

**CVS Albany, LLC v 245-02 Merrick Blvd., LLC**

2009 NY Slip Op 32540(U)

October 5, 2009

Supreme Court, Queens County

Docket Number: 30633/2008

Judge: Orin R. Kitzes

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17  
Justice

	x	Index Number <u>30633</u> 2008
CVS ALBANY, LLC		
- against -		Motion Date <u>July 8,</u> 2009
245-02 MERRICK BLVD., LLC.		Motion Cal. Number <u>29</u>
	x	Motion Seq. No. <u>2</u>

The following papers numbered 1 to 10 read on this motion by defendant 245-02 Merrick Blvd., LLC (Merrick) pursuant to CPLR 3212 for summary judgment dismissing the first, second, third, fourth and fifth causes of action asserted against it in the complaint, and in its favor on its first counterclaim, to sever its remaining counterclaims, and pursuant to CPLR 6514(b) to vacate the notice of pendency.

	<u>Papers Numbered</u>
Order to Show Cause - Affidavits - Exhibits.....	1-5
Answering Affidavits - Exhibits.....	6-10

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff commenced this action predicated upon its claim that defendant Merrick breached an agreement of lease (lease) dated August 28, 2007 between plaintiff, as tenant, and defendant Merrick, as landlord, relating to the demised premises known as 245-02 Merrick Boulevard, Rosedale, New York. Plaintiff alleges the 25-year lease provided that defendant Merrick perform construction of a building in anticipation of plaintiff's occupancy of the premises for the purpose of operating a CVS Pharmacy retail store. The lease term

allegedly was to commence on the actual date of delivery of the premises to plaintiff in the manner and condition provided for in the lease, which was contemplated to happen in May 2008, or at the latest, on February 28, 2009. Plaintiff also alleges that defendant Merrick commenced construction, but in November or December 2008, directed its contractor to halt work and expressly repudiated the lease by advising it was out of money on the project, and unwilling to complete the construction of the store. Plaintiff further alleges that defendant Merrick threatened to transfer the property or enter into a “voluntary” foreclosure or bankruptcy, as a means of undermining plaintiff’s rights and interests in the leasehold. Plaintiff allegedly has suffered harm as a result of defendant Merrick’s failure to perform its obligations under the lease. Plaintiff seeks a judgment granting specific performance of the lease, and declaratory, injunctive and monetary relief.

Defendant Merrick served an answer denying the material allegations of the complaint, asserting various affirmative defenses and interposing counterclaims, including a first counterclaim to declare the lease unenforceable. Plaintiff served a reply to the counterclaims.

Defendant Merrick moves for summary judgment dismissing each of the causes of action asserted in the complaint, and in its favor on its first counterclaim, to sever its remaining counterclaims, and to vacate the notice of pendency. Plaintiff opposes the motion. Defendants Metropolitan National Bank and Titan Capital ID, LLC, have not appeared in relation to the motion.

It is well established that the proponent of a summary judgment motion “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of its position (*see Zuckerman v City of New York*, 49 NY2d 557 [1980], *supra*).

Defendant Merrick asserts that the lease lacks essential terms, is indefinite, vague and uncertain, and at most constitutes an agreement to agree, and therefore, as a matter of law, is unenforceable. According to defendant Merrick, the lease does not adequately specify the work it is required to perform to satisfy its construction obligations thereunder. Defendant Merrick argues that the parties never reached a meeting of the minds relative to the scope of the work it was to perform at the subject premises. In support of its motion, defendant Merrick offers a copy of the pleadings, the affirmation of its counsel, the affidavit of Robin

Eshaghpour, the manager of defendant Merrick, and a copy of the lease, and the exhibits annexed thereto.

Plaintiff counters that the lease is a valid, subsisting contract, which is enforceable, and sets forth, in adequate detail, the obligations of defendant Merrick relative to, among other things, construction and development of the property. Plaintiff argues that defendant Merrick has been aware of its construction and development duties under the lease, as evidenced by Merrick's completion of approximately 65%-70% of the construction of the CVS pharmacy store on the premises. Plaintiff asserts that defendant Merrick's claim of indefiniteness, vagueness and uncertainty relative to the lease, came only after Merrick indicated it was having financial difficulties. Plaintiff also asserts that Merrick has since halted construction, wilfully abandoned the project, threatened to sell the property, and allowed the property to become the subject of a mortgage foreclosure action brought by defendant Metropolitan National Bank. Plaintiff also asserts that such actions constitute a repudiation of the lease, and thereby, a breach of it. Plaintiff argues defendant Merrick consequently is not entitled to summary judgment because there are material issues of fact regarding Merrick's breach of the lease. It offers, among other things, the affidavit of Michael Buckless, its vice president, the affirmation of its counsel, and various e-mail correspondence in opposition to the motion.

