

**Modern Communication Servs., Inc. v NEP Image
Group, LLC**

2008 NY Slip Op 31361(U)

May 8, 2008

Supreme Court, New York County

Docket Number: 0601984/2007

Judge: Eileen Bransten

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

PART 3

Index Number : 601984/2007

MODERN COMMUNICATION SERVICES,

vs
NEP IMAGE GROUP, LLC

Sequence Number : 001

DISMISS COMPLAINT

INDEX NO. 601984/07

MOTION DATE 1/18/07

MOTION SEQ. NO. 601

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

FILED
MAY 13 2008

**IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM**
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 5/8/08


HON. EILEEN BRANSTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

-----X
MODERN COMMUNICATION SERVICES, INC., a
New York Corporation; MANHATTAN
TELEPORT, INC., a New York Corporation; and
503 WEST 33rd STREET ASSOCIATES, INC.,
a New York Corporation,

Plaintiffs,

-against-

Index No. 601984/07
Motion Date: 11-8-07
Motion Seq. No: 01

NEP IMAGE GROUP, LLC, a Delaware Limited
Liability Company; NEP
SUPERSHOOTERS, L.P., a Delaware Limited
Partnership; NEP BROADCASTING, LLC, a
Delaware Limited Liability Co.; NEP, INC., a
Delaware Corporation; and NEP II, INC., a
Delaware Corporation,

Defendants.

-----X

PRESENT: EILEEN BRANSTEN, J.

This action arises from a dispute regarding three commercial leases. The plaintiff-landlords seek a declaration that a non-assignment provision in each of the leases has been triggered by two merger transactions pursuant to which a 50% change in the ownership of the lessee has allegedly occurred. There is also a claim for a declaratory judgment that the tenant has breached the alterations provisions of one lease by not obtaining the landlord's prior written consent before commencing certain internal alterations.

Defendants contend that since the two transactions plaintiffs complain of were mergers involving direct or indirect corporate parents of tenant NEP Image Group, LLC (“NEP Image Group”) and did not transfer any interest in NEP Image Group, the non-assignment provisions have not been triggered. Defendants move, pursuant to CPLR 3211 (a)(1) and (a)(7), for an order dismissing the complaint on the grounds that a defense is founded upon documentary evidence and the pleading fails to state a cause of action.

Background

Plaintiff Modern Communication Services, Inc. (“Modern Communication”) owns real property known as 605-607 West 51st Street, 733 11th Avenue, and 727-731 11th Avenue, New York, New York (“11th Avenue Property”). Plaintiff Manhattan Teleport, Inc. (“Manhattan Teleport”) owns real property known as 513-519 West 54th Street, New York, New York (“54th Street Property”). Plaintiff 503 West 33rd Street Associates, Inc. (“503 West”) owns real property known as 503-505 West 33rd Street, New York, New York (“33rd Street Property”). Each of the plaintiffs are independent corporate entities affiliated with MTI/The Image Group, Inc. (“MTI”).

In March 2003, MTI sold its television studio business, cable and broadcast teleproduction business, post-production business, and related engineering services and equipment to defendant NEP Supershooters, L.P. (“NEP Supershooters”). Part of the businesses sold was equipment located at the 11th Avenue Property, the 54th Street Property, and the 33rd Street Property, but not the real estate itself that the respective plaintiffs owned. As a condition of the asset purchase agreement, NEP Supershooters was obligated to execute ten-year Net Leases for the three real estate properties.

NEP Supershooters was allowed to assign its rights under the Net Leases to NEP Image Group, provided that such assignment did not relieve the purchaser of its obligations under the asset purchase agreement. Net Leases were entered into with NEP Image Group effective March 21, 2003. Each of the three Net Leases was guaranteed by NEP Supershooters.

Defendant NEP Broadcasting, LLC (“NEP Broadcasting”) is the sole general partner of NEP Supershooters, which in turn, is the sole member of NEP Image Group, the named tenant. Plaintiffs allege that all of these defendants are alter egos of the other, operating as a single entity, controlled by interlocking directorships and officers, and managed and controlled out of a single principal place of business in Pittsburgh, Pennsylvania. All defendants are entities organized under the laws of Delaware.

