

**Ecumenical Community Hous. Opportunities  
Hous. Dev. Fund Corp. v Omnipoint  
Communications, Inc.**

2007 NY Slip Op 32704(U)

August 23, 2007

Supreme Court, New York County

Docket Number: 0111415/2006

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
JUDITH J. GISCHE, J.S.C.

PRESENT: \_\_\_\_\_  
Justice \_\_\_\_\_

PART 10

Index Number : 111415/2006  
ECUMENICAL COMMUNITY HOUSING  
vs  
OMMNIPOINT COMMUNICATIONS  
Sequence Number : 001  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

on this motion to/for \_\_\_\_\_

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

**FILED**

AUG 29 2007

NEW YORK  
COUNTY CLERK'S OFFICE

**motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.**

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

Dated: 8/23/07

  
JUDITH J. GISCHE, J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10**

-----X  
ECUMENICAL COMMUNITY HOUSING  
OPPORTUNITIES HOUSING DEVELOPMENT  
FUND CORPORATION,

**DECISION/ORDER**  
Index No.: 111415/06  
Seq. No.: 001

Plaintiff,  
-against-

OMNIPOINT COMMUNICATIONS, INC.  
and T-MOBILE, USA, INC.,  
Defendants.

Present:  
Hon. Judith J. Gische  
J.S.C

-----X  
Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this/these motion(s):

<b>Papers</b>	<b>Numbered</b>
Pltff n/m (§3212) w/DD affirm, CG affid, exhs .....	1
Defs' x/m (§3212) w/RC affid (sep back), exhs .....	2,3
Pltff opp w/DD affirm, CG affid, exhs .....	4
Defs' AOS .....	5

-----X  
*Upon the foregoing papers the court's decision is as follows:*

*GISCHE, J.*

This is an action to enforce a written lease agreement between plaintiff ("Ecumenical" or "plaintiff"), as landlord, and defendant ("Omnipoint" or "defendant"), as tenant, of a commercial premises. Plaintiff now moves for summary judgment on the complaint and dismissing the affirmative defenses. CPLR § 3212. Omnipoint opposes plaintiff's motion and cross moves for summary judgment in its favor, dismissing the entire complaint.

Although issue has been joined, the note of issue has not yet been filed and the time restrictions of CPLR § 3212 have not been triggered. These motions are,

therefore, timely and will be decided by the court on the merits. Brill v. City of New York, 2 N.Y.3d 648 (2004).

### **Background of the Dispute and the Arguments**

Plaintiff is the landlord and owner of a building located at 1050 Amsterdam Avenue, New York, New York. Defendants leased the premises located on the rooftop of plaintiff's building ("premises") pursuant to a written Standard Lease Agreement ("lease"). The lease was originally entered into on February 25, 1997. In relevant part, the lease provides as follows:

**"5. Term.** The initial term of this Agreement shall be for a period of five (5) years ("Term") commencing upon the date Lessee is in receipt of a building permit to begin construction of the Premises [or] April 1, 1997, whichever is sooner ("Commencement Date") and shall terminate on the fifth anniversary of the Commencement Date, unless otherwise provided in Paragraph 12. Lessee shall have the right to renew the Agreement for one (1) five (5) year period ("Renewal Term"), upon the same terms and conditions in effect during the Term. Rent for the Renewal Term shall be negotiated twelve (12) months prior to the expiration of the Term. If Lessee and Lessor cannot mutually agree to the terms of the Renewal Term, then Lessor and Lessee shall have the right to terminate without further obligation at the end of the Term. Lessee shall exercise its renewal rights by providing written notice to Lessor of its intention to renew at least thirty (30) days prior to the expiration of the Term."

It is undisputed that the original lease commenced on April 1, 1997 and was scheduled to expire on March 31, 2002. However, plaintiff, relying upon the sworn affidavit of Charles Gross, the Director of Commercial Leasing and Management which manages plaintiff's building, contends that the lease was thereafter renewed by the parties for another successive five-year term, expiring on March 31, 2007. Plaintiff claims that it is entitled to \$29,099.29/xx representing the rent arrears and it seeks

summary judgment in its favor, contending that defendant has no defenses to its claims. CPLR § 3212.

