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

PRESENT: HON. CAROL EDMEAD PART 35

Justice

The TRIGSTS Group, LLC

INDEX NO. 118632/03

MOTION DATE 4/13/04

- v -

MOTION SEQ. NO. 002

RK FIFTH Avenue Corp

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Answering Affidavits — Exhibits 19-29

Replying Affidavits 30-37

D

Upon the foregoing papers, it is ordered that this motion

JUN - 3 2004

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OFFICE

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that plaintiff's motion for (1) summary judginent on its declaratory judgment cause of action is denied; (2) monetary judgment for defendant's use and occupancy is denied, as rendered moot by order and stipulation dated February 24, 2004; and (3) summary judgment dismissing defendant's counterclaims and affirmative defenses is granted as to defendant's (a) first affirmative defense, (b) fifth affirmative defense, (c) ninth allinnative defense and third counterclaim, (d) tenth affirmative defense and fourth counterclaim, and (e) eleventh affirmative defense and fifth counterclaim; and it is further

ORDERED that the parties shall appear for a Preliminary Conference before Justice Carol R. Edmead, Part 35, Room 543 on July 6,2004, 2:15 p.m.; and it is further

ORDERED that the movant shall serve a copy of this order with noticc of cntry within 20 days of entry.

This constitutes the decision and order of thc Court.

Dated: 5/25/04

HON. CAROL EDMEAD J.S.C.

Check one: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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THE TRIESTE GROUP,

Index No. 118632-2003

Plaintiff,

DECISIONIORDER

-against-

ARK FIFTH AVENUE CORP.,

Defendant.

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MEMORANDUM DECISION

Plaintiff, The Trieste Group, LLC ("plaintiff"), moves for an order pursuant to CPLR 3212 (1) granting plaintiff summary judgment on its declaratory judgment cause of action, and pursuant to CPLR 3001, declaring the rights and relations of the parties, and upon so ruling, that the Court determine and declare that (a) defendant failed to validly exercise its 5-year renewal option regarding the premises comprising the foul-teenth floor in a commercial cooperative corporation located at 85 Fifth Avenue, New York, New York (the "premises"), and that defendant had no further interest in the premises following the expiration of the initial term of the sublease agreement between plaintiff's predecessor-in-interest and defendant on December 31, 2003; (b) effective January 1, 2004, plaintiff is entitled to immediate and exclusive possession of the premises, and defendant has no further rights in or to the premises; (c) plaintiff is entitled to a monetary judgment for defendant's use arid occupancy of tlic premises subsequent to December 31, 2003; and (2) dismissing with prejudice the affirmative defenses and counterclaims asserted by defendant.

In support of its rnotion, plaintiff argues that defendant's right to exercise its option to renew was made "time of the essence" and defendant failed to timely renew the lease

accordingly, and that defendant's right of first refusal was never triggered. In support, plaintiff, through the affidavit of Diane C. Nardone,[1] asserts the following:

On October 13, 1993, Frank Catania ("F. Catania") and defendant **Ark** Fifth Avenue Corp. ("defendant") entered into a 10-year sublease agreement (the "sublease") with respect to the premises. Defendant uses the premises as its headquarters for its many restaurants, catering, and wholesale and retail bakery operations, among other things (*see* SEC 10-K form, Exh. 3, page 2).

Paragraph 1 of the sublease provides that:

> (a) The Lessor [F. Catania] hereby leases to the Lessee [defendant] and the Lessee hereby hires and takes from the Lessor the premises for a term of ten (10) years (the "term") to commence on November 1, 1993, (the "commencement date") and to terminate on October 31, 2003 (the "initial term") unless the term is earlier terminated as provided in this sublease.
>
> (b) The term of this sublease may be renewed for one (1) additional five (5) year term commencing November 1, 2003 and terminating on October 31, 2008 (the "renewal term") provided that the Lessee exercises the option to renew in strict accordance with the terms of subparagraph 1(c) below.
>
> (c) The Lessee has an option to renew the sublease for the renewal term (the "option to renew") upon the following terms and conditions:
>
> * * *
>
> (iii) the Lessee must give the Lessor written notice that the Lessee is exercising its option to renew on or before August 1, 2003 which time is hereby made of the essence of this sublease; . . . .

Although the sublease was later terminated[2], it was reinstated by a Sublease

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[1] According to her affidavit in support of the motion, Nardone was one of two principal negotiators of the sublease on behalf of Frank Catania. Robert Towers' affidavit in opposition asserts that the sublease was drafted by Frank Catania or his agents.

[2] *See*, Nardone affidavit in support of motion, page 4; Robert Towers affidavit in opposition, page 3.

Reinstatement and Modification Agreement, dated December 28, 1993, hctwcen F. Catania and defendant (the "modification agrccment"). Tlic modificvtion agreement provides that

> 1. Paragraph 1(a) of the Sublease is amended to provide that the term of the Sublease shall commence on January 1, I994 (the "commencement date") and shall terminate on December 31, 2003. Paragraph 1(b) of tlic Subleasc is amended to provide that the five *(5)* year renewal term shall commence on January 1, 2004 and shall terminate on December 31, 2008. Paragraph 1(c)(iii) of the Sublcase is amended to change the outsidc date for the giving of notice of exercise of the renewal option to October 1, 2003.
>
> * * *
>
> 8. The Subleasc is hereby reinstated and shall be in full force and effect, as if the same had not bccn terminated, hut subject to the modifications contained in, **and** the other terms and condilions of, this Agreeinent.[3]

Shortly before F. Catania's death in December 1996, his three daughters, Andrea Catania, Claudia Catania, and Lynn Catania Vocffray organized plaintiff, Tlic Ti-ieste Group LLC. At the time of his cleath, F. Cataiiia owncd all of the capital stock in *a* commercial cooperative corporation, The Old Glory Real Estate Corporation ("Old Glory Corp."), applicable to the entire premises. By Icttcr dated February 29, 1997, Nardone notified defendant that F. Catania's estate was in the process of transferring his shares of capital stock in Old Glory Corp. to plaintiff, and requested that beginning March 1, 1997, rent chccks be made payable to plaintiff. The transfer of record owner-ship of the capital stock was effectuated, and dcfcndant made all of its rent chccks payable to plaintiff accordingly

Approximately six years later, by letter dated October 7, 2003, Nardone, on bchalf of plaintiff, advised defendant that as a result of its failurc to exercise its rcncwal option by "the express outside date of October 1, 2003" specified in paragraph 1(a) of the modification

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[3] By Icttcr dated March 15, 1994, defcndant confirmed ''that the suhlcasc is in full force and effect." (Exh. 5).

agreement, the sublease would expire by its terms on December 31, 2003 (Exh. 6).

