

Whitehall Dev. Corp. v Eldad, LLC

2006 NY Slip Op 30814(U)

May 15, 2006

Supreme Court, New York County

Docket Number: 116330/05

Judge: Walter B. Tolub

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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WHITEHALL DEVELOPMENT CORPORATION,

Plaintiff

**Index No. 116330/05
Findings of Fact and
Conclusions of Law**

-against-

ELDAD, LLC, THE MONIAN GROUP &
CUSHMAN & WAKEFIELD
Defendants.

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FILED

MAY 16 2006

**NEW YORK
COUNTY CLERK'S OFFICE**

WALTER B. TOLUB, J.:

This constitutes the court's findings of fact and conclusions of law after a hearing conducted on February 21, 2006.

Plaintiff is the commercial tenant of the eighth and ninth floors of the building located at East 57th Street, New York, New York. Defendant Eldad, LLC ("Eldad" or "Landlord") is the landlord of the Subject Premises. Defendants The Monian Group and Cushman & Wakefield, Inc. are Defendant's managing agents.

Plaintiff commenced this action by summons and verified complaint dated November 21, 2005 which Complaint seeks, *inter alia*, injunctive relief requiring Defendants to immediately sign and return a Department of Buildings ("DOB") public assembly permit application. Defendants' answer denies the allegations of the Complaint and pleads laches as a defense in that the Plaintiff failed to timely seek the Court's intervention.

By Order to Show Cause dated November 28, 2005, Plaintiff sought injunctive relief requiring Defendants to sign the public assembly permit application. The Court ordered "an immediate hearing date", and a hearing was conducted on February 21, 22 and 23, 2006. Plaintiff established it operates a health club and spa in the Subject Premises under the name "New York Health and Racquet Club" pursuant to a commercial lease agreement dated February 28, 1996 (the "Lease") between Plaintiff and Eldad's predecessor-in-interest, Laszlo N. Tauber, M.D. & Associates. (See Exhibit 1). On May 6, 1996, Plaintiff obtained a public assembly permit from the New York City Department of Buildings ("DOB") which states that the lawful use of the Subject Premises is a private health club. (See Exhibit 5).

On January 25, 2002, Eldad became landlord of the Subject Premises (See Exhibit 3). Pursuant to a Lease Modification between Plaintiff and Eldad dated March 1, 2004 (the "Lease Modification"), Plaintiff surrendered its leasehold interest in the sixth and seventh floors of the Building but retained its leasehold interests in the eighth and ninth floors. (See Exhibit 2).

The Lease memorializes Plaintiff's unequivocal right to lawfully use the Subject Premises as a health club and spa.

Article 3, Section 3.1 of the Lease States:

Tenant may use and occupy the Demised
Premises for the Permitted Use and for no

other purpose, subject to the terms and provisions of this Lease and any applicable laws. Landlord acknowledges that the Tenant is affiliated with the New York Health and Racquet Club (HRC), which HRC may actually conduct the operations at the Demised Premises. . . .

"Permitted Use" as defined in the lease is:

. . . a private health club and spa for tenants and HRC's members, guests and customers only . . . including without limitation open exercise areas, fitness equipment areas, swimming pools, locker rooms, sports and recreational facilities, spa services . . . offices, restaurant and other purposes related to a private health club business . . .

(Id., at Article 1, § 1.1 ©).

The Lease additionally states that:

Tenant shall not use or occupy the Demised Premises, or allow the Demised Premises to be used or occupied, in 'violation of law' or the Certificates of Occupancy issued for the building . . .

(Id., Article 3, § 3.3(a)).

Moreover, the Lease requires that Defendants assist Plaintiff in obtaining a public assembly permit, including but not limited to signing the public assembly permit application.

Section 5.1 of the Lease states:

Except for decorative work or non-structural alterations . . . Tenant shall make no other alterations, additions, or improvements . . . in, on or about the Demised Premises without the Landlord's prior written consent. Landlord agrees not to unreasonably withhold its consent to the construction and/or alterations which are in compliance with applicable 'Legal Requirements' and do not

affect the exterior appearance, value or structural integrity of the Demised Premises Building, Structure or Site including, without limitation, the exterior and interior windows and walls.

Section 5.2 of the Lease states:

Tenant shall submit to Landlord detailed plans and specifications . . . for such proposed Alterations and shall not commence any such Alterations without first obtaining Landlord's written approval . . . Landlord will cooperate in the obtaining of permits, approval or certifications needed for the Alterations or Tenant Changes.

