

**National Black Theatre Workshop Inc. v Nubian
Prop. LLC**

2009 NY Slip Op 31588(U)

July 13, 2009

Supreme Court, New York County

Docket Number: 105906/08

Judge: Walter B. Tolub

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

PRESENT: TOLUB
Justice

PART 15

THE NATIONAL BLACK THEATRE
WORKSHOP INCORPORATED

INDEX NO. 105906/08

- v -

NUBIAN PROPERTIES LLC,
ETAC.

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with
the accompanying memoranda opinion

FILED
JUL 20 2009
CLERK OF COURT

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

Dated: 7/13/09

WALTER B. TOLUB
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 15

-----x

NATIONAL BLACK THEATRE WORKSHOP
INCORPORATED,

Index No. 105906/08

Plaintiff,

Mtn Seq. 001, 002

-against-

NUBIAN PROPERTIES LLC, HARLEM APPLE, LLC,
RICHELIEU W. DENNIS., NYEMA S. TUBMAN,
AND DIANE NICHOLAS,

Defendants.

-----x

FILED
JUL 20 2008
CLERK'S OFFICE
COUNTY OF NEW YORK

WALTER B. TOLUB, J.:

Motion sequence 001 and 002 are consolidated and resolved in the following memorandum decision.

This action marks yet another chapter in Harlem's internal and often silenced struggle to retain elements of its once vibrant history and character amidst recent economic revival.

The building at the heart of this particular conflict is located at 2033-2047 Fifth Avenue (proximate to the corner of One Hundred Twenty-Fifth Street and Fifth Avenue) ("the property") and is owned by two entities: plaintiff, the National Black Theatre Workshop Incorporated ("NBT"), and defendant Nubian Properties, LLC ("Nubian Properties"). The property is managed

by a third entity, nonparty Nubian Realty, LLC (Nubian Realty),¹ and is presently subject to a \$6.5 million dollar mortgage in favor of Sovereign Bank.²

In early 2008, Nubian Properties negotiated and executed a twenty-year sublease ("the sublease") with defendant Harlem Apple, LLC ("Harlem Apple")³ allowing for the construction and operation of an Applebee's Neighborhood Grill and Bar franchise ("Applebee's"). Upon learning of the sublease, NBT commenced this action⁴ bringing the first of the two motion sequences presently before this court.

Both motions originally sought injunctive relief. In motion sequence 001, NBT sought an order enjoining defendants Nubian

¹ Nubian Realty is not a named party to this action, and may not be made a direct defendant pursuant to CPLR 1003 by any entity other than plaintiff. They may, however, be properly added as a third-party defendant via CPLR 1007. That having been said, the court notes that inasmuch as Nubian Realty is very much related to NBT and Nubian Properties, as discussed *infra*, the court will treat any future party additions, and, if any, claims of prejudice to the parties, accordingly.

² The mortgage, jointly entered into as between Nubian Properties and NBT in December of 2006, carries a monthly payment of \$44,975.24 with an expected \$5.223 million dollar balloon payment due on January 1, 2012.

³ The parent company of Harlem Apple is Apple-Metro, Inc. ("Apple-Metro"), which was founded in 1994 for the purpose of opening restaurant franchises in the New York Metropolitan area.

⁴ Plaintiff's complaint seeks a declaration that the Applebee's sublease is void, and asserts six additional causes of action for breach of contract, conversion, breach of fiduciary duty, corporate waste, fraud, and seeks an accounting.

Properties and Harlem Apple from conducting further demolition and/or construction at the subject premises. NBT additionally sought an order enjoining Nubian Properties and Harlem Apple from entering into the sublease at the heart of this conflict, and alternatively sought a declaration that if already executed, the sublease was *ultra vires* void and without force based on claimed violations of the terms of the Operating Agreement entered into as between NBT and Nubian Properties. In opposition to motion sequence 001, defendant Harlem Apple cross-moved for an injunction pursuant to CPLR 6311 and 6313 restraining NBT, defendant Nubian Properties, and non-party Nubian Realty from interfering with Harlem Apple's contractual rights to access and improve the premises in accordance with its sublease. Harlem Apple sought similar relief in motion sequence 002, which was brought in an attempt to prevent NBT, Nubian Properties, and non-party Nubian Realty from interfering with Harlem Apple's contractual rights under the sublease to access and improve the premises in conjunction with the installation of an Applebee's Neighborhood Grill and Bar Restaurant.

