[* 1]

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

PRESENT: JUDITH J. GISCHE, J.S.C. PART ____

Index Number : 111604/2007

BEAUTY PLUS STORES II,

VS.

404 6TH AVENUE REALTY

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. ____

MOTION DATE ____

MOTION SEQ. NO. ____

MOTION CAL. NO. ____

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

FILED
DEC 09 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 12/4/08

JUDITH J. GISCHE, J.S.C. 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: PART 10

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BEAUTY PLUS STORES II, INC.,

Plaintiff,

-against-

404 6TH AVENUE REALTY CORP.,

Defendant.

----------x

Decision/Order
Index No.: 111604/07
Seq. No. : 002

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

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

Upon the foregoing papers, the decision and order of the court is as follows:

This action arises from defendant's alleged wrongful refusal to consent to plaintiff's proposed sublease in connection with the Ground Floor at the commercial premises located at 404 6th Avenue in Manhattan (the "premises"). Plaintiff seeks lost rent and revenue from defendant. Defendant now moves for summary judgment dismissing the complaint. Since issue has been joined, and the note of issue has not yet been filed, summary judgment relief is available. CPLR § 3212. Brill v. City of New York, 2 N.Y.3d 648 (2004).

Plaintiff previously moved 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. The court denied that motion by decision and order dated November 15, 2007 (the "prior decision"). For the reasons that follow, defendant has now established entitlement to

summary judgment and plaintiff's complaint is dismissed.

Certain facts are undisputed. 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. Under the Lease, plaintiff may only "use and occupy" the premises for "beauty supplies and related sales and for no other purpose" (the "use clause"). Under Article 51 of the Lease, any proposed subtenant must use the premises solely for the use otherwise permitted under the Lease and shall not change the permitted use.

According to plaintiff, it operated a beauty salon product retail business at the premises for some time, but "[a]s the neighborhood changed for the better, the business did not do well and eventually closed." Plaintiff also claims that it "sold other consumer products such as cell phones, phone cards and batteries." Plaintiff alleges that on June 18, 2007, it presented to defendant a proposed subtenant for the premises, T-Mobile. Plaintiff further claims that, on June 22, 2007, defendant "unreasonably and arbitrarily refus[ed] plaintiff's request for consent to sublet to T-Mobile." It is undisputed that T-Mobile would be using the premises for the sale and rental of personal communication services and products, and other wireless or mobile telecommunication.

Plaintiff has asserted four causes of action, to wit: [1] breach of the lease claiming defendant's refusal to sublet the premises to the proposed subtenant was unreasonable and wilful; [2] seeking a declaration that defendant wrongfully and unreasonably withheld consent to the proposed sublease; [3] seeking a permanent injunction compelling defendant to consent to the proposed sublease; and [4] tortious interference with business.

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. CPLR 3212; Winegrad v. NYU Medical Center, 64 N.Y.2d 851 (1985); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Only if it meets this burden, will it then shift to the party opposing summary judgment who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*. If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1977). The court's function on these motions is limited to "issue finding," not "issue determination." Sillman v. Twentieth Century Fox Film , 3 N.Y.2d 395 (1957). When only issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 A.D.2d 459 (2nd dept. 2003).

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"). 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 landlor 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. 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. The sale of telecommunication products by the proposed subtenant does not reasonably fall within the category of "beauty sales," as that term is plainly understood, and would therefore violate the use clause. Since the use of the premises by the proposed subtenant is not permitted, the defendant can not be found to have unreasonably withheld its consent to the proposed sublease.

Even assuming *arguendo* that T-Mobile's telecommunication products are fashionable, as plaintiff contends, plaintiff's argument that telecommunication and beauty products are thus related is implausible based upon the plain meaning of these terms. Although plaintiff maintains that the parties did not "contemplate these so called distinctions," the discernible difference between beauty supplies and telecommunication products is unavoidable. "[W]hen parties set down their agreement in a clear, complete

document, their writing should as a rule be enforced according to its terms." W.W.W. Associates, Inc. v. Giancontieri, 77 N.Y.2d 157, 162 (1990), Plaintiff's argument rests on an interpretation of the use clause which is contrary to its plain meaning.

Similarly, the commercial reasonableness of defendant's decision to enforce the use clause is a red herring because the issue of whether the proposed sublease would benefit or detriment either plaintiff or defendant is not germane. 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).

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, incidentally 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.

Consequently, defendant did not breach the lease by withholding its consent to the proposed sublet, plaintiff is not entitled to a declaration that defendant unreasonably

withheld its consent and no injunction can be ordered. Accordingly, the first, second and third causes of action are hereby severed and dismissed.

Plaintiff's fourth cause of action sounding in tortious interference with business also fails. To establish a claim based on tortious interference with business relations, a plaintiff must show the existence of a business relation with a third party, defendant's interference with the relation by use of dishonest, unfair or improper means, and plaintiff sustained damages (see Entertainment Partners Group, Inc. v. Davis, 198 AD2d 63 [1 Dept 1993]). Here, plaintiff has failed to establish that the defendant used dishonest, unfair or otherwise improper means to interfere with any of plaintiff's business relations. Accordingly, defendant's motion for summary judgment is granted in its entirety and the complaint is hereby dismissed.

Conclusion

In accordance herewith, it is hereby:

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed; and it is further

ORDERED that the clerk shall enter judgment in favor of defendant 404 6th Avenue Realty Corp. against plaintiff Beauty Plus Stores II, Inc.

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
December 4, 2008

So Ordered

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

FILED
DEC 09 2008
COUNTY CLERK'S OFFICE
NEW YORK