

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: 9/20/06

Motion Cal. No.: 28

The following papers numbered 1 to 13 read on this motion by defendant for leave to reargue the plaintiff's prior motion and defendant's prior cross-motion, and upon reargument denying the plaintiff's motion and granting the cross-motion, and if the motion to reargue is denied, modifying a portion of the court's order; and cross-motion by plaintiff for an Order appointing a special referee to effectuate the sale of the property, holding defendant in contempt of the court's Order dated May 17, 2006 and granting a Yellowstone injunction prohibiting defendant from claiming a default under the lease.

PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits	1 - 4
Notice of Cross-Motion-Affidavits-Exhibits	5 - 8
Opposition to Cross-Motion-Replying Affidavit...	9 - 11
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Upon the foregoing papers it is ordered that the defendant's motion and the plaintiff's cross-motion are determined as follows.

The defendant moves to reargue on the ground that the court erroneously granted plaintiff summary judgment on its cause of action for specific performance and denied defendant's cross-motion for summary judgment dismissing the complaint on the mistaken factual finding that the inconsistency between the Purchase Agreement and the Lease, with respect to the named

tenant, was caused by defendant who drafted the document and based upon the signature page of the Purchase Agreement. The defendant claims that after defense counsel drafted the documents and sent them to the plaintiff, the parties renegotiated various terms, including substituting Unique Marble & Granite Org. Corp. (hereinafter Unique Marble) in place of John Manasakis. The plaintiff's attorney, by hand, made the changes. Although plaintiff's attorney made changes in the Lease, Purchase Agreement and Environmental Rider, he did not change the named of the tenant from John Manasakis to Unique Marble on the Purchase Agreement. The failure to do so resulted in the inconsistency. Defendant also asserts that due to an oversight on its attorney's part, the Purchase Agreement signature page which defendant submitted in its cross-motion and upon which the court relied, was not the correct signature page for the Purchase Agreement.

In view of the above, the defendant's motion to reargue is granted. Upon reargument, the court adheres to its previous determination.

The defendant opposed the plaintiff's summary judgment motion based on the claim that the option was not effectively exercised having been done by John Manasakis, in his individual capacity, that he had no standing to exercise the option as he was not the named tenant, and the tenant's time to exercise the option has expired.

However, even if the court had, in the prior determination found that Manasakis exercised the option in his name individually instead of in the name of the corporate tenant, such finding would not necessarily defeat an otherwise validly exercised option. On facts almost identical to the instant case, the court in Pitkin Seafood Inc. v. Pitrock Realty Corp., 146 AD2d 618 [1989] did not allow a forfeiture merely because the option was exercised in the name of the individual rather than the corporate tenant. The court held relying on J.N.A. Realty Corp. v. Cross Bay Chelsea, 42 NY2d 392 [1977] and United Skates of Am. v. Kaplan, 96 AD2d 232, appeal dismissed 63 NY2d 944, [1984] that a court in equity may excuse the negligent exercise of an option when the tenant is in possession to prevent a substantial forfeiture, where the defective exercise did not cause prejudice to the landlord and resulted from a mistake or similar excusable default.

In the instant case as in Pitkin Seafood Inc., the option was timely exercised and signed by the president of the corporate tenant, John Manasakis who is and remains in possession of the premises. There is no evidence that Manasakis

intended to exercise the option in his individual capacity. The failure to change the name of the tenant from John Manasakis to Unique Marble & Granite Org. Corp., as amended by hand on the lease, and the failure to insert the name of the corporation before his signature is an insignificant defect and may be the product of negligence or mistake rather than an attempt to modify or undermine the agreement of the parties (see, United Skates of Am. v. Kaplan, supra).

Furthermore, after the plaintiff signed the Lease and sent it to the defendant for execution, the defendant also failed to correct the name of the tenant on the Purchase Agreement which was attached to the lease. In view of the explicit language in the option agreement, as to how the option is to be exercised, and the defendant's failure to respond to the plaintiff's request for a "clean" Purchase Agreement, the plaintiff was placed in the unenviable position of having to either execute the Purchase Agreement attached to the fully executed lease as it existed or to unilaterally amend the Purchase Agreement which was an integral part of the fully executed Lease. Either course of action afforded the defendant a potential basis for rejecting the exercise of the option as being defectively exercised.

"It is the court's duty sitting in equity, to attempt to get at the substance of things and to ascertain, uphold and enforce the rights and duties which spring from the real relations of the parties. It will never suffer the mere appearance and external form to cancel the true purposes, objects and consequences of a transaction." (Sargent v. Halsey, 75 Misc.2d 624, 627 [1973], aff'd 42 AD2d 375 [1973]). Where, as here, the intent of the parties, to wit, to give the tenant, Unique Marble, the option to purchase the property, is clearly discernable from the written instrument, which is precisely the right sought to be enforced in this action, the defendant's attempt to gain an unfair advantage by reason of the insubstantial defect in the manner in which the documents were signed is tantamount to evasion of the option agreement (see, Hammer v. Michael, 243 NY 445, 448 [1926]; see also, Hutt v. Johnson, 135 AD2d 501 [1987]). Under the circumstances, and in the absence of any claim of prejudice by the defendant, much less proof of prejudice, equity will intervene to prevent a forfeiture (Pitkin Seafood Inc. v. Pitrock Realty Corp., supra).

The branch of the plaintiff's cross-motion seeking to hold the defendant in contempt and for an Order appointing a referee to execute the "purchase Agreement" and complete the sale is denied as premature.

