[* 1]

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

PRESENT: HON. CAROL EDMEAD PART 35

Justice

The Trieste Group LLC

- v -

ARK Fifth Avenue

INDEX NO. 118632/03

MOTION DATE 3/15/06

MOTION SEQ. NO. 009

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

FILED

MAR 27 2006

COUNTY CLERK'S OFFICE NEW YORK

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, and the transcript of the oral argument on today's date incorporated herein (Lester Isaacs, Reporter), it is

ORDERED that the order to show cause by defendant Ark Fifth Avenue Corp. to enforce a settlement agreement between the parties referenced in the stipulation, dated January 24, 2006 is denied; and it is further

ORDERED that the cross-motion for sanctions and for an order directing defendant Ark Fifth Avenue Corp. to pay a bond into Court is denied; and it is further

ORDERED that the parties shall report to Part 40 for trial on April 21, 2006, 9:30 a.m. There shall be no adjournments of the trial date. It is further

ORDERED that counsel for all parties, and their respective clients shall appear in Part 35 on Monday, March 20, 2006 at 9:30 a.m. for a meeting with the court. It is further

ORDERED that counsel for defendant shall serve a copy of this order with notice of entry within twenty days of entry on counsel for all parties.

This constitutes the decision and order of the Court.

Dated: 3/15/06

HON. CAROL EDMEAD J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

----------X

THE TRIESTE GROUP LLC,

Plaintiff,

-against-

ARK FIFTH AVENUE CORP.,

Defendant.

----------X

Index No. 118632-2003

DECISION/ORDER

HON. CAROL EDMEAD, J.S.C.

MEMORANDUM DECISION[1]

Defendant Ark Fifth Avenue Corp. ("Ark") moves by order to show cause to enforce a settlement agreement between the parties referenced in the stipulation, dated January 24, 2006 which adjourned the court-ordered Referee's hearing on the amount of use and occupancy ("Stipulation").

Order to Show Cause

Counsel for Ark, Michael Buck, asserts that from autumn of 2005 through the winter of 2006, he engaged in settlement negotiations with Stephen Sussman, counsel for plaintiff, The Trieste Group LLC ("Trieste"). The settlement negotiations resulted in an agreement regarding a new sublease between the parties for the space currently occupied by Ark. Incidental to the new sublease, this action was to be settled as to all matters except Ark's independent water damage claims. On January 13, 2006, Trieste's counsel emailed Ark's counsel a draft sublease (Ark, Exh. A).

During subsequent negotiations between counsel, the draft sublease was modified, yet

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[1] The transcript of the oral argument held on today's date (Lester Isaacs, Reporter) is incorporated herein.

two issues regarding withdrawal of the renewal notice and sprinkler charges remained (the "new sublease", Trieste, Exh. B). Trieste's counsel had the new sublease retyped to reflect the modifications. According to Ark, the two minor issues were resolved by Ark's email of January 20, 2006 (Exh. C), by which Ark accepted Trieste's position. Essentially, the new sublease provided that Ark would remain in the premises as subtenant for a ten year term from January 1, 2006 through December 31, 2015, with a five year renewal option. The rent was determined to commence at $259,250.00 per annum, and Ark's right of first refusal was agreed to. Further, the resolution of Trieste's claims for rent during the litigation was agreed to.

Ark contends that on January 20, 2006, the parties had agreed on all the material terms of the new sublease, and entered into the January 24, 2006 Stipulation. According to Ark's counsel, Trieste's counsel confirmed the existence of the settlement at mediation in the Appellate Division, and represented that the only open issue for mediation was the water damage issue. The Stipulation states in pertinent part that:

