

**Women's Interart Ctr., Inc. v New York City
Economic Dev. Corp.**

2010 NY Slip Op 32242(U)

August 19, 2010

Supreme Court, New York County

Docket Number: 109017/2007

Judge: Karen Smith

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

PRESENT: KAREN S-SMITH
Justice

PART 62

Index Number : 109017/2007
WOMEN'S INTERART CENTER INC
VS.
NYC ECONOMIC DEVELOPMENT CORP.
SEQUENCE NUMBER : 009
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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 attached memorandum decision.*

FILED
AUG 23 2010
NEW YORK
CLERK'S OFFICE

Dated: 8-19-2010

KS S

KAREN SMITH J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 62

-----X
 WOMEN'S INTERART CENTER, INC.,

Plaintiff,

-against-

Index № 109017/07

NEW YORK CITY ECONOMIC DEVELOPMENT
 CORPORATION (EDC); ANDREW M. ALPER, President of
 EDC; JERILYN PERINE, Commissioner, Department of
 Housing Preservation and Development; CITY OF NEW
 YORK; DANIEL DOCTOROFF, Deputy Mayor, City of
 New York; and MICHAEL BLOOMBERG, Mayor, City
 of New York,

Defendants.

-----X
 WOMEN'S INTERART CENTER, INC.,

Plaintiff,

Index № 113088/07

-against-

CLINTON HOUSING DEVELOPMENT FUND CORP.,

Defendant.

-----X
 KAREN SMITH, J.:

In the second action, under index number 113088/07, defendant Clinton Housing Development Fund Corp. (CHDFC)¹ moves, pursuant to CPLR 3212, for a summary judgment dismissal of plaintiff Women's Interart Center, Inc. (WIC)'s complaint, as well as an order severing the summary holdover proceedings under Civil Court Landlord and Tenant (L&T) index numbers 63767/08, 63771/08, 63772/08, 63773/08, 63774/08, and 63775/8, and removing and transferring them back to Civil Court for resolution.

¹CHDFC is alternately referred to by the parties and by the documents as "CHDC."

By way of background, WIC is a not-for-profit cultural organization which promotes performing, visual and media arts. It has been a month-to-month tenant in a building located in the "Hell's Kitchen" section of Manhattan at 549 West 52nd Street (549 Building) since 1971. As stated in this court's decision of June 21, 2010, familiarity with which is presumed, in the early 1990's, WIC proposed to purchase the 549 Building and an adjacent vacant structure at 543-551 West 52nd Street and to develop them into a new structure to be called the Interart Rehearsal Studio and Cultural Center Complex (IRSC). The project was well supported by the City of New York (City), and by the community at large. The planning and fund-raising aspects of the project have continued through the years, and in preparation for the construction phase of the project, various arrangements were made to vacate the 549 and 543-551 buildings and to relocate the affected tenants into temporary space. One such space was found in the Old School Building located at 552 West 53rd Street (OSB). The idea was for the OSB to be used as "swing" space for WIC's performance art, and for use by approximately six other artist tenants who were scheduled to be "returned" to the completed IRSC.

In or about late 1995 or early 1996, the City, through its Department of Housing Preservation and Development (HPD), decided to remove the tenants from the OSB and place them in a more "permanent" location. Accordingly, by written agreement, dated January 15, 1996 (1996 Agreement), WIC agreed to vacate the OSB in favor of space, "second floor right," in a City-owned building located at 500 West 52nd Street (500 West). Pursuant to this agreement, WIC executed a separate month-to-month commercial lease with City/HPD for the space at 500 West. The commercial lease requires, among other things, that: WIC pay monthly rent to "The Commissioner of Finance c/o Commercial Leasing Unit/100 Gold Street (6th floor)/New York,

New York 10038,” the failure of which could subject WIC to termination of the lease; changes to the lease could only be made in writing, “executed and acknowledged” by both parties; and that the tenancy could be terminated at any time, with or without cause, by either party upon 30 days’ notice.

By written agreement dated April 15, 1999 and titled “Net Lease,” the City/HPD, as the owner of certain properties in New York City, entered into an arrangement with CHDFC, whereby, for the cost of \$1.00, CHDFC was granted the authority to manage properties identified on annexed lists. The properties each had its own commencement date and the commencement dates for 500 West and the 549 Building were May 1, 2006 and April 1, 2007, respectively (*see* Notice of Motion, Exhibit R-A).

The above action, under index number 109017/07 (primary action), involves the December 2002 decision by the New York City Economic Development Corporation (EDC) to terminate a contract of sale (Contract) it had with WIC. The Contract contemplated that EDC would acquire, by deed from the City, title to the 549 Building and the 543-551 West 52nd Street properties, and then sell these properties to WIC for \$2.00 upon WIC’s completion of its pre-closing obligations. The Contract also gave EDC sole discretion in determining whether these conditions had been met. Noting its dissatisfaction with WIC’s efforts, EDC exercised its right to terminate the Contract by written notice, dated December 10, 2002, stating, among other things, that WIC failed to meet its contractual requirements for financing, and its contractual obligations with respect to the relocation of certain tenants of the Building, including tenant Ensemble Studio Theater (EST). The IRSC project was effectively cancelled by the EDC termination and WIC’s efforts to change EDC’s decision proved futile. As a result, WIC

commenced the primary action, sounding in breach of contract and specific performance of contract, alleging that the various defendants took certain actions, and refrained from taking other actions, in order to permanently derail the IRSC project.² The primary action defendants' summary judgment motion for a dismissal of the complaint was denied, in large part, by the June 21, 2010 decision and order of this court which dismissed only the promissory estoppel claim and directed the completion of certain, previously ordered, discovery.

