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

PRESENT: Hon. MICHAEL D. STALLMAN PART 7
Justice

Index Number : 100708/2009
COOPER, O.D., JEFFREY
VS.
NUMBER 535 PARK AVENUE
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. 100708/09

MOTION DATE 4/13/09

MOTION SEQ. NO. 001

MOTION CAL. NO. 11

The following papers, numbered 1 to 5 were read on this motion to dismiss

	PAPERS NUMBERED
Notice of Motion— Affirmation — Exhibits A-D	1-2
Answering Affirmation — Exhibits A-B	3-4
Replying Affirmation — Exhibits A-C	5

Cross-Motion: ☐ Yes X No

Upon the foregoing papers, it is ordered that this motion to dismiss the complaint is decided in accordance with the annexed memorandum decision, order and judgment.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

HON. MICHAEL D. STALLMAN

Dated: 7/2/09
New York, New York

J.S.C.

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

Check one: X 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 7

----------X

JEFFREY COOPER, O.D.,

Plaintiff,

-against-

Index No. **100708/09**

NUMBER 535 PARK AVENUE,

Defendant.

Decision, Order, and Judgment

----------X

HON. MICHAEL D. STALLMAN, J.:

In this declaratory judgment action, plaintiff seeks a judgment declaring that he validly exercised an option to renew and extend the term of a lease with defendant for space known as apartment B1 in the building located at 535 Park Avenue in Manhattan. Defendant moves to dismiss the complaint, arguing that plaintiff undisputedly failed to comply with the terms of the lease in exercising the renewal option.

BACKGROUND

In 1980, plaintiff and four other doctors allegedly agreed to purchase the shares of a cooperative apartment to operate a combined optometry and ophthalmology practice. The lease, made as of December 1, 1980, is between non-parties Melvin Schrier and George F. Panariello and defendant. However, the complaint alleges that Schrier and Panariello assigned the lease in 1999 to plaintiff and non-party Warren Appleman, and plaintiff claims that Appleman assigned his interest to plaintiff. The lease provides that it "shall be subject to the terms and conditions contained in the proprietary leases for the remaining apartments at the subject premises." Riegel Affirm., Ex A. A rider to the Assignment and Assumption of Lease, dated January 1, 1999, provides in pertinent part:

"(b) Assignee shall have the option to extend and renew the term of this Lease with

> respect to the demised premises . . . for two (2) additional periods of ten (10) years each commencing on January 1, 2009 and ending on December 31, 2018 and on January 1, 2019 and ending on December 31 2028, . . .
>
> (c) The exercise of such renewal option shall be given by Assignee to Landlord no later than six (6) months prior to the expiration date of the (i) initial term or the (ii) term of this Lease in effect if the first renewal option shall have been exercised. Time shall be of the essence in connection with the exercise of any election of Assignee hereunder."

Riegel Affirm, Ex A [Rider, at 2]. The rider does not set forth the form or the manner in which the notice to the landlord is sent. However, paragraph 27 of the proprietary lease states,

> "Any notice by or demand from either party to the other shall be duly given only if in writing and sent by registered mail: if by the Lessee, addressed to the Lessor at the building with a copy sent to the Lessor's Managing Agent; if to the Lessee, addressed to the building. Either party may by notice served in accordance herewith designate a different address for service of such notice of demand. Notices or demands shall be deemed given on the date when mailed."

Riegel Affirm., Ex A [Proprietary Lease, at 14]. Plaintiff alleges that he exercised the option to extend the lease in writing by letter dated April 26, 2007, to defendant's managing agent, via regular mail. Complaint ¶ 3. Plaintiff also claims that another written notice was included with the rent payment for May 2007. It is undisputed that plaintiff never sent a notice to defendant via registered mail to defendant at the building's address.

Plaintiff argues that the Court should declare that he validly exercised the option to renew because his non-compliance was a de minimis technicality, insofar as defendant's managing agent was notified of the option to renew. As plaintiff indicates, the option provision in the Assignment and Assumption of Lease did not itself state that notice must be sent both to defendant and its managing agent. According to plaintiff, he made numerous improvements to customize the premises for use and an optometry and ophthalmology office. In 2004 and 2005, plaintiff allegedly made

improvements to the premises totaling $150,000, which included replacement of the ceilings and walls. More recently, plaintiff allegedly installed new Internet and heating lines this past spring. The complaint asserts two causes of action: a declaratory judgment adjudging that his notice exercising the option to renew was adequate, or in the alternative, a judgment declaring that defendant is equitably estopped from terminating the lease and evicting plaintiff.

DISCUSSION

As a threshold matter, defendant argues that Appleman's purported assignment to plaintiff did not comply with paragraph 16 (a) of the proprietary lease, which requires defendant's approval of Appleman's assignment to plaintiff. However, this argument was raised for the first time in reply. For the purposes of this motion, it is presumed that plaintiff is the valid assignee of Appleman's interest.

