

**Sutton Madison, Inc. v 27 East 65th Street Owners,  
Corp.**

2003 NY Slip Op 30144(U)

December 15, 2003

Supreme Court, New York County

Docket Number: 0117173/2003

Judge: Eileen Bransten

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

**EILEEN BRANSTEN**  
**J.S.C.**

PRESENT: \_\_\_\_\_  
*Justice*

PART 6

Sutton Madison Ave

INDEX NO. 117173/03  
MOTION DATE 12/2/03  
MOTION SEQ. NO. 01  
MOTION CAL. NO. 05

- v -  
27 E 65th Street over

The following papers, numbered 1 to 3 were read on this motion ~~to~~ for summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED	
_____	<u>1</u>
_____	<u>2</u>
_____	<u>3</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**SCANNED**  
DEC 10 2003

**IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM**

MOTION/CASE IS RESPECTFULLY REFERRED TO  
JUSTICE

Dated: Dec 15 2003

Eileen Branst

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
**EILEEN BRANSTEN J.S.C.**  
**J.S.C.**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART SIX

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SUTTON MADISON, INC.,

Petitioner.

-against-

27 EAST 65<sup>th</sup> STREET OWNERS, CORP.,

Respondent.

..... X

PRESENT: EILEEN BRANSTEN, J.

Index No.117173/03  
Motion Date: 12/02/03  
Motion Seq. No.: 01  
Motion Cal. No.: 10

Pursuant to CPLR 3212, defendant, 27 East 65<sup>th</sup> Street Owners Corp. (“Owners, Inc.”) moves for summary judgment of its counterclaim for specific performance.

Background

Owners, Inc. and Sutton Madison, Inc. (“Sutton”) are ground lessees of a building at 27 East 65<sup>th</sup> Street. Owners, Inc. controls floors two through fourteen, which are cooperative residential apartments, and Sutton controls the first floor, which is occupied by commercial subtenants,

In 1994, the parties entered into an agreement concerning the authority of Owners, Inc. to seek financing secured by a mortgage against the parties’ leasehold interest. The agreement gave Owners, Inc. the “exclusive” authority to seek financing up to \$5,500,000, with Sutton retaining a right to object to the financing arrangement if that arrangement imposed greater restrictions on Sutton’s ability to operate the commercial space. If Sutton’s objections were determined invalid by a JAMS arbitrator, the agreement provided that Sutton would sign the loan documents.

On February 20, 2002, Owners, Inc.'s engineer filed a Local Law 11 Report concerning dangers caused by falling bricks from the building. As a result of the report, Owners, Inc. erected a sidewalk scaffold and announced plans to "reskin" the building's facade. To finance this project, Owners, Inc. obtained a Mortgage Commitment from HSBC Bank. Sutton objected to this commitment.

To prevent the reskinning project, Sutton filed a summons and complaint in the Supreme Court of New York County seeking a preliminary injunction. Sutton argued that the reskinning project was too costly, unnecessary and interfered with the commercial tenants. The Honorable Shirley Kornreich dismissed the complaint without prejudice. In her decision, she found that the balance of equities favored Owners, Inc., which erected the scaffolding to protect pedestrians and comply with the law, over Sutton, which was concerned about losing commercial tenants. Judge Kornreich also found that the "irreparable injury" that Sutton alleged was speculative and that, even if those injuries occurred, money damages would be the proper remedy for Sutton.

After this decision was rendered, the parties arbitrated the validity of Sutton's objections to the new mortgage. On April 8, 2003, the arbitrator, Vivien B. Shelanski of JAMS, issued her decision stating that Sutton's objections were invalid and that it must comply with the terms of the agreement. Specifically, she wrote "that Respondent's objections to Claimant's proposed financing transaction are invalid, and that Respondent

must therefore comply with provisions of Paragraph 4(d) of the document entitled Third Modification to Reciprocal Agreement dated October 31, 1994, and sign the commitment or loan document as directed by Claimant.” Verified Petition, Exhibit A., at 1.

The day after the arbitrator’s decision, April 9, 2003, Sutton sent Owners, Inc. a letter stating that in lieu of signing the agreement, it would accept the liquidated damages “penalty” as per Paragraph 4(d).<sup>\*</sup> Affirmation Feder, Exhibit E.

Owners, Inc. brought a petition for confirmation of the arbitration award and for a court order forcing Sutton to sign the loan documents. This court confirmed the arbitrator’s finding that Sutton’s objection to the new mortgage was invalid but refused to issue an order requiring Sutton to sign the loan documents. Instead, this court limited its analysis to Article 75 issues and found that Sutton’s refusal to sign constituted a post-arbitration breach of the contract the effect of which could only be judicially resolved if the parties filed a plenary action.