Plaintiff claims that Omnipoint vacated the premises in January 2005, approximately twenty-seven months prior to expiration of the alleged renewal lease or successive five-year term. Plaintiff seeks rent owed through the end of the lease term, e.g. March 31, 2007. Plaintiff argues that an extension of the lease agreement must have occurred because defendant's January 14, 2005 and June 27, 2006 letters of termination reference a lease and then attempt to terminate that lease. Plaintiff argues that if defendants were only month to month tenants, then they would not need to terminate any lease in order to vacate the premises.

However, Omnipoint contends that it never renewed the lease after it expired and that it never agreed to a "successive five-year term." From April of 2002 through June of 2006, Omnipoint maintains that it did not renew the lease nor enter into any kind of long term agreement to rent the rooftop space. Omnipoint argues that after the original lease expired, it rented the premises on a month to month basis and paid rent as it came due.

Omnipoint asserts that it ended its month to month tenancy by providing the landlord with thirty days' notice on July 26, 2006. Omnipoint further asserts that it fully paid rent through July 31, 2006, and that it does not owe rent through March 31, 2007, because the lease was never renewed.

Defendant seeks summary judgment dismissing the complaint on the ground that plaintiff cannot prove that it breached the renewal lease since there is no such agreement between them. CPLR § 3212.

In the alternative, Omnipoint contends that even if plaintiff establishes that there was a renewal lease, Omnipoint had the right to terminate its tenancy without any further liability, on thirty days' notice after five years for technical reasons. They do not, however, indicate what "technical reasons" they had to terminate the lease in July 2006. In relevant part, the lease provides as follows:

**"10. Termination.** After five (5) years, Lessee may terminate this Agreement without further liability on prior written notice to Lessor which shall become effective thirty (30) days after the date notice is mailed as follows: (iii) technical reasons, including but not limited to signal interference."

#### **Law applicable to motions for summary judgment**

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 eliminate any material issues of fact from the case. Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). Since each side seeks summary judgment, each bears the initial burden of proving its *prima facie* case. If it does, then the opposing party must raise triable issues of fact that require a trial.

When only issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. See Hindes v. Weisz, 303 A.D.2d 459 (2d. Dept. 2003).

## Discussion

The lease expressly states that in order for there to be a valid five-year renewal, rent for the renewal term shall be negotiated twelve months prior to the expiration of the term, and that the lessee shall exercise its renewal rights by providing written notice to the lessor of its intention to renew at least thirty days prior to the expiration of the term. Neither of these events happened. Defendant did not notify the plaintiff of an intention to renew the lease, nor did the parties discuss a new rent rate, or that the rent would stay the same. Consequently, there was no renewal of the original lease.

Defendant's January 14, 2005 and June 27, 2006 letters of termination do not command a different result. Neither letter requests a renewal lease nor were they sent prior to the expiration of the original lease. They do not, in themselves, create a contract or lease between the parties. Plaintiff has not provided any written document in which Omnipoint provides written notice of its intention to renew the lease with plaintiff for another five-year term. Plaintiff, therefore, has not met its burden of proving that the defendant renewed its lease for an additional five-year term, a material element of its breach of contract action argument.

Additionally, plaintiff has also not provided any evidence that the parties negotiated a new rent for a renewal term. Defendant's rent payments remained at the same amount as specified in the original lease agreement, but only by default, not as a result of a new agreement. For these reasons, the court concludes that as a matter of law, the original lease agreement continued on a monthly basis, and was not a new renewal lease.

It is not necessary for this court to consider Omnipoint's alternative argument, because there is no evidence that the lease was renewed for a second five-year term.

Accordingly, since defendant has proven as a matter of law that it was only a month to month tenant, plaintiff's complaint for unpaid rent due under a renewal lease must be dismissed.

In accordance herewith it is hereby:

**Ordered** that plaintiff's motion for summary judgment is denied, and it is further


**Ordered** that defendant's motion for summary judgment is granted, and it is further

**Ordered** that the clerk shall enter judgment in favor of defendant.

This constitutes the decision and order of the court. Any requested relief not expressly granted herein is denied.

Dated: New York, New York  
August 23, 2007

So Ordered:

  
\_\_\_\_\_  
Hon. Judith J. Gische, J.S.C.

**FILED**  
AUG 29 2007  
NEW YORK  
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