Each of the Net Leases contains identical language regarding their assignment. Section 13.1(a) provides that the lessee shall not assign the lease without the landlord’s consent, and that a “transfer of more than a fifty percent (50%) beneficial interest in the Lessee, whether such transfer occurs at one time, or in a series of related transactions, and whether of stock, partnership interest, company share or otherwise by any party in interest shall be deemed an assignment of this Lease.” Complaint, ¶ 55; *see also* Alexander Aff., Ex. 2 at p. 17. Section 13.1(i) provides for a payment to the landlord in the event of any assignment. The provision specifies that the payment is 50% of the amount by which one figure, which is “the net present value (using an eight (8%) percent discount rate) of the fair market rental value of the Leased Property for the balance of the Term, taking into consideration the then-existing leasehold improvements but not Lessee’s trade fixtures and other

personal property,” exceeds a second figure, which is “the sum of (x) the net present value (using an eight (8%) percent discount rate) of the Annual Net Rent, and hereunder for the balance of the Term, including escalation, plus (y) Lessee’s reasonable costs in consummating the assignment, including the costs of alterations, customary brokerage commissions, reasonable attorney’s fees and other customary and reasonable incurred expenses.” Alexander Aff., Ex. 2 at p. 19.

Plaintiffs allege that, in June 2004, two private equity funds known as Apax Partners Inc. (“Apax”) and Spectrum Equity Investors (“Spectrum”), through a series of transactions, formed NEP, Inc. and purchased more than 50% of the legal and beneficial ownership interest in NEP Broadcasting, NEP Supershooters, and NEP Image Group (the “Apax/Spectrum Purchase”). Complaint, ¶ 46; Dalessandro Aff., ¶ 10. As a result of the Apax/Spectrum Purchase, plaintiffs allege that NEP, Inc. became the new beneficial owner and alter ego of NEP Image Group. Complaint, ¶¶ 47-48; Dalessandro Aff., ¶ 10.

Plaintiffs also allege that in February 2007, NEP, Inc. was sold to a new owner known as American Securities Capital Partners, LLC (“American Securities”), through a series of transactions. Allegedly as a result of these transactions, American Securities acquired more than a 50% legal and beneficial ownership interest in the five NEP entities. Complaint, ¶¶ 61-62; Dallessandro Aff., ¶ 12.

Plaintiffs commenced this action on July 14, 2007, asserting four causes of action. The first three causes of action seek a declaratory judgment that the American Securities Purchase triggered the assignment provisions of Section 13.1 of each of the Net Leases, that each of the defendants is responsible, jointly and severally, for payment of the amount contractually due upon an assignment

pursuant to the Section 13.1(i) calculation; that defendants are required to provide plaintiffs with copies of all the transaction documents, as well as current financial information regarding American Securities, that the Net Leases have been breached, and that, as a consequence thereof, plaintiffs are entitled to terminate the Net Leases and to a money judgment for the amount contractually due upon an assignment pursuant to the Section 13.1(i) calculation.

In the fourth cause of action, plaintiff Modern Communication seeks a declaratory judgment that NEP Image Group breached the alterations provision of the 11th Avenue Property Net Lease by not obtaining prior written consent before beginning alterations, and that, as a consequence thereof, this plaintiff is entitled to terminate the Net Lease and to a money judgment in an amount to be determined, plus attorneys' fees and costs. Plaintiff Modern Communication alleges that defendants removed and destroyed one of Modern Communication's two existing studio spaces located on the 11th Avenue Property, gutted a second studio in the building on the 11th Avenue Property, and made more than several million dollars in structural and non-structural changes to the building – all in total disregard of the tenant's obligations under the Net Lease and without complying with the notice and consent provisions in Article X.

Defendants move to dismiss the first three causes of action, arguing that the two transactions complained of did not transfer any interest in NEP Image Group whatsoever, that they were “mergers of parent entities of [NEP] Image Group,” and that under New York law, the words of the non-assignment provision in the Net Leases do not encompass these transactions. Defs. Supporting Mem. Of Law, at pp. 8-13. Defendants also move to dismiss the fourth cause of action, arguing that

documentary evidence establishes that NEP Image Group informed Charles (“Pontillo”), the President of MTI, of its intention to make the alterations, or, alternatively, that landlord Modern Communication waived any requirement of prior written consent to the alterations.