(Id.)

Critically, Section 5.5 of the Lease states:

Landlord agrees to respond to Tenant's submission of alteration proposals and plans and specifications within ten (10) days, except if Landlord determines that an architect's or engineer's review is needed, then within twenty (20) days. If Landlord has not responded to Tenant's notice within eleven (11) business days, Tenant may give Landlord a second notice and, if Landlord does not respond within five business days therefrom, Tenant's alteration proposals and plans and specification shall be deemed accepted.

(Id.)

Plaintiff's architect, Frank Denner, a registered architect with twenty years experience, stated that he has designed and had been responsible for the legal construction of approximately thirty health clubs in the New York area. As is relevant here, he designed layouts for various New York Health and Racquet Clubs, including their flagship health club at 62 Cooper Square.

Mr. Denner is familiar with the New York City Building Code and has previously qualified as an expert at trial on "three to four" occasions.

Mr. Denner testified that he assisted Plaintiff in obtaining its public assembly permit in 1996, and in 2004, he was retained by Plaintiff to draw architectural plans for alteration work to the eighth and ninth floors pursuant to the Lease Modification and in accordance with the New York City Building Code. (See Exhibit 5). Mr. Denner stated that Defendants approved the alteration work and signed the application, thus enabling Mr. Denner to submit an alteration application and architectural plans to the DOB which alteration work was approved and permitted. (See Exhibits 4 and 6). Mr. Denner stated that the alteration work was completed toward the end of 2004.

Mr. Denner testified that DOB regulations require Plaintiff to obtain a new public assembly permit as a result of the alteration work. Mr. Denner stated that he prepared plans and a public assembly permit application for Plaintiff which was submitted for Defendant's signature by Plaintiff's expediter, I&L Consulting Inc., in February 2005. (See Exhibit 7). Mr. Denner stated that Defendants knew that Plaintiff was unable to obtain a public assembly permit without obtaining Defendant's signature and Plaintiff would be unable to defend itself against the DOB and Environmental Control Board ("ECB") Violations without the

permits. (See Exhibits B through D).

Mr. Denner testified that he made several telephone calls to obtain Defendant's signature which calls were ignored. Itzhak Hashinovski of I&L Consulting Inc., testified that he sent the public assembly permit application to Defendants in February 2005 but never received a response.

Plaintiff's Property Manager Director of Operations, Jeff Bodnar, testified that the Monian Group and Cushman & Wakefield received a second copy of the public assembly permit application on or about June 22, 2005. Mr. Bodnar stated that he repeatedly contacted Tony Vetrano of Cushman & Wakefield, Joseph Monian of the Monian Group and Gabriel Dagan of the Monian Group regarding the status of the permit application. Mr. Bodnar confirmed that Defendants received the application, and continued to inquire as to when Defendants would sign the application and, finally, as to why Defendants would not sign the application. (See Exhibit 10). Mr. Bodnar stated that he never received an explanation as to why Defendants refused to sign the application. Tony Vetrano admitted that he received the application and discussed the e-mails which mirrored the e-mails produced by Mr. Bodnar. (See Exhibit "10").

Finally, by letter dated October 20, 2005, addressed to Joseph Monian, one of Plaintiff's attorneys, William Eberight, requested that Defendants sign the public assembly permit

application within ten business days. (See Exhibit 11).

Defendants again failed to object or otherwise respond as requested in the letter and required by the Lease.

Defendants offered the testimony of Evan Brayl, an expediter retained by Defendants. Mr. Brayl testified that Plaintiff's health club is a Physical Culture Establishment ("PCE") and that the New York Zoning Resolution ("ZR") requires that Plaintiff apply to the Board of Standards and Appeals ("BSA") for a PCE special permit before Defendants are obligated to sign the PA application.

The Defendants called Deodat Ramsarran, P.E., DOB Manhattan Chief Plans Examiner and Jeff Mulligan, BSA Executive Director.

Mr. Ramsarran testified that the examiner who reviewed Plaintiff's alteration application did not issue an objection to the health club use because the current Certificate of Occupancy ("CO") (Defendants Exhibit 4) identifies the use of the eighth and ninth floors as a "private health club", and because the application did not propose a change of use. When specifically asked whether the examiner who reviewed the application made a mistake, Mr. Ramsarran responded that he did not.