> . . . plaintiff and defendant have reached an agreement in principle to settle the above-referenced action, which agreement in principle, if consummated, will render academic the determination of market value for use and occupancy, presently scheduled to commence January 25, 2006;
>
> . . . . .
>
> . . . plaintiff has only recently been informed that, as a result of a contemplated sale of the Class A shares of the cooperative corporation which owns the building in which the premises are situated, a significant change in such proprietary lease may be contemplated; and . . . it will not be possible to determine prior to a meeting of the Board of Directors of the cooperative corporation scheduled for January 27, 2006 whether such contemplated changes in the proprietary lease will be effectuated, in the absence of which knowledge it may not be possible to finalize the proposed sublease and related settlement documents;
>
> . . . . .
>
> IT IS HEREBY STIPULATED AND AGREED . . . . as follows:
> 1. The hearing with regard to the determination of market value for use and occupancy

. . . is adjourned without prejudice . . . .

Therefore, Ark argues, the settlement agreement is enforceable. Since the case was resolved pursuant to a superceding agreement, a writing embodying the settlement is not required. Moreover, an oral settlement agreement may be enforced when an adversary has been induced to act in reliance thereon. Here, Ark acted in reliance on the settlement because in the January 24, 2006 Stipulation, Ark agreed to adjourn the Referee's hearing. The sublease is not simply an oral superceding agreement, in that the parties agreed on all material terms of a sublease reflecting that agreement, which Trieste's counsel confirmed both orally and in the Stipulation.

In response, Trieste cross moves for sanctions, including reasonable attorneys' fees, based on Ark's dilatory tactics and frivolous motion, and for Ark to post a bond to insure payment of reasonable use and occupancy. Trieste requests that Ark deposit into Court the difference between its current rent payments to plaintiff ($13/ sq. ft.) and the fair market rental of the premises (over $30/ sq. ft.) retroactive to the expiration of the parties' sublease on December 31, 2003.

Trieste does not contest that the parties reached an agreement in principle to settle their dispute. However, Trieste maintains that such fact is irrelevant. Trieste points out that the "agreement in principle" is followed by the phrase "if consummated," was circulated with a cover note indicating that "we have not yet concluded out settlement discussions with Ark." Further, the "agreement in principle" is no different from the written advice given by Trieste to Ark on November 21, 2005, that the "settlement is contingent upon the execution of a mutually

acceptable sublease incorporating such terms, and the approval of such sublease by the overlandlord." The agreement in principle was not consummated by the "execution of a mutually acceptable sublease incorporating such terms, and the approval of such sublease by the overlandlord." The absence of an executed sublease bars enforcement of any agreement in principle.

Furthermore, even if the parties having reached an agreement in principle were not legally irrelevant, it would be unwarranted to turn the "agreement in principle" into an enforceable settlement given that there are several material issues open since the time Trieste proposed an alternative settlement approach rejected by Ark.

On January 5, 2006, Ark requested a further option of withdrawing the exercise of the five-year renewal option if it was dissatisfied with the market rent determined by an appraisal process. On January 13, 2006, Trieste proposed that the withdrawal of the exercise of such option would require Ark to reimburse Trieste for the cost of the appraisers and that Ark would be responsible for at least 6 months' rent at the market rent as determined by the appraisal process. On January 20, 2006, Ark agreed to pay the appraisers but would pay the higher rent only so long as it remained in the premises. This open issue would involve a difference of about $180,000 (6 months' rent). On January 20, 2006, Trieste notified Ark that a recent development had occurred that "may require fairly substantial changes in the non-monetary provisions of the proposed Sublease" (Trieste, Exh. 14). The owner of the Class A voting shares of the cooperative corporation (Old Glory) advised Trieste of its intent to sell its shares in the building to a purchaser in a transaction in which significant changes in the proprietary lease were proposed. Thus, Trieste could not accept Ark's request in the proposed sublease that any

modifications to the proprietary lease "not have a material adverse effect on" Ark's "rights or obligations under this Sublease" (¶5(a)).