On the same date, Nardone received two letters from defendant and one from defendant's attorney. In one of its letters, defendant advised plaintiff that it "hereby exercises its option under the above-captioned Sublease [sublease and modification agreement] to renew said Sublease for the additional five (5) year term set forth therein. . . ." In the other, defendant stated that it "understood that Sublandlord's 'ownership interest' (as defined in Article 17(a) of the [Sublease] has been transferred one or more times since the date of execution thereof." Defendant therefore demanded information regarding such transfer in order to "evaluate whether or not we should exercise our right of first refusal described in Article 17. . . ." Defendant's attorney added in his letter that there was "some confusion as to where notices should be sent" since the sublease required that notices be delivered to the named sublandlord, namely F. Catania, "whom we understand is deceased" and Nardone's letter indicated that notices be given to plaintiff. Additionally, counsel for defendant claimed that the sublease agreement "did not include a 'time of the essence' requirement" for lease renewal.

In response, and by letter dated October 27, 2003, plaintiff rejected defendant's attempt to exercise its option to renew as untimely, arguing that the time of the essence provision is applicable to the renewal option. Plaintiff further asserted that defendant's "right of first refusal, under paragraph 17(b)" of the sublease, does not apply to a transfer to an entity owned or controlled by any immediate family member of F. Catania or the transfer of such ownership interest by reason of death of F. Catania. Since F. Catania died in 1996, and his ownership interest was transferred to plaintiff, an entity controlled by members of the Catania family, defendant's right of first refusal is inapplicable. Plaintiff also asserted that there could be no

"confusion as to where notices should be sent," in light of Nardone's December 1 2002 letter advising defendant of the address to which rent payments should be remitted.[4]

Plaintiff contends that there is no reference in the modification agreement hat would delete the requirement in paragraph 1(a) of the suhlease that the renewal option be exercised "in strict accordance with tlic terms of the paragraph 1(c) below" or eliminate in subparagraph 1(c)(iii) the provision that "timc is hereby made of the essence." Plaintiff points out that the parties agreed to delete specific language pertaining to paragraph 6(a)(v) and (vi) of the sublease, and could have similarly deleted the strict accordance and timc of the essence phrases if it wcrc the parties' intent to do so.

In all events, argues plaintiff, equity should not intervcnc to relieve defendant of its obligations under the sublcasc to timely exercise the renewal option. Counsel for defendant advised plaintiff that dcfcndant's failure to exercise the option was duc solely to inadvertence. Furthcr, plaintiff would be substantially prejudiced if the Court relieves defendant from the consequences of its failure to timely cxcrcisc its option to rcncw, sincc plaintiff would rcccivc from dcfcndant a small fraction of the fair market rent over the next five years upon which each of tlic three sisters depend to support themselves and their families. In addition, dcfcndant cannot show that non-renewal would result in a substantial forfeiturc to it so as to excuse its untimely exercise of the renewal option, given that there is no goodwill attached to its business headquarters at tlic premises. Moreover, dcfcridant's allcged substantial investments in the

[4] Nardone states that Bob Towers, defendant's counsel, has always had her current office and email addresses, telephone and fax numbers, and to her knowledge, has never had difficulty communicating with her. She states that a few months prior to February 2004, Towers managed to reach her in France by dialing her New York cell number.

premises was made during the initial months of its 10-year term is insufficient to excuse untimely exercise of its option to renew. Nardone asserts that defendant was required to perform all work, subject to plaintiff's approval, necessary for the construction of its business office, and spend $150,000 for such work wilhin the first year of the initial term. Defendant received rent concessions aggregating six months to offset a portion of such capital expenditures. Except for capital improvements made within the first several months of the original ten-year term, Nardone is unaware of any improvements to the premises by defendant. The sublease requires plainti ff's prior approval of improvements done by defendants, and no such approval has ever been sought. Thus, alleged continued improvements cannot constitute proof of a substantial loss made in contemplation of renewal of the sublease.

Based on the above, plaintiff argues that time was of the essence with respect to defendant's renewal option, and defendant cannot be excused from failing to timely exercise the renewal option in "strict accordance" with the terms of the sublease.

With respect to defendant's alleged right of first refusal, paragraph 17 of the sublease, entitled "Right of First Refusal," states:

> (a) Except as otherwise set forth in paragraph (b) below, if, during the term, the Lessor [F, Catania] shall desire to sell or transfer the Lessor's interest in ownership shares for the premises (the "ownership interest"), and the Lessor shall have received a bona fide written offer from a third party for the purchase of such ownership interest, the Lessor, by written notice to the lessee [defendant]shall provide a copy of such written bona fide offer (the "Lessor's Notice") and offer the Lessee the right to enter into a contract to purchase such ownership interest on the same terms and conditions as set forth in the written bona fide offer. 'I'he Lessee shall have thirty (30) calendar days from the Lessee's receipt of tlic Lessor's Notice in which to accept, in writing, the written bona fide offer upon such terms and conditions specified therein; and upon such acceptance by the Lessee, the Lessor and the Lessee shall be bound to a contract for the purchase of the Lessor's ownership interest upon the terms and conditions set forth in the written bona fide offer. . . .

> (b) Notwithstanding anything to the contrary in this sublcasc, thc Lessee shall have no right to purchase the Lessor's ownership interest in tlic prcmiscs if: (i) thc *sale* or transfer involves the sale or transfer of Seller's owncrship interest, or any part thereof, to a corporation, partnership or other entity solely owned or controllcd by thc Lcssor or any immediatc family mcmhcr of the Lessor; . . . (iii) the sale or transfer of the Lessor's owncrship intcrcst by reason of the death or incompetency of the Lessor to any pel-son described in clause (i) above.
>
> * * *
>
> (e) During the tcrm of this subleasc, thc Lcssor shall not sell or otherwise transfer his intcrcst in owncrship shares for the premises except pursuant to paragraph 17 (b) abovc, or pursuant to a bona fide writtcn offcr.

