SHORT FORM ORDER

INDEX NO.: 03206/07

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 46 SUFFOLK COUNTY

PRESENT: Hon. Emily Pines

MOTION DATE:6-19-07,6-19-07,7-18-07
SUBMITTED: 7-18-07
MOTION NO.: 01-MG; CASE DISP
02-XMG; CASE DISP
03-MD; CASE DISP

ALLIED BUILDING PRODUCTS CORP. and FIFTH AVENUE, LLC,

Plaintiffs,

-against-

GUIDO GRECO,

Defendant.

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Williston Park, New York 11596

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ORDERED that the motion by plaintiffs, Allied Building Products Corp. ("Allied") and Fifth Avenue, LLC, ("Fifth"), dated June 4, 2007 for dismissal of defendant's counterclaims pursuant to **CPLR 3211 (a)(7)** is granted; and be it further

ORDERED that the cross-motion by defendant, Guido Greco ("Greco") dated June 11, 2007, for an order granting summary judgment dismissing the complaint, and cancelling the Notice of Pendency filed herein is granted; and be it further

ORDERED that the notice of pendency filed by the plaintiffs on January 26, 2007, on the premises, designated as District 0500, Section 103.00, Block 02.00, Lot 019.004 on the Tax Map of Suffolk County is hereby canceled, and upon service of a copy of this order, the County Clerk shall mark such notice of pendency canceled; and it is further

ORDERED that defendant's cross-motion seeking an order granting summary judgment in favor of defendant on his counterclaims and for an order awarding costs and reasonable attorneys' fees is denied; and be it further

ORDERED that the plaintiffs' motion dated June 27, 2007

for leave to serve and file an amended summons and verified complaint and amended reply to amended counterclaims is denied as moot.

FACTS

This action arises out of a lease for commercial property entered into by Allied (Plaintiffs) as tenant, and Greco (Defendants) as landlord. The lease was executed on June 25th 2003. The lease states that the tenancy shall commence on July 1, 2003 and continue through and include June 30, 2008. Paragraph 2.1 of the lease sets forth a yearly base rent amount for each year of the lease. The rent provisions are numbered in this paragraph as the first lease year through the fifth lease year. The parties entered into a separate letter agreement dated June 17, 2003 which is clearly a modification to the original lease. This letter agreement is on Allied's letterhead and defendant claims it was drafted by Allied's secretary. It was signed simultaneously with the original lease, on June 25, 2003. The letter agreement refers to the original lease and states that in consideration of Allied agreeing to a longer lease commitment, the parties agree that if tenant is not in default, it shall have the right to extend the term of the lease for an additional five-year period, or the tenant shall have the right to purchase the premises following the fifth year of the lease, for the sum of $1.2 million. It further provides that if the tenant exercises such option, notice of tenant's intent must be given no earlier than July 1, 2006 and no later than August 31, 2006, and the closing shall take place within 90 days of such notice.

Plaintiffs contend that it was the original intention of the parties to enter into a three-year lease. However the plaintiffs argue that after negotiations on this point, the defendant had a need to enter into a five-year lease to secure certain financing. The letter agreement was then drafted and executed with the lease. Plaintiffs further argue that even though both the lease and the letter agreement unequivocally refer to a five-year lease, it was the parties intention to allow the exercise of the purchase option after only three-years. The plaintiffs therefore argue that the 2006 dates in the notice provision were intentional allowing plaintiffs to exercise its option after only three years.

Plaintiffs claim that acting in accordance with these intentions, on or about August 25, 2006 it sent a letter to Greco, exercising its option to purchase the premises. Plaintiffs further contend that they sent a letter on or about October 20, 2006 wherein it set forth its intention to close on the property on November 1, 2006. According to the record, and undisputed, is the fact that the defendant failed to appear at this "closing".

Defendant claims that there is no option to purchase the property. Greco acknowledges that he signed a letter agreement on June 25, 2003 pertaining to an option to renew, an option to purchase, and roof repairs. Defendant argues that the letter agreement is unenforceable, however, defendant concedes that if the Court disagrees and finds it enforceable, Allied's right to purchase the premises accrues no earlier then June 30, 2008. In accordance with the letter agreement, Allied's right to purchase the premises will only accrue if Allied is not in default of the lease at the time. Greco claims that as a result of his unwillingness to go forward with the November closing, which was unilaterally scheduled by the plaintiffs, the plaintiffs have ceased paying rent and are instead classifying any payments made by them as offsets to the purchase price. Greco alleges that Allied's failure to pay rent is sufficient to prove Allied's repudiation of the lease and he was entitled to terminate the lease on February 23, 2007.

The record shows that Greco through his counsel sent numerous letters to counsel for plaintiffs. In each of these letters, all dated prior to November 1, 2006, Greco's counsel denied plaintiffs' right to purchase the property and informed Allied that no closing would take place on November 1, 2006.

