**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF NASSAU**

**Present:**
**HON. DANIEL PALMIERI**
**Acting Justice Supreme Court**

**----------x** **TRIAL TERM PART: 47**

**D & A SEITZMAN SERVICE CORP.,**

**INDEX NO.:003838/09**

**Plaintiff,**

**MOTION DATE:3-16-09**
**SUBMIT DATE:4-2-09**
**SEQ. NUMBER - 001**

**-against-**

**720 OWNERS CORP., and**
**WENTWORTH PROPERTY MANAGEMENT,**

**Defendants.**

**----------x**

**The following papers have been read on this motion:**

**Order to Show Cause, dated 3-4-09.....1**
**Memorandum of Law in Support, dated 3-2-09.....2**
**Affidavit in Opposition, dated 3-24-09.....3**
**Reply Memorandum, dated 3-31-09.....4**

This is plaintiff's motion for a preliminary injunction pursuant to CPLR § 6301, to enjoin the defendants, during the pendency of this action, from interfering with plaintiff's use and possession of a coin operated laundry room in defendant's apartment building.

Plaintiff and defendant entered into an Agreement pursuant to which plaintiff was to have operated a coin laundry room in defendant's building. The Agreement was for a period

of 10 years, expiring on May 31, 2008, and contains a provision for automatic renewal on a year to year basis, unless a party gives notice of its intent not to renew.

The Agreement submitted by plaintiff contains a provision (the Refusal Right) giving plaintiff the "right of first refusal to meet any bona fide bid to lease the laundry room(s)... ." The version submitted by defendant, which defendant's attorney claims was received from the plaintiff, has the above clause stricken. An estoppel certificate signed by plaintiff in connection with a recent financing of the subject building refers to an annexed "true, correct and complete copy of the Lease", but nothing is annexed to the copy submitted on this motion.

The defendant contends that the Refusal Right is unenforceable because of General Obligations Law §5-903, which regulates certain self-renewal provisions in contracts.

Defendant also claims that the Refusal Right does not apply to any extension term and is an unreasonable restraint on alienation, relying for both propositions upon *Inwood Park Apartments, Inc., v. Coinmach Industries*, Co., 22 AD3d 350 (1st Dept. 2005), *affirming* 6 Misc.3d 246 (Sup. Ct. NY Cty 2004); *citing Galapo v. Feinberg*, 266 AD2d 150 (1st Dept. 1999).

It appears well settled (at least in the Second Department) that the Agreement in dispute constitutes a lease of realty rather then "a contract for service, maintenance or repair to or for any real or personal property" and as such, the restrictions on automatic renewal contained in GOL §5-903 do not apply. *Coinmach Corp., v. Alley Pond Owners Corp.*, 25 AD3d 642 (2d Dept. 2006); *Coinmach Corp., v. Harton Associates*, 304 AD2d 705 (2d Dept.

2003); *Cf Dime Laundry Service, Inc., v. 230 Apartments Corp.*, 120 Misc. 2d 639 (Sup. Ct. NY Cty. 1983). *See also Mobile Diagnostic Testing Servs., Inc., v. TLC Healthy Care Network*, 19 AD3d 1145 (4th Dept. 2005); *Wornow v. Register Com., Inc.*, 8 AD3d 59 (1st Dept. 2004).

The Agreement is denominated a "Lease", the parties are described as "Lessor" and "Lessee" and the "Premises" consist of a defined space known as the laundry in a specified "Building" which is described on an exhibit, (which is not attached). The Agreement contains a covenant of quiet enjoyment, and permits the Lessee to file a real property transfer tax return if required. The Agreement is a lease of real property and is thus excluded from the reach of GOL §5-903. As such, there is no statutory prohibition against the automatic year to year renewal.

Lacking in merit is defendant's contention that the Refusal Right does not extend into the annual renewal period. The renewal is an extension of the expiration date of the same lease, not a new lease and the Refusal Right (if it does exist) refers to the "expiration of this lease or any renewal" (emphasis added), which leaves no ambiguity that if the parties agreed on the right, it was intended to apply to renewals. In *Galapo v. Feinberg, supra,* it was held that an option to buy is only valid if reaffirmed in a subsequent lease. Here, there is only one lease and it expressly extends the right into renewal periods. *Inwood Park Apartments, Inc., v. Coinmach Industries, Co., supra*, provides meager facts but those provided indicate that the right of first refusal was to continue indefinitely after the lease expired. Here, the Refusal Right only applies to a bid from another to lease the laundry at the expiration of the term and defaults are dealt with separately. Further, the provision in the case of *Inwood Park*

*Apartments* was vastly different from the Agreement here because there the provision permitted a continuance of the contract even if the building owner did not have a substitute. Here, the right of first refusal only applies if there is another bid pending at the end of the term.

Defendant's remaining contention, that the Refusal Right constitutes an unreasonable restraint on alienation relies entirely on *Inwood Park Apartments Inc., v. Coinmach Industries, Inc., supra* and is lacking in merit because, as noted above, the agreement in that case contained a provision that gave a right to the contractor which endured beyond the expiration of the term.

In any event, Courts have recognized that in certain contemporary settings, such as here, which are principally commercial, application of the rule conflicts with its original purpose which is to promote the productive use of property. *Sanko v. Mark*, 52 AD3d 225 (1st Dept. 2008). Recognizing this purpose, our Courts have held that the rule against remote vesting does not apply to preemptive rights (another term used to describe a right of first refusal) in commercial and governmental transactions, that their validity is to be judged by applying the rule against unreasonable restraints and that a preemptive right can be a reasonable and not an unreasonable restriction on alienability. *Metropolitan Transportation Authority v. Bruken Realty Corp.*, 67 NY2d 156, 168 (1986).

In short, a preemptive right which only marginally affects alienability but which otherwise serves a commercial interest is not proscribed. *Emmons v. Trout Lake Club, Inc.*, 194 AD2d 160, 163 (3rd Dept. 1993).

Since this motion is for a preliminary injunction and not summary judgment, this Court need not determine whether a question of fact exists with respect to restrictive alienability or if the issue can be determined as a matter of law. At this juncture and for this purpose, the mere recitation of the rule of law is not enough to bar consideration of a preliminary injunction. *See Anderson v. 50 East 72nd Street Associates*, 119 AD2d 73 (1st Dept. 1986).

Since the Court is not able to determine this motion as a matter of law, the decision will depend on a determination of whether the Refusal Right was in the agreement as argued by plaintiff or deleted as contended by defendant.

CPLR §6312(c) provides that if the elements required for the issuance of a preliminary injunction are demonstrated in the plaintiff's papers, the presentation by the defendant of evidence sufficient to raise an issue of fact, shall not in itself be grounds for denial of the motion and the Court is authorized to make a determination by hearing as to whether each of the required elements exist.

Here, defendant has raised an issue of fact as to whether the Refusal Right exists and that issue will have a bearing on plaintiff's likelihood of success in this action.

A hearing shall be held on April 27, 2009 in this part at 9:30 a.m. No adjournments of this hearing will be permitted absent the permission of or Order of this Court. All parties are forewarned that failure to attend may result in abandonment of a party's contentions or Judgment by default, the dismissal of pleadings (see 22 NYCRR 202.27) or monetary sanctions (22 NYCRR 130-2.1 et seq.).

The stay contained in the Order to Show Cause shall continue pending further order of this court. This motion is adjourned to April 27, 2009, to abide the hearing.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: April 14, 2009

HON. DANIEL PALMIERI
Acting Supreme Court Justice



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