

Madison Ave. Parking Corp. v 1532 Madison, LLC
2007 NY Slip Op 33274(U)
October 9, 2007
Supreme Court, New York County
Docket Number: 0602249/2007
Judge: Barbara Kapnick
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BARBARA R. KAPNICK
Justice
J.S.C.

PART 12

MADISON AVENUE BANKING
CORP.

INDEX NO. 602249/07

MOTION DATE _____

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

- v -

1532 MADISON, LLC

The following papers, numbered 1 to _____ were read 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

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

FILED
OCT 12 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 10/9/07

[Signature]

BARBARA R. KAPNICK J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 12

-----X
MADISON AVENUE PARKING CORP.,

Plaintiff

-against-

1532 MADISON, LLC,

Defendant

BARBARA R. KAPNICK, J.:

DECISION/ORDER

Index No. 602249/07
Motion Seq. No. 001

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This action brought pursuant to First National Stores v. Yellowstone Shopping Centers, 21 N.Y.2d 630 (1968) concerns a vacant parcel of land containing approximately 7032 square feet and located on the northwest corner of 104th Street and Madison Avenue, a/k/a 1532-1542 Madison Avenue, New York, New York, which is currently being used as a parking facility ("the premises").

Plaintiff Madison Avenue Parking Corp. moves by Order to Show Cause for an order:

(1) granting a preliminary injunction pursuant to CPLR §§6301 and/or 6311;

(a) restraining defendant 1532 Madison, LLC and all persons acting in concert with it or under its direction, pending the determination of this action on the merits, from taking any further steps to terminate a certain Lease dated August 24, 2005 or to cause its termination, or to commence any dispossess proceeding on the basis of any alleged defaults recited in the purported Notice

to Cure dated June 18, 2007 or to interfere in any manner with plaintiff's possession, use, occupancy and/or quiet enjoyment of the premises;

(b) tolling and staying the running of plaintiff's time to cure the alleged defaults set forth in the Notice to Cure; and

(2) vacating and setting aside the Notice to Cure.

The Notice to Cure alleges that defendant has violated a substantial obligation of its tenancy by, inter alia, subletting and/or assigning its rights of occupancy to the subject premises to The Mount Sinai Hospital ("MS" or "the Hospital") and/or "John and/or Jane Doe", without permission of the landlord, in violation of paragraph 11 of the Lease and Article X, paragraph 10.1 of the Rider to the Lease.¹

Paragraph 11 provides, in relevant part, that

Tenant ... expressly covenants that it shall not assign, mortgage or encumber this agreement, nor underlet, or suffer or permit the demised premises or any part thereof to be used by others, without the prior written consent of Owner in each instance.

¹ The Notice to Cure also alleges that plaintiff has violated the terms of the lease by posting signage along approximately 40 feet of fence running along the perimeter of the premises, and by maintaining a drop box for clothing donations on the premises, both without defendant's permission.

Article X, paragraph 10.1 provides, in relevant part, that

(a) Subject to the provisions of this paragraph, Landlord shall not unreasonably withhold or delay its consent to an assignment of this Lease, or to a subletting of the entire leased premises, provided that, at the time of such assignment or subletting, the Tenant shall not be in default beyond applicable notice and cure periods of any of the terms and/or conditions of this Lease. Tenant will not license concessions or lease departments in the leased premises, or pledge or encumber by mortgage or other instruments its interest in this Lease, without first obtaining the consent of Landlord, which consent Landlord may withhold in its sole and absolute discretion...

Plaintiff denies that it has assigned or sublet the premises; rather, plaintiff contends that it has merely provided exclusive parking for the Hospital pursuant to a Parking Space Agreement dated September 19, 2006, as amended by Amendment No. 1 to Parking Space Agreement, also dated September 19, 2006 (collectively, "the Agreement"). In addition, plaintiff contends that it maintains control of the parking facility by maintaining insurance coverage on the premises and paying the utilities on the premises.

It is well settled that

"[t]he central distinguishing characteristic of a lease is the surrender of absolute possession and control of property to another party for an agreed-upon rent" (citations omitted). Further, "a tenancy involves an interest in real property which passes to the tenant, and a possession exclusive even of that of the landlord,

except as the lease permits the landlord's entry"
(citation omitted).

First Franklin Square Associates, LLC v. Franklin Square Property Account, 15 A.D.3d 529 (2nd Dep't 2005).

