

Beauty Plus Stores II, Inc. v 404 6th Ave. Realty Corp.

2007 NY Slip Op 33835(U)

November 15, 2007

Supreme Court, New York County

Docket Number: 0111604/2007

Judge: Judith J. Gische

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

PRESENT: GISCHE
Justice

PART 10

BEAVY PLUS STORES II, INC

- v -

404 6TH AVE BEAVY CORP

INDEX NO. 111604/07

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

FILED
NOV 28 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/15/07

JUDITH J. GISCHE, J.S.C.
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

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

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

-----X

BEAUTY PLUS STORES II, INC.,

Plaintiff,

-against-

404 6TH AVENUE REALTY CORP.,

Defendant.

Decision/Order

Index No.: 111604/07

Seq. No. : 001

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):

Papers

Pltf's OSC w/ABK affirm, GDA affid in support, memo	1
Def's AGT affirm in opp, PA affid, exhs	2

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 NOV 28 2007
 COUNTY OF NEW YORK
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Upon the foregoing papers, the decision and order of the court is as follows:

This is an action for breach of a lease between plaintiff Beauty Plus Stores II, Inc., as tenant, and defendant 404 6th Avenue Realty Corp., as landlord, relating to the commercial premises described as the entire building known as 404 6th Avenue in Manhattan (the "premises"). Plaintiff alleges that defendant unreasonably withheld its consent for sublease of the ground floor of the premises (the "Ground Floor"), in breach of the lease, and seeks lost rent and revenue from defendant.

Plaintiff now moves by order to show cause for a preliminary injunction compelling defendant to consent to plaintiff subletting the Ground Floor to: [1] Omnipoint Communications, Inc., d/b/a T-Mobiles ("T-Mobile"); or [2] to another suitable subtenant. Defendant opposes the motion.

Defendant is the owner and the landlord of the premises. On September 8, 2005, plaintiff, as tenant, and defendant, entered into a lease (the "Lease") for the premises for the term of ten (10) years.

Plaintiff operated a beauty salon product retail business on the Ground Floor. Plaintiff states that "[t]he business did not do well and has since closed." Plaintiff also states that it "sold other consumer products such as cell phones, phone cards and batteries" from the Ground Floor.

Plaintiff alleges that on June 18, 2007, it recently presented T-Mobile as a viable subtenant for the Ground Floor. Plaintiff further alleges that, on June 22, 2007, defendant "unreasonably and arbitrarily refus[ed] plaintiff's request for consent to sublet to T-Mobile."

Plaintiff also argues that court should declare that another proposed sublease, Madalex, LLC ("Madalex"), is a suitable subtenant and that defendant has no right to deny such a proposed sublease. Plaintiff has provided financial information for Madalex, as well as a summary of the proposed subtenancy between plaintiff and Madalex. Madalex's would use the premises to provide "quick service Mexican and Mexican style food and wraps" and sell alcoholic beverages.

Defendant contends that the proposed sublease to T-Mobile fails to comply with the use clause of the Lease because T-Mobile is "a communications provider and seller" and is wholly unrelated to "Beauty Supplies and Related Sales." Defendant also claims that plaintiff has not complied with the Lease in presenting Madalex as a proposed subtenant.

Discussion

On a motion for a preliminary injunction, the movant must prove the likelihood of ultimate success on the merits, that it will suffer irreparable harm unless the relief is

granted, and a balance of the equities in its favor. Paine v. Chriscott v. Blair House Associates, 70 A.D.2d 571 (1st Dept. 1979); Aetna Insur. Co. v. Capasso, 75 N.Y.2d 860 (1990). The purpose of a preliminary injunction is to maintain the *status quo* and prevent the dissipation of property that could render a judgment ineffectual. Moy v. Umeki, 10 AD3d 604 (2nd dept. 2004). "Likelihood of success" need only be shown from the evidence presented; conclusive proof is not required. Id. The granting of any preliminary injunction requires the posting of security. CPLR § 6312 (b).

A commercial lease may contain provisions prohibiting assignments or sublets or subjecting them to the landlord's consent. Dress Shirt Sales, Inc. v. Hotel Martinique Associates, 12 N.Y.2d 339 (1963). Provisions limiting assignment or sublets are a restraint on the free alienation of land and are to be strictly construed. Rowe v. Great Atlantic & Pacific Tea Co., 46 N.Y.2d 62 (1978). Nevertheless, such provisions are enforceable because landlords have a substantial interest in controlling the assignability of leases. Mann Theatres Corp. of California v. Mid-Island Shopping Plaza Co., 94 A.D.2d 466 (2d Dept. 1983).