Following this Court’s decision, around October 2003, Sutton commenced a breach of contract action against Owners, Inc.. Sutton alleges that Owners, Inc. (1) breached Article 2.1 of the Reciprocal Agreement, which provides that Owners, Inc. shall comply with the law, and (2) breached Article 6.1, which forbids Owners Inc. from unjustifiably interrupting

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<sup>\*</sup> Neither party has argued that this alleged “liquidated damages” provision, which does not set a dollar figure for Sutton’s anticipated breach but merely forfeits Sutton’s nondisturbance rights, is void as a penalty. Consequently, this issue will not be addressed.

Sutton's use and diminishing Sutton's benefit of the commercial space. Sutton alleges that Owners, Inc. unreasonably erected and maintained the scaffolding in front of the building. Because Owners, Inc. failed to timely complete the repairs, Sutton alleges that on or about June 30, 2003 Vertigo, a commercial tenant of Sutton, was forced to close its business, resulting in approximately \$3,500,000 lost in rents. Sutton seeks damages and injunctive relief.

Owners, Inc. counterclaimed for specific performance of the loan documents, for attorneys' fees in accordance with Article X of the Third Modification to Reciprocal Agreement dated October 31, 1994, and for damages to the building that have resulted from Sutton's refusal to sign.

Subsequent to serving its answer and counterclaims, Owners, Inc. moved for summary judgment on its specific performance counterclaim. In short, Owners, Inc. argues 1) that Article IV of the Third Modification to Reciprocal Agreement dated October 31, 1994 permits the additional remedy of specific performance for breach of Sutton's refusal to sign the commitment and 2) that it is entitled to specific performance.

In opposition to the summary judgment motion, Sutton admits that it has breached the agreement but argues the parties intended to make the liquidated damages provision the sole and exclusive remedy for its refusal to sign the loan documents. The provision in issue reads "[I]f Sutton fails for any reason to execute the commitment or loan document as directed by

the [Owners, Inc.], Sutton agrees that as liquidated damages for such default, and nondisturbance agreement benefitting Sutton with respect to loan documents in effect at the time of such default shall immediately and without further notice be deemed to be void and of no further force and effect.”

### Analysis

The purpose of contractual interpretation is to determine the intent of the parties. *Mallad Constr. Corp. v. County Federal Sav. & Loan Asso.* 32 N.Y.2d 285 (1973). The best evidence of intent is, of course, the written agreement. *Salmow v. Del Col.* 79 N.Y.2d 1016 (1992). The entire agreement, rather than individual provisions, should be examined to determine intent. *Eighth Ave. Coach Corp. v. New York*, 286 N.Y. 84, 88 (1941). Parol evidence is admitted only when the contractual language is ambiguous. *Intercontinental Planning v. Daystrom, Inc.*, 24 N.Y.2d 372 (1969). Language is ambiguous when it is reasonably susceptible of more than one interpretation. *Chimart Associates v. Paul*, 66 N.Y.2d 570, 573 (1986). Significantly, if the parties intend a liquidated damages clause to be an exclusive remedy upon breach, their intent must be expressed in explicit language. *Rubinstein v. Rubinstein*, 23 N.Y.2d 293 (1968).

From a review of the Third Modification to Reciprocal Agreement dated October 31, 1994, it is clear that the parties' intended to ensure Sutton's cooperation in securing future

financing. Article I deals with the refinancing of the existing mortgage in 1994. It states that Sutton is to execute the documents and cooperate fully in the refinancing.

Article III sets out the agreement for future financing. It gives Owners, Inc. the exclusive authority to obtain new or replacement financing for up to \$5,500,000 secured by a mortgage against the leasehold interest of Owners, Inc. and Sutton. Sutton agreed to cooperate in every respect with Owners, Inc. in connection with such mortgage, including without limitation providing documents, certificates of leases, copies of licenses and permits and executing any and all applications, credit authorizations and loan documents.

Article IV addresses any disputes over the proposed new mortgage. It states that the obligation of Sutton to cooperate with the proposed mortgage transaction was of material concern to Owners, Inc.. If Sutton had an objection to the new mortgage because it created greater restrictions or more onerous terms, Sutton could demand arbitration. If Sutton's objection was found invalid by the arbitrator, The agreement provided that Sutton would sign the load documents.