Plaintiff asserts that neither F. Catania nor plaintiff has ever received any offer, much less a bona fide written offer from a third party for tlic purchasc of thc ownership interest in the prcniiscs. When F. Catania died in 1996, his estate, including his owncrship intcrcst in thc prcmiscs, was divided equally among his three daughters, and thcsc sisters dccidcd **Io** hold heir intcrcst in thc premises in a limited liability company, to wit: plaintiff herein. Notwithstanding dcfendant's contention in its letter that thc owncrship intcrest has been transferred several times, plaintiff rcmains thc record and beneficial holder of thc capital stock and proprietary lcasc applicable to thc prcmises. Nardone claims that the only change in thc mcmbcrs of plaintiff occurred following the death of Andrea Catania (Ms. Catania) in August 2000. Under the terms of Ms. Catania's Last Will and Testament, her one-third ownership intcrcst in plaintiff was transferred to thc Andrea Catania 1999 Insurance Trust (the "Andrea Catania Trust"), of which Nardone is a beneficiary. Such "change" in the identity of onc of three members of plaintiff by reason of death Andrcn Catania "hardly qualifies" as a receipt of a bona fide written offcr from a third party so as to trigger the right of fiist refusal. Nardone further claims that upon her death, arid unless she was to exercise a power of appointment, the Andrea Catania Trust interest in

plaintiff will be distributed in equal shares to Lynn and Claudia Catania. Moreover, no bona fide written offer has been made, and the premises are still controlled by members of the Catania family. Paragraph 17 makes plain that transfers to family members, directly or indirectly, or transfers occasioned by reason of death, are not to be subject to any right of first refusal. According to Nardone, defendant has tendered no payments for any period subsequent to December 2003 although it remains in possession of the premises.[5]

In opposition, defendant argues that paragraph 3 of the modification agreement eliminated the time of the essence language contained in paragraph 1(c)(iii) of the sublease. Defendant and defendant's counsel were "fully aware that the time of the essence provision was not included" in the modification agreement, and it was defendant's "intention that the deletion of that language eliminated any time of the essence requirement with respect to the renewal notification." In this context, summary judgment is unwarranted since the provisions of the sublease and modification agreement concerning defendant's renewal right are ambiguous, and discovery is needed to confirm the intent of plaintiff with respect to the amendments, as well as Nardone's knowledge of the improvements in the premises, her discussion with Towers, and defendant's intent to remain through the renewal term.

Also, defendant contends that plaintiff is estopped from relying on the time of the essence provision. Here, defendant claims that plaintiff had actual knowledge of defendant's intent to renew based on Tower's conversation with Nardone while she was in France. It was during this

[5] Plaintiff's contention that defendant is liable to plaintiff for its continued use and occupancy of the premises following the alleged expiration of the sublease on December 2003 was resolved under a separate motion.

conversation, defendant alleges, that Towers discussed the installation of electronic fire safety devices at the premises, and the unobtrusiveness of the installation in light of defendant remaining in the premises for a long period of time. According to Towers, Nardone accepted defendant's concerns, the equipment was installed as defendant requested, and the plaintiff and defendant shared the costs. Further, in light of the friendly ongoing relationship, any delay in delivering formal renewal notice arose based on Towers' trust of Nardone and his reliance on his prior conversations in which they discussed and agreed upon defendant's renewal of the sublease. Defendant's inadvertence in failing to send formal written notice arose from 'Towers' understanding that defendant's renewal had already been agreed to by both sides.

Also, defendant claims that it would suffer a forfeiture if evicted from the premises and forced to abandon hundreds of thousands of dollars of improvements, which defendant is still depreciating. Defendant has allegedly made substantial improvements to the premises, including approximately $800 million to convert the premises from an "empty shell" to a "first class corporate headquarters," $25,000 for new air conditioning in 1998, $25,000 for telephone equipment in 2000, and $16,000 for new carpet in 2000. Defendant claims that it has been depreciating these various improvements over 15 years, 7 years, 7 years, 10 years, respectively.

Further, defendant contends that discovery is needed to address plaintiff's argument that prejudice would result in permitting defendant to renew its leasehold for the renewal rent amount, given that Lynn Catania Voeffray and Claudia Catania both own other floors of the subject building.

Moreover, plaintiff's breach of the sublease by transferring interests in plaintiff outside the immediate family of F. Catania in violation of paragraph 17(e) (discussed below), and by

permitting water to continually invade the premises and destroy defendant's property and partially evicting defendant fi-om thc prcmiscs militate against plaintiff's claim to cquity.

Dcfcndant also alleges that it is entitled to exercise its right of first refusal under paragraph 17. Dcfcndant argues that paragraphs 17(a) through 17(c), when read together, mean that F. Catania had no right to transfer the ownership interests other than as set forth in paragraph 17, and that upon any impermissible transfer, defendant's right of first refusal was triggered. According to dcfcndant, paragraph 17(c) precludes transfers or sales of the shares appurtenant to the premises. Dcfcndant points out that upon tlic death of F. Catania, the shares appurtenant to thc prcniiscs were transfeel-red to his estate, **and** hereafter, to plaintiff, which was then owned by F. Catania's three daughters. Howcvcr, when one of the daughters died, her stock was transferred to the Andrea Catania Trust for the benefit of Nardonc, who is not a member of the immediatc family of F. Catania. According to defendant, plaintiff never advised defendant that Andi-ea Catania's interest in the premises and plaintiff was being transferred out of the control of F. Catania's immediatc family. Dcfcndant maintains that it was its intention that "if thc [p]remises were transferred by Frank Catania to entities other than those solely within the control of his immediate family, or pursuant to other hcrcin irrelevant provisions of paragraph 17, then Ark [defendant] would have thc right to exercisc its right **of** first refusal."

Dcfcndant also maintains that paragraph 17(b) should not be read as setting forth exceptions to paragraph 17(a), but should be read as a description of types of transfers that would trigger thc right of first refusal other than thosc described in paragraph 17(a). Hei-e, defendant asserts that paragraph 17(b)(iii) pi-ovidcs that defendant shall have not a right to purchasc F. Catania's interests if there is a "salc or transfer of thc [Catania] interest by reason of death or

incompetency of [Calania] to any person described in clause (i) above" meaning any entity "solely owned or controlled" by an "immediate family member of Catania." Defendant argues that if paragraph 17(a) establishes two conditions for the right of first refusal, paragraph 17(b) cannot logically be considered an exception to defendant's right of first refusal because the sale or transfer on death to family members provision later found in 17(b)(iii) would not involve a bona fide written offer. Thus, paragraph 17(b) sets forth other types of transfers as to which defendant had or did not have a right of first refusal. Defendant also points out that **Nardone's** letter of October 27, 2003 acknowledged defendant's "right of first refusal, under paragraph 17(b) of the sublease agreement". . . . Further, to the extent that a bona fide written offer was required, plaintiff cannot avoid the right of first refusal by secretly transferring Ms. Catania's share into a trust without obtaining that offer. Finally, defendant asserts that the Court cannot determine that paragraph 17 is unambiguous as a matter of law, and summary judgment is inappropriate.[6]

