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

PRESENT: WALTER B. TOLUB Justice PART 15

Index Number : 107277/2004
VANLEX STORES
vs
BFP 300 MADISON II LLC
Sequence Number : 005
SUMMARY JUDGMENT

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

The following papers, ... 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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
OCT 06 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 9/25/08

WALTER B. TOLUB 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 15
----------X

VANLEX STORES, INC.,

Plaintiff,

-against-

Index No. 107277/04
Mtn. Seq. 005

BFP 300 MADISON II, LLC,
BFP 300 MADISON I, LLC,
BROOKFIELD FINANCIAL PROPERTIES, L.P.,

Defendants.

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TOLUB, J.:

This action is based upon defendants' alleged breach of a right of first offer provision contained in an Agreement of Lease, dated June 24, 1996 (1996 Lease).

Plaintiff Vanlex Stores, Inc. (Vanlex) had been the tenant of the street level store premises and basement level premises (collectively "Premises") in the building located at 310 Madison Avenue, New York, New York. The 1996 Lease was for a term of eighteen years and nine months and was entered into with the Defendant Madison II's predecessor in interest, non-party Lawrence Rivkin, as receiver and owner. The 1996 Lease contained a provision whereby it could be terminated in the event that the owner intended to demolish the building and a provision requiring the owner to provide plaintiff Vanlex with the Right of First Offer to return to the New Building. The owner terminated the Lease because of demolition.

The original complaint asserted causes of action for declaratory relief, injunctive relief, rescission and specific performance. Vanlex moved for a preliminary injunction and defendants moved to dismiss the complaint. This court denied the preliminary injunction and granted, in part, defendants' motion, dismissing the causes of action for rescission and declaratory relief, holding that defendants are not required to offer Vanlex a lease that permits it to use the Premises in accordance with the use provision of the prior lease with its predecessor.

In January 2005, Vanlex filed an amended complaint (Complaint), asserting the same causes of action that were asserted in the original complaint and adding a cause of action for breach of the 1996 Lease. Defendants answered the Complaint, asserting eight affirmative defenses based upon the following claims: Vanlex's failure to state a cause of action for a material breach or any injury suffered by Vanlex; Vanlex's complaint is moot; unclean hands; estoppel; Vanlex's lack of damages and/or failure to mitigate harm; res judicata and collateral estoppel; the pleading is contradicted by documentary evidence; and the pleading is untimely.

Defendants now move for summary judgment dismissing the Complaint. Vanlex cross-moves for summary judgment on its fourth cause of action for breach of the 1996 Lease. These motions, to a significant extent, turn on the interpretation of the following

provision contained in section 39.05 of the 1996 Lease (First Offer Provision):

> Tenant's Right of First Offer: In the event that (i) Owner shall exercise the option set forth in this Section 39.01 to terminate this Lease (ii) *Owner shall thereafter build a new building on the Real Property* or substantially alter or renovate the existing Building, as the case may be, (iii) *upon completion of such new building or alteration or renovation*, Owner, in Owner's sole judgment, shall determine to lease space on the Street Level thereof as a store or include commercial retail space on the first floor of the new or renovated Building, as the case may be, and (iv) such completion of such new building or alteration and renovation shall be substantially completed on a date on which there would have been at least five (5) years remaining in the original Demised Term but for such termination of this Lease, Owner shall notify Tenant: (a) of the fact that either the Demised Premises is so restored and will be used as a store or Owner is so including such commercial retail space in the building; and (b) in such notice Owner shall advise Tenant of the terms and conditions upon which Owner is willing to lease the Demised Premises or such commercial retail space. *Upon the occurrence of all of the aforesaid events Tenant shall have the option*, exercisable by notice to Owner within thirty (30) days after the delivery of such notice by Owner, to lease such commercial retail space which is the subject of such offer, upon the terms, covenants and conditions set forth in such offer, and in the event that Tenant so exercises such option, the parties shall promptly enter into a lease covering such space (x) upon all of the terms, covenants and conditions set forth in such offer, and (y) where such terms, covenants and conditions are not inconsistent with the provision of this Lease, upon the applicable provisions of this Lease which are not so in

inconsistent [*sic*].