ANALYSIS

A. First Three Causes of Action: American Securities Purchase

1. Defendants’ Motion to Dismiss Based on Documentary Evidence

On a “CPLR 3211(a)(1) motion to dismiss . . . , such motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” *Goshen v. Mutual Life Ins. of New York*, 98 N.Y.2d 314, 326 (2002), citing *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994). The court is obliged to accept the complaint’s factual allegations as true, and accord the plaintiffs the benefit of every possible favorable inference. *Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267, 270-71 (1st Dept. 2004). In those circumstances where the documentary evidence flatly contradicts the legal conclusions and factual allegations, however, they are not presumed to be true or accorded every favorable inference. *Biondi v. Beekman Hill House Apt. Corp.*, 257 A.D.2d 76, 81 (1st Dept. 1999), *affd* 94 N.Y.2d 659 (2000); *Kliebert v. McKoan*, 228 A.D.2d 232 (1st Dept. 1996), *lv. denied* 89 N.Y.2d 802 (1996).

In support of their motion, defendants submit the agreements from the Apax/Spectrum Purchase and American Securities Purchase, the three Net Leases, and documents relating to the

alterations made to the 11th Avenue Property. Defendants contend that the words of the second sentence of Section 13.1(a) of the Net Leases reach only transfers of an ownership interest in the tenant itself, NEP Image Group, and that no such transfer occurred. In other words, defendants argue that mergers involving the tenant's parent, NEP Supershooters, or entities even farther removed from NEP Image Group do not implicate a transfer of any beneficial interest in NEP Image Group itself.

Section 13.1(a) is the same for each lease and states, in pertinent part:

Lessee shall not assign this Lease, or underlet the Leased Property, in whole or in part, without in each instance obtaining the prior written consent of the Lessor, which consent shall not be unreasonably withheld or unduly delayed. *A transfer of more than a fifty percent (50%) beneficial interest in Lessee, whether such transfer occurs at one time or in a series of related transactions, and whether of stock, partnership interest, company share or otherwise, by any party in interest shall be deemed an assignment* of this Lease.

Alexander Aff., Ex.2 at p. 17 (emphasis added).

The wording of this provision states that a transfer of more than a 50% beneficial interest in the defendant tenant NEP Image Group qualifies as an assignment. Pursuant to the Apax/Spectrum Purchase in June 2004, NEP, Inc. and NEP II, Inc. acquired by merger defendant tenant NEP Image Group's parent entity, NEP Supershooters. Through this merger, NEP, Inc. and NEP II, Inc. acquired all of the limited partnership interests and all of the general partnership interests of NEP Supershooters (Alexander Aff., Ex. 5 at p. 2), and thus acquired NEP Supershooters' 100% partnership interest in NEP Image Group. Under the American Securities Purchase in February

2007, NEP, Inc. merged with ASP NEP Merger Sub, Inc. and became a direct wholly owned subsidiary of ASP NEP Holdco, Inc.

Because plaintiff's causes of action regarding the alleged assignment only concern the American Securities Purchase, the court limits its discussion to the American Securities Purchase.¹ In order for the American Securities Purchase to trigger the assignment provision of Section 13.1, as plaintiffs urge, parent entity NEP, Inc.'s merger with ASP NEP Merger Sub, Inc. must qualify as a "transfer of more than a fifty percent (50%) beneficial interest in [defendant NEP Image Group]." As explained below, defendants' documents do not conclusively establish that no such transfer occurred.

Though Black's Law Dictionary defines "beneficial interest" as "[p]rofit, benefit, or advantage resulting from a contract . . . as distinct from the legal ownership or control," Section 13.1 provides an indication of what the parties considered to be a "beneficial interest," stating that an assignment includes a 50% or more transfer of the "beneficial interest in the lessee . . . whether of stock, partnership interest, company share or otherwise by any party in interest." This language clearly states that the parties meant for the term "beneficial interest" to encompass the partnership interest in NEP Image Group, the lessee. Moreover, the list contains the open-ended phrase "or