The two motions were initially submitted in August of 2008. On November 10, 2008, Harlem Apple, frustrated with repeated denials of access to the premises, delivered a Notice of Termination to defendant Nubian Properties declaring it had terminated the Applebee's Sublease. Contemporaneously, Harlem

Apple notified the court that it was withdrawing its requests for a preliminary injunction. Three days later, the parties appeared in court at which time it was suggested and agreed that the two original motions, still *sub judice*, would be converted to motions for partial summary judgment. Affording the parties an opportunity to submit supplemental papers (see, Guggenheimer v. Ginzburg, 43 NY2d 268; Livaz v. Mitzner, 303 AD2d 381 [2nd Dept 2003]), this court directed a second round of oral arguments on the motions, which were fully submitted in late December of 2008.

Background

Untangling the relationship between NBT, Nubian Properties, and Nubian Realty requires the recitation of the history of these entities and an introduction to the individuals behind their respective creation.

In 1968, the late Dr. Barbara Ann Teer⁵ founded the National Black Theatre, a non-profit theatre company offering theatrical productions, workshops, symposia, and special events, many of which focus on promoting the artistic and cultural endeavors of African-American artists. As expressed by its founder,

National Black Theatre has grown into one of Harlem's most prestigious cultural and educational Institutions whose mission is to provide an alternative learning environment offering a place to aid in the transformation and human development of African Americans locally, nationally, and

⁵ Dr. Teer passed away unexpectedly prior to the full submission of these motions.

internationally. To accomplish this mission, National Black Theatre offers theatre productions, workshops, symposia and special events at the Premises which allow participants to express dignity, respect, and cultural values of self love (Affidavit of Dr. Barbara Ann Teer ¶3).

At some point after its creation, NBT acquired the subject premises at Fifth Avenue and 125th Street, in an area which was once part of Harlem's vibrant artistic and cultural scene.⁶ In the mid-1990's, NBT's growing prominence led the City of New York to officially rededicate the corner of East 126th Street and Fifth Avenue as "National Black Theatre Way" (Affirmation of Raymond N. Hannigan, Esq. ¶10, Exhibits 3, 5).

Despite NBT's recognition by both local and theatrical communities as being a cultural asset, NBT found itself faced with the prospect of foreclosure in 2002. With the hopes of avoiding financial demise, NBT decided to lease out portions of the Fifth Avenue property. The resulting search for prospective tenants led to the introduction of Dr. Teer to defendant Richelieu W. Dennis ("Dennis"), the owner and operator of a store focusing on the advancement of African American heritage in the local community (Teer Affidavit, ¶ 7). The similar cultural ideologies held by both NBT and Mr. Dennis coupled with their

⁶ Few reminders of the countless arts venues that once existed from roughly 122nd Street through 142nd Street remain. The vast majority of them have long since been converted or demolished in the name of progress. NBT's most proximate still-standing neighbor from the Harlem Renaissance era is the venerable Apollo Theatre.

respective financial prospects ultimately led to the creation of a partnership between NBT and Nubian Properties.⁷

Creation of Nubian Realty

Guided by prior respective legal counsel, NBT and Nubian Properties negotiated and entered into a thirty-four page Operating Agreement ("the Operating Agreement") creating non-party Nubian Realty, a limited liability company organized "solely to engage in the acquisition, leasing, management and sale of real property" (see, Nubian Realty Operating Agreement, Section 2.3). NBT then sold Nubian Properties a 49% interest in the property, which was deeded to Nubian Realty. (Affirmation of Joseph Fleming, Esq. ¶2).

Notwithstanding NBT's status as majority interest holder in the property, it is conceded that under the Operating Agreement, Nubian Properties holds the financial advantage. In addition to having the right as general manager, to control, administer, and operate Nubian Realty's business affairs (Teer Affidavit, Exhibit A, Operating Agreement Article IV), Nubian Properties negotiated a substantial one-third (1/3) discount on the rent it was to pay for any space it elected to lease (see, Operating Agreement 4.4.1; Affirmation of Joseph Fleming, Esq. ¶3-7). The Operating Agreement also allows Nubian Properties to reap 2/3 of all

⁷It is unclear to this court whether Nubian Properties existed as a legal entity prior to April 2002.

profits generated from the subject property, irrespective of whether said profit is generated from lease or sale, with the remaining 1/3 profit going to NBT (id.; Dennis Affidavit ¶7).

