

**JFK Holding Co. LLC v City of New York**

2009 NY Slip Op 31054(U)

May 12, 2009

Supreme Court, New York County

Docket Number: 110582/2008

Judge: Milton A. Tingling

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

PRESENT: HON. MILTON A. TINGLING  
J.S.C.  
Justice

PART 44

Index Number : 110582/2008  
JFK HOLDING CO. LLC  
vs.  
CITY OF NEW YORK  
SEQUENCE NUMBER : 001  
DISMISS ACTION

INDEX NO. \_\_\_\_\_  
MOTION DATE 12/3/08  
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 is decided in accordance with the annexed decision.

**FILED**  
MAY 13 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 5/12/09 \_\_\_\_\_ mat  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

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

**PRESENT: Honorable Milton A. Tingling**  
Justice

Part 44

-----X

Index No.: 110582/2008

JFK Holding Company LLC and J. F. K.  
Acquisition Group,

Plaintiffs,

Decision

-against-

City of New York and Department of Homeless  
Services,

Defendants.

-----X

Defendants, City of New York and Department of Homeless Services (DHS), a city agency, move to dismiss this breach of contract action pursuant to CPLR 3211 (a) (7) on the grounds of lack of priority, Statute of Frauds and non-compliance with certain provisions of the City Charter. Allegedly breached is a 5 year lease containing two five year renewal options signed on October 1, 2002 by plaintiffs (JFK ), property owners in Queens County, and The Salvation Army, not a party to this action, who JFK describes as a “chosen intermediary” of DHS. The lease was executed following negotiations held exclusively between JFK and DHS, whose files hold the original lease.

The stated purpose of the lease was to convert JFK’s then unoccupied hotel premises into a multi-use shelter facility to house hundreds of needy families, thereby alleviating a growing homeless crisis in the city. Essentially placed in issue by this action is whether the city is liable under the restoration clause in the lease to finance the cost of returning the

premises to their original condition upon its expiration. This occurred prematurely in August 2004, when DHS cancelled a Services Agreement entered into by DHC and The Salvation Army on December 12, 2005, providing for the City to fund all expenses owing under the lease, including monthly rent payments. Acknowledging this commitment, the City delivered to The Salvation Army on September 28, 2005 a check for \$10,000,000 in payment for the early termination fee due under the lease. This amount was immediately transferred to JFK.

The Services Agreement was contemplated in the terms of the lease signed two months earlier. Indeed, the lease expressly stated that The Salvation Army agreed to become JFK's "tenant" solely in order to enable (it) to fulfill its obligations to (DHS). The complaint traces DHS's cancellation to a press conference announcement by Mayor Bloomberg on July 5, 2005 that the shelter would be closed in view of the City's successful management of the homeless crisis. Allegedly, this was a cynical political tactic aimed at easing pressure in this issue during a mayoralty campaign, when "DHS abandoned the facility and ... (its) residents including approximately 300 adults and more than 700 children." In any event, the moving papers do not attempt to qualify this apparently first homeless shelter closing in New York City among the "many commendable steps...the City has taken...to try to ensure that no one who is entitled to shelter is wrongly deprived of it" (Callahan v Carey, 53AD3rd 404, 407, 1<sup>st</sup> Dept-2007).

The motion to dismiss the complaint is denied, JFK having pleaded a valid cause or action alleging that the December 12, 2004 Services Agreement was effectively incorporated into the October 1, 2004 lease agreement between DHS and The Salvation Army and

constitutes a written guaranty of all obligations undertaken by JFK's nominal tenant, including compliance with the restoration clause. For pleading purposes, at the least, the City's contention that the Services Agreement merely bound DHS to fund operating expenses incurred by the City agency's alter ego is defeated by the following open ended language: "If DHS effectively terminates the Services Agreement it must honor all obligations of The Salvation Army to pay all required lease payments...as guarantor of The Salvation Army's obligations." This terminology, viewed in conjunction with the undisputed negotiations between DHS and the property owner, clearly establish viable closely related claims sounding in breach of contract by a disclosed principal and failure to comply with the independent guaranty of the lease obligations incurred by a signatory acting in a purely representative capacity (see Ell Dee Clothing Co. v Marsh, 247 NY 392, 397-1928; Peckham Road Corp. v Town of Putnam Valley, 218 AD 2d 789, 791 [2d Dept-1995]).

Movants' reliance on the City Charter is misplaced. Firstly, the defense that all agreements with the City must be in writing clearly does not apply given the two written documents placed at issue in this case. As to the claim that JFK failed to comply with the Charter provision that the Corporation Counsel "must review and approve all leases, deeds and contracts...", an explanation from the DHS personnel who negotiated both documents is surely in order, in all fairness. By the same token, the City is not entitled to dismissal as a matter of law based on the fact its agency chief did not personally sign the Services Agreement. A material issue of fact still remains as to whether her deputy was authorized to execute the document.

All in all, a serious equitable issue is raised in this case as to whether a private contracting party bears the burden of compliance with Charter provisions on occasions where a City Agency is in a better position to comply and the contract has been substantially executed.

An answer shall be served on plaintiffs within 20 days after service of a copy of this Order with Notice of Entry.

**FILED**

MAY 13 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Date

5/12/09

*M.A.T.*

HON. MILTON A. TINGLING  
J.S.C.