Paragraph "7" of the lease, in relevant part, provides:

**"7. LANDLORD'S CONSTRUCTION. DELIVERY OF THE PREMISES.**

(a) Landlord hereby covenants and agrees, at its own cost and expense, to construct the Building and develop the Premises as shown on **Exhibit A**, including, without limitation, providing the means to obtain water, electricity and all other necessary utilities to the Premises, and to do all other work (collectively, '**Landlord's Work**') as required and as specified on the preliminary plans and specifications (collectively, the 'CVS Prototype Construction Specifications'), dated 9.1.06-A, together with such other engineering requirements and points of detail to construct a CVS 'prototype 11,970' store, which shall include but not be limited to: (I) a Mezzanine or Basement Space, (ii) the Drive-Thru, (iii) a scissors lift, (iv) a conveyor between the ground floor store space and such Mezzanine or Basement Space, as the case may be, (v) plumbing and electrical wiring for walk-in cooler and '1 Hour' photographic processing, (vi) fire alarm, and (vii) a fire sprinkler system. The parties acknowledge that any work which would have been Tenant's responsibility under a CVS Prototype Construction Specifications

shall remain Tenant's obligation with respect to the Premises constructed and demised herewith (**'Tenant's Work'**), the list containing those items comprising Tenant's Work is annexed hereto as **Exhibit 'B-1'**, and Tenant's Work is designated on said list as 'CVS.' The cover page to the CVS Prototype Construction Specifications is attached hereto as **Exhibit 'B'**, it being acknowledged that the final plans and specifications for Landlord's Work which are not yet complete and are subject to the reasonable approval by Landlord and Tenant (**'Final Plans'**), all of which shall be completed by Landlord in accordance with Applicable Laws...." (emphasis in the original).

Paragraph 53 of the lease, in relevant part, provides:

**"53. ENTIRE AGREEMENT.**

This Lease and the exhibits referred to herein and attached hereto set forth the entire agreement between the parties hereto and may not be changed or terminated orally or by any agreement unless such agreement shall be in writing and signed by the party against whom enforcement of such change or termination is sought...."

Paragraph 55 provides:

**"55. HEADINGS. EXHIBITS.**

It is agreed that the headings of the various Articles herein are for convenient reference only and are not to be construed as part of this Lease. All exhibits attached to this Lease are hereby incorporated by reference into this Lease."

Exhibit "A" is comprised of a blank cover sheet denominated as "Exhibit 'A' Site Plan" and a detailed schematic drawing entitled "PROPOSED SITE PLAN," with the address of the subject premises printed thereon. Exhibit "B" is comprised of a cover sheet denominated as "Exhibit 'B' Landlord's Work," and a two-page computer printout denominated "CVS pharmacy © 1999-2007 Forms (Add Take Off)."

Mr. Eshaghpour states, in his affidavit, that the preliminary plans and specifications referred to as the "CVS Prototype Construction Specifications," were not part of the lease, and claims defendant Merrick has never seen any such specifications. In addition, Mr. Eshaghpour states that defendant Merrick and plaintiff never reached an agreement as to the

work necessary to perform fully such other “engineering requirements and points of detail” to construct a “CVS ‘prototype 11,970’” store, or as to the “Final Plans.”

Mr. Buckless, however, avers that plaintiff provided defendant Merrick with the “CVS Prototype Construction Specifications.” He also avers that defendant Merrick used these form specifications in consultation with Merrick’s architect to develop the final construction plans for the project, which in turn were used by defendant Merrick to obtain a building permit from the New York City Department of Buildings in 2008. Mr. Buckless further avers that defendant Merrick was familiar with these form specifications from its past work on other CVS construction projects and yet waited, until nearly 15 months after the execution of the lease and commencement of construction, before claiming, in an e-mail dated November 19, 2008, there were “inconsistencies” in the lease which were “unresolved.” Mr. Buckless states that defendant Merrick has indicated it needs more money to complete the project, and demanded that plaintiff contribute such money or agree to a rent increase under the lease, or takeover the project while paying rent under the lease.

