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

PRESENT: TOLUB Justice

PART 15

INDEX NO. 117248/09

MOTION DATE 9/25/09

MOTION SEQ. NO. 001

MOTION CAL. NO.

652 PARK EAST

- v -

LEXINGTON GARDENS

The following papers, numbered 1 to _____ were read on 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 accompanying memorandum decision

FILED

NOV 19 2009

NEW YORK COUNTY CLERK'S OFFICE

Dated: 11/16/09

WALTER B. TOLUB J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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E-Z PARK EAST, INC.,

Plaintiff,

-against-

LEXINGTON GARDENS ASSOCIATES

Defendants.

Index No. 112448/09
Mtn Seq. 001

WALTER B. TOLUB, J.:

This is one of three actions commenced by plaintiff to enforce a commercial lease rider option to renew for properties located on East 126th Street in Manhattan. Plaintiff uses each of the properties to operate commercial parking facilities.[1] By this motion, plaintiff moves for an order enjoining defendant from removing plaintiff from the leased premises. Plaintiff additionally seeks an order consolidating this action with the summary holdover proceeding pending in the Civil Court of the City of New York captioned, Lexington Garden Associates v. E-Z 2 Park Management Inc., (L&T Index No 72167-2009).

Defendant, in opposition, cross-moves for dismissal of plaintiff's action pursuant to CPLR 3211(a)(7).

Background

In 2003, non-party E-Z 2 Park Management ("E-Z 2 Park")

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[1] This case is related to E-Z Park East, Inc. v. Triangle Housing Associates, L.P. (Index No. 112449/2009), and E-Z Park East, Inc. v. 1775 Housing Associates, LP (Index No. 112447/2009). All three actions have similar motions *sub judice*.

negotiated and leased the property known as the "35 Auto Parking Area located adjacent to the building known as Lexington Gardens" ("the 35 Auto Parking Area") from defendant Lexington Gardens Associates.[2] (Order to Show Cause, Exhibit 2) for the purpose of operating a commercial parking lot. The initial lease term was to commence on March 1, 2003, and end on February 28, 2008, and contained an option to renew the lease for an additional five-year rental term. The option to renew, set forth at paragraph 40 of the lease, reads as follows:

> 40. Upon ninety (90) days prior written notice Tenant shall be granted an option for an additional 5 year extension on rental terms to be negotiated but not to exceed twenty-five (25%) above current rental

(id., Exhibit 2). According to the terms of the lease, notice of renewal, and for that matter, any notice in writing to the landlord, was to be made by certified or registered mail (id. at Paragraph 12).

On February 1, 2004, E-Z 2 Park assigned the subject lease to plaintiff. Plaintiff paid the required rent to defendant and on October 1, 2007, November 19, 2007, December 19, 2007 and June 26, 2008, sent written correspondence to defendant indicating its intent to renew the subject lease (id., Exhibit 3). Defendant

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[2] The court notes that in each of the subject leases, the address of each defendant is stated as being "in care of" nonparty entity Marion Scott Real Estate, Inc., located on 107-129 East 126th Street.

did not respond to plaintiff's correspondence, and appears to have taken no immediate action when plaintiff's lease expired on February 28, 2008. However, after plaintiff's lease expired, defendant began accepting plaintiff's continued monthly payments for the 35 Auto Parking Area. Defendant accepted these payments without comment until April 2009, and on April 15, 2009, served plaintiff with a 30 day notice to terminate the premises (Order to Show Cause, Exhibit 4). Defendant commenced the summary holdover proceeding in the Civil Court shortly thereafter (id., Exhibit 5). In response, plaintiff commenced the instant action seeking specific performance and a declaratory judgment enforcing the lease. The instant motions followed.

Discussion

Inasmuch as defendant raised a challenge as to the validity of the lease at issue, this court begins its inquiry with the question of whether the option to renew contained within the lease is valid because it requires negotiation of future rent.

Contrary to defendant's arguments, while the option to renew does not explicitly set forth a future rent for the five year lease extension, the terms of paragraph 40 explicitly states that said rental increase would not be more than 25% above the current rent being paid by the tenant. The methodology for determining the increase is therefore not uncertain, as defendants would prefer this court to believe (see, Joseph Martin, Jr.