Trieste notes that on January 11, 2006, Ark transmitted to Trieste a "Settlement Agreement Draft," which referred to the "simultaneous execution" of the sublease annexed thereto as Exhibit A (which was not annexed), limited releases, and a stipulation of discontinuance. The Settlement Agreement Draft provided that all of the documents set forth shall be held in escrow by Ark's counsel, "subject to receipt of all necessary consents to the Sublease Agreement, from the cooperative board of 85 Fifth Avenue, and any other requisite consents to make the Sublease Agreement valid and in full force and effect."

On January 13, 2006, Ark also proposed a modification to the proposed sublease regarding fixtures and attachments to the premises (Exh. 11, ¶9(f)). Ark was advised that such provision would require an inspection by Trieste and its engineer, and arrangements were made for such inspection on January 30, 1:30 p.m. During the inspection, it was observed that the workmanship was inferior, code violations were probable, and various documents (filed plans, mechanical equipment use cards, fire alarm sign-off) were requested (See follow up letter, dated January 31, 2006). On February 3, 2006, Ark provided one electrical sign off.

The proposed sublease referred to an irrevocable and transferrable letter of credit, in the form of Exhibit A, to be delivered to Trieste by Ark, and Ark proposed the deletion of the phrase "satisfactory to Lessor." No form of letter of credit was ever transmitted to Trieste.

The proposed sublease was also subject to Old Glory's consent (¶5[e]), which was never sought inasmuch as the sublease was never finalized.

Ark's representation that the parties reached an agreement regarding a new sublease after

all settlement discussions had concluded are intentional misstatements of material fact and belied by contemporaneous documentation, warranting sanctions.

In reply, Ark argues that with respect to the alleged open issues, none of them were open as of January 20, 2006. The parties agreed to the fixture provision of the sublease (Trieste Exh. 11, ¶9(f)), and the post agreement process of inspecting the premises and obtaining documents did not have anything to do with the sublease provision itself. There was no dispute as to the language of the lease extension in the sublease and Ark's email (Trieste Exh. 14) simply reflects the fact that if the lease extension became effective, Ark might not need to stay in possession during the entire six-month extension period. The form of the lease between Trieste and Old Glory and the impact of any changes to that lease were not open issues, since there was a complete agreement between the parties as to the effect of the Old Glory lease and that the new sublease was subject to the overlease. Further, the ancillary documents, *i.e.*, the letter of credit, were not open issues. The ministerial act of signing them was never in dispute and is completely immaterial. Ark also contends that the totality of the circumstances, the parties' emails, and admissions of the parties concerning the material terms, indicate that a definite agreement between Ark and Trieste exists and is enforceable. In fact, in response to the January 20, 2006 email from Ark, Trieste's counsel did not state that there were any open issues, but was only concerned about waiting until the Board of Directors discusses the matter before "finalizing the form of the Sublease."

Additionally, there is no basis to order a bond.

In reply in support of the cross-motion, Trieste argues that the contention that Trieste blindly approved in advance the request that it be required to accept, as is, and absorb the cost of

necessary modifications, removal, and repair of fixtures to the premises, which could aggregate many tens of thousands of dollars is absurd and false. Also, there is no prejudice to Ark being required to post a bond and deposit funds into the Court. Further, an out-of-court settlement must be adequately described in a signed writing. Thus, even if the parties had agreed to all the terms of the sublease, it is undisputed that the Settlement Agreement Draft of January 11, 2006 was never signed or even commented upon by Trieste.

Analysis

Where the parties contemplate that a signed writing is required there is no contract until one is signed and delivered (*Municipal Consultants & Publishers, Inc. v Town of Ramapo* (47 NY2d 144). For example, parties which clearly express an intention not to be bound until their preliminary negotiations have culminated in the execution of a formal contract cannot be held bound to the agreement unless execution has occurred (*Brause v Goldman*, 10 AD2d 328 [1st Dept 1960]). Even where the parties may not have expressly reserved the right not to be bound prior to the execution of the signed contract, language contained in correspondence exchanged in connection with the contract may establish an intent to be bound only after a formal signing (*see Dratfield v Gibson Greetings*, 269 AD2d 294 [1st Dept 2000]). Thus, it has been held that unless there has been execution [and delivery] of a lease, there is no valid written agreement (*see Beck v New York News*, 92 AD2d 823 [1st Dept 1983]), which is consistent with the principle that the due signature of a lease instrument is but one step in the process of conveying an interest in land (*219 Broadway v Alexander's, Inc.*, 46 NY2d 506 [1979]).

