

STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

UNIVERSITY PLAZA Tx. LIMITED
PARTNERSHIP,

Plaintiff,

v.

LARRY'S MEXICAN RESTAURANT, INC.,
EBERARDO GUERRERO, III a/k/a
EBERARDO GUERRERO, a/k/a EBERARARDO
and ELEANOR GUERRERO,

Defendant.

AMENDED
DECISION AND ORDER

Index #2005/08896

This is a motion by defendants to stay arbitration and for summary judgment. Plaintiff cross-moves to compel arbitration.

The parties entered into a lease, dated 9/10/04 (Ex. A), in which defendants-tenants were to lease premises from plaintiff-landlord in Houston. Under the lease, renovations were to be contemplated by the Landlord before occupancy by Tenant, which was to begin on September 1, 2004, or at some unspecified time thereafter. On July 5, 2005, Landlord "advised [defendant] that the premises were ready for delivery to and possession by [defendant restaurant]." Tenants did not take possession of the leasehold, nor did they open the restaurant.

The parties exchanged letters during July 2005, regarding the Landlord's (plaintiff's) claimed failure to suitably prepare the premises for the tenant (defendant) as required by the lease. Tenant's Texas counsel wrote Landlord on July 11, 2005, in response to Landlord's notification to tenant that the premises

were ready for occupancy. Tenant claimed first that the lease was not a valid contract "because the time of performance is indefinite." Second, Tenant claimed that Landlord "has not lived up to numerous obligations under the lease," specifically those under §29.06 itemized as follows: (1) Landlord's contractor severely damaged the concrete floor without remediation to a "ready for final floor preparation" condition; (2) Landlord removed the drop ceiling without replacement as required by §29.06; (3) Landlord failed to install light fixtures in the ceiling. Tenant's letter sought termination of the parties' relationship and demanded return of the deposit.

Landlord responded in counsel's letter of July 19, 2005. Landlord declared the lease fully enforceable; accused Tenant of using "two minor items related to the completion of the premises" as a pretext for "attempting to abrogate the lease"; declared that the failure to replace the drop ceiling was due to Tenant's specific request that it not be replaced; maintained that the floor was indeed ready for final floor preparation; and warned Tenant that it could expect that Landlord would litigate the enforceability of the lease, including suing the Guerrero's on their guaranties.

Thereafter, plaintiff (landlord) filed suit seeking (1) declaratory relief that the lease is enforceable despite Tenant's claim of unenforceability, by reason of §1.03 of the lease, which

specifies that Tenant's performance "shall commence upon September 1, 2004, or when owner delivers possession, whatever occurs last," (2) specific performance compelling Tenant to accept possession of the premises, (3) damages for breach of the lease, including acceleration of the rent and reasonable attorney's fees, and (4) damages by reason of its expenditures to prepare the premises for Tenant's occupancy and the anticipated expenditures to prepare the premises for a new Tenant.

After joinder of issue on September 16, 2005, but not until December 13, 2005, plaintiff-landlord sought arbitration under §22.07 of the lease (Ex. D). Tenants submit that the demand for arbitration was served only after settlement negotiations broke down, and that plaintiff therefore waived arbitration.

Defendants submitted photographs, attached to Guerrero's affidavit, to demonstrate the unacceptable condition of the premises (Exh. B). Much of the disagreement between the parties pertains to the condition of the ceiling and the other matters of renovation detailed in §29.06. Defendants assert through affidavits of Guerrero and Russell Hruska, defendants' architects, that the renovations were not completed as per the requirements of §29.06 when they observed the premises, and in no way were the premises ready for moving in on July 5, 2005 as plaintiff-landlord would have the court believe. Additionally, both men maintain that, contrary to plaintiff's assertions,

neither of them ever agreed, orally or otherwise, to any amendments or alterations to what was detailed in §29.06 of the lease.