¹ Though plaintiffs in their motion papers argue that both the Apax/Spectrum Purchase and American Securities Purchase were assignments, the complaint only seeks a declaratory judgment regarding the American Securities Purchase. The court therefore does not reach the defendants' arguments regarding the Apax/Spectrum Purchase but does note, however, that plaintiffs have not refuted defendants' arguments.

otherwise,” which renders the language of Section 13.1 sufficiently broad to include the partnership interest in NEP Image Group. Defendants, however, argue that the court should follow the Delaware definition of the term “beneficial interest,”² which defendants assert is defined in *Lusk v. Elliott* (1999 WL 644739 [Del. Ch. Aug. 13, 1999]) as signifying both economic and membership interests. Defendants contend that neither economic nor membership interests of NEP Image Group have been assigned. In *Lusk*, however, the court did not set out to define the meaning of “beneficial interest,” and in fact merely used the term “beneficial interest” synonymously with “financial interest” in its examination of whether the beneficial interest or the entire membership interest of a limited liability corporation had been transferred.³ 1999 WL 644739 at *1, *4.

Defendants’ submissions are inconclusive and fail to show that the American Securities Purchase did not involve a transfer of 50% or more of the beneficial interest in NEP Image Group under any definition of the term. The American Securities Purchase resulted in NEP, Inc. becoming a wholly-owned subsidiary of ASP NEP Holdco, Inc. Alexander Aff., Ex. 6 at p. 1 (“Upon consummation of the Merger, [ASP NEP Merger Sub, Inc.] will cease to exist and [NEP, Inc.] will become a direct wholly-owned subsidiary of [ASP NEP Holdco, Inc.]”). It is unclear from the American Securities Purchase agreement whether NEP, Inc. still retained its controlling interest in NEP Image Group through its ownership of NEP Supershooters after becoming a wholly-owned

² NEP Image Group is organized under Delaware law.

³ In any event, Section 24.11 of the Net Leases states that the Net Leases shall be governed by New York law.

subsidiary, and defendants have not offered any affidavits from persons knowledgeable about the transaction to illuminate the meaning of the agreement or the fate of NEP Image Group.

Defendants also argue that Section 13.1(k) explicitly exempts mergers or consolidations from the scope of the non-assignment provision.

Section 13.1(k) states,

Notwithstanding the foregoing, Lessee shall not be required to obtain Lessor's consent to, an [sic] Sections 13.1(a), (b), (c), (h) and (j) of the Article shall not apply to (i) any sublease or assignment from Lessee to any party controlling, controlled by or under common control with Lessee ("control" and its variants meaning ownership of more than fifty (50%) percent of the equity interests in the party in question); or (ii) *any assignment of this lease from Lessee to any entity (x) that is the successor to Lessee's by merger or consolidation or (y) that acquires all or substantially all of Lessee's business operations for good and valuable consideration and that has a certified net worth at least equal to Lessee's then net worth.*

Alexander Aff., Ex. 2 at p. 20 (emphasis added). In their opposition papers and the affidavit of their CEO, William A. Dallessandro ("Dallessandro"), plaintiffs point to a typo in the first part of the sentence and contend that it is meant to be read as "consent *in* Sections 13.1(a), (b), (c), (h) and (j) of the Article shall not apply to . . . (ii) any assignment of this lease . . ." Regardless of the typo and the alleged correction of that typo, however, Section 13.1(k) only negates the need for prior consent in certain situations and has no impact on Section 13.1(i), the provision requiring a payment in the event of an assignment. Thus, even if an assignment that falls within the meaning of Section 13.1(k)(ii) occurred, defendants would still have to make a payment under Section 13.1(i). This

section of the agreement therefore does not elucidate whether the American Securities Purchase is within the scope of Section 13.1. Defendants therefore have failed to conclusively establish by documentary evidence that the American Securities Purchase transactions fall outside of the language of Section 13.1(a).

2. Defendants' Motion to Dismiss for Failure to State a Cause of Action

The court now turns to defendants' argument that dismissal is warranted because plaintiffs have failed to state a cause of action in their claim that the American Securities Purchase resulted in an assignment.