Not surprisingly, the Operating Agreement includes language, now challenged, that governs the rights of respective parties when leasing, and more particularly, subleasing, portions of the premises. The first challenged provision of the Operating Agreement is found in Section 5.1.2.7. NBT claims that this provision gives them the right to restrict the leasing of the space in the 2033 Fifth Avenue Building to tenants whose businesses are not in conflict with NBT's 'cultural integrity' and mission (id., Operating Agreement at 5.1.2.7). This provision, in pertinent part, reads as follows:

5.1.2.7 [The General Manager has the power to] execute or modify leases with respect to any part or all of the assets of the Company, provided, however, that **no space in the building known as 2033 Fifth Avenue New York, shall be leased to a tenant whose business or activities are not reasonably inconsistent with the cultural integrity and mission of the National Black Theatre Workshop Incorporated;** [***].

(emphasis added).

The second provision, Section 8.8.2, involves Nubian Properties' right to lease and, more particularly, their right to sublease the premises:

8.8.2 Nubian Properties LLC shall have the right to lease any available space in the Premises so long as the Company

owns the Premises. The amount of rent shall be fair market value. The amount of rent for the first year of such lease shall be based on \$50.00 per square foot of occupied space per year. **Nubian Properties LLC may sublet such space, on any terms it may so determine, to Nubian Heritage Inc., or its successors, and/or assigns.**

(emphasis added). Nubian Properties maintains, among other things, that this provision gives them the absolute right to rent any space in the Fifth Avenue Property that becomes available - including its own (Dennis Affidavit ¶7).

Following the execution of the Operating Agreement, Nubian Realty began issuing leases for various portions of the property. NBT executed its seven-year lease with Nubian Realty on April 24, 2002. Nubian Properties, misidentified in one portion of its lease as its occupant, Nubian Heritage, LLC ("Nubian Heritage"), executed a thirty-year lease for the first floor and basement of the North Tower on October 1, 2003 ("the October 2003 lease") (Dennis Affidavit, Exhibit B). By the time Harlem Apple was considering tenancy, Nubian Properties had entered into multiple rental agreements for various spaces located on the property.⁸

⁸ As of August, 2008, the premises housed the following commercial tenants: G.C.B.M Inc. d/b /a Edible Arrangements (an edible fruit centerpiece chain store); The Body Shop (cosmetics chain); David's Check Cashing (check cashing branch); and Nicholas, Inc. (book and artifact store); Nicholas Novelty (retail skin store). A seventh commercial tenant, Cold Stone Creamery, apparently executed a lease for an ice cream franchise but never opened. The premises is also home to non-profit tenant

The 2006 Property Refinancing

In December of 2006, Nubian Properties and NBT entered into a second agreement in contemplation of the refinancing of the property (see Dennis Affidavit, Exhibit B) ("The 2006 refinancing agreement"). The untitled twenty-two paragraph agreement, which is poorly drafted, does not explicitly reference the Operating Agreement until paragraph 18, and then only incorporates that singular paragraph into the Operating Agreement.⁹ What the 2006

Harlem Children's Zone.

⁹ Paragraph 18 reads as follows:
 After the closing of such refinancing, the principal and interest payments on such mortgage loan shall be paid 53% by NP and 47% by Realty. In the event that the building is sold, then, prior to distribution of proceeds of sale pursuant to section 4.23 of the operating agreement, any outstanding indebtedness shall be repaid 85% by NP and 15% by NBT, and should Realty default on this mortgage, this amount represent [sic] each parties [sic] respective financial responsibility to the lender and each other.. [sic] Further, such repayments shall be paid, to the extent that funds are available from the net proceeds of the closing of such sale as would otherwise be allocated between the parties. The payment of NP of its proportional share of such mortgage shall be in full satisfaction of the following obligations: (a) any rent or added rent due from NP or its affiliates, to Realty accrued prior to the date of such refinance, (b) any monies owed by NP or Realty to NBT pursuant to the operating agreement of Realty or any other agreement between such parties accrued prior to the date of such refinance, except as set forth in Section 5, above, (c) any monies owed by NBT to NP to Realty pursuant to the operating agreement of Realty or any other agreement between such parties accrued prior to the date of such refinance, (d) any monies owed by Realty to NP pursuant to the operating agreement of Realty or any other agreement between such parties accrued prior to the date of such refinance. The provisions of this Section shall supercede anything to the contrary contained in the operating agreement of Realty. (id., emphasis added).

