SHORT FORM ORDER **Index Number: 28294-2009**

**SUPREME COURT - STATE OF NEW YORK**
**COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY**

*Present*: **HON. EMILY PINES**
J. S. C.

Original Motion Date: 05-27-2010
Motion Submit Date: 05-27-2010
Motion Sequence .: 002 MOTD

_____X

**SETAUKET PROPERTIES CORP.,**

**Plaintiff,**

**-against-**

**OPEN DOORS MANAGEMENT, INC., STYLIANOS KYRITSIS and JANINE KYRITSIS, Individually,**

**Defendants.**
_____X

Attorney for Plaintiff
Law Offices of John J. Andrews, Esq.
By: Kenneth J. Lauri, Esq.
503 Main Street
Port Jefferson, New York 11777

Attorney for Defendants
Mark I. Masini, PC
825 East Gate Blvd., Suite 308
Garden City, New York 11530

***ORDERED,*** that the plaintiff's motion (motion sequence number 001) for summary judgment and dismissing defendants' counterclaims is granted in part and denied in part; and it is further

***ORDERED,*** that a status conference is scheduled for September 21, 2010 at 9:30 a.m. before the undersigned.

Plaintiff commenced this action for a declaratory judgment and ancillary relief by the filing of a Summons and Verified Complaint and subsequently an Amended Verified Complaint dated December 2, 2009 and served March 23, 2010. Issue was joined by defendants' service of a Verified Answer with Counterclaims and plaintiff served a reply to the counterclaims. The gravamen of this action is whether there was a valid lease between the parties as it is undisputed that a fully executed copy of the lease was never delivered to defendants.

The submissions reflect, as set forth in the Amended Complaint and affidavit of Richard Kolsch

("Kolsch"), vice president of plaintiff corporation, that plaintiff is the owner of a commercial building located at 6 South Jersey Avenue, Setauket, New York (the "subject premises"). On or about September 30, 1999, plaintiff's predecessor, Cam Real Estate leased the subject premises to Child Site Corp. ("Child Site") for a monthly base rent of $14,584.00 and required Child Site to pay additional common area maintenance or "CAM" charges. Child Site used the subject premises for a day care center. In 2001, Child Site assigned the lease to Little Stink, Inc. ("Little Stink") who continued the use of the subject premises. Pursuant to period increases in the rent contained in the lease, in 2008, the rent and CAM charges totaled $22,045.83 per month. At this point, in the spring of 2008, Little Stink advised plaintiff that it was interested in selling its business to defendant Open Doors Management, Inc.[1] ("Open Doors" or "defendant") and that Open Doors wanted a new lease rather than assignment of the existing lease. Plaintiff states that it agreed to execute a new lease provided it contained the same rental terms as the existing lease and further that a copy of the current lease was given to defendants. Plaintiff requested that its then counsel, Joel Katims ("Katims") prepare the lease, containing the identical terms and forward to defendant. Plaintiff alleges that Katims prepared the lease and forwarded to defendants' counsel, but that unfortunately, the rent schedule was erroneous and Open Doors executed the lease. Kolsch states that he discovered the mistake and instructed Katims not to forward the lease to Open doors because the rent amount was incorrect. Thus, the lease was never delivered to defendant or defendant's counsel.

Plaintiff thus commenced the instant action asserting four (4) causes of action: declaratory judgment that no lease exists between the parties; mistake in the lease of which defendants were aware and declaring the lease null and void; reformation of the lease to reflect the proper amount of rent; and for the use and occupancy of the subject premises. Defendants interposed an Answer wherein they assert counterclaims for a declaratory judgment that the lease was in full force and effect, breach of contract and attorney fees.

Plaintiff now moves for summary judgment and argues that pursuant to the plain language of the lease, it only would have become effective upon execution and delivery by the landlord (plaintiff) and tenant (Open Doors). Instead, in this case, it is clear that no fully executed copy of the lease was ever sent to defendant or defendant's counsel and thus, plaintiff argues that the lease is not valid. Since there

---

[1]Plaintiff asserts in the Complaint that defendants Stylianos Kyritsis and Janine Kyritsis are the sole officers, directors and shareholders of Open Door.

was no lease and defendants have been occupying the subject premises, plaintiff further argues that it is entitled to sums representing the market value of the use and occupancy of the subject premises. Finally, plaintiff asserts that the counterclaims raise no issues of fact and must be dismissed.

Defendants oppose the motion and submit an affirmation of counsel and affidavit by Jennifer Riano Goez ("Goez"), counsel's legal assistant. Plaintiff also attaches an affidavit by Janine Kyritsis, president of Open Doors. Defendants claim that it negotiated the lower rental amount with Katims but did not speak directly with a representative of plaintiff. Defendants claim that the fully executed lease was delivered to Katims to be held in escrow, together with the security deposit and termination of lease with the former tenant. By letter dated April 30, 2009, defendants' counsel sought the release of the lease from escrow. Defendants claim that the rental amount was not erroneous, but rather negotiated between the parties, as evidenced by drafts containing the same amount that were circulated between counsel. Defendants claim that Katims was acting as the escrow agent to hold the lease and plaintiff cannot rescind delivery. Although defendants admit that the fully executed lease was never received by defendants, that it was delivered because it was sent to Katims. Defendants argue that there is a question of fact as to whether Katims was acting as an escrow agent and thus summary judgment must be denied.