It is well settled that “[i]f an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract [citations omitted]” (*Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 482 [1989], *rearg denied* 75 NY2d 863 [1990], *cert denied* 498 US 816 [1990]), and that a “mere agreement to agree, in which a material term is left for future negotiations, is unenforceable” (*Martin Delicatessen v Schumacher*, 52 NY2d 105, 109 [1981]). At the same time, however, the courts have been reluctant to apply the doctrine of indefiniteness rigidly, recognizing that “at some point virtually every agreement can be said to have a degree of indefiniteness” and that to do so “may defeat the reasonable expectations of the parties in entering into the contract [citation omitted]” (*id.* at 483). In fact, with respect to indefiniteness, the courts must “endeavor to hold parties to their bargain and the definiteness doctrine is a doctrine of last resort (*see Marshall Granger & Co., CPAs, P.C. v Sanossian & Sardis, LLP*, 15 AD3d 631 [2005])” (*Capelli Enters., Inc. v F&J Cont. Food Corp.*, 16 AD3d 609, 610 [2005]). Additionally, if there is an objective method for supplying a missing term, such method must be used (*see Matter of 166 Mamaroneck Ave. Corp. v 151 E. Post Rd. Corp.*, 78 NY2d 88, 91 [1991]).

In this instance, it is eminently clear from the language of the lease that plaintiff and defendant Merrick intended to be bound by it. The lease includes all the terms of the landlord-tenant relationship, i.e. a 25-year lease term, the use of the premises, the schedules of initial rent and rent for several extension periods, the assignment of responsibilities for repairs to the premises, and the payment of utilities, taxes and insurance, assignment and subletting terms, and provisions regarding termination, default and holdover, indemnity, governing law, severability and force majeure. Furthermore, defendant Merrick undertook

construction and built a substantial portion of the building before apprising plaintiff of its belief that the lease had “inconsistencies.”

Defendant Merrick’s contention that the phrase “preliminary plans and specifications” is indefinite is without merit. The lease provided an objective method for identifying those plans and specifications, insofar as it referenced them collectively as the “CVS Prototype Construction Specifications,” “dated 9.1.06-A.” Plaintiff, has raised triable issues of fact as to whether such document exists and whether defendant Merrick had a copy of such document and utilized it in preparing building plans. To the extent defendant Merrick asserts that the phrase “engineering requirements and points of detail” to construct a “CVS ‘prototype 11,970’” store, is indefinite, plaintiff has raised a triable issue of fact as to whether there is an objective means of determining the engineering requirements and points of detail regarding a CVS prototype “11,970” store. Plaintiff also has raised a question of fact as to whether “final plans” were achieved, and relied upon by defendant Merrick when obtaining permits, and thus, whether the lease was not merely an agreement to agree.

Plaintiff likewise has raised a triable issue of fact as to whether defendant Merrick has breached the lease by its express repudiation of the lease. Under such circumstances, summary judgment dismissing the complaint or in favor of defendant Merrick on its counterclaim is unwarranted (*see Zuckerman v City of New York*, 49 NY2d 557 [1980], *supra*).

The complaint, which seeks to enforce provisions of a lease, plainly demands a judgment which will affect the possession, use or enjoyment of, real property (*see CPLR 6501*). As a consequence, it justifies the filing of a notice of pendency by plaintiff (*see 5303 Realty Corp. v O & Y Equity Corp.*, 64 NY2d 313, 320 [1984]; *Robert Fiancé Hair Design Institute, Inc. v Concourse Properties Co.*, 130 AD2d 564 [2d Dept 1987] [filing of notice of pendency proper where plaintiff’s action sought declaratory judgment that lease was in full force and effect, and enforcement of lease provisions]; *see also 220 E. 56th St. Corp. v. Excelsior Sav. Bank*, 253 App Div 345 [1<sup>st</sup> Dept 1938] [filing of notice of pendency proper where plaintiff, alleging unlawful ouster, sought restitution of real property which it had possessed as tenant]; *Lafayette Forwarding Co. v Rothbart Garage Operators, Inc.*, 205 App Div 247 [1<sup>st</sup> Dept 1923] [filing of notice of pendency proper where plaintiff-lessee sued to enjoin defendant from excluding plaintiff from possession of a portion of leased premises]; *Pix Furniture, Inc. v Loew’s Theatres & Realty Corp.*, 131 Misc 2d 517, 519 [Bronx County 1986], *affd* no opinion 129 AD2d 1018 [1<sup>st</sup> Dept 1987]).

Accordingly, the motion is denied.

Dated: October 5, 2009

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J.S.C.