ltd.*, 164 AD2d at 277 "[when] interpreting a contract, the intent of the parties governs. A contract should be construed so as to give full meaning and effect to all of its provisions. Words and phrases are given their plain meaning. Rather than rewrite an unambiguous agreement, a court should enforce the plain meaning of that agreement. Where the intent of the parties can be determined from the face of the agreement, interpretation is a matter of law and the case is ripe for summary judgment. On the other hand, if it is necessary to refer to extrinsic facts, which may be in conflict, to determine the intent of the parties, there is a question of fact, and summary judgment should be denied."

reading of Paragraph 15 of the Answer. Paragraph 15 states the following:

"If Defendant 63 West 38th Street Development LLC seeks to invoke its rights under said paragraph 64, it shall have no obligation to make the "Demolition Payment" described in that paragraph."

Lasky argues that the word "if" casts confusion and ambiguity upon whether or not the Landlord will seek to terminate the Lease. Although this is some evidence of confusion and ambiguity, as Lasky previously pointed out, the Lease sets forth that the 2010 Termination Notice is irrevocable. This Court cannot state as a matter of law that the Landlord is barred from pursuing an early termination of the Lease. In Paragraph 15, the Landlord is addressing the applicability of the "Demolition Payment" that results under the Demolition Clause, and may not be setting forth its intention to reserve a right or place an option on the Lease's termination, which as mentioned above, is precluded from doing. Therefore, Lasky's position as to ambiguity cannot establish a prima facie showing for summary judgment.

II. Early Termination of The Lease

A contractual provision giving a party an option to terminate a lease will be strictly construed by the courts (*Leighton's, Inc.*, 95 AD2d at 682; *Dubois & Son, Inc. v Goldsmith Bros.*, 273 AD 306 [1st Dept 1948]). Lasky argues that the

Landlord has no right to early termination of the Lease under the Demolition Clause because it failed to meet certain conditions as set forth therein.

Lasky argues that a landlord is not entitled to cancel a lease where there has been a non-occurrence of a condition precedent. According to Lasky, because the Landlord substantially renovated the lobby (the "2007 Lobby Renovation") during the first ten years of the Lease, in purported contravention of the Demolition Clause, the Landlord has no right to early termination.

The Demolition Clause does not restrict the Landlord from substantially renovating other areas (common or otherwise) of the Building during the Lease term, provided that such renovations do not adversely affect Lasky's "use of or access to" the leased premises, or affect Lasky's space as if a complete demolition would (see Lease, Article 20, 64). There is clearly an issue of fact as to whether the 2007 Lobby Renovation adversely affected Lasky's use or access to the leased premises. The appropriate result would potentially be a determination that a breach of the Lease occurred.

The Demolition Clause allows the Landlord to terminate the Lease early upon not less than twelve months' prior written irrevocable notice, but only "If Owner [Landlord] shall at any time after the tenth (10) anniversary of the Commencement Date of

this lease decide to demolish or substantially renovate the Building" (emphasis added). Therefore, Lasky argues, and this Court agrees, that the Landlord must not have decided to substantially renovate the Building (as limited above) before the tenth anniversary of the Commencement Date of the Lease prior to invoking the Demolition Clause as a basis for early termination.

However, at this point in the litigation, there has not been adequate discovery to properly adjudicate this issue and the other issues raised in this motion. Therefore, summary judgment must be denied at this time.

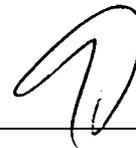
All other arguments not addressed in this decision have been considered and deemed without merit.

Accordingly, it is

ORDERED that Plaintiff Lasky's motion for summary judgment is denied without prejudice to a renewal at the close of discovery; and it is further

ORDERED that the parties are to expeditiously conclude all outstanding discovery, and file a note of issue/certificate of readiness.

Dated: May 31, 2011



J.S.C.

CHARLES E. RAMOS