refinancing agreement does include however, are a number of provisions that establish financial reporting responsibilities for Nubian Realty (id. ¶¶ 2-5), as well as two provisions concerning Nubian Properties' subleases and rent discount. These paragraphs, upon which Nubian Properties relies in support of their claim that there is no prohibition on subleasing, are identified and read as follows:

9. NP shall provide NBT with copies of all lease agreements between Realty and NP. NBT will be provided copies of all existing leases and subleases of the property as well as any renewals of a lease, sublease, or any new lease.

10. NP shall not receive a refund of one-third of rents paid by NP except for subleases from NP for the North Tower basement, the space currently occupied by Nubian Heritage of Harlem LLC located on the first floor of the North Tower and the space currently occupied or allocated for Shea Spa located on the second floor of the North Tower.

(id.; Nubian Properties' Memorandum of Law in Opposition to Plaintiff's Motion for a Preliminary Injunction, pgs. 9-11). The 2006 Refinancing Agreement additionally includes the following provision relevant to the arguments advanced by Nubian Properties:

20. This agreement constitutes the entire agreement of the parties and supersedes all previous agreements, relating to the subject matter hereof, written or oral, between the parties. No statement, promise, or inducement made by either party, or the agent of either party, either written or oral, which is not provided in this agreement, is binding upon such party. Further, subsequent to the contemplated

refinancing, the parties will add these amendments to the Member Certificates (id.).

The Applebee's Sublease

The genesis of the Applebee's sublease dates back to late 2007 when Apple-Metro, the parent of Harlem Apple, learned of the potential availability of commercial space capable of accommodating an Applebee's restaurant in Harlem. Intrigued with the possibility, members of Apple-Metro met with defendant Nyema Tubman to learn more about the property. Harlem Apple claims that Mr. Tubman represented to Apple-Metro that he was one of the owners of the building at 2037 Fifth Avenue, and that the premises were available for long-term lease. Harlem Apple further claims that when they met defendant Richelieu Dennis, he also informed Apple-Metro that he was a co-owner of the premises.

Negotiations began, and, in anticipation of entering into a rental agreement, the principals of Apple-Metro formed Harlem Apple. According to Harlem Apple, inspections were conducted and architects, engineers, and kitchen designers were hired to consult on the project (July, 2008 Affidavit of Roy Raeburn,¹⁰ Notice of Cross Motion, ¶14). Harlem Apple also inquired into the ownership structure of the building and was informed by the attorney for Nubian Properties that Nubian Properties was the

¹⁰ Mr. Raeburn is the President of Apple-Metro and the manager of Harlem Apple (id. ¶1).

sole manager of Nubian Realty, and that Mr. Dennis was the sole manager of Nubian Properties (id., ¶ 16, July 2008 Raeburn Affidavit, Exhibit A). The attorneys for Nubian Properties also informed Harlem Apple that Nubian Realty was comprised of two members: Nubian Property and NBT (id.).

As part of its due diligence, Harlem Apple claims that it reviewed the deed for the property, the Certificate of Occupancy for the Building, and ran a title report, all of which confirmed that Nubian Realty was the owner of the premises (July 2008 Raeburn Affidavit, ¶ 16). Harlem Apple additionally reviewed the lease agreement between Nubian Realty and Nubian Properties ("the Overlease") to confirm that Nubian Properties had the authority to sublease the Premises. According to the Nubian Realty-Nubian Properties lease, it did. The court notes, however, that Nubian Properties' claimed authority under the aforementioned lease is seemingly without limitation despite the language of, or any reference to, the Operating Agreement (id. ¶ 15; July 2008 Raeburn Affidavit, Exhibit B; Dennis Affidavit, Exhibit C).¹¹