The Lease is a contract which governs plaintiff and defendant's relationship with respect to the premises, as tenant and landlord, respectively. Pursuant to the Lease, the parties agreed that plaintiff shall "use and occupy" the premises for "beauty supplies and related sales and for no other purpose" (the "use and occupancy clause").

Specifically, Article 3 of the Lease provides that: "[plaintiff] shall make no changes in or to the [premises] of any nature without [defendant's] prior written consent."

Articles 11 and 51 of the Lease permit plaintiff to sublease the premises upon meeting certain conditions:

"51. Article 11 of this Lease is modified to the following extent. If [plaintiff] shall desire to assign this Lease or sublet the Leased Premises in whole or in part, [defendant] will not unreasonably withhold or delay its consent thereto provided:

(A) [plaintiff] shall give [defendant] at least ten (10) days' prior written notice of its desire to assign or sublet, which notice shall include reliable information indicating that the proposed assignee or subtenant is reputable, financially responsible and shall not change the use permitted thereunder for [plaintiff];

(B) Landlord's consent is conditional upon [plaintiff] delivering to [defendant] the following:

1) The assignee or sublessee shall have no less than 10 years operating this type of business at the commencement of this lease term and be of sufficient financial worth and soundness adequate to operate such a business.

...

3) If a sublease be involved, a counterpart executed copy of the proposed sublease, which sublease shall specify that *the premises to be sublet shall be use [sic] solely for the same use permitted hereunder for [plaintiff]*, that such sublease shall not be assigned, nor the premises further sublet, nor such use changed without the prior written consent of the landlord as herein provided (emphasis added).

(C) [Plaintiff] shall have no right to sublet or assign the [premises] if it is in default under this lease."

Plaintiff may only "use and occupy" the premises for "beauty supplies and related sales and for no other purpose." By virtue of Article 51, any proposed subtenant must use the premises solely for the use otherwise permitted under the Lease and shall not change the permitted use. For at least the following reasons, Plaintiff has not made a prerequisite showing of likelihood of ultimate success on the merits of its claims.

* 6]

Contrary to plaintiff's assertion, it has not met all the requirements of the Lease in order to obtain defendant's reasonable consent to the proposed T-Mobile sublease. It is not disputed that T-Mobile, the proposed subtenant, would use the premises for the "sale and rental of personal communications services and products, and other wireless or mobile telecommunication." The sale of telecommunication products does not reasonably fall within the category of "beauty sales," as that term is plainly understood.

Plaintiff's argument that telecommunication and beauty products are related is implausible and plaintiff's use of the terms "beauty" and "fashion" interchangeably is rejected. There is a discernible difference between beauty supplies and personal telecommunication products, even assuming *arguendo* that these telecommunication products have a "fashion element," as plaintiff contends. The court concludes that the sale of telecommunication products is unrelated to "beauty sales," and the T-Mobile sublease is contrary to the explicit language of the use and occupancy clause as well as Article 51 of the Lease.

It is irrelevant whether the proposed sublease is a benefit or detriment to plaintiff and defendant, respectively. Plaintiff agreed to the terms of the Lease in an arms length transaction. The controlling provisions in the Lease contain no inherent ambiguity or uncertainty, and the court will not interpret the use and occupancy clause in a way not intended by the parties at the time the lease was entered into merely to relieve a party from asserted disadvantage flowing from the terms of the Lease. Collard v. Incorporated Village of Flower Hill, 52 N.Y.2d 594 (1981). Nor is the court persuaded that the use and occupancy clause is unconscionable. The court cannot insulate plaintiff from his voluntary decision to execute the Lease and the terms therein.

Plaintiff has also asserted that defendant tried to "squeeze" and "hold-up" plaintiff by seeking a substantial amount of plaintiff's profit under the T-Mobile sublease in exchange for defendant's consent thereto. It is of no moment that defendant attempted to settle this claim, and therefore, this otherwise unsubstantiated assertion would be inadmissible as proof of liability. CPLR § 4547; Chemical Bank v. Stahl, 244 A.D.2d 234 (1st Dep't 1997).

Moreover, the fact that plaintiff, while operating a beauty salon product retail business, sold "cell phones, batteries and phone cards," does not render the use provision contained in the Lease unenforceable. Plaintiff has cited no legal authority in support of this position.

As for the proposed subtenancy with Madalex, plaintiff has failed to establish that it complied with the Lease in presenting Madalex to defendant as a proposed subtenant.

Accordingly, plaintiff's motion for a preliminary injunction is denied.


The court hereby schedules a preliminary conference in this matter on December 13, 2007 at 9:30 a.m. at 80 Centre Street, Room 122.

Any requested relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the court.

Dated: New York, New York
November 15, 2007

So Ordered:


HON. JUDITH J. GISCHE, J.S.C.

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