New York courts, in adhering to the terms of parties' assignment clauses, have characterized mergers as changes in the corporate form that do not constitute assignments. *CRT Services, Inc. v. Seven Hanover Assocs.*, 1992 WL 236198 *6 (S.D.N.Y. 1992); *Brentsun Realty Corp. v. D'Urso Supermarkets, Inc.*, 182 A.D.2d 604, 605 (2d Dept. 1992); *Torrey Delivery, Inc. v. Chautauqua Truck Sales and Serv., Inc.*, 47 A.D.2d 279, 282 (4th Dept. 1975) ("Technically, a merger is a corporate reorganization. It is the corporate form that is affected, not the corporate property").

In this case, the merger at issue was between a parent entity, NEP, Inc., and a third party. Though the merger here therefore does not even involve the tenant, plaintiffs may nonetheless have a cause of action for a declaration that the American Securities Purchase resulted in an assignment because the language of the Net Leases specify that transfers of a beneficial interest in tenant NEP Image Group can trigger an assignment.

In support of their motion, defendants primarily rely on two cases that involve assignment clauses that are distinguishable from Section 13.1 of the Net Leases. In one of defendants' cases, *CRT Services, Inc., supra*, the parent of plaintiff tenant converted from a general partnership into a limited partnership. During that conversion, the general partnership parent transferred all of the plaintiff tenant's stock to the limited partnership, and defendant landlord contended that this was an assignment because the lease stated "[a]ny direct or indirect transfer of a controlling interest by or of a corporate tenant [other than sales on a recognized stock exchange], or of a major partnership interest of a partnership tenant, shall be deemed an assignment [for] purposes of this Article." *CRT Services, Inc.*, 1992 WL 236198 at *4-5. The court, however, in construing New York law, concluded that the parent entity's conversion from a general to a limited partnership was not an assignment of the lease that violated the contract's non-assignment provision. The parent entity was the parent of both the original tenant and the assignee, and the court reasoned that the parent's change in form "had no effect upon the property or leasehold estate in the hands of either of those two entities." *CRT Services, Inc.*, 1992 WL 236198 at *6. In addition, the court noted that the parent's change from a general to a limited partnership was "not the sort of event against which the nonassignment covenants are intended to protect the Landlord" and that it would be particularly inappropriate to characterize as an assignment the parent entity's changed form since the parent was not a party to or guarantor of the lease. *Id.*

The assignment clause in the lease in *CRT Services, Inc.* appears to be less expansive than Section 13.1 of the Net Leases in this case. The *CRT Services, Inc.* lease characterized a transfer of

controlling interest or a “major partnership interest of a partnership tenant” as an assignment. 1992 WL 236198 at *5. On the other hand, Section 13.1 characterizes a 50% or more transfer of a beneficial interest in the tenant as an assignment. Like the tenant in *CRT Services, Inc.*, NEP Image Group itself apparently still exists as a limited partnership as a result of the American Securities Purchase. However, the ownership interests in NEP Image Group, which may include “stock, partnership interests, company shares, or otherwise” may have transferred from NEP, Inc. to a third party in the transaction. Unlike in *CRT Services, Inc.*, where tenant’s stock changed hands from the parent’s general partnership entity to the same parent’s limited partnership entity, here, the parent NEP, Inc. merged with a third party and, in so doing, the ownership of NEP Image Group has allegedly changed.

Defendants also rely on *Cellular Telephone Co. v. 210 East 86th Street Corp.* (44 A.D.3d 77 [1st Dept. 2007]), in which the court stated that the acquisition of a parent by a third party does not trigger a non-assignment violation. *Cellular Telephone Co.*, 44 A.D.3d at 82 (“Given the vast web of interlocking ownership between many corporations, it would be unreasonable to read the lease provision as effecting an assignment or transfer whenever some far removed corporate parent is sold, especially when the lease expressly limits the prohibition to capital stock of tenant . . .”).

In *Cellular Telephone Co.*, the assignment provision in the lease stated “the transfer or other disposition of in excess of twenty-five (25%) percent of the issued and outstanding capital stock of Tenant or any corporate tenant or subtenant, or the transfer of in excess of twenty-five (25%) percent of the total interest in any other entity (partnership or otherwise) which is Tenant or subtenant,

however accomplished, whether in a single transaction or in a series of transactions, shall be deemed an assignment of this Lease or such sublease, as the case may be.” *Cellular Telephone Co.*, 44 A.D.3d at 78-79. After the parent of the tenant’s parent was purchased, defendant landlord canceled the lease, contending that the purchase constituted an assignment of the lease that therefore triggered the landlord’s cancellation right.