Likewise, "[a] sublease transfers exclusive possession of the premises within the sublease to the subtenant." South Bronx Neighborhood Development Area v. City of New York, 46 A.D.2d 766 (1st Dep't 1974).²

The fact that the instrument herein was called a 'Parking Space Agreement' instead of a sublease or an assignment "is not controlling since the end sought by the instrument rather than mere words govern its nature (citation omitted)." The Statement, Inc. v. Pilgrim's Landing, Inc., 49 A.D.2d 28, 33 (4th Dep't 1975). See also, American Jewish Theatre, Inc. v. Roundabout Theatre Co., Inc., 203 A.D.2d 155 (1st Dep't 1994).

Significantly, the subject agreement specifically provides that "MS shall have the *exclusive right to use the entire Facility* (emphasis supplied) including every parking space located at the

² In that case, the court noted that "[w]hile the controls imposed ... by the sublease restricted the subtenant's use of the premises, they did not similarly affect or limit the subtenant's exclusive possession of the premises." South Bronx Neighborhood Development Area v. City of New York, *supra* at 766.

Facility to MS (as currently configured 60 spaces) on an exclusive basis for purposes of employee parking at the Facility each day on a 24-hour basis during the Term (as hereinafter defined)."

The term of the Agreement is from October 1, 2006 through September 30, 2009, unless sooner terminated in accordance with the notice provisions set forth in the Agreement. See, American Jewish Theatre, Inc. v. Roundabout Theatre Co., Inc., supra at 156, which held that "[w]here one party's interest in another's real property exists for a fixed term, not revocable at will, and terminable only on notice, a landlord-tenant relationship has been created."

In addition, the Agreement contains the following provisions, all of which are consistent with the terms of a leasehold agreement:

11. Brokerage. Each party covenants, warrants and represents to the other that no broker brought about this Agreement and that such party had no conversations or negotiations with any broker concerning this Agreement and the terms hereof. Each party agrees to indemnify and hold harmless the other against and from any and all claims for any brokerage commissions and all costs, expenses and liabilities in connection therewith, including, without limitation, attorneys' fees and expenses, arising out of any conversations or negotiations had by the indemnifying party with any broker.

* * *

15.³ Insurance. MS will maintain, at its sole cost and expense, liability and garagekeepers insurance in the amounts of \$5 million and \$1 million respectively and [plaintiff] shall be named as an additional insured on said policies for [plaintiff's] vicarious liability arising out of the negligent acts or omissions of MS, its employees and any person or entity insured under MS's insurance policies...

* * *

17.⁴ Holdover; Interest. In the event that MS does not vacate the Premises in accordance with the terms hereof, then (a) from the date that MS should have vacated the Premises, all fees due hereunder will be payable at the rate of 200% of what such fees would have been and (b) MS will be liable for any damages suffered by [plaintiff] due to MS's *holdover* (emphasis supplied)...

Based on the papers submitted and the oral argument held on the record on July 24, 2007, this Court finds that the Agreement in question granting exclusive possession of the demised premises to MS constitutes a sublease/assignment.

"The *Yellowstone* injunction is intended to preserve the status quo under the lease until the rights of the parties can be adjudicated without consideration of the merits of their contentions (citation omitted)." 144 East 40th Street Leasing Corp. v. Schneider, 125 A.D.2d 195, 196 (1st Dep't 1986). However, where,

³ The "new" paragraph 15 is set forth in paragraph 12 of Amendment No. 1.

⁴ The "new" paragraph 17 is set forth in paragraph 14 of Amendment No. 1.


as here, "it is clear that the tenant is breaching the lease, granting Yellowstone relief would, in effect, simply be a judicial rewriting of the lease, granting the tenant a significantly longer period of time to cure than is provided by the actual lease, without any countervailing benefit to the landlord..." Sweet NY, Ltd. v. 95 Morton Street Assoc., N.Y.L.J., May 19, 1999, p. 27, col. 2 (Sup. Ct., N.Y. Co.).

Since there is no dispute that plaintiff never obtained written consent of the landlord prior to entering into the subject Agreement, this Court finds that plaintiff is in breach of its lease, and thus is not entitled to Yellowstone relief.

Accordingly, plaintiff's motion is denied in its entirety, and the temporary restraining order contained in the Order to Show Cause is vacated.

This constitutes the decision and order of this Court.

Date: October 9, 2007


Barbara R. Kapnick
J.S.C.

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