In reply, plaintiff denies any intent to delete the time of the essence provision, which remains intact, and contends that defendant failed to raise a triable issue as to the time of the essence requirement. Plaintiff also denies any knowledge of the installation of the new air-conditioning unit, telephone equipment, and carpeting. In any event, assuming that defendant had such notice, expenditures on such improvements could not form the basis to excuse defendant from untimely exercise since the major costs of the improvements, i.e., ***$800.000,*** were

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[6] In defendant's counsel's memorandum, it is claimed that plaintiff has breached the sublease by permitting water to enter the premises, damaging the property and causing actual eviction of defendant from parts of the premises. Plaintiff contends that such reference to water leaks is diversionary.

made during the initial months of the sublease. Similarly, defendant's reference to depreciation is irrelevant. Plaintiff/Nardone also denies having any discussion with Towers concerning renewal either before or after she sent her letter dated October 7, 2003. The construction project claimed by defendant involved a building-wide installation of electronic smoke alarms to comply with the building code (Local Law 5). Old Glory required all tenants, including plaintiff, to contract Fire Safety Alarms ("FSA") of New Jersey to install necessary devices, and when installation was completed prior to April 2003, plaintiff paid FSA the full contract price. However, for aesthetic purposes, defendant requested FSA to encapsulate the conduits, and as an accommodation to defendant, plaintiff split the $1,100 bill for the work. Further, defendant's assertion that plaintiff "agreed" to defendant's renewal of sublease is irrelevant and without merit. Since the renewal option gave defendant a right to accept, within a period of time, plaintiff's offer to renew, and such offer was irrevocable until the specified expiration date, to wit: October 1, 2003, plaintiff's consent or "agreement" was not required. Thus, plaintiff's consent, if any, would be meaningless if defendant elected not to renew.

Also, the water leak to which defendant refers in its complaint recently filed in Supreme Court have no relevance to the issues herein and can be adequately addressed in the independent action.

Plaintiff also contends that defendant failed to demonstrate a triable issue as to the inapplicability of the right of first refusal. Defendant points out that defendant abandoned its argument that the transfer from F. Catania's estate to plaintiff constituted a breach of the sublease. Moreover, in regard to defendant's characterization of the transfer of Ms. Catania's one-third membership interest from her estate to her insurance trust by reason of her death as a

transfer of the ownership interests in the premises outside the control of the family of F. Catania, two-thirds of the membership interests are owned directly by the daughters of F. Catania and thus, control of the premises remains the Catania family. Further, although plaintiff referred to the financial position of the Catania sisters in Nardone's affidavit, it "was not considered a material fact on this motion." Even if the Catania sisters were financially secure, and the Court considered equitable factors, defendant has failed to make a competent evidentiary showing of making improvements of a substantial character in contemplation of the exercise of the renewal option. Further, paragraph 17(e) merely sets forth the Lessor's covenant not to sell or otherwise transfer his interest in the premises except pursuant to a bona fide offer or under paragraph 17(b), and neither provision expands the right of first refusal defined in paragraph 17(a). Even assuming the transfer of plaintiff's ownership interest violated paragraphs 17(b) and 17(e), defendant might possibly have, depending on the circumstances, a breach of contract and damages claim owing to such alleged breach.

Finally, plaintiff contends that defendant failed to demonstrate a genuine need for discovery. There is no need to go beyond the four corners of the documents in order to determine whether the parties intended to eliminate the "time of the essence" requirement. Discovery to ascertain plaintiff's alleged knowledge of defendant's improvements is immaterial, given that defendant's forfeiture claim is barred due to the fact that the major costs of its alleged improvements occurred during the initial months or first year of the sublease. Defendant's alleged need for discovery concerning the discussions between Nardone and Towers is also disingenuous in light of the documentary evidence.

Analysis

To obtain summary judgment, tlic movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR § 3212 [b]). It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212 [b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor *(Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad* v *New* ***York*** *Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright* v *National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Sup Ct New York County, Oct. 21, 2003]). This standard requires that the proponcnt of a rnotion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad* v *New* ***York*** *Univ. Med. Ctr.*, **64** NY2d *851*, 853 [1985]; *Zuckerman v City of New* ***York,*** 49 NY2d *557, 562* [1980]; *Silverman v Perlbinder*, *307* AD2d 230, 762 NYS2d 386 [1st Dept 20031). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]).

Alternatively, to defeat a motion for summary judgmcnt, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR $3212 [b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issuc requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v*

City of New York, supra, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 20031). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Defendant "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief' (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 413 NYS2d 650 [1978]; *Plateman v American Totalisator Co.*, 45 NY2d 910, 912, 411 NYS2d 230 [1978]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347, 668 NYS2d [1st Dept 1998]).

The fundamental, neutral precept of contract interpretation is that agreements are to be construed in accord with the parties' intent (*see Slatt v Slatt*, 64 NY2d 966, 967, 488 NYS2d 645, reargdenied 65 NY2d 785, 492 NYS2d 1026 [1985]). "The best evidence of what parties to a written agreement intend is what they say in their writing" (*Slamow v Del Col*, 79 NY2d 1016, 1018, 584 NYS2d 424 [1992]). A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms (*see e.g. R/S Assoc. v New York Job Dev. Auth.*, 98 NY2d 29, 33, 744 NYS2d 358, *rearg denied* 98 NY2d 693, 747 NYS2d 411 [2002]; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162, 565 NYS2d 440 [1990]). A contract is unambiguous if the language it uses has "a definite and precise meaning, unattended

by danger of misconception in the purport of the [agreement]itself, and concerning which there is no reasonable basis for a difference of opinion" (*Breed v Insurance Co. of N. Am.* 46 NY2d 351, 355, 413 NYS2d 352 [1978], *rearg denied* 46 NY2d 940, 415 NYS2d 1027 [1979]). Thus, if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity (*see e.g. Teichman v Community Hosp. of W. Suffolk*, 87 NY2d 514, 520, 640 NYS2d 472 [1996]; *First Natl. Stores v Yellowstone Shopping Ctr.*, 21 NY2d 630, 638, 290 NYS2d 721, *rearg denied* 22 NY2d 827, 292 NYS2d 1031 [1968]). Ultimately, the court's aim is a practical interpretation of the language employed by the parties so that there may be a realization of the parties' "reasonable expectations" (*see Sutton v East River Sav. Bank*, 55 NY2d 550, 555, 450 NYS2d 460 [1982]).

