

Montaperto Ltd. v Liu
2007 NY Slip Op 31429(U)
May 30, 2007
Supreme Court, New York County
Docket Number: 0102060/2007
Judge: Marcy S. Friedman
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: FRIEDMAN
Hon. Marcy S. Friedman *Justice*

PART 57

MONTAPERTO LTD
- v -
FRWIN LTD

INDEX NO. 102060/07
MOTION DATE _____
MOTION SEQ. NO. 1
MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED
FILED
JUN 04 2007
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is denied as per
accompanying decision/order dated 5-30-07.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 5-30-07

[Signature]
Hon. Marcy S. Friedman *Justice*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x

MONTAPERTO LTD., et al.,

Plaintiffs,

- against -

IRWIN K. LIU, et al.,

Defendants.

_____ x

Index No.: 102060/07

DECISION/ORDER

FILED

JUN 04 2007

NEW YORK
COUNTY CLERK'S OFFICE

In this action for declaratory and injunctive relief and damages, plaintiff Montaperto Ltd. (“Montaperto”) contends that it has a contractual right to an assignment from defendants Chin Po Liu and Irwin Liu (collectively “Liu”) of a master lease for a commercial premises at 14 Jay Street in Manhattan. Montaperto further contends that the purported exercise of a right of first refusal by defendant 14 Jay Street Owners Corp. (“Owners Corp.”) to take the master lease on the same terms and conditions as the assignment was invalid. Montaperto moves for a preliminary injunction restraining defendants from assigning the master lease during the pendency of this action.

It is well settled that a preliminary injunction is a drastic remedy which will be granted “only where the movant shows a likelihood of success on the merits, the potential for irreparable injury if the injunction is not granted and a balance of equities in the movant’s favor (Grant Co. v Srogi, 52 NY2d 496, 517; McLaughlin, Piven, Vogel, Inc. v Nolan & Co., 114 AD2d 165, 172, lv denied 67 NY2d 606).” (Chernoff Diamond & Co. v Fitzmaurice, Inc., 234 AD2d 200, 201 [1st Dept 1996].) “The movant has the burden of establishing a right to this equitable remedy.”

(McLaughlin, Piven, Vogel, 114 AD2d at 172.)

Plaintiff fails to show a likelihood of success on the merits of its claim to entitlement to assignment of the master lease. The court rejects plaintiff's contention that it has a right of first refusal, under its lease with Liu, with respect to any assignment of the master lease, and its further apparent contention that such right is superior to Owners Corp.'s right of first refusal under paragraph 50 of the master lease. By its terms, paragraph 2(b) of the Rider to Montaperto's sublease with Liu affords Montaperto a "right of first refusal to lease the demised premises at whatever the bona fide offer for such premises is after [the] lease has expired," which will occur in 2009. This paragraph does not provide a right of first refusal to an assignment of the underlying master lease during the term of the sublease.

Plaintiff also fails to demonstrate the merits of its claim that defendant's exercise of its right of first refusal was invalid. To the extent that plaintiff argues that Owners Corp.'s exercise was untimely, this claim lacks merit under these circumstances in which Liu did not notify Owners Corp. of the amount plaintiff agreed to pay for assignment until on or about December 13, 2006, and Owners Corp. notified Liu of its exercise of its right of first refusal on or about December 18, 2006. To the extent that plaintiff argues that Owners Corp.'s exercise of the right of first refusal was invalid because Owners Corp. failed to consider the tax consequences of the exercise or made the decision to set up a nominee corporation to hold the master lease, plaintiff fails to submit any legal authority that it has standing to challenge the business judgment of Owners Corp.'s board of directors. Plaintiff also fails to submit any authority that Owners Corp.'s December 18 letter was not an acceptance of the assignment on the same terms and conditions as Montaperto had offered, or that Montaperto could defeat Owners Corp.'s exercise of its right of first refusal by increasing the amount of its offer to purchase to master lease after

Owners Corp. had notified Liu of its intent to purchase the master lease for the amount of plaintiff's initial offer. (See Lin Broadcasting Corp. v Metromedia, Inc., 74 NY2d 54 [1989].)

There is authority that the degree of proof required to establish the element of likelihood of success on the merits should be reduced where a preliminary injunction is necessary to preserve the status quo, provided that a showing is made that irreparable harm will result absent the injunction. (See State of New York v City of New York, 275 AD2d 740 [2d Dept 2000]; U.S. Ice Cream Corp. v Carvel Corp., 136 AD2d 626 [2d Dept 1988].) Here, however, plaintiff fails to make any showing that it will suffer irreparable harm in the event assignment of the master lease to Owners Corp. is not enjoined. In particular, plaintiff fails to show that the premises is uniquely suited to its business (compare Oriburger, Inc. v B.W.H.N.V. Assocs., 305 AD2d 275 [1st Dept 2003]; South Amherst, Ltd. v H.B. Singer, LLC, 13 AD3d 515 [2d Dept 2004]), or that it cannot be adequately compensated by money damages in the event it is ultimately determined that it had a right to the assignment of the master lease. (See generally Sterling Fifth Assoc. v Carpentille Corp., 5 AD3d 328 [1st Dept 2004]; New York City Off-Track Betting Corp. v New York Racing Assn., 250 AD2d 437 [1st Dept 1998].) Moreover, as noted above, upon the expiration of its sublease in 2009, it will have a right of first refusal to continue to lease the premises.

FILED

JUN 04 2007


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

**NEW YORK
COUNTY CLERK'S OFFICE**

ORDERED that the parties shall appear for a preliminary conference in Part 57 of this Court on June 21, 2007 at 11:00 a.m.

This constitutes the decision and order of the court.

Dated: New York, New York
May 30, 2007


MARCY FRIEDMAN, J.S.C.