SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY

Present:

HON. ANTHONY L. PARGA

Justice

----------X **PART 11**

JOHN NOVELLO and DAVID STEINER,

INDEX NO. 22426/07

Plaintiff,

-against-

MOTION DATE: 1/17/08
SEQUENCE NO. 001

215 ROCKAWAY, LLC.,

Defendant.

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Upon the foregoing papers, it is ordered that the motion by plaintiffs John Novello and David Steiner by order to show cause pursuant to CPLR 6301 for an order enjoining defendant 215 Rockaway, LLC, its officers, directors, employees, agents or assigns from selling or contracting to sell or transferring any fee interest or the shares of stock of defendant allocated to 215 Rockaway Boulevard, Cedarhurst, New York (the premises) to anyone except plaintiffs and from taking any action to terminate plaintiff's occupancy of the premises is granted to the extent that defendant 215 Rockaway, LLC or its officers, directors, employees, agents and assigns are

enjoined pending the outcome of this action from selling or encumbering the subject premises at 215 Rockaway Turnpike in Lawrence New York provided that plaintiffs are not in default under the lease agreement and provided that they post an undertaking in the amount of $900,000 (nine hundred thousand dollars) within ten days of the date of this order. So much of plaintiffs' motion as appears to seek ultimate relief, i.e., a declaration of plaintiff's rights under the lease agreement and an order directing specific performance is denied as there is no notice of an application for summary judgment, the parties did not treat the application as one for summary judgment, and it is not clear that issue has been joined.

This action concerns alternative purchase provisions in an original lease agreement between Charlotte Strongwater (Strongwater) as Landlord and Sanjay Kirtane, M.D., P.C.. (Kirtane) as tenant (the subject lease). The subject lease provides for a ten year term commencing on August 17, 1998 for premises located at 215 Rockaway Turnpike in Lawrence New York . Kirtane leased the entire premises which were built to suit a cardiology practice, including nuclear cardiology facilities. Sanjay Kirtane avers by affidavit that he expended over $150,000 on improvements to the leased premises. By Assignment and Assumption Agreement executed January 30, 2006 Kirtane assigned the subject lease to plaintiffs John Novello and David Steiner, M.D. (the Kirtane Assignment).

The Kirtane Assignment cross-references an assignment by landlord Charlotte Strongwater. She assigned the subject lease to herself and Murray Strongwater on December 30, 2003. They "simultaneously assigned . . . to 215 Rockaway LLC . . ." (the Strongwater Assignment). A copy of the cross-referenced Strongwater Assignment assigns not only the Kirtane lease, but also an additional lease which indicates that 215 Rockaway LLC leased the subject premises as landlord to

Strongwater as tenant in 1977. The Strongwater Assignment restores landlord status to 215 Rockaway LLC, but inexplicably, requires the landlord assignee to pay rent to assignors Charlotte and Murray Strongwater. It is noted that the Strongwater Assignment, although dated December 22, 2003 is not acknowledged until January 30, 2006, the same date as the Kirtane Assignment to plaintiffs.

As noted above the rider to the subject lease contains two purchase terms and provides the tenant with an option to purchase and/or a right of first refusal. The two provisions do not cross-reference or refer to each other. Each stands independently. In relevant part the two purchase provisions read as follows:

> 6. OPTION TO PURCHASE
>
> . . .
>
> E. Tenant *may exercise* its option to purchase *by giving Landlord notice* of such exercise *not later than six (6) months prior to the expiration of the original term* hereof. In the event that Tenant fails to do so or a formal *contract of sale* shall not have been signed on or before the date that shall be *three (3) months prior to the expiration of the original term* hereof, this option shall be deemed to have been waived and shall be of no further force or effect.
>
> 7. RIGHT OF FIRST REFUSAL
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> If *during the term of this lease* Landlord shall have received a bona-fide arms's (sic) length offer to purchase the building containing the demised premises, and Landlord shall wish to accept such offer, Landlord shall notify Tenant of all substantive terms of such offer and forward to Tenant a contract of sale embodying such terms for Tenant's execution. . . .
> (emphasis supplied)