Defendants further seek summary judgment on the complaint as well. The principal contention of defendants is that plaintiff breached the lease agreement in the first instance by not furnishing the renovated premises in the condition specified in the lease, at the time [7/5/05] when plaintiff ostensibly dictated that defendants were obligated to move in under the lease. In support of its argument, defendants point to §28.03, which mandates that there can be no alterations or changes to the lease unless such changes are reduced to writing. Defendants submit that, regardless of whether they made oral changes to the renovation requirements, which they insist they did not because there is no written agreement to that effect, the lease must be deemed breached by plaintiff in the first instance as a matter of law, and they are entitled to summary judgment. Defendants refer to authority that a landlord must substantially complete renovations under the terms of a lease before the landlord may declare the premises ready for occupancy.

Plaintiff's Position.

Plaintiff asserts that it is entitled to arbitration on the very distinct questions which it raises in its demand, namely whether defendants by their actions and words, waived the

replacement/repair of the ceiling fan, and whether it substantially performed its duties and responsibilities under the lease. Plaintiff contends that these questions are unique and separate from the causes of action pled in the complaint and, accordingly, plaintiff has not waived the right to arbitrate as a result of filing the complaint.

Plaintiff asks the court to pay particular attention to the entire language of §28.03 which plaintiff reads as containing qualifying language which serves to allow oral amendment to the contract by reference to other sections of the lease. In that regard, points to §29.11 which specifically allows for defendants' "input" into the plans to modify the leasehold. By reference to the right of input, plaintiff contends that the parties, at a meeting at the site, agreed to modify the renovation provisions of the lease to include the lack of a drop-down ceiling. In support of that premise, plaintiff submits an affidavit from its architect and the project manager to show that such an agreement took place. Plaintiff also includes the written modified plans to demonstrate that the agreement was modified on that point (Ex. B to Bishop affidavit).

Because, according to plaintiff, these questions are arbitrable, plaintiff contends that its resort to litigation did not involve a waiver of the right to seek arbitration of them. Plaintiff draws particular attention to §22.07 of the lease,

which provides that unresolved disputes involving money damages are not arbitrable. Plaintiff sought relief in court for those particular claims. Moreover, plaintiff insists that the second cause of action seeks specific performance, which is injunctive relief, and the arbitration clause of the lease specifically preserves plaintiff's right to seek arbitration while pursuing a cause of action for injunctive relief. Plaintiff further notes that the demand for arbitration only named the corporate restaurant, not the individuals who are named in this action, who executed guarantees on the lease.

Plaintiff also opposes the motion for summary judgment, contending that the motion is a "non-sequitur" because the issue of the ceiling fan is not the subject of the plaintiff's complaint. In any event, plaintiff submits the affidavits of Todd Hardy, as project manager, and James Bishop, as project architect, in opposition to the motion, in which plaintiff tries to establish that each of the renovation duties detailed in §29.03 were either completed or altered as the result of the wishes of defendants. Both men assert that the alterations which took place were either at the suggestion of defendants or with their complete knowledge and consent. It is submitted that there never was a "time is of the essence" letter by defendant and the lease had sufficient provisions as to when the restaurant was to have been made ready for occupancy. Bishop maintains that

all changes to the renovation plan were the result of an onsite meeting with representatives of both parties, and with the specific agreement of defendants.

Hardy maintains that the building was, and is, code compliant and that the facility stands ready for occupancy. He states that he "never told Mr. Guerrero that the Premises were ready" on July 5th. Rather he asserts that he told him "that we were getting close to being able to deliver possession of the Premises." He submits that defendants are jumping the gun and stating that the premises were not ready because defendants wish to extract themselves from a lease for a project that is simply beyond their means. Plaintiff concludes that, because of the different versions of what transpired regarding the parties' relationship, issues of fact have been raised which preclude the granting of summary judgment.

Defendants' Reply

In reply, defendants assert that plaintiff made admissions in their papers which aid defendants' case. Defendants contend that Hardy admitted that plaintiffs only may have been ready to transfer the premises on the operative date of 7/5/05, which contradicts plaintiff's assertion in the complaint that "the premises were ready for delivery to and possession by [defendants]" on 7/5/05 (emphasis supplied). Defendants contend that any ambiguity must be held against plaintiff as the drafter

of the contract, and that the plain meaning of the "input" clause versus the written modification clause would result in the natural conclusion that the concept of "input" does not trump the merger requirement.