Courts have held that; "[A] cardinal principle governing the construction of contracts is that the entire contract must be considered and, as between possible interpretations of an ambiguous term, that will be chosen which best accords with the sense of the remainder of the contract" (see, **Metropolitan Life Insurance Company v. Noble Lowndes International Inc.** 84 NY2d 430; see, also, **Prime Realty Holding Co. v Station Plaza Company,** 122 A2d 141). Furthermore, a court will endeavor to give the contract construction, most equitable to both parties (see, **Metropolitan Life Insurance Company v. Noble Lowndes International Inc.** 84 NY2d 430). The lease and the letter agreement are now before the court. Both documents refer without question to a five-year lease term. The letter agreement explicitly states that it is a modification to the original lease and that it was entered into as a result of Allied's willingness to enter into a longer contract then it originally wanted. In consideration of the longer lease, Allied was granted both an option to renew and an option to purchase the property for the sum of $1.2 million following the fifth year of the lease (emphasis added). The dates contained in the notice provision clearly had to have been between July 1, 2008 and August 1, 2008 to give effect to the clear intent of the letter modification. Moreover, the modification goes on to state that the closing on the property will be 90 days from notice, which can only be exercised after expiration of the five year term. Since both the lease and the letter agreement bind the parties to a

five-year lease term and the lease provides for rent payments through the fifth year, the court finds that the parties clearly intended that the notice provision to read between July 1, 2008 and August 31, 2008. This interpretation of the contract best accords with the sense of the remainder of the agreement (see, **A & Z Appliances, Inc. v Electric Burglar Alarm Co., Inc.** 90 AD2d 802).

When deciding a motion to dismiss, pursuant to **CPLR 3211 (a)(7)**, the court is to liberally construe the complaint, accept the alleged facts as true, give the plaintiff the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable legal theory. The criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one (see, **Leon v Martinez**, 84 NY2d 83 and **Guggenheimer v Ginzburg**, 43 NY2d 268).

The Court finds that plaintiffs do not currently possess the right to purchase the premises. That right does not accrue until June 30, 2008. Accordingly, defendant's cross-motion seeking dismissal of the complaint against him seeking specific performance of the lease is granted pursuant to **CPLR 3211 (a)(1)** and **CPLR 3211 (a)(7)**. The Court also grants defendant's motion cancelling the Notice of Pendency filed in this action since there exists no action to enforce a contract related thereto.

Remaining before the court is defendant's cross-motion seeking summary judgment on his counterclaims. These counterclaims seek declaratory judgment on the plaintiffs' alleged repudiation of the lease, indemnification, costs and attorneys' fees for abuse of process and breach of the duty of good faith and fair dealing. Plaintiffs have also moved to dismiss these counterclaims and have asked the court to institute sanctions against the defendant.

Summary judgment is warranted when there are no issues of fact to be resolved by the trier of fact (see, **Hartford Accident & Indemnity Co. v Wesolowski**, 33 NY2d 169, 172; **Sillman v Twentieth Century Fox Film Corp.**, 3 NY2d 395, 404). The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (see, **Winegrad v New York Univ. Med. Center**, 64 NY2d 851, 853; **Zuckerman v City of New York**, 49 NY2d 557, 562; **Sillman v Twentieth Century Fox Film Corp.**, *supra* at 404). To defeat the motion, the opponent must present evidentiary facts sufficient to raise a triable issue of fact (see, **Freedman v Chemical Constr. Co.**, 43 NY2d 260, 264). Mere conclusions, expressions of hope, or unsupported allegations or assertions are insufficient to defeat a motion for summary judgment (see, **Zuckerman v City of**

New York, *supra* at 562) .

A court when asked to grant declaratory judgment is dependent upon the facts of the case and it is usually unnecessary where a full and adequate remedy is already provided (see, **E.B. Latham & Company v Mayflower Industries**, 278 AD 90) In the case now before the Court, the issue of the commercially reasonable meaning of the purchase option has been resolved. Therefore there is no remaining issue of fact in this matter. The plaintiff's attempt to "comply" with what they believed to be the notice provision contained in the letter agreement rendered the contract impossible to perform i.e. closing in 90 days and purchasing following the five-year lease. However, plaintiffs' attempted compliance with this term does not rise to a repudiation of the lease. It is well-settled that to support a claim for anticipatory repudiation there must be an unqualified and clear refusal to perform with respect to an entire contract and a finding that a repudiating party is seeking to avoid its obligations by advancing an untenable interpretation of the contract (see, **O'Connor v. Sleasman**, 37 AD3d 954). In this case, the plaintiffs' act of exercising what they believed to be the purchase option in a strict application of the language of the contract, does not qualify as repudiation and plaintiffs' motion to dismiss the repudiation counterclaim is, accordingly, granted.

The Court finds that the lease and the letter agreement as interpreted by the court, is valid and remains in effect. Under the terms thereof, the plaintiffs' right to purchase the property does not accrue until 2008. Therefore any payments made by the plaintiffs in connection with the lease shall be deemed monthly rent payments in accordance with the terms of the lease.

The defendant's remaining counterclaims are dismissed. Defendant has counterclaimed for abuse of process, indemnification, and breach of the duty of good faith and fair dealing. In light of the court's determination that the issue before it was simply one of contract interpretation, and the court's finding that the plaintiffs' actions in no way rose to the level of repudiation of the lease remaining counterclaims cannot be maintained.

In light of the above, plaintiffs' further motion to amend the pleadings denied as moot.

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

DATED: July 31, 2007

Emily Pines

Emily Pines J. S.C.