By letter dated May 25, 2006 plaintiff tenants gave notice to 215 Rockaway, LLC stating "we are notifying you of our decision to exercise the option granted to

purchase 215 Rockaway Turnpike, Lawrence, New York." The tenants stated that they were "ready, willing and able" to consummate the transaction. By letter dated June 5, 2006 counsel for the landlord advised that the purchase price could not be determined under the lease until November of 2007 and thus the tenants exercise of the option to purchase was premature. By letter dated June 26, 2006 counsel for the tenants advised that the inability to determine the exact purchase price until November did not bar exercise of the option, as "the sale price can be determined by the application of a formula at a later date" and the lease did not set forth a "limitation on the time period" for exercise of the option. Less than two weeks later counsel for the landlord advised that it "has just received a bona fide offer from a third party to purchase the premises . . . for the sum of $2,000,000". By letter dated November 18, 2007 counsel for plaintiffs advises that the tenants "reiterate" their decision to exercise the option to purchase "pursuant to the Lease, Rider Paragraph '6A'".

Plaintiffs commenced this action for a declaration that they validly exercised the option to purchase and for specific performance requiring the landlord to convey the premises in accordance with the purchase option. Plaintiffs seek a preliminary injunction enjoining defendant from conveying the premises or taking any steps to terminate the subject lease.

In order to prevail on this motion plaintiffs must "establish a likelihood of success on the merits, irreparable injury in the absence of an injunction, and a balance of equities in [their] favor" (*Gerstner v. Katz*, 38 AD3d 835, 836 [2d Dept 2007]). If plaintiffs succeed they must post an undertaking (CPLR 6312(b); *Gerstner v. Katz, supra*).

Addressing the first issue, likelihood of success on the merits, the provisions of the subject lease are subject to the same rules of construction as are contracts

generally (*Tantleff v. Truscelli*, 110 AD2d 240, 244 [2d Dept 1985], *affd* 69 NY2d 769 [1987]). And, it is a fundamental principle of contract constructions that the court may not "rewrite" the contract for the parties "under the guise of construction" or "construe the language in such a way as would distort the contract's apparent meaning" (*Tantleff v. Truscelli*, *supra* at p 245). A contract must be construed "to give effect to all of its terms, avoiding interpretation which would render a critical portion of the document meaningless" (*PNC Capital Recovery v. Mechanical Parking Sys.*, 283 AD2d 268 [1st Dept 2001], *app dsmd* 98 NY2d 763 [2002], citing *Bank of New York v. Murphy*, 230 AD2d 607 [1st Dept 2001], *lv. dismissed* 89 NY2d 1030 [1997]).

Plaintiffs have established a likelihood that they will succeed on their claim for specific performance of the purchase option in the lease agreement. The court finds that there is no language in the lease which prohibiting exercise of the purchase option in May of 2006, and the purchase option "should not be construed so as to add by implication" such limitation (see, *Gorham v. Arons*, 282 App Div 147, 150-151 [1st Dept 1953], *affd* 306 NY 782 [1954]).

The two purchase provisions provide valuable rights to the tenant and landlord (i.e., the landlord need not hold the purchase option open if he has an offer from a third party purchaser). The lease language does not give preference over one to the other. In the absence of any language giving one or the other preference, the first exercised i.e., the purchase option or the offer of a right of first refusal, would eliminate the ability to exercise the other (*see, Tantleff v. Truscelli, supra*). Thus if the landlord finds a buyer before the tenant exercises his purchase option, and presents the tenant with a contract and the opportunity to match the third party's offer, the tenant could not then exercise the purchase option. Such a reading of the purchase

option would render the landlord's right to sell the premises to a third party illusory (*see, Tantleff v. Truscelli, supra; Moon v. Haeussler*, 153 AD2d 1002 [3d Dept 1989]). And, once a tenant gives notice of intent to exercise a purchase option in accordance with the lease, "the unilateral option agreement ripens into a fully enforceable bilateral contract" and the landlord is then bound and may no longer trigger the first refusal option (*Kaplan v. Lippman*, 75 NY2d 320, [1990]).