This rule yields, however, when the parties have agreed on all contractual terms and have

only to commit them to writing (*Municipal Consultants & Publishers, Inc. v Town of Ramapo, supra*). When this occurs, the contract is effective at the time the oral agreement is made, although the contract is never reduced to writing and signed *(Municipal Consultants & Publishers, Inc. v Town of Ramapo, supra*). Where all the substantial terms of a contract have been agreed on, *and there is nothing left for future settlement*, the fact, alone, that it was the understanding that the contract should be formally drawn up and put in writing, does not leave the transaction incomplete and without binding force, *in the absence of a positive agreement that it should not be binding until so reduced to writing and formally* (*Municipal Consultants & Publishers, Inc. v Town of Ramapo, supra*) (emphasis added).

Consistent therewith, even where there is no expressed intent to be bound only upon the execution of a formal contract, where there are substantial changes to a draft contract and correspondence subsequent to the draft contract indicate that there was never a meeting of the minds on material terms, the parties are not bound to the contract which was not delivered fully executed (*see Yenom Corp. v 155 Wooster Street, Inc.*, 23 AD3d 259 [1st Dept 2005]; *Venture Manufacturing v Matco Group, Inc.*, 6 AD3d 850 [3d Dept 2004] [parties' correspondence also memorialized the need to resolve numerous additional material terms before any binding sublease agreement could be finalized]).

Ark cites to a lengthy portion of the case, including the caselaw noted above, *Municipal Consultants & Publishers, Inc. v Town of Ramapo* (47 NY2d 144) for the proposition that a binding agreement can be created absent a signed writing. However, just as Ark ignores the impact of (and failed to submit) relevant email correspondence surrounding the settlement negotiations, Ark does not address the qualifying phrases contained in the above quoted material.

The balance of the Court's analysis of the quoted material in *Municipal* is critical. The Court in *Municipal* continued:

> . . . Here, of course, there was no understanding that the agreement would not be binding, short of formal execution by the supervisor . . . . *All the terms* of the contract had been negotiated and agreed upon. They were, in fact, expressed in Municipal's written standard contract which had been modified in several slight respects through negotiations. *There was no understanding or agreement that the contract would not be binding until both parties had signed it, and therefore it is enforceable although it was never memorialized with a mutually signed writing.*

Although Ark seeks to rely on select email correspondence to establish Trieste's alleged unconditional agreement to the sublease terms, Ark fails to appropriate the proper weight to the other correspondence which indicated that settlement was not concluded. In November 2005, the "proposed settlement terms – outlined in the Term Sheet" were approved by Trieste, and "[t]he settlement [was] *contingent upon* the *execution* of a mutually acceptable sublease incorporating such terms, and the approval of such sublease by the overlandlord" (emphasis added) (Trieste, Exh. 3). After receiving Ark's proposed changes on January 5, 2006, Trieste responded that the "overwhelming majority of the suggested changes in the proposed Sublease are both substantive and unacceptable" (Trieste, Exh. 8). The January 10, 2006 Settlement Agreement draft sent by Ark indicated that the parties would execute and deliver to each other the sublease agreement in the form annexed as Exhibit A, which was to be held in escrow subject to receipt "of all necessary consents to the Sublease Agreement" from 85 Fifth Avenue's cooperative board and "the requisite consents to make the Sublease Agreement valid and in full force and effect." The Settlement Agreement Draft further provides that in the event the "requisite consent" was not obtained, the Sublease Agreement "shall be null, void and of no further force and effect." (Trieste, Exh. 9). The January 20, 2006 email from Ark indicates an acceptance of a proposal by