Mr. Mulligan testified that it is not possible for an owner or lessee to file a PCE application with BSA without first receiving an objection from DOB requiring that such a permit be obtained. As DOB had no cause to issue such an objection, it is

not only incorrect for the Defendants to contend Plaintiff is required to obtain a PCE special permit, it is impossible for Plaintiff to do so.

In response to defense counsel's contention that all New York Health and Racquet Club facilities are PCEs, citing to its flagship location at 62 Cooper Square, Frank Denner provided rebuttal testimony explaining how the facility at Cooper Square differed from the Subject Premises. Mr. Denner stated the health club or PCE use at 62 Cooper Square is a new use, e.g. not based on any previously existing health club operation, and, as such, the operator was required to obtain a PCE Special Permit pursuant to ZR § 73-36. Mr. Denner explained that, in contrast, use of the Subject Premises as a "health club" is grandfathered, as the use was commenced prior to the enactment of ZR § 73-36. Mr. Denner continued that whether the use in the Subject Premises meets the current definition of PCE is irrelevant; the use predated the regulation, and as such, ZR § 73-36 is inapplicable. Mr. Denner further confirmed that DOB never objected to the use based on the prior and current CO (See Exhibits 4 and 13). Thus, Plaintiff had no reason or basis to make any application to BSA.

Point I
Defendants Waived Any Objections To
Signing The Public Assembly Permit Application

"[W]aiver is the voluntary abandonment or relinquishment of a known right, which, except for such waiver, the party would

have enjoyed.” (P&D Cards & Gifts v. Matejka, 150 AD2d 660 [2d Dept 1989]). Waiver “may be accomplished by express agreement...” (Hadden v. Consolidated Edison Co. Of New York, 45 NY2d [1978]).

Section 5.5 of the Lease is an “express agreement” and easy to interpret:

Landlord agrees to respond to Tenant’s submission of alteration proposals and plans and specifications within ten (10) days, except if Landlord determines that an architect’s or engineer’s review is needed, then within twenty (20) days. If Landlord has not responded to Tenant’s notice within eleven (11) business days, Tenant may give Landlord a second notice and, if Landlord does not respond within five business days therefrom, Tenant’s alteration proposals and plans and specification shall be deemed accepted.

Plaintiff first forwarded the public assembly permit application to Defendants in February 2005. Defendants did not respond. On or about June 22, 2005, Plaintiff forwarded a second copy of the public assembly permit application to Defendants. Defendants did not respond despite follow up e-mails from Jeff Bodner. On October 20, 2005, Plaintiff again requested that Defendants sign the permit application or, at the very least, formulate a meaningful response. Defendant did not respond. Their failure precluded them from objecting at trial that as the operator of a physical culture establishment, Plaintiff is first obligated to apply for and obtain a physical culture

establishment permit from the BSA. Since no objections were made as required under Section 5.5 and the proof is otherwise legally sufficient, this Court concludes that Defendants waived their objections to signing the public assembly permit application under the Lease.

**Defendants Must Be Compelled To Sign
The Public Assembly Permit Application**

The refusal of one party to perform his contract amounts to abandonment of it, leaving the other party to his choice of remedies, e.g., to sue for breach or compel specific performance. (Suvitsky v. Sukenik, 240 AD2d 557, 559 [2d Dept 1997]). Moreover, “[s]pecific performance is a proper remedy . . . where ‘the subject matter of the particular contract is unique and has no established market value.’” (Id., citing to Van Eagner Advertising Corp. v. S&M Enterprises, 67 NY2d 186 [1986]) and is most appropriate under circumstances where “money damages would be inadequate to protect the ‘expectation interest’ of the injured party.” (Cho v. 401-403 57th Street Realty Corp., 300 AD2d 174, 175 [1st Dept 2002]). In determining whether to require specific performance:

a trial court must consider, among other factors, the difficulty of proving damages with reasonable certainty and of procuring a suitable substitute performance with a damages award . . . Specific performance is an appropriate remedy for a breach of contract concerning goods that are ‘unique in kind, quality or personal association’ where

suitable substitutes are unobtainable or unreasonably difficult or inconvenient to procure. Suvitsky v. Sukenik, 240 AD2d 557, 559 [2d Dept 1997].

In this case, Plaintiff's "expectation interest" is twofold. First, Plaintiff expects that it may legally operate a private health club without being fined for lacking the proper permits. Second, Plaintiff expects Defendants to comply with the Lease. Consequently, when the Defendants breached paragraph 5.5 of the Lease, the Plaintiff is entitled to its choice of remedy.