The service of a copy of a judgment or order with notice of entry serves to commence the running of the time within which a party may appeal (CPLR 5513) and, as in this case, may impact upon time periods specified in the judgment or order. To be effective the "Notice of Entry" must strictly comply with CPLR 5513 and state exactly when and with whom the order or judgment was entered, and if it describes the judgment or order, the description must be accurate (see, Reynolds v. Dustman, 1 NY3d 559 [2003]; Norstar Bank of Upstate NY v. Office Control Systems, Inc., 78 NY2d 1110 [1991]). Where the notice served is materially defective, it does not serve to limit the time period for appeal, or the time for performance directed in the order (see, Lum v. YWCA, 136 AD2d 972 [1988]).

In this case, the plaintiff made three attempts to serve Notice of Entry of the order dated May 17, 2006, however, only the notice dated September 1, 2006 complied with the requirements of a notice of entry in that it accurately conveyed the place and date of entry of the order. Although a copy of the order was annexed to each prior Notice of Entry, unlike the Order served in Norstar Bank of Upstate NY v. Office Control Systems, Inc., supra, the order in this case did not bear the stamp of the Queens County Clerk indicating that it was entered and the date of entry. Inasmuch as the defendant was ordered to execute and deliver two copies of the "Purchase Agreement" within 30 days of service of a copy of the order with notice of entry, it was not yet in default on September 1, 2006 when the plaintiff moved for contempt.

The branch of the plaintiff's motion for a Yellowstone injunction is denied.

The purpose of a Yellowstone injunction is to allow a tenant confronted by a threat of termination of the lease to obtain a stay tolling the running of the cure period so that after a determination of the merits, the tenant may cure the defect and avoid a forfeiture of the leasehold (see, Long Island Gynecological Services, P.C. v. 1103 Stewart Ave. Associates Ltd. Partnership, 224 AD2d 591 [1996]). It is well settled, however, that a Yellowstone injunction may not be granted where it is sought after the expiration of the period to cure or after the service of the notice of termination (see, Long Is. Gynecological Servs. P.C. v. 1103 Stewart Ave. Assocs. Ltd. Partnership, supra; Rappa v. Palmieri, 203 AD2d 270 [1994]).

In support of its application, the plaintiff maintains that after the court granted specific performance, all of the outstanding rent which was withheld and deposited in plaintiff's

attorney's the escrow account was sent to the defendant's The attorney rejected the money claiming it was not the proper party to whom payment is to be made and the amount was not the total amount of rent due. Thereafter, the defendant served plaintiff with a notice of default. The plaintiff moves for a Yellowstone injunction to enjoin the defendant from declaring the plaintiff in default for non-payment of the rent in anticipation of the defendant using a rent default as the basis for avoiding having to honor the option agreement.

In opposition, the defendant argues that a Yellowstone injunction may not be granted where the basis of the default is the non-payment of rent. In addition, the defendant asserts that the notice of default was appropriate because the tendered rent was refused on the ground that it was not "full" payment of all amounts due.

Contrary to the defendant's argument, the court may grant a Yellowstone injunction where the default in the lease is based on the non-payment of rent (see, Lexington Ave. & 42nd St. Corporation v. 380 Lexchamp Operating, Inc 205 AD2d 421 [1994]) provided such motion is timely made. However, neither the plaintiff nor the defendant submitted a copy of the notice of default or state the manner in which it was served, and whether a notice of termination was also served. Under the circumstances the court cannot determine whether the application for a Yellowstone injunction was timely made. However, based upon the parties' submissions and defendant's concession that the notice of default included a demand for rent already paid, the notice of default is defective and of no force and effect.

Finally, a Yellowstone injunction is, in any event, unnecessary in this case in view of the plaintiff's willingness to pay the back rent. The court previously determined that while the option agreement was ambiguous as to whether the parties intended that the lease remain in effect after the plaintiff exercised the option, the intent of the parties, as evidenced by their conduct, was to have the lease remain in effect until closing. Therefore, the plaintiff is required to pay all rent and additional rent in due under the lease. Contrary to the plaintiff's belief, the unilateral act of placing the rent in escrow with its attorney is not tantamount to the timely payment of rent and does not serve to modify defendant's remedies provided in the Lease (see, e.g. Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Avenue Associates, 93 NY2d 508 [1999]).

Accordingly, the defendant shall, within 20 days of service of a copy of this Order with notice of entry, provide plaintiff with an itemized bill for all of the rent and additional rent that is due under the lease. Plaintiff shall, within 20 days after service of the bill, pay the back rent to the defendant in accordance with parag. 3 of the lease. If the parties are unable to agree on the amount of the back rent due, the plaintiff shall pay all of the undisputed portion to the defendant, continue to pay rent in the future as it becomes due and pay the disputed amounts to the defendant's attorney, J. James Carriero, Esq., to be held in escrow until the discrepancy is resolved at the trial of the plaintiff's claim for damages caused by the defendant's breach of the option agreement (see, Cohn v. Mezzacappa Bros., Inc., 155 AD2d 506 [1989]; Bregman v. Meehan, 125 Misc.2d 332 [1984]). The payment of the disputed amounts of rent into defendant's attorney's escrow account shall not be construed as a default in payment of rent nor shall it be considered a default under the lease so as to void the option agreement.

Dated: October 25, 2006
D# 27

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J.S.C.