401 W. 14th St. Fee LLC v Mer Du Nord Noordzee, LLC
2006 NY Slip Op 30525(U)
June 23, 2006
Supreme Court, New York County
Docket Number: 11761/05
Judge: Joan A. Madden

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

PRESENT: Madden Justice PART 11

401 West 14th St.

INDEX NO. 117619/05

MOTION DATE

- v -

MOTION SEQ. NO. 01

Mer Du Nord Noordzee

MOTION CAL. NO.

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

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

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and action are determined in accordance with the annexed decision, order and judgment.

UNEILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B)

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

Dated: June 23, 2006

J.S.C.

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 11

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401 WEST 14TH STREET FEE LLC,

Plaintiff,

INDEX NO. 11761/05

-against-

MER DU NORD NOORDZEE, LLC, d/b/a "MARKT" RESTAURANT,

Defendant.

JOAN A. MADDEN, J.:

This is an action for declaratory and injunctive relief with respect to a lease for commercial restaurant premises located in the "meat-packing district" in Manhattan. Plaintiff 401 West 14th Street Fee LLC ("current owner" or "14th Street Fee") originally moved by order to show cause for a preliminary injunction enjoining the defendant tenant Mer Du Nord Noordzee, LLC ("Mer Du Nord") from interfering with its rights to post a "to let" sign at the premises and for access to the premises to show to prospective tenants. Mer Du Nord opposed the motion and cross-moved for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the complaint.

As a result of a series of conferences and discussions with this Court, the parties essentially reached an agreement as to the preliminary injunctive relief sought by plaintiff 14th Street Fee. The parties further agree that the only issue remaining to be resolved in this action, is the issue raised in defendant Mer Du Nord's cross-motion, which goes to the ultimate relief sought in the complaint, namely a declaratory judgment as to the effectiveness and validity of the notice of termination, which states that the lease will terminate as of June 30, 2006.

The following facts are not disputed unless otherwise noted. By a lease dated May 28 1998, the former owner, 401 West 14th Realty LLC ("former owner" or "14th Realty") leased to defendant Mer Du Nord the ground floor and basement of the building located at 401 West 14th Street. Although the lease provides for a 15-year term which commenced on June 1, 1998 and expires on May 31, 2013, it also gave the former owner the right to terminate the lease 7 ½ years after its commencement, pursuant to the terms as outlined in paragraph 84:

> 84. Sale of Building/Land Use Change/Early Lease Termination. Notwithstanding any other provision of the Lease or extension thereof, it is agreed that after the completion of seven and one-half (7 ½) years of this lease that in the event that the Owner determines that it must reoccupy said premises in preparation or furtherance of a bonafide sale or redevelopment of the entire [emphasis in original] property into residential use then in this event the owner shall have the option to terminate the Lease Agreement upon delivery of written termination notice to the Tenant by certified and regular mail advising the Tenant that its lease terminates no less than six (6) months from the date of the termination notice, but in no event earlier that June 1, 2006. The Tenant acknowledges that this clause was expressly bargained for and that the Tenant considers the six (6) months notice provision sufficient time to vacate and no additional consideration is required, nor was bargained for. Upon such termination and vacatur, all of the lease obligations of the parties shall end. Landlord will furnish Tenant with proof of any such sale or redevelopment when such notice is given.

On December 2, 2005, the former owner issued a termination notice to Mer Du Nord stating that it had entered into a contract to sell the property, and pursuant to paragraph 84, was exercising its right to terminate the lease effective June 30, 2006; the notice also gave Mer Du Nord more than six months' notice of the termination. The notice states in pertinent part:

> PLEASE TAKE NOTICE that the Owner has entered into a bona fide contract of sale to sell the Building. More Specifically, Owner has entered into a Contract of Sale dated March 7, 2005 with respect to the entire Building (and the property on which it stands with TIP Acquisitions LLC – an entity which is not affiliated with Owner – scheduled to close on or about December 6, 2005. (A copy of the Contract of Sale without exhibits [except as relevant here], and with all payment-

> related terms redacted, is annexed hereto.) And Owner has determined that in preparation and/or furtherance of the sale it must reoccupy the premises. (See in this regard Contract of Sale "Exhibit R".) [emphasis in original]

After quoting paragraph 84 of the lease, the termination notice states that

> pursuant to Lease ¶84, please take notice that Owner is terminating your Lease as of June 30, 2006, a date which is at least six (6) months from the date of this notice (and this notice is deemed given as of the date of hereof pursuant to Lease ¶27). Accordingly, as of June 30, 2006 this Lease and the term thereunder shall end and expire as fully and completely as if the expiration of said six (6) months period was the day herein definitely fixed for the end and expiration of this lease and the term thereof, and you shall be required to then quit and surrender the demised premises, broom clean, and having delivered the keys to the Premises to the then-landlord at the time of surrender.