Analysis

As a general rule, like any contract right, the right to arbitrate may be modified, waived or abandoned. Sherill v. Grayco Builders, Inc., 64 N.Y.2d 261 (1985). If a party commences an action seeking a judicial determination of the controversy and seeks arbitration on the same issues after efforts at settlement have failed, the party is held to have waived arbitration. Hart v. Tri-State Consumer, Inc., 18 A.D.3d 610 (3d Dept. 2005). "But as to claims separate and distinct [submitted to arbitration], no waiver of arbitration may be implied from the fact that resort has been made to the courts on other claims arising under a common agreement which remains in full force and effect." Denihan v. Denihan, 34 N.Y.2d 307, 310 (1974). Similarly, if a party seeks protective relief merely to preserve the status quo, it does not waive arbitration. Sherrill v. Grayco Builders, Inc., 64 N.Y.2d at 272; Hart v. Tri-State Consumer, Inc., 18 A.D.3d at 612.

With these principles and precedents in mind, plaintiff has waived arbitration. As well explained in Johanson Resources Inc. v. La Vallee, 271 A.D.2d 832 (3d Dept. 2000), a similar case:

We begin by noting that although "[n]ot every foray into the courthouse effects a waiver of the right to arbitrate" (Sherrill v. Grayco Bldrs., 64 N.Y.2d 261, 273, 486 N.Y.S.2d 159, 475 N.E.2d 772), a contractual right to arbitrate may be waived or abandoned if the party invoking arbitration "manifest[s] a preference 'clearly inconsistent with [his] later claim that the parties were obligated to settle their differences by arbitration' " (id., at 272, 486 N.Y.S.2d 159, 475 N.E.2d 772, quoting Matter of Zimmerman v. Cohen, 236 N.Y. 15, 19, 139 N.E. 764). A manifestation of such intent may be found where that party affirmatively seeks the benefits of litigation (see, id., at 273, 486 N.Y.S.2d 159, 475 N.E.2d 772; see also, De Sapio v. Kohlmeyer, 35 N.Y.2d 402, 405, 362 N.Y.S.2d 843, 321 N.E.2d 770). As noted in Great N. Assocs. v. Continental Cas. Co., 192 A.D.2d 976, 979, 596 N.Y.S.2d 938, "[w]hile there are many actions which can manifest a waiver, one of the more common is the prior commencement of a judicial action or proceeding wherein the claims sought to be redressed embrace the same issues as those contained in the claim for which arbitration is sought."

If the only relief sought by Johanson in action Nos. 1 and 2 had been replevin, we would agree that no waiver of the right to arbitration was effectuated by him (compare, Matter of Assael v. Assael, 132 A.D.2d 4, 521 N.Y.S.2d 226; Board of Educ. of City School Dist. of City of N.Y. v. Reuther, 58 A.D.2d 637, 396 N.Y.S.2d 41) since a party does not waive the right to arbitration by merely "mov[ing] in court for protective relief in order to preserve the status quo while at the same time exercising [his] right under the contract to demand arbitration" (Preiss/Breismeister Architects v. Westin Hotel Co.--Plaza Hotel Div., 56 N.Y.2d 787, 789, 452 N.Y.S.2d 397, 437 N.E.2d 1154). Johanson, however, is not a party who merely sought to preserve the status quo while arbitration was simultaneously demanded or pending (cf., Zaubler v. Castro, 23 A.D.2d 877, 259 N.Y.S.2d 221); rather, he asserted arbitrable issues in two separately commenced actions, most significantly, breach of contract claims based on the lease and the management contract (see, Hawthorne Dev. Assocs. v. Gribin, 128 A.D.2d 874, 513 N.Y.S.2d 796). Said differently, it cannot be fairly stated that the claims asserted in action Nos. 1 and 2 constitute "litigation of separate and distinct claims" from those to be

arbitrated such that no waiver has occurred (PromoFone Inc. v. PCC Mgt., 224 A.D.2d 259, 260, 637 N.Y.S.2d 405; see, Denihan v. Denihan, 34 N.Y.2d 307, 310, 357 N.Y.S.2d 454, 313 N.E.2d 759).