Option to Renew

At the outset, the Court observes that contract provisions are not ambiguous merely because the parties interpret them differently (*Mount Vernon Fire Ins. Co. v Creative Hous.*, 88 NY2d 347, 352, 668 NE2d 404 [1996]). Thus, after examining the sublease and modification agreement as a whole and considering the relationship of the parties and the circumstances under which the contract was executed (*Kass v Kass*, 91 NY2d 554, 566 [1998]), the Court determines that the terms of the sublease and modification agreement concerning defendant's option to renew are clear and unambiguous.

The modification of a contract results in the establishment of a new agreement between the parties which *pro tanto* supplants the affected provisions of the original agreement while leaving the balance of it intact (22A NY Jur Contracts § 474 *citing Cortesi v R & D Constr. Corp.*, 73 NY2d 836 [1988], *modifying* 137 AD2d 901 [3d Dept] and *Beacon Terminal Corp. v*

Chemprene, Inc., 75 AD2d 350 [2d Dept 1980]). Although the effect of a modification is the production of a new contract, it consists not only of the new terms agreed upon but of as many of the terms of the original contract as the parties have not abrogated by their modification (22A NY Jur Contracts § 474). Thus, modifications do not necessarily abrogate the original contract entirely. Instead, the terms of the original contract are still to be followed so far as not changed or as inconsistent with the new terms.

Under the sublease, paragraph 1(b), defendant was obligated to exercise its option to renew "in strict accordance" with the terms of paragraph 1(c), which required defendant to serve notice of its exercise of the option to renew "before August 1, 2003 which time is hereby made of the essence of this sublease."

It is undisputed that paragraph 8 of the modification agreement reinstates the sublease "as if the same had not been terminated, but subject to the modifications contained in, and other terms and conditions of, this [modification][a]greement." The language in paragraph 8 clearly expresses the intent of the parties to revive all of the terms of the sublease, except as to those changes contained in the modification agreement. According to the provisions contained in paragraph 1 of the modification agreement, the commencement and termination dates of the sublease, as well as the renewal term of the sublease were extended two months. Such modification reflected the fact that the sublease was entered into in October 1993, and after termination, was reinstated two months later in December 1993. The modifications therefore expressed the parties' intent to expand the dates by which certain events and rights commenced, in order to reflect the two-month period for which the sublease was no longer in effect. In comport with principles of contract interpretation, the Court finds that the amendments contained

in paragraph 1 of the modification agreement did not act to supplant paragraphs 1(a), 1(b), or 1(c)(iii) in their entirety, hut served to inodify or amend the dates so affcctcd by the two-month break in the parties' contractual relation (*see Tejani v Allied Princess Bay Co.*, 204 AD2d 618 [2d Dept 1994] [stating that the modification agreement left intact only those provisions of the original agreement which were not expressly or impliedly supplanted]; *Beacon Terminal Corp. v Chemprene, Inc.*, 75 AD2d 350 [2d Dcpt 1980]; *Greek Orthodox Archdiocese of N. & S. Am.* v *Abrams*, 162 Misc 2d 850 [Supreme Court New York County 1994]). Thus, in this context, defendant's contention that it was aware that the lime of the essence provision was not included in the modification agreement is of no consequence, whcrc thc language in such provision expresses an intent to solely modify effective dates.

Tlic Court also notes that if thc modifications in paragraph 1 were intended to entirely replace paragraphs 1(a), 1(h), or 1(c)(iii) of the sublcasc, thc parties could have so stated as they did in paragraph 3 of the modification agreement, which provides: "Paragraph 6(a) of thc Sublease is amended to *delete* clauses (v) and (vi) thereof and to *substitute the following in place of the deleted material*" (emphasis added). Paragraph 1 of the modification agreement lacks any such language, arid this Court declines to read such language into it (*see e.g. Sally v Magee*, *225* AD2d 816 [3d Dept 1996]; *see also Cornhusker Farms, Inc. v Hunts Point Co-op. Market, Inc.*, 2 AD3d 201 [1st Dept 2003]; *Slatt v Slatt,* 102 AD2d 475 [1st Dept 1984]). Thus, defendant's contention that it intended to eliminate thc time of the essence requirement is defeated by thc absence of any language to this effect in paragraph 1 of the modification, especially whcrc thc parties' intent to eliminate or delete other provisions of the sublease were made evident elsewhere in the modification agreement.

As such, paragraph 1 of the sublease, as modified by the modification agreement, provides:

> (a) 'I'he Lessor hereby leases to the Lessee and the Lessee hereby hires and takes from the Lessor the premises for a term of ten (10) years (the "teim") tocommence on *January 1*, 1994, (the "commencement date") and to terminate on *December* 1, 2003 (the "initial term") unless tlic term is earlier terminated as pi-ovided in this sublease.
>
> (b) Tlic term of this sublease may be renewed for one (1) additional five (5) year term commencing *January 1, 2004* and terminating on *December* 31, 2008 (the "renewal term") provided that the Lessee exercises the option to renew in strict accordance with tlic temis of subparagraph 1(c) below.
>
> (c) The Lessee has an option to renew the suhlease for the renewal term (the "option to renew") upon the following terms and conditions:
>
> * * *
>
> (iii) the Lessee must give the Lessor written notice that the Lessee is exercising its option to renew on or berot-e *October* 1., 2003 which time is hereby made of the essence of this sublease; . . . .

(Emphasis added *t.o*rcflect the terms modified by the modification agreement.).

When "lime of the essence" is expressly stated in a contract, the parties are obligated to strictly comply with the terms of the contract and tender performance on law day unless the time for performance is extended by mutual agreement (*see Milad v Marcisak,* 307 AD2d 281 [2d Dept 2003] [findingthat purchasers defaulted on their contractual obligations by failing to appear at the closing on the scheduled tiinc which was made of the essence]; *Hakim v Orient Land Dev. Corp.*, 3107, [1st Dept 2001]; *East Lincoln Realty Ctr. v Isley*, 170 AD2d 574, 575 [2d Dept 1991] [where tinic was expressly rendered of the essence in a promissory note, defendants were obligated to strictly comply with the terms of the note]).

It is uncontested that defendant failed to renew the sublease in "strict accordance" with the terms of the sublease, as modified, in that it failed to provide written notice that it was

exercising its option to renew by October 1, 2003. Consequently, the sublease expired by its terms, as modified, on December 1, 2003.

