

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2
Justice

UNIQUE MARBLE & GRANITE ORG. CORP.,

Plaintiff,

-against-

HAMIL STRATTEN PROPERTIES, LLC.,

Defendant.

Index No: 15185/05

Motion Date: 4/19/06

Motion Cal. No.: 29

The following papers numbered 1 to 18 read on this motion by plaintiff and cross-motion by defendant for summary judgment.

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affidavits-Exhibits	1 - 9
Memorandum of Law in Support.....	10 - 11
Notice of Cross-Motion-Affidavits-Exhibits	12 - 16
Answering-Reply Memorandum of Law.....	17 - 18

Upon the foregoing papers it is ordered that the plaintiff's motion for summary judgment on its claim for specific performance is granted to the extent that the defendant shall execute and deliver two copies of the "Purchase Agreement" within 30 days of service of a copy of this order with notice of entry. The plaintiff's application for an inquest and determination of damages is denied. The parties have not completed discovery with respect to damages. The defendant's cross-motion is denied.

On April 1, 2004 the plaintiff as tenant and defendant as landlord entered into a lease of the premises known as 83-29 9th Street, Long Island City, N.Y. The lease also granted the tenant an option to purchase the premises in accordance with the terms and conditions of a Contract of Sale attached as Exhibit C and labeled "Purchase Agreement." The lease provided at Par. 43 that if the lease is in full force and effect and there is no material default under the lease at the time of the exercise of the option and at the time scheduled for the closing of title, the tenant shall have the right and option to purchase

the property. "The tenant shall exercise [the] option by executing and delivering to Owner four (4) counterparts of the Contract on or before May 31, 2005, **TIME BEING OF THE ESSENCE** with respect to such date."

By letter dated January 6, 2005 plaintiff's real estate attorney sent the defendant's attorney a letter notifying defendant that the plaintiff has elected to exercise the option. The attorney requested that defense counsel advise whether he will forward four(4) "clean" counterparts of the "Contract of Sale" or if plaintiff should execute four counterparts of Exhibit C to the Lease. Having received no response, plaintiff's attorney, on January 14, 2005 sent defense counsel four executed counterparts of Exhibit C, "Purchase Agreement" together with a check for the down payment. Despite plaintiff's counsel's repeated demands that defendant execute the Contract, and defense counsel's assurances that it would be done, the defendant never executed the Purchase Agreement. On March 31, 2005 plaintiff's attorney faxed a letter to defense counsel notifying him that beginning April, 2005 the plaintiff would be sending the monthly rent payments to plaintiff's attorney to be held in escrow pending the defendant's execution of the Purchase Agreement.

The defendant never executed the Purchase Agreement, nor did it reject the plaintiff's exercise of the option and return the down payment. Plaintiff commenced this action for specific performance and for monetary damages caused by the defendant's refusal and delay in complying. Plaintiff now moves for summary judgment in its favor for an order directing the defendant to comply with the Lease/Purchase option and scheduling an inquest for the determination of the amount of plaintiff's damages.

The plaintiff has submitted sufficient evidence to establish, prima facie, its entitlement to summary judgment. Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]; Zukerman v City of New York, 49 NY2d 557, 562 [1980].) It is undisputed that in January, 2005 plaintiff was not in default in any provision of the lease/option agreement and the plaintiff, through his attorney provided timely notice of the its intention to exercise the option. It is also undisputed that the defendant failed to respond to the plaintiff's request to remit a "clean" Contract of Sale for execution and exercise of the option. As a result plaintiff, "BY: John Manasakis", timely executed and delivered a counterpart of the Purchase Agreement annexed to the lease. Where, as here, the movant has established its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring

a trial of the action. (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]; Zukerman v City of New York, 49 NY2d 557, 562 [1980].) This the defendant failed to do.

In response to the plaintiff's motion, defendant cross-moves for summary judgment dismissing the complaint arguing (1) that the tenant, Unique Marble & Granite Org. Corp. (hereinafter Unique) never exercised the option because the Purchase Agreement was executed by John Manasakis individually rather than in his corporate capacity as president of Unique, (2) that plaintiff has no right to exercise the option because of its non-payment of rent, and (3) that there was a failure of consideration in that a Restraining Notice served upon defense counsel on June 20, 2005, precluded release of the down payment thus making it impossible for plaintiff to close.

The defendant's claim that the plaintiff did not exercise the option because the Purchase Agreement was signed by John Manasakis in his individual capacity is without merit. Although the lease/option agreement grants the "tenant" the option, the Purchase Agreement specifically names John Manasakis as the buyer on the title page. Moreover, the Purchase Agreement and the lease were prepared by the defendant and any inconsistencies or ambiguities created by these documents must be construed against the defendant. (See, Matter of Cowen & Co. v. Anderson, 76 N.Y.2d 318, 323 [1990]; Reckess v. Goldman, 12 AD3d 658, 659 [2004].) Furthermore, even accepting defendant's claim that only the tenant could exercise the option, the manner in which the Purchase Agreement was signed sufficiently indicates John Manasakis' representative capacity.

Equally unavailing is the defendant's argument that the plaintiff has no right to exercise the option because it is in default under the lease for non-payment of rent. Under the circumstances in this case, the defendant cannot avoid its obligation to sell as agreed in the lease/option agreement based upon the plaintiff's alleged failure to pay rent. The plaintiff paid rent to the defendant up until March 31, 2005. The plaintiff's payment of rent into escrow began over two months after it exercised the option and only as a response to defendant's continued failure to execute the Purchase Agreement.

Generally, upon the exercise of an option to buy leased premises contained in a lease, the tenant becomes a purchaser in possession and the landlord tenant relationship terminates, unless the parties intend otherwise. (See, Fulgenzi v. Rink, 253 AD2d 846 [1998]; Barbarita v. Shilling, 111 AD2d 200 [1985].) The intention of the parties may be expressed by a provision in the

lease agreement or may be inferred from various factors including the terms of the lease or option and the conduct of the parties. (Barbarita v. Shilling, supra at 202 citing Rae v. Courtney, 250 NY 271 [1929].) Although the lease/option agreement is ambiguous in this regard, the plaintiff's conduct of paying rent after it exercised the option and then depositing it in escrow with its attorney, is sufficient evidence of the intent of the parties that the lease remain in effect until closing of title. While technically placing the rent in escrow is a default, it is no bar to granting summary judgment to the plaintiff. The plaintiff was not in default when the option was exercised and the plaintiff can cure the existing default, if any, prior to the closing so as to comply with the lease/option provision insofar as it provides that plaintiff must not be in default at the time scheduled for closing (emphasis added).

Nor may defendant avoid its obligation based on its claim of failure of consideration due to the restraining notice. Until such time as the closing is to take place, the defendant is not entitled to the down payment and no inability to perform exists.

Dated: May 17, 2006

D# 25

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J.S.C.