In late February of 2008, Harlem Apple claims that it was

¹¹ Indeed, Section 13 of the lease between Nubian Realty and Nubian Properties reads as follows:

13. **Assignment, Subletting.** Tenant may assign this Lease or sublet all or any portion of the Premises without the consent of Owner.
(id.).

advised by Mr. Dennis that the rental agreement between the parties would be a sublease for the premises rather than a lease because premises were held in the name of Nubian Realty, and Nubian Realty had leased the premises to Nubian Properties (Raeburn Affidavit, ¶ 13). On April 15, 2008, Nubian Properties and Harlem Apple entered into a twenty-year sublease ("the Applebee's Sublease") for a significant portion of the basement and first floor of the North Tower (Raeburn Affidavit, Exhibit B). The twenty-four page sublease identifies the Overlandlord, the owner of the land, and the owner of the building as Nubian Realty (id. §1.4, § 5.1). The Applebee's Sublease additionally contains the representation that either no third party consents were required to sublease the property, or that they had already been successfully obtained. In pertinent part, the relevant provision of the Sublease reads as follows:

Incorporation of the Overlease.

5.1 To induce Subtenant to enter into this Sublease, Overlandlord hereby covenants and represents that (i) it is the owner of the land and the Building [***] (v) it's (sic) execution and delivery of this sublease and any agreement relating to the Subleased Premises shall constitute its representation that either no third party consents are required or that it has obtained all necessary third party consents [***]

(id.).

Despite having executed the sublease, Harlem Apple never commenced renovations of the premises. Shortly after the

execution of the Applebee's Sublease, NBT commenced the instant action, and both NBT and Nubian Properties began denying Harlem Apple access to the newly subleased premises. With the parties embroiled in litigation, on April 24, 2008, Harlem Apple delivered the required \$93,882.50 security deposit due under the Sublease to its legal counsel. Letters to Nubian Properties dated June 16, July 7, and July 17, 2008 demanding access to the premises however, went unanswered (July 2008 Raeburn Affidavit, Exhibit D, E; August 2008 Raeburn Affidavit Exhibit 2).

On August 7, 2008, for the first time, Nubian Properties claimed, in opposition to Harlem Apple's motion and cross-motion seeking a preliminary injunction, that Harlem Apple was not yet entitled to possession of the premises because it had not delivered the required security deposit and an executed Franchisee Rider it claimed was required under the Applebee's Sublease (see, Dennis Affidavit, ¶14; Nubian Properties Memorandum of Law in Opposition to Harlem Apple's Motion for a Preliminary Injunction, p. 2-3; Affirmation of Lori Marks-Esterman in Support of Harlem Apple's motion for Partial Summary Judgment, ¶15). On August 27, 2008, counsel for Harlem Apple tendered both the security deposit and the Franchisee Rider (Marks-Esterman Affidavit in Support of Harlem Apple's motion for Partial Summary Judgment, Exhibit 8). Despite delivery of the demanded documents, Nubian Properties continued to deny Harlem

Apple access to the premises, and, on November 7, 2008, Harlem Apple delivered Nubian Properties notice that it was terminating the Sublease (id., Exhibit 9).

Current Summary of Arguments

As previously mentioned, Harlem Apple has withdrawn those portions of its motion and cross-motion which sought preliminary injunctive relief. By these converted motions for partial summary judgment, NBT, Nubian Properties, and Harlem Apple all seek a declaration as to the validity and status of the Applebee's Sublease. NBT seeks an order invalidating the Applebee's Sublease based on Nubian Properties' violation of Section 8.8.2 of the Operating Agreement. NBT additionally argues that even if the Applebee's Sublease were permissible under the Operating Agreement, it should be declared void because the operation of an Applebee's franchise involves the serving of alcohol, which NBT argues is an activity that runs counter to its cultural integrity and mission, thereby violating Operating Agreement Section 5.1.2.7.

Relying upon the same provisions of the Operating Agreement and the language included in the 2006 refinancing agreement, Nubian Properties seeks an order declaring the Applebee's Sublease valid. Nubian Properties additionally seeks confirmation that, contrary to NBT's interpretation, Section 8.8.2 of the Operating Agreement does not limit its ability to

sublease the premises, and further seeks an order declaring that the issuance of a sublease to Harlem Apple is permissible under both the provisions of the Nubian Realty-Nubian Properties lease and the 2006 Refinancing Agreement (Dennis Affidavit, ¶11).

