

Cellular Telephone Company v 210 East 86th Street Corp.

2006 NY Slip Op 30196(U)

September 18, 2006

Supreme Court, New York County

Docket Number: 0101582/2005

Judge: Karen Smith

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

PRESENT: _____

PART 44

Index Number : 101582/2005
CELLULAR TELEPHONE COMPANY
vs
210 EAST 86TH STREET CORP.
Sequence Number : 003
SUMMARY JUDGMENT

INDEX NO. 101582/2005
MOTION DATE 7/13/06
MOTION SEQ. NO. 003
MOTION CAL. NO. _____

The following papers, numbered 1 to 4 were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	<u>1</u>
Notice of cross-motion & Affidavits in opposition to motion	<u>2</u>
Answering Affidavits — Exhibits <u>on cross-motion & reply motion</u>	<u>3</u>
Replying <u>Memoranda Affidavits</u> <u>on cross-motion and motion</u>	<u>4</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross motion
are decided in accordance with the attached
memorandum decision and order.

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Dated: 9/18/06

KSS
KAREN SMITH J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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 44

-----X

CELLULAR TELEPHONE COMPANY and
NEW CINGULAR WIRELESS PCS LLC

Plaintiff,

Index no.: 101582/2005
Motion seq.: 003
Motion date: July 13, 2006

-against-

DECISION AND ORDER

210 EAST 86TH STREET CORP.,

Defendants.

-----X

PRESENT: KAREN S. SMITH, J.S.C.:

Defendant 210 East 86th Street Corporation's motion for summary judgment dismissing the complaint is denied and plaintiffs Cellular Telephone Company's ("CTC") and New Cingular Wireless PCS, LLC's ("NCWP") cross motion seeking summary judgment on their claim is granted for the reasons stated more fully below.

Plaintiffs filed this declaratory judgment action seeking a judgment declaring that the defendant did not validly cancel the commercial lease agreement ("Lease") between itself and plaintiff CTC. Defendant answered with two counterclaims seeking 1) a declaratory judgment that an assignment of the Lease has occurred and that plaintiffs have held over without the defendant's consent, and 2) a judgment in ejectment compelling plaintiffs to vacate the premises. Defendant filed a motion to dismiss pursuant to CPLR §§ 3211(a)(1) and (a)(7) which was denied on April 15, 2006. Defendant now seeks summary judgment declaring that a series of corporation transactions on the part of plaintiffs violated the non-assignment provisions of the

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Lease and triggered the defendant's right of recapture under the Lease as of October 26, 2006. Defendant also seeks an order compelling plaintiffs to vacate, and an award of attorneys fees. Plaintiffs have cross-moved for summary judgment, arguing that the transactions at issue were not assignments of the Lease or, in the alternative, that the assignments were permitted under the Lease and not of the type that would trigger defendant's right of recapture.

The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence in an admissible form to demonstrate the absence of any material issues of fact (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1987]). Once the movant has made such a showing, the burden then shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of any material issues of fact requiring a trial of the action (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

In support of its motion, defendant submitted a copy of the Lease, a copy of a partnership agreement forming CTC dated March 18, 1983, a Certificate of Merger dated October 27, 2004 evidencing a merger between LIN Cellular Communications Corporation and LIN Merger Sub, LLC, a letter from plaintiffs' counsel dated August 22, 2005, a letter from plaintiffs' counsel dated November 19, 2004, and a document entitled "Notice of Landlord's Election to Cancel Lease".

In opposition to defendant's motion and in support of their cross-motion for summary judgment, plaintiffs submitted a number of items: portions of the EBT of Barton Mark Perlbinder, president and owner of defendant; a copy of the Lease; a document entitled "Notice of Landlord's Election to Cancel Lease"; the sworn affidavits of Steve Greenstein, former director of retail operations for ATTWS; David Meichtry, construction manager in the North

