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

PRESENT: EDWARD H. LEHNER Justice

PART 19

Number : 601533/2008

36 WOOSTER REALTY, LLC

36 WOOSTER STREET LLC

ENCE NUMBER : # 001

DISMISS COMPLAINT

INDEX NO. 601533-08

MOTION DATE

MOTION SEQ. NO. #007

MOTION CAL. NO.

__ 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

NOV 25 2008

COUNTY CLERK'S OFFICE

FOR THE FOLLOWING REASON(S):

Dated: NOV 25 2008

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 19

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134-136 WOOSTER REALTY, LLC and
134-136 WOOSTER COMMERCIAL, LLC,

Plaintiffs,

Index No.
601533/08

- against -

134-136 WOOSTER STREET LLC and
ADIDAS PROMOTIONAL RETAIL OPERATIONS, INC.,

Defendants.

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EDWARD H. LEHNER, J.:

Before the court is a motion by defendant 134-136 Wooster Street LLC ("defendant") to dismiss the complaint pursuant to CPLR 3211(a)1.

This is an action for specific performance of a contract for the purchase by plaintiffs from defendant of the building located at 134-136 Wooster Street (the "Building") in the borough of Manhattan (the "Contract"). The Contract states a purchase price of $10,870.00, and provides that plaintiffs are acquiring the Building subject to a lease dated June 26, 2002 between defendant as landlord, and adidas Promotional Retail Operations, Inc. ("adidas") as tenant (the "Lease"). Paragraph 20 of the Contract provides the following with respect to the rights of the parties should adidas exercise certain rights under the Lease:

> Supplementing and modifying section 4.03 of this Contract, (a) Purchaser has fully reviewed the lease by and between Seller and adidas

> Promotional Retail Operations, Inc. ("Tenant") dated June 26, 2002, and is fully familiar with its terms and conditions; (b) recognizes and acknowledges that Tenant has a right of first refusal to purchase the Property pursuant to the terms of the Lease; (c) recognizes and acknowledges that in the event that Tenant elects to exercise said right, this Contract will be canceled, and the Deposit as set forth in paragraph (a) of Schedule C shall be immediately returned by Escrowee to Purchaser, and Seller and Purchaser shall have no other obligations toward the other (d) Purchaser recognizes and acknowledges that in the event that Tenant elects not to exercise its right of first refusal, this Contract shall be binding in all respects.

The right of first refusal (the "Option") referred to above is contained in paragraph 27 of the Lease and states:

> RIGHT OF FIRST REFUSAL. In the event that during the Term hereof, Landlord desires to sell the Building, Landlord shall first notify Tenant in writing that the Building is available for sale and the basic economic terms on which Landlord is seeking to sell the Building. If Tenant is interested in pursuing such purchase, Tenant shall give Landlord written notice of its interest within ten (10) days of receipt of notice from Landlord. Upon Landlord's receipt of such election from Tenant, Landlord and Tenant shall use all reasonable efforts to enter into a contract of sale for the Building on mutually acceptable terms, and Landlord shall not pursue any other buyers unless and until such negotiations are mutually terminated. If Tenant does not timely elect to exercise its right of first refusal hereunder, or elects not to exercise its right of first refusal, then Landlord shall be free to offer the Building to other parties.

On March 24, 2008, defendant sent the following letter to adidas:

> Please be advised that this letter constitutes notice pursuant to paragraph 27 of the Lease, ... of Owner's desire to sell the Building and that the Building is available for sale.
> The economic terms are as follows. Offering Price: $10 Million net. Broker's fee: paid by Purchaser. Mortgage assumption fee: paid by

> Purchaser. Closing: 60-90 days. Mortgage: all cash, except assumption of current mortgage (approx $4.75 m.).
> Please advise if Tenant will exercise its right of first refusal.

Three days after sending this notice, defendant entered into the Contract. On April 2, 2008 (within the ten day period provided in paragraph 27 of the Lease), adidas's counsel sent the following notice to defendant:

> Notice is hereby given by and on behalf of adidas, under paragraph 27 of the Lease, that Tenant is interested in and desires to negotiate the purchase of the Premises according to the notice dated March 24, 2008 ... as well as the terms and conditions of said paragraph 27.

On the same day, defendant's counsel sent a letter to adidas stating:

> My client has had to revise the estimate of the market value of the Building referred to above. She has been advised by several specialists that with a 4% to 5% cap rate, the Building is worth $11.5 to $13.5 million.
> My client is not interested in selling the Building for below its market value.
> If you need additional time to respond, please advise and I will direct your request to my client.

A few days after receipt of the April 2 letter from adidas, defendant's counsel telephoned plaintiffs' counsel and advised him that in light of the notice from adidas exercising the Option, the Contract was cancelled and the down payment would be returned (tr. p. 21). In a letter dated April 7 from adidas's counsel to defendant's counsel, it was asserted that defendant was "not free to adjust" the purchase price referred to in the March 24 letter.