(Hogan Aff., Ex. 1, at 96 [emphasis added]).

Many of the additional relevant facts of this case were stated in detail in this court's memorandum decision, filed December 9, 2004 (12/9/04 Decision), and, therefore, are not restated herein. To the extent that additional facts are relevant to this decision, they are stated in the discussion below. Unless stated otherwise in this decision, defined terms in the 12/9/04 Decision shall have the same meaning when used herein.

Discussion

Defendants' Motion for Summary Judgment

Defendants argue that the First Offer Provision was not triggered until the new building was completed, that Vanlex has no claim for breach based upon the lease-leaseback transaction with CIBC[1], and that Vanlex has no claim based upon Madison I's April 16, 2004 letter offering Vanlex use of the Premises. Vanlex counters that defendants breached the First Offer Provision, arguing that "it did not matter in what order the events set forth in Article 39.05 occurred." (Vanlex Opp. Mem. of Law, at 30). Vanlex also argues that none of the offers it received were first, or bona fide, offers, and that Madison II

[1]For an explanation of the leaseback arrangement and the role of CIBC, please see the 12/9/04 Decision.

was required to present Vanlex with an offer with terms and conditions upon which defendants "had determined were terms and conditions upon which they would lease the space" (that is, the same terms and conditions offered to CIBC in the lease-leaseback transaction).[2] (*Id.* at 29).

"[A] lease is subject to the rules of construction applicable to any other agreement." (*George Backer Mgt. Corp. v Acme Quilting Co.*, 46 NY2d 211, 217 [1978]). "[W]here the parties to a contract have set down their agreement in a clear and complete document, such writing should be enforced according to the terms therein [citations omitted]." (*Nola Realty LLC v DM & M Holding L.L.C.*, 33 AD3d 523, 526 [1st Dept 2006]). "The foregoing principle is particularly important 'in the context of real property transactions, where commercial certainty is a paramount concern, and where . . . the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length.'" (*Id.* [citations omitted]).

Here, the First Offer Provision is clear and unambiguous, and it expressly provided that Vanlex was to be offered the new lease only "upon completion of [the] new building ... ." It is undisputed that the lease-leaseback transaction took place in

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[2] The court notes that Vanlex submits a 38-page opposition brief, 14 pages of which are devoted to quoting deposition testimony without explaining the relevance of that testimony in its argument.

March 2001, the leases relevant to that transaction were amended in April 2002, and the new building was not completed until January 2004. Indeed, defendants submit evidence showing that, in essence, the lease-leaseback transaction was a financing device, whereby the new building could be constructed on CIBC's credit. CIBC never used or occupied the Retail Space, nor could it at the time of the lease-leaseback transaction, because the space did not exist at that time and the right to use the space was simultaneously subleased to Madison I (which, upon completion of the new building, offered the Premises to Vanlex). Thus, defendants have made a prima facie showing that the First Offer Provision was not triggered until the new building was completed. Therefore, based upon the plain language of the First Offer Provision, the lease-leaseback transaction did not violate the 1996 Lease because it occurred prior to the completion of the new building, and, as a result, prior to the accrual of Vanlex's first offer rights.[3]

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[3] The court notes that, although Vanlex's request for a preliminary injunction was denied, the 12/9/04 Decision stated that Vanlex had established a likelihood of success on the merits of its claim for breach of the First Offer Provision, based upon Madison II leasing the Premises to CIBC without offering the lease to Vanlex. This comment was not a ruling on the merits. *Bingham v Struve*, 184 AD2d 85, 88 (1st Dept 1992) ("[a] judicial determination regarding likelihood of success on the merits does not ... amount to a predetermination of the issues"). Moreover, as conceded by Vanlex, the 12/9/04 Decision was made at the time of Vanlex's application for a preliminary injunction, pre-answer and pre-discovery, and, as a result, it was based upon an incomplete record.