East region for ATTWS; Patrick Breslin, senior managing director for GVA Williams Real Estate Co.; and Debbie Braun (“Braun”), counsel for CTC at the time the Lease was negotiated; Carolyn J. Wilder (“Wilder”), Assistant Secretary of NCWP. In addition to these items, plaintiffs submitted evidence of multiple corporate transactions taking place between October 26, 2004 and December 31, 2004; a Certificate of Merger between LIN Cellular Communications Corporation and LINCC Conversion Entity, LLC, dated October 26, 2004, filed with the New York Department of State (the surviving business being named LIN Cellular Communications LLC); a Certificate of Conversion converting LIN Broadcasting Corporation to LIN Broadcasting LLC, dated October 26, 2004, filed with the Delaware Department of State; a Certificate of Merger between LIN Cellular Communications LLC and LINCC Conversion Corporation, dated October 27, 2004, filed with the New York Department of State (the surviving business being named LIN Cellular Communications Corporation); a Certificate of Merger between Cellular Systems, Inc. and LIN Cellular Communications Corporation, dated October 27, 2004, filed with the New York Department of State; a Certificate of Merger between LIN Cellular Communications Corporation and LIN Merger Sub LLC, dated October 27, 2004, filed with the New York Department of State (the surviving business being named LIN Cellular Communications LLC); a Certificate of Merger between LIN Cellular Communications LLC and New Cingular Wireless PCS,¹ dated December 31, 2004, filed with the Delaware Secretary of State and accompanied by a Certificate of the same merger filed with the New York Department of State.

¹ The Certificate of Merger filed in New York states that AT&T Wireless PCS, Inc. changed its name to New Cingular Wireless PCS LLC on October 26, 2004.

The relevant facts are contained in the parties' moving papers and are not in serious dispute. Defendant is the owner of 209-213 East 85th Street and 210-214 East 86th Street, New York, New York. As of September 30, 2004, plaintiff CTC was a New York partnership with two equal partners, Cellular Systems, Inc. ("CSI") and LIN Cellular Communications, LLC ("LIN LLC"). LIN LLC owned a 96.671% share of CSI; the remaining 3.329% share was held by private individuals. LIN LLC was wholly owned by LIN Broadcasting LLC, which was in turn owned by AT&T Wireless Services, Inc. ("ATTWS").

On December 23, 1997, defendant entered into a lease agreement ("Lease") with plaintiff CTC for commercial space in defendant's building. The Lease was for a five year term commencing on January 1, 1998, with an option to renew. On December 18, 2001, CTC exercised its option to renew the lease for another five years. Accordingly, the Lease now terminates on December 31, 2007.

The relevant provisions of the lease at issue are contained in paragraph 49 of the Lease:

- 49.1 (a) Tenant shall not (i) assign or otherwise transfer this Lease or the term or estate hereby granted or (ii) sublet the Premises or any part thereof or allow the same to be used or occupied by others or in violation of any of the provisions of this Lease, without, in each instance, obtaining the prior written consent of Owner which such consent may be withheld for any reason (whether reasonable, unreasonable or arbitrary) or for no reason. **For purposes of this Article 49, the transfer or other disposition of in excess of twenty-five (25%) percent of the issued and outstanding capital stock of Tenant or of any corporate tenant or subtenant, or the transfer of in excess of twenty-five (25%) percent of the total interest in any other entity (partnership or otherwise) which is Tenant or subtenant, however accomplished, whether in a single transaction or in a series of related or unrelated transactions, shall be deemed an assignment of this Lease or such sublease, as the case may be. (Emphasis added).**
- (b) **Notwithstanding anything to the contrary in this Lease** (but subject to all restrictions regarding the use of the Premises), provided and on

condition that Tenant is not then in default under any provision of this Lease after receipt of notice thereof and the expiration of any applicable cure period which are specifically provided for in this Lease in respect of such default (if any), **this Lease may be assigned and the Premises may be sublet, in whole or in part, from time to time, without Owner's consent (but with not less than thirty (30) days prior notice to Owner) (i) to any person into or with which Tenant or any successor of Tenant may be merged or consolidated or (ii) to any person which is an affiliate, parent or successor of Tenant.** (Emphasis added).

- 49.5 **Anything herein contained to the contrary notwithstanding**, should Tenant desire to assign this Lease or sublet the Premises or any portion thereof, then Tenant shall send to Owner a written notice by registered mail, return receipt requested, at least thirty days prior to the date that Tenant intends such assignment or subletting to commence, setting forth the proposed commencement date of such assignment or subletting.... **In the case of an assignment or subletting of the entire Premises, within thirty days after receipt of the aforesaid notice, Owner may notify Tenant that Owner elects (a) to cancel this Lease, in which event such cancellation shall become effective on the date set forth in Tenant's notice as the proposed commencement date of the proposed assignment or subletting**, with the same force and effect as if said date were the expiration date of the Lease.... (Emphasis added).