The plaintiff tenant sought a declaration that the landlord had not validly canceled the lease based on the alleged assignments. The *Cellular* court concluded that the third party’s purchase of the parent of the parent was not an assignment, because the terms of the lease required a transfer of 25% of the stock of the *tenant* in order to constitute an assignment, and the purchase only involved the stock of the *parent*. *Cellular Telephone Co.*, 44 A.D.3d at 80-82 (noting that the tenant’s stock was not transferred “except in the broadest sense,” by the sale of the parent of the parent to a third party).

Section 13.1 appears to be more expansive than the assignment clause in *Cellular Telephone Co.* Transfers that trigger an assignment in *Cellular Telephone Co.* are limited to: (a) stock and (b) “the total interest in any other entity (partnership or otherwise) which is Tenant or subtenant.” 44 A.D.3d at 78-79. In contrast, in this case, a transfer of beneficial interest in the tenant, “whether of stock, partnership interest, company share, or otherwise” will trigger an assignment. The court in *Cellular Telephone Co.* diligently adhered to the language of the lease and focused on the absence

of a transfer of tenant's stock.⁴ Here, because the assignment clause covers a broader range of interests that, if transferred, trigger an assignment, it is possible that the American Securities Purchase may have included a transfer of beneficial interest in NEP Image Group. Defendants' reliance on *CRT Services, Inc.* and *Cellular Telephone Co.* is, therefore, unavailing.

The court in *Cellular Telephone Co.* does find an assignment, however, in another series of transactions. The landlord in *Cellular Telephone Co.* had also contended that an assignment occurred when the original tenant entity ceased to exist by operation of law and the succeeding corporate entity then merged with another affiliated entity.⁵ In that transaction, the change in tenant was a result of intra-corporate transactions, and the court, deeming this to be an assignment, reasoned that the parties could have negotiated and drafted the assignment provision in such a way as to make absolute the "intra-corporate right of assignment" if they had wished to allow such transactions to occur without triggering the assignment clause. *Cellular Telephone Co.*, 44 A.D.3d at 83.

Here, it is possible that the parties negotiated and drafted the assignment provision to cover precisely the type of transfer that occurred in the American Securities Purchase. Without affidavits from parties with personal knowledge explaining the American Securities Purchase, it is unclear

⁴ The tenant was not a partnership, so there were no partnership interests in the tenant that could have been transferred.

⁵ One of the two equal partners of the original tenant partnership acquired 100% of the partnership interest, which caused the original tenant to dissolve by operation of law since effectively only one partner owned 100% of the partnership tenant. That acquiring partner then merged into an affiliated entity that later merged into the entity that ultimately became the tenant in the action.

what transfers occurred in that transaction. Moreover, it is also unclear what the parties meant by “beneficial interest,” though the Dalessandro affidavit offers some clarity in this regard. *See Teitelbaum Holdings, Ltd. v. Gold*, 48 N.Y.2d 51, 56 (1979) (“[M]atters extrinsic to the agreement may not be considered when the intent of the parties can be gleaned from the face of the instrument”); *Helmsley-Spear, Inc. v. New York Blood Center, Inc.*, 257 A.D.2d 64, 68 (1st Dept. 1999). According to Dalessandro, the intent of Section 13.1 was to prevent defendants whom he collectively refers to as “NEP” from profiting from the below-market rental rate that plaintiff landlords offered to “NEP” in exchange for “NEP’s” purchase of certain business assets. Dalessandro Aff., ¶ 21-24. This explanation of the intent behind the assignment clause therefore suggests that if defendants entered into transactions that benefitted from the value of NEP Image Group’s leasehold interest in the plaintiffs’ properties and involved a transfer of a beneficial interest in NEP Image Group, the assignment clause may be triggered. The American Securities Purchase may qualify as such a transaction. Given the broad language and intent of Section 13.1, the Net Leases are distinguishable from the leases in *CRT Services, Inc.* and *Cellular Telephone Co.*, and defendants’ argument that plaintiffs have failed to state a cause of action is unavailing.