As discussed above, the first offer to lease the Premises was made to Vanlex by Madison I's April 16, 2004 letter, and Vanlex's president testified that Vanlex was not damaged by receiving the initial offer from Madison I rather than Madison II. Ades Dep., at 82-83. Thereafter, Madison II sent Vanlex a letter, dated January 6, 2005, offering to lease the Premises. On July 27, 2005, Madison II sent six additional offers to Vanlex to lease the Premises. Madison I leased the Premises to non-party Sephora USA, Inc. in the fall of 2006, only after Vanlex failed to accept any of the above-referenced offers, and no third party occupied the retail space until March 2007, long after Vanlex's failure to accept the offers made by defendants. For the foregoing reasons, defendants have made a prima facie showing that Vanlex's second cause of action for an injunction, which is based upon defendants' alleged failure to lease the Premises until giving Vanlex a bona fide and proper offer, is without merit.

Vanlex's fourth cause of action is based upon Vanlex's claim that the First Offer Provision entitled it to receive the same terms and conditions to lease the Premises as were offered to CIBC and Madison I. Vanlex's argument is based on the following language of the First Offer Provision:

> Owner shall notify Tenant: (a) of the fact that either the Demised Premises is so restored and will be used as a store or Owner is so including such commercial retail space

> in the building; and (b) in such notice Owner shall advise Tenant of the terms and conditions upon which Owner *is willing to lease the Demised Premises or such commercial retail space*.

(Emphasis added.) According to Vanlex, this language means that the Owner was required to advise Vanlex of the terms and conditions upon which "the Owner was willing to lease the commercial retail space to anyone, not just Vanlex." Vanlex Opp. Mem. of Law, at 32. In other words, Vanlex argues that, because Madison II was willing to provide CIBC and Madison I with certain lease terms and conditions in the lease-leaseback transaction in 2001, the First Offer Provision locked Madison II into the same terms and conditions when it made its offer to Vanlex in 2004.

Specifically, Madison II's lease to CIBC was made subject to the "[p]ossible right of [Vanlex], pursuant to a lease which has been terminated, to the extent that such right survives the termination of such lease, to lease space at the improvements to be constructed on the Land." (Hirsch Aff., Ex. 5 (c), Exhibit B [2]). Section 5.01 of Madison II's lease to CIBC, and section 1.03 (a) of CIBC's lease to Madison I, contain the following language:

> The Retail Premises may be used and occupied for retail uses and lawful uses incidental thereto, provided that the foregoing uses and uses incidental thereto are in keeping with the character and appearance of a first-class office building which includes retail space; and the Retail Premises shall not be used or occupied for any other use or purpose.

(Hirsch Aff., Ex. 7, at 19 and Ex. 8, at 3).

However, for the reasons discussed above, Vanlex's right to receive an offer to lease the Premises had not accrued at the time of the lease-leaseback transaction. Therefore, the terms and conditions of the lease between CIBC and Madison II are irrelevant. Moreover, as Vanlex concedes on pages 13 and 34 of its opposition brief, the court already determined that defendants were not required to offer Vanlex a new lease that would allow it to operate the Premises under the use provision contained in the 1996 Lease.[4]

Moreover, the CIBC lease was not a lease of the retail space previously occupied by Vanlex. Rather, Madison II leased CIBC the entire premises (that is, as Vanlex concedes on page 8 of its opposition brief, the land and the entire building at 300 Madison Avenue) as a master lease in order to obtain financing to construct the new building. The CIBC lease merely states generally that the use of the retail space must be "in keeping with the character and appearance of a first-class office building which includes retail space." (Hirsch Aff., Ex. 7, at

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[4] As stated in the 12/9/04 Decision, the plain language of the 1996 Lease grants the owner the right to dictate the terms and conditions upon which it was willing to lease the Premises to Vanlex. Nothing in the 1996 Lease limits the owner's ability to restrict the use of the Premises in the offer to lease the new building. Under the First Offer Provision, defendants are permitted to restrict Vanlex's use of the Premises to the extent contained in the notice of offer to lease.

19 and Ex. 8, at 3). Thus, the CIBC lease does not state specific terms and conditions upon which Madison II was willing to lease the Premises to any tenant. Therefore, Vanlex's argument, that it was entitled to receive the same terms and conditions to lease the Premises as were offered to CIBC and Madison I, is without merit.