On October 27, 2004, as part of a broader corporate transaction, LIN LLC acquired the remaining 3.329% shares of CSI to hold a 100% interest in that company. CSI then transferred all of its assets and liabilities to LIN LLC and ceased to exist. According to papers filed by both sides, as a result of CSI's dissolution which left CTC with only one partner - namely LIN LLC - CTC dissolved as a matter of law and merged with LIN LLC. Both parties concede that LIN LLC became the legal successor to CTC's interest in the Lease and this transaction is not challenged by defendant.

In a letter dated November 23, 2004, defendant notified CTC that it was terminating the Lease. In that letter, defendant stated that, as a result of a merger between ATTWS and a wholly owned subsidiary of Cingular Wireless LLC, CTC had assigned its rights under the lease to

Cingular Wireless LLC. Because CTC failed to notify defendant timely, defendant announced that it was compelled to terminate the Lease effective October 26, 2004. On January 11, 2005, defendant commenced a summary proceeding in the Civil Court of New York County to evict CTC. On February 3, 2005, CTC and NCWP commenced the instant declaratory action. Defendant and plaintiffs have stipulated to mark the Civil Court summary proceeding off the calendar pending resolution of this action.

On October 26, 2004 and October 27, 2004, a series of mergers and conversions were filed involving business entities who were parents or indirect parents of CTC, several of which defendant contends triggered its right to recapture the lease under provision 49.5 of the Lease.

When interpreting a written instrument, the intention of the parties should be determined from the language of the instrument, and where the language is unambiguous, “resort cannot be had to extrinsic evidence to contradict the express terms of the writing.” (*Wallace v. 600 Partners Co.*, 205 AD2d 202, 205 [1st Dept. 1994], *aff’d* 86 NY2d 543 [1995]; *see also Teitelbaum Holdings, Ltd. v. Gold*, 48 NY2d 51 [1979]). “It is incumbent on the court, when interpreting a contract, to give the words and phrases contained therein their ordinary, plain meaning.” (*Wallace v. 600 Partners Co.*, 205 AD2d at 208; *see also Mazzola v. County of Suffolk*, 143 AD2d 734, 735 [2nd Dept. 1988]).

First, defendant argues that when Cingular Wireless, LLC purchased 100% of stock in AT&T Wireless Services, Inc. on October 26, 2004, 100% of plaintiff CTC’s ownership interest was assigned to Cingular Wireless, LLC, thereby triggering the right to recapture the Lease. The Lease, in provision 49.1(a), defines an assignment as “the transfer or other disposition of in excess of twenty-five (25%) percent of the issued and outstanding capital stock of Tenant or of

any corporate tenant or subtenant, or the transfer of in excess of twenty-five (25%) percent of the total interest in any other entity (partnership or otherwise) which is Tenant or subtenant....” As CTC was a partnership on October 26, 2004 and the only tenant on the Lease, an assignment by CTC would require that 25% of its interest be transferred or otherwise disposed of. On that date only two partners held an interest in CTC: LIN LLC and CSI. There is no evidence in the record that any of CTC’s partnership interest was transferred in this transaction; rather, the stock sale in question was that of ATTWS, an indirect parent of CTC who is not a party to the lease.

Defendant further contends that regardless of whether CTC’s interest was transferred, the transfer of an indirect parent’s stock is a transfer in the tenant’s “ownership interest,” which effectuates an assignment under the Lease. Reading the Lease to have this effect would require the Court to ignore the “ordinary, plain meaning” (*Wallace v. 600 Partners Co.*, 205 AD2d at 208) of the language agreed upon by the parties, namely that an assignment requires a transfer of more than 25% of “interest in any other entity (partnership or otherwise) **which is Tenant** or subtenant.” (Emphasis added). The assignment provisions of the Lease do not indicate that a transfer of an indirect parent’s stock would have any effect on the Lease.

Second, defendant points to a merger between LIN Cellular Communications Corporation (“LIN Corp.”) - the successor tenant to CTC by operation of law - and LIN Merger Sub LLC on October 27, 2004 as evidence that plaintiff tenant made an assignment triggering defendant’s right to recapture the lease. Again, however, defendant’s argument asks the Court to ignore the clear language of the Lease. Provision 49.1(b) of the Lease provides that, “**Notwithstanding anything to the contrary in this Lease . . .** the Lease may be assigned and the Premises may be sublet, in whole or in part, from time to time, **without Owner’s consent** (but with not less than