However, notwithstanding defendant's default, defendant may be entitled to equitable relief. In this regard, it has been held that although a tenant has no legal interest in the renewal period until the required notice is given, an equitable interest is recognized and protected against forfeiture in some cases where the tenant has in good faith made improvements of a substantial character, intending to renew the lease, if the landlord is not harmed by the delay in the giving of the notice and the lessee would sustain substantial loss in case the lease were not renewed (*J. N. A. Realty Corp. v Cross Bay Chelsea, Inc.*, 42 NY2d 392 [1977]).

In *J. N. A. Realty Corp.* (*supra*), the owner of a building sought to recover possession of the premises claiming that the lease had expired. The lease granted the tenant an option to renew and although the notice was sent, through negligence or inadvertence, it was not sent within the time prescribed in the lease. The landlord sought to enforce the letter of the agreement, and the tenant asked for equity to relieve it from a forfeiture. The Court articulated the well-settled principle that notice exercising an option is ineffective if it is not given within the time specified. The Court also explained that equitable relief in these cases is problematic because a default on an option usually does not result in a forfeiture, given that the option itself does not create any interest in the property, and no rights accrue until the condition precedent has been met by giving notice within the time specified. Thus, stated the Court, equity will not intervene because the loss of the option does not ordinarily result in the forfeiture of any vested rights. However, the Court opined that when a tenant in possession under an existing lease has neglected to exercise an option to renew, he might suffer a forfeiture if he has made valuable improvements on the

property. Because the tenant made a considerable investment in improvements on the premises, to wit: $ 40,000 at the time of purchase, and an additional $ 15,000 during the tenancy, would lose a considerable amount of its customer good will if the location is lost, and was at fault, but not in a culpable sense, the Court found that there would be a forfeiture and the tenant was entitled to equitable relief provided there was no prejudice to the landlord. However, since the record was unclear as to the landlord's prejudice if the tenant was relieved of its default, a new trial on this issue was warranted.

The tenant's burden of first establishing that there would be a forfeiture of valuable improvements on the property was reaffirmed by *Soho Development Corp. v. Dean & DeLuca Inc.*, 131 AD2d 385 [1st Dept 1987]). In *Soho*, the First Department distinguished *J.N.A. Realty*, and held that equity should not intervene under the fact of *Soho*, where the record demonstrated that the major costs of improvements made by the tenant were incurred during the first two years of the lease. The Court opined that presumably, all of the improvements had been effectively amortized and depreciated over the life of the lease, and consequently, the tenant had "reaped the benefit of any initial expenditure" (*see also Wayside Homes, Inc. v Felicia Purcelli*, 104 AD2d 650 [2d Dept 1984] [*distinguishing J.N.A. Realty Corp., supra* and finding that equity should not intervene to relieve plaintiff from its failure to timely act; not only did plaintiff fail to present credible proof that strict adherence to the requirement of timely exercise of the second option to renew would constitute a forfeiture, the record revealed that by far the major costs of the improvements made by plaintiff were incurred during the first year of its 30-year occupancy, and plaintiff had long since reaped the benefit of any initial expenditure]).

It has also been noted that the "good will" of a business enterprise is a substantial and

valuable asset, and deserving of protection against forfeiture so as to invoke equitable relief to a tenant who defaults in timely exercising its right to renew a lease (*see Sy Jack Realty Co. v Pergament Syosset Corp.*, 27 NY2d 449, 453 n1 [1971]; *Grunberg v George Assoc.*, 104 AD2d 745 [1st Dept 1984] [tenant, a retail gift boutique, claimed that it made substantial improvements to the leasehold and established valuable good will at the present location]).

Here, the affidavit of defendant's Executive Vice President indicates, in conclusory fashion, that defendant "spent in excess of $800,000.00 to transform the empty shell of the Premises . . . to a first class corporate headquarters . . . [and that] it has been depreciating the leasehold improvements aspects of its improvements over a 15 year term that encompassed renewal period." The affidavit continues to state additional improvements to the premises, and indicates that defendant intended to use such improvements during the five-year renewal term. Defendant submits a document, dated March 19, 2004 entitled "Book Asset Detail 2/01/04 - 2/29/04", which identifies four categories of expenditures related to the Premises: (1) leasehold improvements, (2) machinery equipment, (3) organization, and (4) software. Notably, only three items are listed as "leasehold improvements," made in 1994 and 1995, and amount to a sum of $323,577.85 (the "Asset Detail Document").

It is undisputed that under paragraph 9 of the sublease, defendant was required to perform all work, subject to plaintiff's approval, necessary for the design and construction of a "first class office." Defendant's work included (1) creating an architectural design and layout for the 14th floor, (2) complete engineering of all HVAC, electrical and plumbing systems, (3) providing labor and materials necessary to complete installation of the HVAC system, plumbing work, electrical work, drywall partitions and ceilings, computer wiring, telecommunications, flooring

finishes, lighting fixtures, window treatments, tile work in new restrooms, millwork and all finishes (see paragraphs **34** and 35 of defendant's Amended Answer; Nardone's affidavit, paragraph 21; sublease paragraph 9 and schedule D thereto). It is also undisputed that defendant received rent concessions aggregating six months (Schedule B to the sublease, subd. E).

Defendant does not dispute plaintiff's contention that the work performed to the leasehold to "transform" the premises into a first class office was performed during the first two years of the sublease. In this regard, the recently generated Asset Detail Document submitted by defendant reflects that the leasehold improvements were made within the first two years of the sublease.[7]

Thus, defendant's initial conclusory and vague assertion that it performed $800,000. in "improvements" to the leasehold is insufficient to raise a triable issue of fact that an eviction here would result in a forfeiture (*Freedman v Chemical Constr. Corp.*, **43** NY2d 260 [1977] [stating that conclusory assertions will not defeat summary judgment; the opponent of a properly made summary judgment motion must present evidentiary facts sufficient to raise a triable issue of fact]; *see generally, Ticor Title Guarantee Company v Harry Bajraktari*, 261 AD2d 156 [1st Dept 1999] *citing Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [same]; *Marton Assoc. v Peter Vitale*, 172 AD2d 501 [2d Dept 1991] [vague assertions and unsupported statements made by defendant do not raise issues of fact]).