Article V provides remedies for a breach by Owners, Inc.. Sutton was given exclusive authority over the ground leases. Owners, Inc. agreed to cooperate fully, including executing documents to effect ground leases. If Owners, Inc. refused to execute the documents in seven days, Sutton had the right to obtain an injunction.

In light of the agreement read as a whole, it is absolutely clear that the parties intended additional remedies other than liquidated damages for Sutton's refusal to sign. The agreement unambiguously expresses the parties' intent to cooperate to ensure future refinancing arrangements. It would certainly be contrary to the intent of parties as expressed in the agreement - - indeed, it would be absurd - - to interpret the liquidated damages provision as Sutton's absolute veto power over Owners, Inc.'s "exclusive authority" to obtain new or replacement financing secured by a mortgage.

Moreover, the language of the liquidated damages provision itself supports a conclusion that the parties intended additional remedies. Nowhere in this provision do the parties explicitly state that liquidated damages are the sole and exclusive remedy for breach.

That Owners, Inc. may seek additional remedies, however, does not mandate that Owners, Inc. is entitled to specific performance. Before Owners, Inc. can be awarded this equitable remedy, it must establish that money damages are inadequate. *Cho v. 401-403 57<sup>th</sup> Street Reality*, 300 A.D.2d 174 (1<sup>st</sup> Dep't 2002). The decision whether to grant specific performance lies in the sound discretion of the trial court. *Id.* Accordingly, this court must be satisfied that Owners, Inc. is unable to finance the "reskinning" project by any alternate means, If Owners, Inc. can acquire alternate financing, then it is entitled to damages in the amount of the difference between the cost of financing the project with Sutton's signature and the cost of financing without Sutton's signature. Specific performance would be

warranted only if Owners, Inc. can show that, after a reasonable effort, it was unable to secure any alternate financing. To afford Owners, Inc. the opportunity to make this showing, a trial on this issue is required. *See*, CPLR 3212(c).

Other than the damages question, there are two issues that can be resolved quickly. First, in its motion papers, Owners, Inc. has argued that Judge Komreich's decision denying Sutton's preliminary injunction is collateral estoppel for issues that will arise in litigating Sutton's breach of contract claim. This argument is misplaced. The denial of a motion for a preliminary injunction does not constitute the law of the case or an adjudication on the merits. *Van Wagner Advertising Corp. v. S & M Enterprises*, 67 N.Y.2d 186 (1986); *Walker Mem. Baptist Church v. Saunder*, 285 N.Y. 462, 414 (1941).

Second, Sutton has requested that this court send the proceedings to arbitration. Sutton, however, has failed to show that it is entitled to arbitration. Under Article IV of the agreement, the arbitrator is limited to determining the validity of Sutton's objection that the proposed mortgage commitment imposes a greater burden. That has been done. The arbitration clause does not give the arbitrator the broad power to decide all issues that may arise under Article IV, and Sutton has not argued to the contrary in its papers. Sutton has also argued that pursuant to Paragraph 6.1 of the Reciprocal Agreement it is entitled to arbitrate whether the proposed renovations diminish its benefits. Sutton, however, waived its right to

arbitrate this issue when it filed its summons and complaint. *Esquire Industries, Inc. v. East Bay Textiles, Inc.*, 68 A.D.2d 845 (1<sup>st</sup> Dep't 1979).

Accordingly, it is

ORDERED that the First Counterclaim is severed; and it is further

ORDERED that ten days from the date of this order, defendant shall file with the Clerk of the Trial Support Office (Room 158) a copy of this order with notice of entry, a note of issue and a statement of readiness, and shall pay the appropriate fees, if any, and said Clerk is directed to thereupon assign this matter for trial on January 23, 2004; and it is further

ORDERED that pursuant to CPLR 3212(c) both parties are to appear on January 23, 2004 at 9:30 A.M. for an immediate trial on the issue of the adequacy of damages for the First Counterclaim; and it is further

ORDERED that the parties are to submit to the Part Clerk in Room 442 a list of witnesses; proposed findings of fact and conclusions of law; and pre-trial memoranda by January 9, 2004. Pre-trial memoranda shall be no longer than ten pages and formatted in compliance with New York County Supreme Court Civil Branch Rule 14; and it is further

ORDERED that both parties are to appear for a pre-trial conference on January 13, 2004 at 9:30 A.M.. After the pre-trial conference, the parties are to participate in a preliminary conference for the remaining claims and counterclaims.

Dated: New York, New York  
December 15, 2003

ENTER

A handwritten signature in black ink, appearing to read "Eileen Bransten", is written over a horizontal line. The signature is stylized and cursive.

Hon. Eileen Bransten