Given the resulting loss of one option by exercise of the other, the permitted timing of exercise is of great significance. The subject option allows the tenants to elect to purchase the premises at the end of the lease term, requires that they exercise the option at least six months prior to the end of term, and requires them to have a written contract at least three months prior to the end of term. The lease provides a formula for determining the purchase price as of a certain date in November of 2007 through an adjusted cost basis.

Generally an option is an irrevocable offer by a landlord, which once accepted by the tenant, ripens into an enforceable agreement (*Kaplan v. Lippman, supra*), and, as noted, the purchase option here must be exercised no later than six months prior to the end of term. It is silent with regard to exercise earlier than six months, and there are no grounds to infer or read in such a restriction. This is particularly so as the lease contains a provision which permits the landlord to seek a third party purchaser and trigger the right of first refusal with no language of restriction during the lease term. If the lease were intended to favor the landlord's rights over those of the tenants, the agreement could have so provided. For example, the purchase option clause could have stated that it must be exercised no later than six months prior to the end of term and no earlier than nine months prior thereto. Or it could easily have stated that such option could not be exercised until the purchase price was

determined. There is no such language, and the court will not read in additional terms. As written, the option to purchase may be exercised at any time prior to the six month cut off date (see, *Laurino v. Hewman*, 17 Misc2d 654 [Supreme Court Suffolk County 1959], *affd* 10 AD2d 725 [2d Dept 1960]).

There is no impediment to exercise prior to fixing the purchase price. A formula and date for fixing the purchase price is provided for, making it ascertainable prior to the deadline for entering a written purchase agreement. Thus the option to purchase exercised in May of 2006 is enforceable (*see, Pino v. Harnischfeger*, 42 AD3d 980, 984 [4th Dept 2007]).

Plaintiffs have also satisfied their burden to show irreparable harm. The loss of realty satisfies as a predicate for irreparable harm, and "a conveyance might render any judgment ineffectual" (*Blake v. Biscardi,* 52 AD2d 834 [2d Dept 1976]; *Vincent v. Seaman,*;152 AD2d 841 [3d Dept 1989]; *Gresser v. Princi*, 128 AD2d 752, [2d Dept 1987], *appeal dismissed* 70 NY2d 693 [1987]).

Finally the equities are balanced in plaintiffs' favor. The timing of the landlord's attempted third party sale is suspect, as is the third party's offer. Plaintiffs exercised their option in late May of 2006, and in early June defendant advised that the exercise was premature. Within three weeks the tenants disputed that limitation on their option to purchase, and less than ten days later the landlord gave notice of a third party purchaser offering more than twice the market value of the premises as shown on the website of the Nassau County Assessor's Office, mynassauproperty.com. An appraisal submitted by plaintiffs also indicates that the third party offer is inflated.

Insofar as defendant asserts that plaintiffs have unclean hands, the doctrine of unclean hands in equity only applies when the complaining party shows that the

offending party's "immoral, unconscionable conduct" is "directly related to the subject matter in litigation" and that the complainant "was injured by such conduct" (*Kopsidas v. Krokos*, 294 AD2d 406, 407 [2d Dept 2002]). There is no allegation here of damage from the alleged conduct. Accordingly, the motion for a preliminary injunction is granted provided plaintiffs post the directed undertaking.

The parties shall appear for a Preliminary Conference on February 28, 2008, at 9:30 A.M. in the Differentiated Case Management Part ("DCM"), Nassau County Supreme Court, to schedule all discovery proceedings. A copy of this order shall be served on DCM Case Coordinator Richard Kotowski.

Dated: February 5, 2008.

Anthony L. Parga, J. S. C.