Furthermore, it is uncontested that the Premises is defendant's *corporate headquarters* of

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[7] The recently generated Asset Detail Document submitted to support defendant's claim that it has been depreciating the leasehold improvements over a 15-year term that encompassed the renewal period, is insufficient in the absence of any supporting documentation evidencing its intent at the time the improvements were made.

its many restaurants, catering, and wholesale and retail bakery operations. Therefore, any good will created by defendant is not attached to its corporate headquarters at the premises, but to the individual locations of its various operations, if at all.

However, it cannot be said at this juncture that an eviction would not constitute a substantial forfeiture of the additional improvements made by defendant five and seven years after the sublease commenced, to wit: air conditioning equipment, telephone equipment, and carpeting, as well as the costs expended by defendant related to the installation of electronic fire safety devices in 2003 (*J.N.A.*, 42 NY2d 392, *supra* [considering, among other things, $15,000 in improvements made during the tenancy]). *Soho* (*supra*) does not compel a different result, given that unlike the defendant herein, there was no claim by the tenant in *Soho* of any expenditures made during the tenancy.

Under such circumstances, defendant's claim that it will suffer a forfeiture of substantial improvements or of good will if evicted from the Premises is at issue (*see Home of Histadruth Ivrith, Inc. v State Facilities Dev. Corp.*, **114** AD2d 200 [3d Dept 1986] [finding an issue of fact as to whether a substantial forfeiture of the tenant's improvements costing in excess of $87,000 would result from not permitting renewal of five-year lease, which provided for extensive rehabilitation of the premises]).

Furthermore, plaintiff has failed to articulate any legally cognizable prejudice to warrant denial of equitable relief as a matter of law. Plaintiff claims that excusing defendant's default would force the remaining Catania sisters to accept rent at a below-market rate. However, this possibility was evident at the inception of the sublease and, without more, cannot be attributable to any delay in defendant's exercise of its option to renew. Moreover, plaintiff does not allege

that it *has* changed its position in any manner or to its detriment as a result of defendant's delay in exercising its option (*see Sy Jack Realty Co. v Pergament Syosset Corp.*, 27 NY2d at 453 [stating that landlord did not suffer any damage or prejudice because of the delay resulting from the nondelivery of the defendant's letter exercising renewal option]; *Beltrone v Danker*, 328 AD2d 763, 764 [3d Dept 1996] [defendants have made no showing that they have a prospective tenant or that they were otherwise prejudiced as a result of plaintiffs' two-month delay in giving notice of intent to renew]; *see generally J.N.A. v Cross Buy Chelsea, Inc.*, 42 NY2d at 400 [requiring trial on issue of prejudice to explore whether after the tenant's default the landlord, made other commitments for the premises]).

Plaintiff points out that none of *J.N.A.*'s progeny, which applied equitable considerations in determining whether to excuse an untimely exercise of a lease renewal option had an express time of the essence provision. However, prior to granting equitable relief to the tenant despite its failure to timely exercise its renewal option, the Court in *J.N.A.* stated that at law, "time is always of the essence of the contract." Thus, the presence of the time of the essence provision herein does not bar equitable relief.

As such, the branch of plaintiff's motion for summary judgment on its declaratory judgment cause of action is denied at this juncture.

Right of First Refusal

Defendant's right of first refusal allegedly arises out of plaintiff's alleged improper transfer of its ownership interest in violation of the sublease/modification agreement. When Andrea Catania died, her stock was transferred to the Andrea Catania Trust for the benefit of Nadine, who is not a member of the immediate family of F. Catania, and it is argued that

therefore, tlic interest in the premises and plaintiff were transferred out of the control of F. Catania's immediate family in violation of paragraphs 17 (b) and (e) of the sublease.

Dcfcndant's right of first refusal, as expressed in paragraph 17(a), is triggered upon the occurrence of the following circumstances, to wit: (1) the Lessor desires to sell or transfcr his intcrcst in Old Glory, and (2) the Lessor has received a hona fide written offer from a third party for the purchase of such ownership interest." At this point, paragraph 17(a) requires that the Lessor provide "written noticc" and a copy of a bona fide written offer to defendant, and consequently, "offer tlic Lessee the right to enter into a contract to purchase such ownership intercst on the same terms and conditions as set forth in the writtcn bona fide offer." Such language unquestionably requires the existence of a bona fide offer.

Howcvcr, immediately preceding tlic terms setting forth defendant's right of first rcfusal appears the phrase "Except as otherwise set forth in paragraph (b) below" which provides that "Notwithstanding anything to the contrary in this sublcase, the Lessee shall have no right to purchase the Lcssor's ownership interest in the prcmiscs if' (i) the sale or transfer of such interest or part thereof is made to an entity "solely owned or controllcd by the Tcssor or any immediate family member of the Lessor" or the sale or transfer of such is made by reason of the death or incompetency of tlic Lessor tu any person described in clause (I) abovc. Thus, contrary to defendunt's contention, paragraph 17(b) stiltes circumstances under which defendant *could not* purchase the **Lessor's** ownership interest in the premises even where a bona ride written offer was made. 'I'hus, paragraph 17(b) is simply a limitation on defendant's right of first refusal set forth in 17(a) in the event the Lessor intended to sell or transfer the interests in the premises and received a bona fide written offer for such transfer or sale. When reading paragraphs 17(a) and

(b) together, one concludes that when the Lessor desires to sell or transfer its ownership interest in the premises, and has received a bona fide written offer for the purchase of Lessor's ownership interest in the premises, defendant's right of first refusal is thereby triggered, unless, as set forth in paragraph 17(b), the sale or transfer is one to an entity solely owned or controlled by Lessor of an immediate family member of Lessor or is a sale or transfer by reason of the Lessor's death or incompetency. Stated another way, paragraph 17(b)(i) and (iii)[8], read together with 17(a) is interpreted as the following: except where there is a sale or transfer of the Lessor's ownership interest to an entity solely owned or controlled by Lessor or immediate family of Lessor or where there is a sale or transfer of Lessor's ownership interest to Lessor's immediate family due to Lessor's death or incompetency, if Lessor desires to sell or transfer the Lessor's ownership interest **and** receives a bona fide written offer from a third party for the purchase of such ownel-ship interest, Lessor shall offer the Lessee the right to purchase the ownership interest on the same terms as offered by the third party.

