

**G & T Food Associates Corp. v Midtown Market
Diner, Inc.**

2003 NY Slip Op 30073(U)

August 18, 2003

Supreme Court, New York County

Docket Number: 0060145/2003

Judge: Shirley W. Kornreich

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

PRESENT: **SHIRLEY WERNER KORNREICH**
Justice S.C.

PART J4

G + T Food Associates Corp.

INDEX NO. 601456/08

- v -

Metro Market Direct Inc.

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. **SCANNED**

AUG 29 2003

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	
1	2
3	
4	5

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the annexed decision/order/judgment

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

[Signature]

[Signature]

Dated: _____

SHIRLEY WERNER KORNREICH
J.S.C. J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

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

-----X
G & T FOOD ASSOCIATES CORP.,

Plaintiff,

Index No. 601456/03

-against-

**DECISION/ORDER/
JUDGMENT**

MIDTOWN MARKET DINER, INC., JRL ASSOCIATES
LLC, MATAS ASSOCIATES PARTNERSHIP and
MATAS ASSOCIATES LLC,

Defendants.

-----X
KORNREICH, SHIRLEY WERNER, J.:

Plaintiff sublessee operates a diner in a building owned by Midtown Market Diner, Inc. (“Midtown”), which building is located on property owned by Matas Associates, LLC (“Matas”), and has a parking lot contiguous to it which is owned by JRL Associates, Inc. (“JRL”), a successor in interest of Midtown. Midtown is the overtenant of both the diner property and the parking lot property. Plaintiff brings this action seeking monetary damages based on: 1) overtenant Midtown’s alleged breach of the sublease agreement with plaintiff; 2) negligence and breach of an implied warranty of good faith by Midtown; 3) intentional and tortious interference of contract by defendant JRL; 4) fraudulent misrepresentation by Midtown and JRL; and 5) tortious interference of contractual obligations by all defendants. Plaintiff also asks for a declaratory judgment of the rights and obligations of the parties on the subject leases, and a preliminary and permanent injunction to stay the commencement of summary proceedings and the sale of the subject properties. Finally, it requests specific performance extending the subject lease and sublease, which terminated on June 10, 2003, for a period of five additional years.

In its complaint, plaintiff alleges the following facts. Overtenant-Midtown’s lease had a

term expiring on June 30,2003. Plaintiff entered into a sublease with Midtown on October 1,1993, which was to terminate on June 10,2003, but which had a provision providing for a five year option to renew upon notice six months prior to expiration of the sublease. The sublease was subject to all of the terms of the overlease. At the same time, plaintiff and Midtown executed a lease for the parking lot property which was to terminate at the expiration of the diner sublease.

According to the complaint, in or about December, 1991, Midtown and Matas, by letter agreement, provided for a renewal option of the overlease upon written notice, six months prior to expiration. Plaintiff further alleges that it orally exercised its option to renew on numerous occasions on or before December, 2002, but was advised by Midtown that Midtown's option to renew the overlease ~~was~~ lost ~~as~~ a result of litigation. The complaint alleges that Midtown voluntarily and without cause surrendered its option. Plaintiff claims that JRL and Matas are in contract to sell their properties and that Midtown wrongly refused to renew plaintiff's sublease.

Midtown and JRL, now, move to dismiss the complaint pursuant to CPLR §3211(a)(1) and (7), and Matas cross-moves for dismissal. In support of its motion, Midtown/JRL submit: an affidavit of Saul Zelin, a principal and/or member of the entities; the sublease agreement; the overleases; copies of real estate tax bills; a Civil Court decision granting Midtown possession of a portion of the subject property ~~as~~ against 580 ~~Bar~~ Corp. (another tenant of the subject property) and the warrant thereon; a May 27,2003 letter to plaintiff noting plaintiff's default on its sublease; and the complaint herein. Matas submits the affiiation of its attorney and a 1999, "so ordered" Supreme Court stipulation of settlement entered into between Midtown and Matas.

Plaintiff opposes dismissal and submits: its attorney's affirmation; an affirmation from Constantine Kasirnis, its president; a December 18,1991 letter from Midtown's then counsel regarding a modification of the overlease; an October, 1997 Summons and Complaint filed by

Midtown against Matas in Supreme Court, New York County, seeking a declaratory judgment that the December 18, 1991 letter modified the overlease and provided Midtown with an option to renew; and the 1999 stipulation settling the 1997 case.