Lastly, Harlem Apple, who withdraws the portion of their original motion (motion sequence 002) and cross motion (motion sequence 001) which sought a preliminary injunction, seeks a declaration that the Applebee's Sublease is valid and enforceable. Harlem Apple further seeks an order declaring that Nubian Properties had both actual and apparent authority to execute the Sublease and breached that lease when they failed to provide access to the premises, thus warranting an award of partial summary judgment on its first and second cross-claims for breach of contract and indemnification against Nubian Properties.

Discussion

Irrespective of whether the relief sought is partial or total, a motion for summary judgment limits the court's role to finding issues, not resolving them. It is therefore incumbent upon the moving party or parties to provide the court with admissible evidence sufficient to demonstrate an absence of any triable issues of fact, thereby demonstrating entitlement to judgment as a matter of law (Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]; Winegrad v. New York Univ. Med. Center, 64 NY2d 851, 853 [1985]). See generally, Barr, Altman,

Lipshie, and Gerstman; New York Civil Practice Before Trial, [James Publishing 2007] §37:91-92). Successful opposition to the motion requires the production of evidentiary proof in admissible form that is sufficient to establish the existence of material issues of fact requiring trial. Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient for this purpose (Zuckerman v. City of New York, 49 NY2d 557 [1980]).

One of the primary problems in this case, is the unfortunate and untimely passing of Dr. Teer, who sadly, is the only individual capable of explaining the meaning of "cultural integrity" and "mission" of NBT as defined in the Operating Agreement. Since Dr. Teer is no longer available to attest to what these concepts meant, no one, not even those currently at the helm of NBT, can offer illumination as to Dr. Teer's understanding or interpretations. The testimony offered by Michael Lythcott,¹² Dr. Teer's son, about his mother's definition and interpretation of these terms is therefore hearsay. While it is possible to use such testimony to defeat a motion for summary judgment, it cannot be used in support of one (see CPLR 4515; Friedman v. Sills, 112 AD2d 343 [2nd Dept 1985]; Moyer v. Briggs, 47 AD2d 64, 66 [1st Dept 1975]). Where it is the only evidence presented, the same testimony may also not be used to defeat a

¹²Mr. Lythcott has been previously involved with the operation of NBT and presently serves as one of the theatre company's executives.

motion for summary judgment (Stock v. Otis Elevator Company, 52 AD3d 816 [2nd Dept 2008]; Navarez v. NYRAC, 290 AD2d 400 [1st Dept 2002]; Guzman v. L.M.P. Realty Corp, 262 AD2d 99 [1st Dept 1999]). Under the circumstances of this case, and based on the evidence presented, this court is unable to issue an order finding that the issuance of the Applebee's sublease breached Section 5.1.2.7 of the Operating Agreement.

The same conclusion, however, cannot be reached with respect to Section 8.8.2. of the Operating Agreement. Contrary to the assertions made by Nubian Properties and Harlem Apple, there is nothing contained within the papers substantiating the claim that the language of Section 8.8.2, on its own, somehow allows Nubian Properties to sublease the premises to any party it desires. There is also nothing contained within the papers to support the claim that the 2006 agreement entered into as between NBT and Nubian Properties in connection with the refinancing of the premises acted to alter the Operating Agreement (see, Dennis Affidavit, Exhibit B).

As a general rule, contractual agreements are to be read so as to avoid interpretations which would otherwise render a particular provision meaningless (Two Guys From Harrison, NY v. S.F.R. Realty Associates, 63 NY2d 396,403 [1984]). They are also to be enforced according to the plain meaning of their terms (Regal Realty Services LLC v. 2590 Frisby, LLC, 62 AD3d 498 [1st

Dept 2009]; Bailey v. Fish & Neave, 8 NY3d 523 [2007]).