The language in 17(d) also lends support to the Court's finding that a bona fide written offer is necessary to trigger defendant's right of first refusal. Paragraph 17(d) provides that "The Lessee shall not be entitled to exercise its right of first refusal to accept a written bona fide offer to purchase the Lessor's ownership interest if the Lessee is in default . . . ." There is no mention here of a right of first refusal stemming from any circumstance other than one presenting a bona fide written offer. There is also no reference to a right of first refusal in the event the Lessor's interest is transferred or sold in nianner not identified in 17(b). Thus, defendant's contention that 17(b) creates additionnl circumstances under which defendant's right of first refusal is triggered

[8] Paragraph 17(b)(ii) is not implicated by the parties or the facts under this case.

is unsupported by the cxpr-css languagc of the paragraphs 17(a), (b) or (d).

The Court observes that paragraph 17(e) places limitations on the *Lessor's* ability to sell or transfer the ownership interests in the premises. Under paragraph 17(c), the Lessor is prohibited from selling or transferring the Lessor's ownership intcrest to any person or entity other than (1) pursuant to "17(b) above", i.e., (a) to an entity solely owned or controlled by Lessor or immediate family of Lcssor [17(b)(i)], (b) the Lessor's immediate Family as a result of Lessor's death or incompetency [17(b)(iii)], or (2) pursuant to a bona fide written offer. However, there is no concomitant language in paragraph 17(c) indicating that a sale or transfer of Lessor's ownership intcrcst in a manner othcr than those specified in 17(b) or by a bona fide writtcn offer shall rcsult in defendant's right of first refusal. Thus, when read in conjunction with paragraphs 17(a) and (b), paragraph 17(e) simply provides that thc Lessor may only transfer or sell thc ownership interests in a manner described in 17(b) or pursuant to a bona fide written offer, and, in the event the Lessor desires to sell or transfer the ownership interests and receives a bona fidc offer, dcfcndant may purchasc such intcrcsts, cxccpt as to thosc sales or transfers to an entity solely owned or controlled by Lessor or immediate family of Lessor [17(b)(i)], (b) the Lessor's immediate family as a result of Lessor's death or incompetency [17(b)(iii)]. Again, dcfcndant's right of first rcfusal is dcpcndcnt upon thc cxistcncc of ***a*** bona fidc written offcr, and any violation hy the Lessor or plaintiff of paragraph 17(e) raises, instead, a possibility of a breach of sublcase claim.

In this latter regard, plaintiff argues that the premises are "still controlled by members of the Catania family" (Nardone Affidavit, ¶¶15-16), in that "two thirds of thc membership intcrcsts are nwncd directly hy thc daughtcrs of Frank Catania" (Nardone, Reply Affidavit ¶16).

Furthermore, according to Nardone's affidavit, Nardone states that "Upon my death, unless I were to exercise a power of appointment, the 'Trust's interest in Trieste will be distributed in equal shares to Lynn and Claudia Catania." As such, it appears that Nardone, who is not an immediate member of the Catania family, controls one third of the membership interests of the premises. Therefore, since it is undisputed that the latest transfer was made in the absence of a bona fide written offer., and plaintiff failed to establish that the transfer of the ownership interest was made to an entity "*solely* owned or controlled by the immediate family member of the Lessor" as required by the sublease, there is an issue of fact as to whether plaintiff breached the transfer limitations set forth in paragraph 17(c) of the sublease (emphasis added).

Therefore, even assuming that the transfer of ownership interest in Old Glory from plaintiff to the trust to the benefit of Nardone constituted a transfer of ownership out of the control of F. Catania's immediate family in violation of the paragraph 17(e) of the sublease, defendant's right of first refusal is not triggered by any such violation.

Defendant maintains that it was its intention that "if the [p]remises were transferred by Frank Catania to entities other than those solely within the control of his immediate family, or pursuant to other herein ii-relevant provisions of paragraph 17, then Ark [defendant] would have the right to exercise its right of first refusal." Defendant's intent, which is aptly and eloquently articulated in opposition to the motion, is not, however, stated in or reflected by the plain terms of the sublease. Contrary to defendant's contention, careful analysis of paragraph 17 does not yield a finding that when an interest in the premises is transferred to an individual outside the immediate family of F. Catania, or to an entity not solely owned or controlled by F. Catania's immediate family member triggers defendant's right of first refusal, Thus, that the sale or

transfer was to an individual outside the immediate family of Lessor does not trigger defendant's right of first refusal where there was no bona fide written offer to purchase the ownership interest in the first instance. Furthermore, defendant's reliance on paragraph 17(b) for the proposition that such paragraph describes types of transfers that would trigger the right of first refusal other than those described in paragraph 17(a), and does not set forth exceptions to the transfers identified in paragraph **(a)** is incongruous with the terms of 17(a) and (b), and thus, without merit.

Based on the above, plaintiff's motion for (1) summary judgment on its declaratory judgment cause of action is denied; (2) monetary judgment for defendant's use and occupancy is denied, as rendered moot by order and stipulation dated February 24, 2004, and (3) summary judgment dismissing defendant's counterclaims and affirmative defenses[9] is granted as to defendant's **(a)** first affirmative defense alleging that the complaint fails to state a cause of action, (b) fifth affirmative defense alleging breach of paragraph 17 [right of first refusal] of the sublease, (c) ninth affirmative defense and third counterclaim alleging plaintiff's alleged breach of the renewal option provision of the sublease, (d) tenth affirmative defense and fourth

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[9] Defendant's remaining affirmative defenses and counterclaims are alleged as follows: second affirmative defense that plaintiff's claims are barred by the doctrine of unjust enrichment, third affirmative defense that defendant conducted itself in a commercially reasonable manner, fourth affirmative defense that plaintiff's claims are barred by the doctrine of unclean hands, waiver, estoppel, and ratification; sixth affirmative defense that defendant's notice of intent to exercise its renewal option should be excused based on principles of equity; seventh affirmative defense and first counterclaim for declaratory judgment declaring plaintiff *to* honor defendant's exercise of its renewal option and comply with plaintiff's obligations under the sublease and modification agreement; eighth affirmative defense and second counterclaim for specific performance with respect to defendant's renewal option; and twelfth breach of sublease and modification agreement stemming from the transfer of ownership interest to persons who are not part of the immediate family of F. Catania.

counterclaim for a declaratory judgment declaring that defendant has the right to exercise the right of first refusal and that plaintiff must transfer plaintiff's ownership interest to defendant, and (e) eleventh affirmative defense and fifth counterclaim for specific performance concerning defendant's right of first refusal seeking a transfer of ownership interest to defendant."[10]

This constitutes the decision and order of the court

Dated: May 25, 2004

Hon. Carol R. Edmead, J.S.C.

[10] The parties' motion papers are silent as to defendant's second, third, and fourth affirmative defenses.