Article 19(A) of plaintiff's sublease provides:

(ix) The Undertenant acknowledges, agrees and understands that notwithstanding paragraphs 19(A)(viii) and (D) and (E) of this Sublease from 6/11/2003 to 6/10/2008 inclusive that said option has not been consummated and is still being negotiated and Exhibits A, B and C [proposed overlease extensions and modifications] which are annexed hereto and made a part hereof and collectively are part of Exhibit 1 ("the overlease") constitute the extent to which negotiations have progressed with respect to the extension of the ground lease for an additional five (5) years i.e. from 6/11/2003-6/10/2008 inclusive. It is distinctly understood and agreed and is a condition of this Sublease Agreement that overtenant cannot and will not guaranty said five (5) year extension but Overtenant agrees to use Overtenant's best efforts to consummate exhibits A, B and C and obtain said extension for an additional five (5) years starting on 6/11/2003 and ending on 6/10/2008 inclusive. It is the understanding of the parties hereto and the essence of this agreement that in the event after good faith attempts by Overtenant to consummate exhibits A, B and C Overtenant cannot consummate same' and therefore cannot grant said extension then, in such event, it is distinctly understood and agreed and is the essence of the understanding between the parties hereto that this Sublease shall expire on 6/10/2003 and under no circumstances shall the Undertenant [sic] have any liability to the Undertenant because the Overtenant cannot obtain an additional five (5) year extension commencing on 6/11/2003 and terminating on 6/10/2008 inclusive. The Undertenant acknowledges and agrees that the attached exhibits A, B, and C represent the best that Overtenant can offer to the owner of the ground lease to obtain said extension and represent good faith attempts to obtain same and in the event Overtenant cannot consummate exhibits A, B and C after making best efforts to do so, then Overtenant shall have no liability to Undertenant for failure to obtain an option for extension of ground lease for an additional (5) years...

Paragraph 19(D) requires plaintiff undertenant to "timely and properly exercise the option," and paragraph 19(E) provides that the option is only effective if the undertenant is not in default; the

¹ The 1991 lease extension was never executed by Matas.

option must be exercised “not later than one (1) year prior to 6/30/2003.” Paragraph 75(A) of the sublease, then, states that “[a]ny notice, statement, demand or other communication required or permitted to be given pursuant to this Sublease,” shall be made to the Overtenant’s attorney and an address is specified. Paragraph 75(A) further provides:

Such notice shall be served personally or sent by United States mail, Certified or registered, return receipt requested, with postage pre-paid,...

The overlease requires all notice obligations under the lease to be “given by certified or registered mail.” Overlease, para. 22.²

Plaintiff, also, entered into a lease with Midtown for the JRL property that was coterminous with the diner sublease and included an entity called 580 Bar Corp. as a co-tenant. The adjacent property comprised a parking lot. Midtown entered into an additional sublease agreement with 580 Bar Corp., for a portion of the diner premises. Plaintiff had the right to pay one-half of 580 Bar Corp.’s rent and its additional rent for six months should 580 Bar Corp. vacate and further was obligated to occupy or sublet the space for the six months and take over the sublease of 580 Bar Corp. in the seventh month. Subl., para. 89. Should this obligation not be fulfilled, Midtown had the right to give notice of termination and terminate plaintiff’s sublease by paying it \$100,000 in the

² The overlease, in paragraph 39, states:

Owner and Lessee hereby agree in the event of any dispute or controversy or disagreement or the argument of any kind, nature or description between **each Lessee [emphasis added]**, arising out, due to or by reason of the within Lease, that such dispute or controversy or disagreement or argument shall be submitted arbitration [sic] before Saul Zelin as the sole and exclusive arbitrator and his written decision and award shall be binding **and** conclusive on each Lessee with the same force and effect **as** if it were set forth in length hereinafter and either Lessee is authorized to c o n f i i such award and enter Judgment thereon in the Supreme Court of the State of New York, County of New York.

last year of the sublease. Id. By order dated May 31,2001 and a warrant signed in July, 2001,580 Bar Corp. was evicted for illegal use of its premises in an action brought by Midtown. Plaintiff did not exercise its obligation to assume 580 Bar Corp.'s lease, and Midtown, on May 27,2003, served notice of termination upon plaintiff, offering it the \$100,000 required by the saublease.