Additionally, defendants allege that reformation is not appropriate because there was no error in the rental amount that they were aware of and no fraudulent misrepresentation by defendants. Defendants also claim that the causes of action against the individual defendants must fail because plaintiff has failed to establish that piercing the corporate veil is appropriate since the lease was solely for the benefit of the corporation. Finally, defendants claim plaintiff has failed to respond to discovery demands. In light of all of the above, defendants argue that discovery must proceed, plaintiff's former counsel deposed and plaintiff's motion for summary judgment be denied in its entirety.

Plaintiff submits a reply affirmation by its counsel wherein it reiterates that terms of the lease are incontrovertible - to wit, the lease would only take effect when a fully executed copy was delivered to the tenant. Since same undisputably did not occur, no lease existed and the motion for summary judgment must be granted. Plaintiff claims that defendant has failed to raise a triable issue of fact but rather, the uncontroverted facts are that a lease was prepared, it was executed by defendant and delivered to Katims, who did not forward an executed copy back to defendants. Plaintiff challenges defendants' assertion that Katims was the escrow agent; instead, plaintiff argues that Katims was merely the attorney

for plaintiff and when the mistake was discovered, Katims acted properly in withholding the lease. Plaintiff claims that defendants' request for additional discovery is merely a "fishing expedition" which must be rejected. Plaintiff argues that there is no question of fact and at a minimum the Court should declare that there is no valid lease and the action for use and occupancy could continue.

It is well settled that to obtain summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. ***Goldberger v. Brick & Ballerstein, Inc.*, 217 A.D.2d 682, 629 N.Y.S.2d 813 (2d Dept. 1995)** (internal citations omitted). The burden then shifts to the party opposing the motion to come forward with proof in admissible form demonstrating there are genuine issues of material fact which preclude the granting of summary judgment. ***Zayas v. Half Hollow Hills Cent. School Dist.*, 226 A.D.2d 713, 641 N.Y.S.2d 701 (2d Dept. 1996)**. "It is not up to the court to determine issues of credibility or the probability of success on the merits, but rather to determine whether there exists a genuine issue of fact." ***Triangle Fire Protection Corp. v. Manufacturer's Hanover Trust Co.*, 172 AD2d 658, 570 NYS2d 960 (2d Dept. 1991)**. A motion for summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility." ***Scott v. Long Island Power Auth.*, 294 AD2d 348, 741 NYS2d 708 (2d Dept. 2002).**

The Court of Appeals has recognized that:

> A lease, as in the case of conveyances of an interest in land generally, requires the fulfillment by the parties of certain prerequisites to take effect. It is the well-established rule in this State that delivery is one such requirement, the absence of which, without more, renders the lease ineffective. The requirement that a lease be delivered to be effective as a conveyance of an interest in land is not peculiar to this State alone, but is ingrained in the common-law principles of real property in many States.

***219 Broadway Corp., v. Alexander's Inc.*, 46 N.Y.2d 506, 414 N.Y.S.2d 889, 387 N.E.2d 1205 (1979).** ***See eg., 709 Route 52, Inc., v. DelCastillo*, 27 Misc.3d 127(A), 2010 WL 1408625 (App. Term. 9th and 10th JD 2010)**. Moreover, clear and unambiguous provisions of a lease must be enforced according to their terms. ***2004 McDonald Ave. Realty, LLC v. 2004 McDonald Ave., Corp.*, 50 A.D.3d 1021, 858 N.Y.S.2d 203 (2d Dept. 2008).**

In the instant case, plaintiff has met its prima facie burden of demonstrating entitlement to summary judgment on the first cause of action declaring the nullity of the "lease" of the subject premises. The plain and unequivocal language of the lease required "delivery" of the executed lease by the plaintiff in order for it to be effective. Defendants admit that a fully executed lease was not delivered by plaintiff and it is clear that Katims was plaintiff's counsel, he acted at plaintiff's direction in withholding the lease and was not the "escrow agent" for both parties. Therefore, since the lease was not delivered it did not become effective and plaintiff is granted summary judgment on the first cause of action. The remaining causes of action are severed and continued. Defendants' claim that it is entitled to discovery on this issue is without merit and its counterclaims for a declaratory judgment, breach of contract and counsel fees are dismissed.

Counsel are reminded that a status conference is scheduled for September 21, 2010 at 9:30 a.m. before the undersigned.

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: August 5, 2010
Riverhead, New York

Emily Pines

**EMILY PINES**
J. S. C.