In response to the termination notice, Mer Du Nord's counsel sent the former owner a letter dated December 9, 2005 stating that they were in the process of reviewing both the lease and 14th Realty's letter to ascertain the propriety of "your attempt to terminate Tenant's Lease" and that they were unable to determine whether there was bona fide contract to sell the building "because the copy of the Contract furnished to us was redacted. Please forward to me a copy of the complete, fully executed Contract as soon as possible" (emphasis in original).

On December 12, 2005, 14th Realty's counsel e-mailed Mer Du Nord's counsel and enclosed an unredacted copy of the contract of sale. The e-mail stated that the closing of the sale of the building was scheduled for "later that week," and that 14th Realty "believes" that the December 2, 2205 termination notice "is fully sufficient as it stands . . . [and] rejects the assertion in your letter that you cannot determine from what was already included in the Termination Notice . . . whether or not the contract of sale here is bona fide (–for you well know that it is a bona fide sale contract). Without prejudice to the foregoing, however, and fully reserving all rights, Current Owner [14th Realty] has directed us to forward to you a complete and

fully executed copy of the contract; and this transmission shall be deemed to relate back to, and to supplement, the Termination Notice, as if originally provided as part thereof."

On December 13, 2005, Mer Du Nord executed a "Lease Estoppel Certificate," which, *inter alia*, states that "Landlord is in default of its obligations under the Lease, including without limitation . . . Landlord's improper termination of the Lease."

The closing of the sale of the property took place on December 15, 2005 and 14th Realty transferred its interest to the new owner, plaintiff 14th Street Fee. On or about December 21, 2005, the new owner commenced the instant action by securing an order to show cause seeking preliminary injunctive relief. The complaint asserts a First Cause of Action for a judgment declaring that the termination notice is effective and that Mer Du Nord is "obligated to comply therewith, to not interfere with the New Owner's interim rights relating to the re-letting of the premises, and to timely surrender possession on or before June 30, 2006 as stated in the Termination Notice." The Second Cause of Action seeks a preliminary and permanent injunction "forbidding" Mer Du Nord from interfering with the new owner's efforts to re-let the premises and directing Mer Du Nord "to initiate a winding-down of its business" so that it can surrender possession on June 30, 2006. The Third Cause of Action seeks attorney's fees pursuant to paragraph 62 of the lease. In response to plaintiff's order to show cause, Mer Du Nord cross-moved to dismiss the complaint.

As noted above, the only outstanding issue for determination is whether the lease was validly terminated in accordance with paragraph 84. The resolution of this issue turns upon the interpretation of that lease provision, specifically the circumstances under which the lease may be terminated prior the to expiration of the 15-year term. Plaintiff 14th Street Fee asserts that

paragraph 84 provides for early termination in the event of either a "bona fide sale" or a redevelopment of the entire property into residential use. Mer Du Nord agrees that there are two conditions which trigger the early termination clause, either a bona fide sale or a redevelopment of the entire property, but argues that both those conditions are modified by the phrase "into residential use"; in other words, in the event of either a sale or a redevelopment of the property, the entire building must be converted to residential use, including Mer Du Nord's first floor and basement premises. The dispute underlying this action arose as a result of the new owner's expressed intention to continue leasing space in the building, including Mer Du Nord's premises, for commercial use. For this reason Mer Due Nord maintains that its lease cannot be terminated early pursuant to paragraph 84.