Id. 271 A.D.2d at 835-36. Plaintiff has done the same thing here. Waiver will result where the claims sought to be redressed in a "judicial action or proceeding * * * embrace the same issues as those contained in the claim for which arbitration is sought." Great Neck Assocs. v. Continental Cas. Co., 192 A.D.2d 976, 979 (3rd Dept. 1993). Whether there was an enforceable lease in the sense that defendants' obligations to pay rent had commenced necessarily encompassed the issue, acknowledged to be arbitrable, whether the renovations were completed as promised under the lease or waived by defendants. Nitti v. Goodfellow, 256 A.D.2d 1082 (4th Dept. 1998). By commencing the litigation which necessarily would encompass all the questions raised in the arbitration, plaintiff has waived arbitration of the same issues. Tengtu Intern. Corp. v. Pak Kwan Cheung, 24 A.D.3d 170 (1st Dept. 2005). Also, the request for injunctive relief in the second cause of action is not interposed merely to preserve the status quo, but rather is designed to significantly alter the parties' current position with respect to each other. The motion to stay arbitration is granted.

Defendants' motion for summary judgment is, however, denied. Even assuming that the right to provide "input" cannot trump the merger clause in the lease, there are issues of fact which must

be determined regarding what transpired at the meetings between the parties and their representatives relative to the renovations. Both sides give different versions of what transpired, which at this juncture is absent deposition testimony, and the trier of fact must decide the veracity of these versions. Whether the representatives could bind the tenants is another question to be resolved by the factfinder.

Because the Statute of Frauds prohibits "only 'executory' oral modification," Rose v. Spa Realty Associates, 42 N.Y.2d 338, 343-44 (1977), and because, "even if a contract expressly provides for modifications to be in writing, an oral modification will be enforced where it has been fully performed, J & R Landscaping, Inc. v. Damianos, 1 A.D.3d 563, 564-65 (2d Dept. 2003), or partially performed if "the partial performance be unequivocally referable to the oral modification," Rose v. Spa Realty Associates, 42 N.Y.2d at 343-44; Pau v. Bellavia, 145 A.D.2d 609, 610-11 (2d Dept. 1988), plaintiff has raised more than sufficient questions of fact on these issues to withstand summary judgment. See J & R Landscaping, Inc., 1 A.D.3d at 564 (when both parties "actively continue" to negotiate away contingencies "well after" the applicable time periods provided under the contract, they have "effectuated a modification of the contract as to this time constraint"); Ehrenpreir v. Klein, 260 A.D.2d 532, 532-33 (2d Dept. 1999). Plaintiff's performance of a

complete demolition of the drop ceiling thus would properly be viewed as unequivocally referable to the alleged oral modification, because the lease only required that the "[c]eiling grid shall be repaired/replaced throughout . . . with matching ceiling tiles." Without reference to the alleged oral modification, there would have been no need to demolish the metal "drops" for the ceiling tiles unless they themselves needed complete replacement, which no party contends was necessary. But the point here is that enough in the way of raising an issue of fact on these issues has been presented to preclude summary judgment on all but the Second Cause of Action.

The admission by plaintiff on this motion that the premises were not ready on 7/5/05, but were only close to being ready, totally contradicts the assertion in the complaint that, in fact, the premises were ready. If they were not ready, that date cannot be the triggering device for specific performance under these lease provisions. Therefore, the second cause of action can be seen to fail as a matter of law because there can be no material issues of fact that defendants should be forced to specifically perform as of 7/5/05. Nitti v. Goodfellow, 256 A.D.2d 1082 (4th Dept. 1998). Summary judgment is granted dismissing the Second Cause of Action.

SO ORDERED.

KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: February 21, 2006
Rochester, New York