B. Fourth Cause of Action: 11th Avenue Property Alterations

Finally, defendants argue that the fourth cause of action is completely belied by certain documentary evidence establishing that NEP Image Group informed Pontillo, the President of non-party MTI, of its intention to make alterations to the 11th Avenue Property, or, alternatively, that

plaintiff Modern Communication waived any requirement of prior written consent to alterations of the 11th Avenue Property.

Article X of the Net Lease for the 11th Avenue Property governs lessee alterations and states, in pertinent part, “Lessee shall make no other changes or alterations to the Leased Property or any additions to the Leased Property . . . without the express consent and approval in writing of the Lessor [Modern Communication Services].” Alexander Aff., Ex. 2 at p. 14. In addition, Article X imposes additional requirements on the tenant NEP Image Group before it could make any alterations to the property, including that NEP Image Group: (1) submit to Modern Communication detailed plans and specifications of the proposed alterations; (2) obtain all permits, approvals, and certificates required; and (3) furnish Modern Communication with duplicate original copies of Workers Compensation and comprehensive liability policies naming Modern Communication as an additional insured. *Id.* at 14-15.

Defendants submit documentary evidence that allegedly shows that Pontillo was aware of the alterations and approved them in writing. In particular, defendants submit documents that Pontillo signed, including documentation from the application to the New York City Department of Buildings, work permit applications, and purchase orders for supplies allegedly obtained for the 11th Avenue Property alterations. Though defendants’ submissions may show that MTI was aware of the alterations to the 11th Avenue Property, the documents do not utterly refute plaintiffs’ factual allegations that the tenant of the 11th Avenue Property did not comply with the terms of Article X of the Net Lease, which required, *inter alia*, that defendant tenant obtain written consent for the

alterations from Modern Communication and submit to Modern Communication detailed plans and specifications for the proposed alterations and duplicate original policies of Workers Compensation and comprehensive liability policies.

In addition, though MTI, through Pontillo, may have been aware of the alterations, the defendants' documents do not conclusively establish that plaintiff Modern Communication itself was aware of the alterations so that its acceptance of rent subsequent to the alterations could have constituted a waiver. Moreover, Section 24.3 of the Net Lease for the 11th Avenue Property in fact contains a nonwaiver clause that states, in pertinent part, that "[n]o waiver by Lessor of any provision of this Lease shall be deemed to have been made unless expressed in writing and signed by Lessor. No acceptance of rent . . . from lessee after any default . . . shall constitute a waiver. . . ." Alexander Aff., Ex. 2 at p. 27. This nonwaiver clause is enforceable, and defendants have submitted no evidence of a written waiver from plaintiff. See *Excel Graphics Technologies, Inc. v. CFG/AGSCB 75 Ninth Ave., L.L.C.*, 1 A.D.3d 65, 69-70 (1st Dept. 2003) ("[I]t is clear that the parties to a commercial lease may mutually agree that conduct, which might otherwise give rise to an inference of waiver, shall not be deemed a waiver of specific bargained for provisions of a lease."), *lv. dismissed* 2 N.Y.3d 794 (2004). Defendant's argument that Modern Communication's continued acceptance of rent from defendants after the 11th Avenue Property alterations occurred constitutes a waiver of the requirements of Article X of the Net Lease therefore fails.

For the reasons discussed above, the court denies defendants' motion to dismiss all four causes of action.

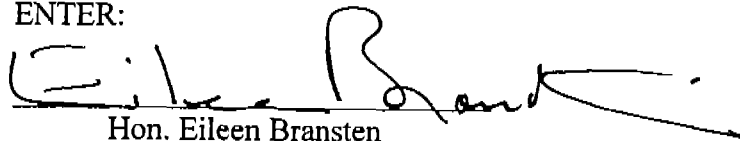
Accordingly, it is

ORDERED that the court denies NEP Image Group, LLC, NEP Supershooters, L.P., NEP Broadcasting, LLC, NEP, Inc., and NEP II, Inc.'s motion to dismiss the complaint; and it is further

ORDERED that defendants shall serve and file an answer to the complaint within twenty (20) days of service of a copy of this order with notice of entry.

Dated: May 8, 2008

ENTER:



Hon. Eileen Bransten

FILED
MAY 13 2008
NEW YORK
COUNTY CLERK'S OFFICE