"An election to renew must be timely, definite, unequivocal and strictly in compliance with the lease term." American Realty Co. v 64 B Venture, 176 AD2d 226, 227 (1st Dept 1991). As discussed above, paragraph 27 of the proprietary lease requires all notices to defendant be sent, via registered mail, to defendant at the building address, and to defendant's managing agent. The Assignment and Assumption of Lease does not specify where notices of the option to renew should be sent to the landlord, and the manner in which they must be sent. However, paragraph 10 of the Assignment and Assumption of Lease states, "Except as previously modified in this Assignment and Assumption of Lease, all of the remaining provisions of the Lease shall remain in full force and effect." Riegel Affirm., Ex A [Assignment and Assumption of Lease, at 6]. It is undisputed that plaintiff never sent a notice exercising the option to renew via registered mail to defendant, at the building address.

Notwithstanding the failure to comply strictly with the terms of an option to renew, equity may intervene in certain circumstances to avoid forfeiture. Such cases involved situations where the notice to renew was not timely sent. In that context, to maintain a cause of action for such equitable relief, the plaintiff must plead:

> "(1) that the tenant's delay in exercising his option to renew was the result of an honest mistake or excusable default, (2) that the tenant has made substantial improvements on the premises and has a valuable interest in the leasehold interest, and (3) that the landlord has not been prejudiced by the delay"

Godnig v Belmont Realty Co., 124 AD2d 701, 702 (2d Dept 1986) (citations omitted). The leading case is J.N.A. Realty Corp. v Cross Bay Chelsea (42 NY2d 392 [1977]). There, the tenant had notified the landlord of its desire to renew the lease, but the notice was sent five months after the option to renew had expired. The tenant asked for equity to relieve it from a forfeiture of the tenancy. Following a trial, the Civil Court held that the tenant was entitled to relief, and the Appellate Term affirmed the decision. The Appellate Division reversed, granting the landlord's petition to recover possession. The Court of Appeals reversed the Appellate Division and ordered a new trial, reasoning that the tenant made a considerable investment in improvements in the premises, and would lose considerable good will if the location were lost. By contrast, it was unclear from the record whether the landlord would be prejudiced if the tenant were relieved of its default.

Here, plaintiff claims that, in reliance on the extension of the lease term, he installed a new heating system, renovated an optical dispensary room, installed state-of-the-art optometry equipment, and performed renovations. Cooper Aff. ¶ 27. Plaintiff claims that, if the lease is terminated, he will have to reestablish the practice where he has been for the past 30 years to another location and risk loss of patients, and invest in constructing a new space at great financial and emotional expense. Id.

¶ 14. Plaintiff claims that defendant seeks to terminate the lease to install a gymnasium in the space.

Although plaintiff's circumstances are somewhat similar to the tenant in J.N.A. Realty Corp.,

> "[N]othing in J.N.A. suggests that equity may reach out to find that a party has substantially complied with the terms of an option clause when he has not, or to rewrite the clause to suit one of the parties. A failure of the magnitude of this plaintiff's is only venial if the other party to the contract is willing to forgive it. While, by its nature, equitable right must always depend upon the facts of a particular case, under the circumstances here prevailing the power of equity should not intervene. Substantial noncompliance with the terms of an option clause cannot be rewarded by a judicial forgiveness that redounds to the detriment of the other party to the contract."

McVey v Simone, 73 AD2d 959, 960 (2d Dept 1980). Plaintiff undisputedly did not comply with the notice requirements of the lease to validly exercise the option to renew the lease. Equitable relief is not warranted under the circumstances alleged.

Plaintiff's reliance upon the doctrine of equitable estoppel is misplaced.

> "The purpose of equitable estoppel is to preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, and loss or prejudice to the other would result if the right were asserted. The law imposes the doctrine as a matter of fairness. Its purpose is to prevent someone from enforcing rights that would work injustice on the person against whom enforcement is sought and who, while justifiably relying on the opposing party's actions, has been misled into a detrimental change of position."

Matter of Shondel J. v. Mark D., 7 NY3d 320, 326 (2006). The complaint does not contain any allegation that defendant misled plaintiff from validly exercising his option to renew.

Therefore, defendant's motion to dismiss is granted to the extent of the declaration provided for herein. When a court resolves the merits of a declaratory judgment action against the plaintiff, the proper course is not to dismiss, but rather to issue a declaration in favor of the defendants. Maurizzio v Lumbermens Mut. Cas. Co., 73 NY2d 951 (1989); Washington County Sewer District

No. 2 v White, 177 AD2d 204, 206 (3d Dept 1992).

CONCLUSION

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss is granted; and it is further

ADJUDGED and DECLARED that plaintiff did not validly exercise an option to renew and extend a lease dated December 1, 1980 with defendant for Apartment B1 in the building known as 535 Park Avenue, in Manhattan.

Dated: July 2, 2009
New York, New York

ENTER:

J.S.C.

HON. MICHAEL D. STALLMAN