Additionally, since at least 1997, Midtown and Matas have been involved in litigation arising from the illegal activities and eviction of 580 Bar Corp. In 1997, Midtown brought an action to declare their 1991 lease modification/extension valid and in full force. Matas countered with an eviction action naming Midtown, plaintiff and 580 Bar Corp. Plaintiff defaulted in appearing in that action. The 1997 litigation was settled by stipulation in 1999. Matas, therein, stated it "refused to grant Midtown any extension of the Lease beyond June 30,2003." The 1998 landlord-tenant proceeding was discontinued in that stipulation.

Conclusions of Law

CPLR 3211(a)(7) provides for dismissal for failure to state a cause of action. In determining a motion under this section, the Court must "accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994). Accord Campaign for Fiscal Equity, Inc. v. State of N.Y., 86 N.Y.2d 307, 318 (1995). Factual claims in the complaint, however, if contradicted by documentary evidence, are not entitled to such consideration. Maas v. Cornell University, 94 N.Y.2d 87, 91 (1999). Indeed, a complaint may be dismissed based upon a defense founded upon documentary evidence if the documentary evidence resolves all factual issues as a matter of law and disposes of the plaintiff's claim. CPLR 3211(a)(1); Ozdemir v. Caithness Corp., 285 A.D.2d 961,963 (3d Dept.), lv. denied 917 N.Y.2d 605 (2001).

Here, all of plaintiff's causes of action rest on its claim that Midtown and **JRL** wrongly failed to extend its option for a five year lease renewal. The documentary evidence, however, refutes this claim.

Plaintiff failed to exercise its option timely or properly **as** dictated by both the sublease and overlease. The sublease requires that the renewal option be exercised, in writing, one year before the sublease's expiration. Nowhere in the complaint is this alleged. Rather, plaintiff, in its complaint, contends that an oral exercise of its option six months before the lease expiration was sufficient. This clearly is not the case. Nor will plaintiff's contention that notices were routinely accepted by the parties orally, cure its failure to abide by the lease. Where, **as** here, there is a writing which on its face represents a complete agreement between the parties – even when there is no express merger clause -- “the parol evidence rule operates, absent fraud or mutual mistake ..., to exclude proof of all prior or contemporaneous negotiations between the parties, **as** well as any extraneous oral agreement which is intended to contradict or modify the terms of the instrument.” Manufacturers Hanover Trust Co. v. Margolis, 115 A.D.2d 406,407 (1st Dept. 1985). Accord 259 A.D.2d 331 (1st 1999).

Plaintiff's inability to demonstrate that it exercised its option timely or properly in and of itself militates for dismissal of the complaint. However, even were the option exercised in writing and in a timely fashion, dismissal would still be required both due to Midtown's inability to renew its overlease and plaintiff's default on its sublease.

The litigation papers from the 1997 action brought by Midtown against Matas make clear that Matas disputed the binding nature of the 1991 letter sent by Midtown's attorney to a principal of Matas, not Matas' attorney. The fact that two year old action was settled, standing alone, is no proof of bad faith on the part of Midtown and **JRL**. In fact, plaintiff and Midtown entered into the

sublease two years after the 1991 letter, acknowledging that Midtown's option to extend its overlease to 2008 *had not been consummated*. Sublease, Art. 19(A) (ix). This provision of the sublease stands as an admission by both Midtown and plaintiff that the December, 1991 letter was not binding and the 1997 litigation weak.

Finally, plaintiff's failure to exercise its option to take over 580 Bar Corp.'s sublease, on its face, was a default under its sublease, negating plaintiff's right to renew. Plaintiff's arguments of estoppel and waiver do not abrogate the default. The requirement that plaintiff exercise the option to take over 580 Bar Corp.'s space is set forth in the sublease. Nothing done by Midtown or JRL stopped plaintiff from notifying Midtown of its desire to exercise this obligation. Nor, under the sublease, did Midtown have to notify plaintiff that it must take over 580 Bar Corp.'s space. 580 Bar Corp. shared the diner and parking lot with plaintiff. Plaintiff was fully aware of its eviction and should have been aware of its obligations under its lease.

In sum, accepting the allegations in the complaint, which are not refuted by documentary evidence, as true and according plaintiff the benefit of every possible favorable inference, no cognizable legal theory is set forth. The documentary evidence submitted – the various leases and court papers -- resolve all factual issues, as a matter of law, in defendants' favor. Accordingly, it is

ORDERED that defendants' motion and cross-motion are granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: August 18, 2003
New York, New York



SHIRLEY WERNER KORNREICH