In the instant case, a 'plain meaning' reading of Section 8.8.2 of the Operating Agreement reveals that Nubian Properties has the right to lease any of the property's available space as long as Nubian Realty owns it. Nubian Properties can lease the vacant space to parties at fair market value. Nubian Properties can also sublet the space it leases to itself, on any terms it desires, to one entity: Nubian Heritage, or any of Nubian Heritage's successors and/or assigns. There is simply no ambiguity about this provision.¹³

Nubian Properties' claim that NBT's failure to object to the issuance of prior Nubian Properties subleases confirms that there was no restriction in the Operating Agreement is, at best, misleading. Especially so when the papers themselves reveal that five of the subleases entered into by Nubian Properties following the execution of the Operating Agreement were actually with entities affiliated with, or partly owned by, members of Nubian Properties and/or Nubian Heritage (Tubman Transcript 182-183); Supplemental Submission in Support of Plaintiff's Motion for

¹³ An ambiguity in a contract does not exist simply because the parties urge different interpretations of contractual terms (Bethlehem Steel Co. v. Turner Construction Co., 2 NY2d 456 [1957]; Elletson v. Bonded Insulation Co., Inc., 272 AD2d 825 [3rd Dept 2000]). It is the result of the terms of an agreement being susceptible to more than one reasonable interpretation (239 East 79th Owners Corp. v. Lamb 79 & 2 Corp., 30 AD3d 167 [1st Dept. 2006]). That is simply not the case here.

Summary Judgment, Exhibit K). These subleases would therefore not have been challenged by NBT because they were permissible under the Operating Agreement.

Nubian Properties, and to some extent Harlem Apple, also fail to gain any ground with their arguments that the Nubian Realty-Nubian Properties lease¹⁴ and the 2006 Refinancing Agreement somehow change the subleasing restrictions imposed under the Operating Agreement. They do not. This is in large part because modifications of the Operating Agreement not only require a writing, they "require the written consent of the Members holding two-thirds or more of the Percentages then held by Members (Operating Agreement 9.4). Nubian Properties, as defined in the Operating Agreement, is the holder of a 49% interest in Nubian Realty. Modification of the Operating Agreement could therefore only be effectuated with NBT's consent. Inasmuch as the papers presented do not support the contention that the Operating Agreement had been modified to allow subleasing to any party other than those identified, a declaration that Nubian Properties violated Section 8.8.2 of the Operating Agreement when it issued the Applebee's Sublease is

¹⁴The court would be remiss if at this juncture, it did not comment on the rather curious exclusion of the Operating Agreement subleasing restriction in the Nubian Realty-Nubian Properties lease. The court would also be remiss if it failed to note that the only signatory to the lease, both as Manager of Nubian Realty and Manager of Nubian Properties, is Mr. Dennis.

warranted (Zuckerman, 49 NY2d 557). Furthermore, since Nubian Properties could not issue the subject sublease under the Operating Agreement to Harlem Apple, the lease must be, and is, declared void, and the portion of Harlem Apple's motion seeking summary judgment on its first and second cross-claims for breach of contract and indemnification against Nubian Properties is at this juncture, denied.

Accordingly, it is

ORDERED that the portion of the converted motion for partial summary judgment advanced by plaintiff, The National Black Workshop Incorporated, which seeks an order invalidating the sublease issued by defendant Nubian Properties, LLC to Harlem Apple, LLC, as violative of Section 8.8.2 of the Operating Agreement of Nubian Realty is granted; and it is further

DECLARED that the aforementioned sublease is void; and it is further

ORDERED that the relief sought by defendant Nubian Properties, LLC is denied; and it is further

ORDERED that the portion of the motion advanced by defendant Harlem Apple seeking partial summary judgment on its first and second cross-claims for breach of contract and indemnification against Nubian Properties is denied with leave to renew;¹⁵ and it

¹⁵The court will entertain any additional applications to amend pleadings as necessary, and anticipates that the relief sought in Harlem Apple's cross-claims will be revisited in the

is further


ORDERED that the Clerk of Court enter judgment accordingly,
and it is further

ORDERED that the balance of this action shall continue.


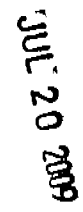

Counsel for the parties are directed to appear in IA Part 15,
Room 335, 60 Centre Street on August 28, 2009 at 11:00 a.m. for a
Preliminary Conference in this matter.

This memorandum opinion constitutes the decision and order
of the Court.

Dated: 7/13/09



HON. WALTER B. TOLUB, J.S.C.


COUNTY CLERKS OFFICE
NEW YORK

JUL 20 2009


future.