It is well settled that the interpretation of a lease provision is governed by the same rules of construction applicable to other contractual agreements. George Backer Management Corp. v. Acme Quilting Co., 46 NY2d 211, 217 (1978); Missionary Sisters of the Sacred Heart v. New York State Division of Housing & Community Renewal, 283 AD2d 284, 288 (1st Dept 2001); New York Overnight Partners, L.P. v. Gordon, 217 AD2d 20 (1st Dept 1995), aff'd 88 NY2d 716 (1996). Where the terms of a contract are straightforward, clear and unambiguous, its interpretation presents a question of law for the court, and the parties' intent must be gleaned from the four corners of the agreement, based upon the language employed on the face of the contract, without resort to extrinsic or parol evidence. See Greenfield v. Phillies Records, Inc., 98 NY2d 562, 569-570 (2002); 150 Broadway N.Y. Assocs. v. Bodner, 14 AD3d 1 (1st Dept 2004). The parol evidence rule forbids proof of an oral agreement that might add to, vary or contradict the terms of a written contract. See Stage Club Corp. v. West Realty Co., 212 AD2d 458, 459

(1st Dept 1995).

Here, the intent of the parties can be gleaned from the clear and unambiguous language of paragraph 84, which gave the former owner the right to terminate the lease "in the event that the Owner determines that it must reoccupy said premises in preparation or furtherance of a bonafide sale or redevelopment of the entire property into residential use" [emphasis in original]. Contrary to Mer Du Nord's contention, the phrase "into residential use" does not modify the phrase "bona fide sale," as the use of the disjunctive "or" to separate "bona fide sale" from "redevelopment of the entire property for residential use" indicates that each phase is separable and is be construed as a separate alternative ground for terminating the lease. See Cresvale Int'l Inc. v. Reuters America, Inc., 257 AD2d 502, 505 (1st Dept 1999); Pig Restaurant, Inc. v. Odelia Enterprises Corp., 244 AD2d 196 (1st Dept 1997); Med Mac Realty Co., Inc. v. Lerner, 154 AD2d 656, 660 (2nd Dept 1989), app dism 75 NY2d 1004 (1990); Quantum Maintenance Corp. v. Mercy College, 8 Misc3d 885, 891 (Sup Ct, Rockland Co 2005); Bassuk Bros. Inc. v. Utica Insurance Co., 2002 WL 31925593 (Sup Ct, Kings Co 2002), aff'd 1 AD3d 470 (1st Dept 2003), lv app dism 3 NY3d 696 (2004). Since the early termination clause was written in the disjunctive, the limiting language "into residential use" modifies only the immediately preceding phrase regarding the "redevelopment of the entire property." And the separate provision for termination in the alternative event of a "bona fide sale" must be considered as written, to mean a bona fide sale in the broadest sense, without any restriction as to how the building will be used once it is sold.

Mer Du Nord's arguments to the contrary are not persuasive. First, the use of the phrases "this event" and "such sale" in paragraph 84 does not indicate that the right of termination was

intended to be limited in the manner suggested by Mer Du Nord. Furthermore, the use of "or" in the provision requiring the "Landlord to furnish Tenant with proof of any such sale or redevelopment," to separate "sale" from "redevelopment," reinforces the foregoing analysis of the use of the disjunctive to mean in either event. Second, Mer Du Nord's reliance on extrinsic and parol evidence, which includes the history of the lease negotiations, the language in prior drafts of the instant lease and the language in other tenants' leases, is misplaced, as the interpretation urged by Mer Du Nord narrows and conflicts with the scope of the termination clause as written. Where as here, the lease is clear on its face as written, such extrinsic and parol evidence is not properly considered to vary its terms. See American Building Maintenance Co. v. Solow Management Co., 7 AD3d 331 (1st Dept), lv app dism 4 NY3d 702 (2004).

Mer Du Nord's further arguments as to substantive and procedural defects in the notice of termination are without merit. Mer Nord asserts the March 2005 contract of sale could not serve as the predicate for the December 2, 2005 notice of termination, because the lease required the former owner to wait until the 7 ½ year period had run before making any "determination" to reoccupy the building. By its clear and express terms, the lease is not so restrictive. Paragraph 84 simply required the former owner to wait until the 7 ½ year period expired on December 1, 2005, before taking steps to terminate the Mer Du Nord's lease by serving a notice of termination. The lease did not impose any restrictions on the former owner's rights prior to the expiration of that period, to negotiate a sale or to execute a contract of sale, in which it agreed to exercise its right, under the lease, to terminate Mer Du Nord's lease, once that right accrued.