thirty (30) days prior notice to Owner) **(i) to any person into or with which Tenant or any successor of Tenant may be merged or consolidated or (ii) to any person which is an affiliate, parent or successor of Tenant.**” (Emphasis added). The evidence submitted by both defendant and plaintiff shows that LIN Merger Sub LLC was formed on October 27, 2004 and that upon effect of the merger, the name of the surviving business was to be LIN Cellular Communications LLC, indicating that the merger was between affiliates as provided for under subsection (ii).² Regardless, however, of whether LIN Merger Sub LLC was an affiliate of LIN LLC, by defendant’s own admission, the transaction was a merger between the successor of CTC and another business entity, falling explicitly under the exception outlined in provision 49.1(b)(i). In fact, none of the documents submitted by either plaintiff or defendant evidence a transaction falling outside the scope of either 49.1(b)(i) or (ii).

Defendant, however, argues that the language in provision 49.1(b), providing that certain assignments between affiliated or merged entities may be done from time to time without the owner’s consent, must be read in conjunction with provision 49.5, which gives defendant the right to elect to recapture the Lease within thirty days of receiving notice of an assignment.

“In interpreting a contract, the document must be read as a whole to determine the parties’ intent, giving a practical interpretation to the language employed so that the parties’ reasonable expectations are realized. Further, a court should not adopt an interpretation which would leave any provision without force and effect.” (*Gonzalez v. Norrito*, 256 AD2d 440 [2nd Dept. 1998],

² The Certificate of Merger between LIN Cellular Communications Corporation and LIN Merger Sub LLC, dated October 27, 2004, states that LIN Merger Sub LLC was formed on the same day. Further, the Wilder affidavit states that LIN Merger Sub LLC had as its sole member LIN Broadcasting LLC.

lv. dismissed, 93 NY2d 888 [1999]). Words in a contract “are never to be construed as meaningless if they can be made significant by any reasonable construction.” (*67 Wall Street Co. v. Franklin National Bank*, 37 NY2d 245 [1975]).

Provision 49.1(a) requires that the tenant obtain written consent for all assignments and states that the owner may withhold consent for any reason. Part (b) of the same provision makes an exception to that general requirement for “(i) persons into or with which Tenant or any successor of Tenant may be merged or consolidated or (ii) to any person which is an affiliate, parent or successor of Tenant,” notwithstanding anything to the contrary in the Lease. Provision 49.5 allows the owner, “[a]nything herein contained to the contrary notwithstanding,” to not only withhold consent, as is provided for in 49.1(a), but also to cancel the Lease within thirty days of receiving notice of the tenant’s intent to assign the Lease. Defendant’s assertion that even though plaintiff was not required to obtain prior consent for an assignment under 49.1(b), defendant could still cancel the Lease upon notice pursuant to 49.5, defies any logical interpretation. Defendant, in its reply affidavit, concedes that the assignments in question do not violate the lease, but argues that the right of recapture applies nonetheless. The express language of the Lease suggests otherwise.

Further, defendant argues in its reply affidavit that “the parties agreed that the right of recapture would still apply so that if the rental market changed substantially enough, Defendant would not be unfairly compelled to endure an entirely new tenancy at antiquated rates.” (Defendant Reply Affidavit ¶ 5). However, nowhere in the contract does it indicate that, regardless of plaintiff’s right to make certain assignments defendant retains the right to recapture. It is well settled that “[c]ourts should not, under the guise of interpretation, rewrite part of an

agreement which is clear and explicit simply because a party's expectation of the bargain does not materialize due to a change in economic climate." (*Wallace v. 600 Partners Co.*, 205 AD2d 202, 206 [1994], *aff'd*, 86 NY2d 543 [1995]). Where, as here, the issue before the court is the question of intention, and it is determinable by the written instrument itself, such question is one of law and is appropriately decided on a motion for summary judgment. (*Teitelbaum Holdings, Ltd. v. Gold*, 48 NY2d 51 [1979]).

The court finds that plaintiffs have satisfied their burden on summary judgment to make a *prima facie* showing of entitlement to judgment as a matter of law. As defendant has failed to raise a triable issue of fact in its papers, the Court grants plaintiff's motion.

Accordingly, it is

ORDERED that defendant's motion for summary judgment dismissing the complaint is denied; and it is

FURTHER ORDERED that plaintiff's cross-motion for summary judgment is granted and defendant's counterclaims and affirmative defenses are dismissed.

The foregoing constitutes the decision and order of this court.

Dated: September 18, 2006

New York, New York

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SEP 26 2006

ENTER: NEW YORK
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HON. KAREN SMITH