In any event, "[t]he court's role is limited to interpretation and enforcement of the terms agreed to by the parties; it does not include the rewriting of their contract and the imposition of additional terms." (*Matter of Salvano v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 85 NY2d 173, 182 [1995]; *see also Matter of Wallace v 600 Partners Co.*, 86 NY2d 543, 548 [1995] ["[i]t is axiomatic that a contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed" quotation marks and citation omitted]).

Here, the First Offer Provision required the Owner to "advise Tenant of the terms and conditions upon which Owner *is willing* to lease the Demised Premises or such commercial retail space." (Emphasis added.) As discussed above, the First Offer Provision contemplated a new lease offer to Vanlex only *after* the completion of the new building and the Owner's determination to lease the retail space, which undermines Vanlex's argument that any provision contained in the CIBC or Madison I leases has any

relevance to the terms of the offer made to Vanlex.

The only reasonable interpretation of the present tense "is willing" language is that it provides discretion to the Owner to make an offer to Vanlex with whatever terms and conditions it is willing to provide at the time the offer is made, not "the terms and conditions Madison II had determined it *was willing* to lease the commercial retail space ... to anyone," as is argued by Vanlex. Vanlex Opp. Mem. of Law, at 4 (emphasis added). This interpretation is consistent with the 12/9/04 Decision, wherein the court stated that the 1996 Lease granted the owner the right to dictate the terms and conditions upon which it was willing to lease the Premises to Vanlex.

Vanlex provides no legal authority, nor a contractual basis, in support of its interpretation of the First Offer Provision as requiring Madison II to offer Vanlex the terms of the CIBC or Madison I lease. *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 571 [2005] ["'[m]ere assertion by one that contract language means something to him, where it is otherwise clear, unequivocal and understandable when read in connection with the whole contract, is not in and of itself enough to raise a triable issue of fact' [citation omitted]"; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] ["one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests

his claim ...; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient"]).

Vanlex also appears to be arguing that defendants breached the implied covenant of good faith and fair dealing, claiming that "Defendants could not have in good faith reasonably demanded that Vanlex return to the New Building as anything other than Dollar Bills." Vanlex Opp. Mem. of Law, at 28. As discussed above, this court has already determined that defendants were not obligated to provide Vanlex with an offer that would allow it to operate a Dollar Bills store. This determination is the law of the case and refutes Vanlex's argument. *Martin v City of Cohoes*, 37 NY2d 162, 165 [1975] ["[t]he doctrine of the 'law of the case' is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned"]).

In any event, "[t]he covenant of good faith and fair dealing cannot be construed so broadly as to effectively nullify other express terms of the contract, or to create independent contractual rights." *National Union Fire Ins. Co. of Pittsburgh, PA v Xerox Corp.*, 25 AD3d 309, 310 [1st Dept 2006]). In other words, there can be no implicit requirement in the 1996 Lease that Vanlex be permitted to return to the retail space as a Dollar Bills store when the explicit language of the 1996 Lease

provided the building owner with discretion as to the terms and conditions to be offered. For the foregoing reasons, Vanlex's argument is unpersuasive, and the defendants' motion for summary judgment dismissing the fourth cause of action is granted.

The first and third causes of action of Vanlex's original complaint were already dismissed pursuant to the 12/9/04 Decision, but Vanlex's amended pleading re-asserts identical claims. Vanlex does not challenge the prior dismissal of its third cause of action for rescission and specific performance, but claims that the first cause of action survived dismissal to the extent that Madison II has not provided Vanlex with the notice required under the First Offer Provision and given Vanlex the opportunity to entertain the first offer to lease the retail space.

However, the law of the case doctrine applies to these "legal determinations that were necessarily resolved on the merits in a prior decision." *Brownrigg v New York City Hous. Auth.*, 29 AD3d 721, 722 [2d Dept 2006]). In any event, even assuming for the moment that the first cause of action was not dismissed in the 12/9/04 Decision, it is dismissed for the reasons stated herein.

Accordingly, it is hereby

ORDERED that plaintiff's cross motion for summary judgment is denied; and it is further

ORDERED that defendants' motion for summary judgment is granted and the amended complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 9/21/08

ENTER:

WALTER B. TOLUB J.S.C.