Ark, however, such acceptance (to pay the appraisers and the higher rent number for up to 180 days) was conditioned on Ark's ability to "stay that long" and in fact, was not consistent with the proposal by Trieste preceding such acceptance. Moreover, the later January 20, 2006 email from Trieste in response indicated the potential for "future conflict" in light of possible substantial changes to the Old Glory overlease, which would impact the sublease's provision that "any modifications [to the overlease] do not have a material adverse effect on [Ark's] rights or obligations under this Sublease" (Second draft, ¶5(a)). The January 24, 2006 letter indicates that the parties "have not yet concluded our settlement discussions." And, the very Stipulation upon which Ark relies to demonstrate Trieste's acknowledgment of the new sublease states that the agreement in principle, *if consummated*, will render the use and occupancy hearing academic, and that it was not possible to finalize the sublease in light of recent developments. The Oxford English Dictionary defines "consummated" as perfected, completed, and finished (Oxford University Press 2004). Thus, this Stipulation, which was executed by all parties, demonstrates that it was understood that the "agreement in principle" was not able to be finalized, perfected, completed, and finished at that time in light of certain terms of the proposed Sublease. Further, the inspections and documents requested on January 31, 2006 were tied to Arks's proposed modification to the sublease regarding fixtures.

Thus, the language contained in correspondence exchanged in connection with the proposed Sublease establishes that the parties' settlement negotiations were not concluded such that the mere ministerial act of execution was pending. Instead, the correspondence indicates that the settlement was not finalized or consummated, and that there was an intent to be bound only after a formal signing of the Sublease and Settlement Agreement. Notably, the proposed

new sublease was only part of the overall settlement of the action, which required "execution of a mutually acceptable sublease" and approval from the overlandlord (Trieste, Exh. 3). Further, it cannot be said that there was nothing left for future settlement or negotiation of either the settlement of the action or the proposed sublease.

The cases upon which Ark rely are either factually or legally distinguishable.

Turning to Trieste's cross-motion, the application for sanctions and for Ark to post a bond, is denied. Although Ark's order to show cause fails, Trieste's application for the imposition of costs and/or sanctions is unwarranted. 22 NYCRR § 130-1.1 permits a court, in its discretion, to award sanctions for frivolous conduct. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues, the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party (22 NYCRR § 130-1.1). In this case, although Ark's reliance on caselaw was misplaced, its use of valid law as a basis for the order to show cause eliminates the characterization of Ark's application as frivolous. Ark's attempt to enforce the parties' proposed sublease by the instant order to show cause was not necessarily a delay tactic to avoid the hearing on use and occupancy or the trial, since the recent adjournment of the hearing on use and occupancy was done in light of the parties' attempt to consummate the sublease (*see* Stipulation). The Court declines to order a bond, given that the caselaw and section upon which Trieste relies does not adequately support the posting of a bond in the amount sought.

Based on the foregoing and the transcript of the oral argument on today's date

incorporated herein (Lester Isaacs, Reporter), it is

ORDERED that the order to show cause by Ark enforce a settlement agreement between the parties referenced in the stipulation, dated January 24, 2006 is denied; and it is further

ORDERED that the cross-motion for sanctions and an order directing Ark to pay a bond into Court is denied; and it is further

ORDERED that the parties shall report to Part 40 for trial on April 21, 2006, 9:30 a.m. There shall be no adjournments of the trial date. It is further

ORDERED that counsel for all parties, and their respective clients shall appear in Part 35 on Monday, March 20, 2006 at 9:30 a.m. for a meeting with the court. It is further

ORDERED that counsel for defendant shall serve a copy of this order with notice of entry within twenty days of entry on counsel for all parties.

This constitutes the decision and order of the Court.

Dated: March 15, 2006

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