Here the Lease directs Defendants to assist Plaintiff in obtaining a public assembly permit, including but not limited to, signing the application. The evidence adduced at trial demonstrates that Defendants have unreasonably withheld their consent. Defendants' conduct is a clear violation of the Lease amounting to an abandonment of the contract and entitling the Plaintiff to its choice of remedy. (See Stuvisky v. Sukenik, *supra*). Plaintiff's procurement of a public assembly permit is the only means by which to lawfully operate a health club and spa in the Subject Premises.

Point II

Plaintiff Is Not Required To Obtain A Physical Culture Establishment Special Permit

Notwithstanding the testimony of Mr. Ramsarran and Mr. Mulligan, Defendants continue to assert that a Special Permit is

required for Plaintiff's health club, citing ZR §§ 12-10 and 73-36. Indeed, ZR § 12-10 sets forth a broad definition which appears to capture all facilities which a layman would perceive as a health club or gym, to wit:

any establishment or facility, including commercial and non-commercial clubs, which is equipped and arranged to provide instruction, services, or activities which improve or affect a person's physical condition by physical exercise or by massage. Physical exercise programs include aerobics, martial arts and the use of exercise equipment.

Per ZR § 73-36, facilities meeting the definition of PCE set forth in ZR § 12-10 and located within specifically enumerated zoning districts¹ must apply to BSA for a special permit, provided the following required findings are made by the applicant:

- (1) that such use is so located as to impair the essential character or future use or development of the surrounding area; and
- (2) that such use contains:
 - (I) one or more of the following regulation size sports facilities; handball courts, basketball courts, squash court, paddleball courts, racketball courts, tennis courts; or
 - (ii) A swimming pool of a minimum of 1,500 square feet; or
 - (iii) facilities for classes, instruction and programs for physical

¹Application for special permit to BSA, where required, may only be made for PCE facilities located in commercial (C1-9, C2, C4, C5, C6 or C8) and manufacturing (M1, M2 or M3) districts. The Building is located in a C5-3, C5-2.5 district.

improvement, body building, weight
reduction aerobics or martial arts;
or

- (iv) facilities for the practice of
massage by New York State licensed
masseurs or masseuses.

While ZR §§ 12-10 and 73-36 appear to require a special permit for all facilities occupied as gyms or health clubs, Defendants ignore one detail that is fatal to their argument: the effective date of the PCE regulations.

On November 16, 1978, under Calender No. 145, the New York City Board of Estimate approved amendments to the ZR², which, *inter alia*, introduced predecessor to ZR § 73-36, establishing a new BSA special permit for all facilities meeting the definition of PCE. Health club facilities in existence prior to November 16, 1978, became "grandfathered non-conforming uses".

Non-conforming uses are defined in ZR § 12-10 as lawful uses which become non-conforming as of the effective date of the ZR, December 16, 1961, or as of the effective date of any subsequent amendments to the ZR. Per ZR § 52-11, non-conforming uses may be continued in accordance with ZR Article V, which, *inter alia*, proscribes enlargement or extension of the non-conforming use beyond a particular stated threshold.

Exhibits 14 and 15, resolutions pertaining to BSA Calendar

²Pursuant to City Planning Commission ("CPC") Report N780387 ZRY, adopted by the CPC on November 8, 1978.

Nos. 42-03-BZ and 328-02-BZ³, provide examples of other facilities which, though meeting the definition of PCE set forth in ZR § 12-10, were considered grandfathered, as the health club use predated the effective date of the amendment to the ZR.


Exhibit 13, a temporary Certificate of Occupancy (No. 77818) for the Subject Premises dated July 17, 1977, clearly shows the health club use on the subject floors, and predates the enactment of the amendments to the ZR requiring application to BSA for a PCE special permit. Plaintiff's health club use is therefore based on a pre-existing, non-conforming or "grandfathered" use, and is not subject to the requirements of ZR § 73-36.

Accordingly and for the reasons stated herein, Plaintiff is entitled to a judgment compelling Defendants to sign the public assembly permit application and they are so directed.

This constitutes the decision and order of this court.

Dated: 5/15/06

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MAY 16 2006
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 HON. WALTER B. TOLUB, J.S.C.

³Applications to BSA for PCE special permits were subsequently made in the cited cases to permit proposed enlargement or to legalize previously completed enlargements of the preexisting, non-conforming or grandfathered use.