Delicatessen, Inc. v. Schumacher, 52, NY2d 105 [1981]). Since the four corners of the agreement indicate that the parties understood that if the option to renew were elected, a rent increase would result, but at a rate that would not exceed more than 25% of the current rent, the provision cannot be held to be uncertain and unenforceable (see, Carmon v. Soleh Boneh Ltd., 206 AD2d 450 [2nd Dept 1994]; Cobble Hill Nursing Home v. Henry & Warren Corp, 74 NY2d 475 [1989]; Mamaroneck Avenue Corp. v. East Post Road Corp., 78 NY2d 88 [1991]).

Nor can defendants successfully argue that because plaintiff failed to provide notice to the landlord in the manner set forth under the lease, the renewal clause may now be dishonored. In this case, defendant does not dispute that plaintiff's notice of intent to renew was received or, that said notice was timely (Affirmation of Keith J. Riemer in Support of Cross-Motion ¶10). Defendant only takes issue with the method of delivery of the notice, because it did not arrive by either certified or registered mail (Cross-Motion; Affirmation of Neda Barzideh ¶6).

Defendant however, did not dispute the method plaintiff used to elect the option to renew, until defendant served notice upon plaintiff at the end of April 2009. By this court's count, that was also after defendant had accepted, without comment, fourteen monthly payments for the leased commercial premises. As appropriately noted by the Court of Appeals,

> "acceptance of rent by a landlord from a tenant with knowledge of the tenant's violation of the terms of the lease normally results in a waiver of the violation (see, *Wollard v. Schafer Stores Co.*, 272 NY 304. 5 N.E.2d 829; *Murray v. Harway*, 56 NY 337). The logic underlying this rule is plain enough: the option rests with the landlord to recognize the violation and terminate the tenancy. If he chooses to ignore it and accepts rent with knowledge of the tenant's violation then the acceptance evidences his waiver and an election to continue the relationship. Although the intent to waive is usually a question of fact, knowing acceptance of rent without any effort to terminate justifies an inference that the landlord has elected to hold the tenant to the lease"

(Jefpaul Garage Corp. v. Presbyterian Hospital in City of New York, 61 NY2d 442, 447-448 [1984]).

Defendant in the instant action ignored what is now claimed to be a violation for more than a year. Under Jefpaul Garage, defendant may not now claim that they did not waive the election to continue the rental relationship, and they may not now claim that plaintiff did not properly elect the option to renew. Defendant's cross-motion to dismiss is therefore denied in its entirety.

The remaining question is thus whether plaintiff is entitled to a preliminary injunction, which is answered in the affirmative. Plaintiff in this case has established that very likely, they will succeed on the merits of their claim. They have also established that the loss of the space, means the loss of their parking business at the leased location. Since plaintiff

stands to lose its business, equity favors preservation of the status quo until the claims advanced are fully resolved (Nassau Roofing & Sheet Metal Co. v. Facilities Dev. Corp., 70 AD2d 1021 [3rd Dept 1979]).

Lastly, having reviewed the papers, it is determined that in the interest of judicial economy, consolidating the summary nonpayment proceeding with the instant action is entirely appropriate under the circumstances of this case.

Due deliberation having been had, and it appearing to this Court that a cause of action exists in favor of the plaintiff and against the defendant and that plaintiff is entitled to a preliminary injunction on the ground that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual, as set forth in the aforesaid decision, is

ORDERED that defendant, its agents, servants employees, and all other persons acting under the jurisdiction, supervision and/or direction of defendant are enjoined and restrained, during the pendency of this action, from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person or control of defendants or otherwise, from taking any steps to remove Plaintiffs from the premises known as the 35 Auto Parking Area located adjacent to the building known as

Lexington Gardens at 127 East 107th Street, New York, New York, including but not limited to the commencement or further prosecution of actions in the Civil Court; and it is further

ORDERED that the portion of plaintiff's motion seeking to consolidate the instant action with the summary nonpayment proceeding commenced in the Civil Court of the City of New York, captioned, Lexington Gardens Associates v. E-Z 2 Park Management Inc., (L&T Index No 72167-2009 is granted, and the Clerk of the Civil Court of the City of New York is directed to transfer the papers on file in the aforementioned action to the Clerk of the Supreme Court, New York County, upon service of a certified copy of this order and payment of the appropriate fee, if any, and it is further

ORDERED that the Clerk of the Supreme Court, New York County, upon receipt of a copy of this order with notice of entry, shall, without further fee, assign a New York County Index Number to the file transferred pursuant to this order; and it is further

ORDERED that defendant's cross-motion to dismiss is denied in its entirety.

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

Dated: 11/16/09

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