Although, as of the date of oral argument on October 17, more than a half year had elapsed since adidas sent the March 27 notice, no agreement had been entered into between defendant and adidas, the said parties indicating that this litigation and the filing of a notice of pendency with respect thereto has hampered the consummation of an agreement. It also appears that there may be litigation between adidas and defendant as to whether there has been a good faith effort to conclude an agreement as contemplated by said paragraph 27.

Plaintiffs maintain that the Option is unenforceable as merely a non-binding agreement to agree, whereas defendant contends that plaintiffs have no standing to challenge the subject Lease provision as they are not parties to that agreement. In their complaint, plaintiffs allege that the sending by defendant of the letter of April 2 increasing the proposed purchase price results in the letter of March 24 being "withdrawn, superceded and/or null and void" (¶ 14), and that as a consequence, the letter of adidas of April 2 "was of no further force and effect" (¶ 15).

At oral argument, defendant's counsel stated that, although he did not raise the issue in the papers (tr. p. 12), he believes the Option to be unenforceable for the same reason asserted by plaintiff, to wit: it is an unenforceable agreement to agree; but he further stated that defendant had an unequivocal enforceable obligation to act reasonably in negotiating with adidas (tr. p. 13).

"The decision whether or not to award specific performance is one that rests in the sound discretion of the trial court." [Sokoloff v. Harriman Estates Development Corp., 96 NY2d 409, 415 (2001)]. Here, neither plaintiffs nor defendant has come into court with clean hands. When said parties entered into the Contract on March 27, they were aware of the Option set forth in the Lease. In paragraph 20 of the Contract, plaintiffs "recognize[d] and acknowledge[d] that (adidas) has a right of first refusal to purchase the property ... (and agreed) that in the event (adidas) elects to exercise said right, the Contract will be cancelled, and the deposit ... shall be immediately returned ... and (plaintiffs) and (defendant) shall have no other obligations towards the other." Under the Option provision, adidas had 10 days from the sending of the March 24 letter in which to express its interest in the purchase of the Building, and that defendant agreed not to "pursue any other buyers unless and until such negotiations are mutually terminated." Notwithstanding the clear commitments set forth in the Lease, plaintiffs and defendants entered into the Contract only 3 days after the sending of the March 24 letter, and thus plaintiffs knowingly entered into a transaction at a time they knew that defendant had committed itself to not seek buyers other than adidas.

While it may be that the Option represents a non-binding agreement to agree [see, Joseph Martin, Jr., Delicatessen, Inc. v. Schumacher, 52 NY2d 105, 109 (1981); Aksman v. Ju, 21 AD3d 260 (1st Dept. 2005)], and that plaintiffs, although not a party

to the Lease, may have, absent an agreement to the contrary, been entitled to challenge its enforceability[see, National Land and Building Corporation v. Kazim, 25 AD3d 513 (1st Dept. 2006)], the provisions of the Option were not of such a nature that they can be said to have been illegal and against public policy. Thus, plaintiffs and defendant were entitled to enter into an agreement to have their rights and obligations determined based on how the parties to the Lease acted with respect to the Option. Since plaintiffs agreed that the Contract would be cancelled if certain notices were sent, their rights are determined by such agreement. In Vermont Teddy Bear, Inc. v. 538 Madison Realty Company, 1 NY3d 470, 475 (2004), the court set forth the following with respect to a contract involving realty:

> when parties set down their agreement in a clear, complete document, their writing should ... be enforced according to its terms. We have also emphasized this rule's special import in the context of real proerty transactions, where commercial certainty is a paramount concern, and where ... the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length (citations omitted)

See also, South Road Associates, LLC v. International Business Machines Corporation, 4 NY3d 272 (2005); 101123 LLC v. Solis Realty LLC, 23 AD3d 107 (1st Dept. 2005).

Here, the sending of the March 24 letter by defendant and the April 2 letter by adidas resulted in a termination of the Contract in accordance with the specific unambiguous provisions of paragraph 20 thereof. The fact that defendant sent a second notice on April 2 that modified the purchase price to be requested in the

negotiations does not alter the foregoing, nor does the fact that adidas and defendant have not as yet come to an agreement require a contrary determination. Clearly, the existence of this action and the filing of a notice of pendency with respect thereto affected the ability of the parties to consummate an agreement with respect to the Building .

In light of the foregoing, the motion of defendant 134-136 Wooster Street LLC to dismiss the action as against it is granted and it is declared that the Contract has been validly termination in accordance with the provisions of paragraph 20 thereof. The determination herein in no way affects the respective rights and obligations of defendant and adidas as against each other.

The Clerk shall enter judgment accordingly and shall cancel the notice of pendency filed in connection with this action. This decision constitutes the order of the court.

November 25, 2008

J.S.C.