Mer Du Nord also argues that the former owner's determination to reoccupy the premises was not "in preparation or furtherance of a sale," as required under paragraph 84 of the lease,

since when the notice of termination was sent, the former owner "had long since contracted to sell" the building and "*a fortiori* the former Owner could not have determined that it 'must reoccupy said premises' in preparation or furtherance of a sale that had already occurred." This argument is difficult to follow, but at best it appears that Mer Due Nord asserts the use of the word "reoccupy" in the paragraph 84, required the former owner to take actual physical possession of premises prior to executing any contract for the sale of the building. Once again, the imposition of such a requirement would rewrite the clear and express terms of the lease by imposing a more restricted meaning than the clear import of the provision as written.

Mer Du Nord further argues that since the contract of sale predated the termination notice, the former owner improperly "ceded" its right to the purchaser to make a "determination" as to the termination of the lease. This argument is likewise hard to follow, but appears to be based upon the use of the word "determines" in the portion of paragraph 84 which provides "in the event the Owner determines that it must occupy said premises." Such argument is unsupported by the record. It cannot be disputed that the former owner's name appears on face of the termination notice, and is signed by a Gerald Sussman as a "Member" of "401 West 14th Realty LLC." Moreover, the contract of sale was presumably negotiated by the former owner and the purchaser, and pursuant to Section 17.14, the former owner expressly agreed to terminate eight specific leases, including Mer Du Nord's Lease. Exhibit R to the lease lists the names of the eight tenants whose leases were to be terminated by the "seller," and notes with respect to Mer Du Nord, that "Tenant to be issued Termination Notice by Seller on December 2, 2005."

Finally, Mer Du Nord asserts that the termination notice was procedurally defective for not including a complete and unredacted copy of the March 2005 contract of sale. Upon

acknowledging receipt of the termination notice and the redacted contract of sale, Mer Du Nord's counsel objected to the contract in its redacted form, and the former owner promptly responded with an unredacted copy, which included the purchase price. Paragraph 84 required the former owner to "furnish Tenant with proof of any such sale or redevelopment when such notice [of termination] is given." While this provision required "proof" of the sale, it does not specify or define the nature or substance of such proof. Under these circumstances, absent specific language in the lease indicating otherwise, the submission of the copy of the contract of sale with the purchase price redacted, as supplemented by the follow-up submission of the unredacted contract, sufficiently satisfied the lease requirement to furnish "proof" of the sale. As to Mer Du Nord's further assertion that it was entitled to "proof" that the prospective purchaser was not affiliated with the former owner, the lease does not require such proof.

Based on the foregoing, the Court concludes that the former owner properly exercised its right to terminate Mer Du Nord's lease pursuant to paragraph 84 based upon a bona fide sale of the property, and that pursuant to the December 2, 2005 notice of termination, the termination of Mer Du Nord's lease is effective as of June 30, 2006.

In view of this decision, order and judgment, plaintiff's First and Second Causes of Action for declaratory and injunctive relief have been resolved. The Third Cause of Action seeks attorney's fees pursuant to paragraph 62 of the lease, which provides that "in the event of the Tenant's breach of this lease, the Tenant shall be responsible to the Landlord for reasonable legal fees incurred by the Landlord in the enforcement of any provision of this lease, provided Landlord is the successful party in a lawsuit." Under this provision, plaintiff is entitled to attorney's fees upon the successful prosecution of a claim for breach of the lease. The instant

action, however, is limited to claims for declaratory and injunctive relief. Thus, absent a claim for breach of the lease, no basis exists for awarding attorney's fees, and the Third Cause of Action must be dismissed.

Accordingly, it is hereby

ADJUDGED AND DECLARED that Mer Du Nord's lease was validly terminated in accordance with paragraph 84, and pursuant to the December 2, 2005 notice of termination, the termination of Mer Du Nord's lease is effective as of June 30, 2006; and it is further

ORDERED that plaintiff's motion for a preliminary injunction is denied; and it is further

ORDERED that defendant's cross motion to dismiss the complaint is denied; and it is further

ORDERED that plaintiff's Third Cause of Action for attorney's fees is dismissed.

DATED: June 23, 2006

ENTER:

J.S.C.