The instant (second) action involves the same plaintiff and many of the same participants involved in the primary action. Here, WIC charges CHDFC with engaging in conduct which has effected, and continues to effect, its ability to comply with WIC's obligations under the Contract by intentionally undermining WIC's ability to relocate the Building's tenants prior to the date set for closing.

Plaintiff commenced the second action by service of a summons with notice, dated September 28, 2007. The complaint, setting forth four separate causes of action, was served on or about March 24, 2008. In response, defendant served a pre-answer motion to dismiss, pursuant to CPLR 3211 (a) (1) and (7). By order, dated July 14, 2008, this court dismissed plaintiff's claim for tortious interference with contract and dismissed that aspect of plaintiff's cause of action sounding in prima facie tort which demanded punitive damages (*Walsh Brothers, Inc. v Ruppert*, 7 AD2d 896 [1st Dept 1959] and 103 NY Jur 2d, Torts § 20). Not dismissed were plaintiff's first cause of action for a declaration that the net lease is null and void and that CHDFC does not have the authority to terminate plaintiff's tenancies, plaintiff's second cause of

²Plaintiff initially commenced its action in federal court alleging both federal and state causes of action. After the federal claims were dismissed, the court dismissed the state claims without prejudice to renew in state court, which plaintiff did under index number 109017/07.

action for a permanent injunction, and the balance of plaintiff's fourth cause of action, incorrectly denominated as plaintiff's second "As and For a Third Cause of Action," sounding in prima facie tort. Issue was joined by service of defendant's answer, and the litigious nature of this dispute, like that of the primary action, has continued to guide the parties' prosecution and defense of this action.

By orders dated February 29, 2008 and August 27, 2008, the instant action was joined for discovery and trial with the main action, and defendants were prohibited from taking any actions with respect to the premises involved in the Contract between WIC and EDC prior to the resolution of the litigation which could compromise WIC's right to immediate ownership and possession of the property should WIC ultimately be successful in its (primary action) claims for breach of contract and specific performance. By order, dated May 15, 2008, six Civil Court L&T actions commenced by CHDFC in an effort to terminate the tenancies of WIC and/or its subtenants from the 500 West and/or 549 Building, have been removed to Supreme Court to accompany the joined actions.

With respect to the instant motion for a summary judgment, in addition to asserting that its authority was granted to it by way of the "Net Lease," CDHFC repeatedly states that its motion is predicated upon this court's granting of the then-pending defense motion for summary judgment in the primary action. However, CDHFC's assertions are misguided, as by order, dated June 21, 2010, that motion was, in large part, denied. This court found that there were questions of material fact as to what transpired in the months immediately prior to the scheduled closing that resulted in EDC's decision to terminate the Contract and whether there is merit to WIC's claim that, once the City administration made an internal decision to derail the IRSC project,

defendants City, Deputy Mayor Daniel Doctoroff and/or Mayor Michael Bloomberg took steps to frustrate the Contract, including not evicting EST, a tenant which has been described by various parties as “recalcitrant.” WIC contends that the decision by CHDFC to terminate plaintiff’s tenancies in 500 West and in the 549 Building, including the commencement of the six L&T actions, is part of a concerted effort with the defendants named in the primary action, to find a way around EDC’s Contract obligations and to back out of the IRSC project without incurring legal problems related to a contract breach.

An examination of the “Net Lease” reveals that it is, and was intended to be, a management agreement, in which the City/HPD retained for itself a possessory interest in each of the named/identified properties. Article II of the “Net Lease” provides, in relevant part, that in exchange for \$1.00, the City, through City/HPD as lessor, would lease the premises to CHDFC, as lessee, on a month-to-month basis (sections 2.2 and 2.3). The City/HPD specifically limited CHDFC’s authority as follows: “§ 2.6 No Agency. The sole and exclusive relationship of Lessor and Lessee hereunder shall be that of landlord and tenant. Lessee is not and shall not be deemed to be an agent or partner of Lessor by virtue of this Net Lease.”

Article III sets forth CHDFC’s property management responsibilities, including those pertaining to repairs, maintenance and services such as heat, hot and cold water, electricity and gas, trash disposal and vermin extermination (Sections 3.2 - 3.4). Notably, Section 3.6 limits CHDFC’s ability to make any improvements or alterations to any of the properties without the prior written consent of City/HPD, and Section 3.9 requires CHDFC to notify City/HPD “immediately upon the occurrence of any incident in the Premises that may result in a claim against Lessee and/or Lessor” These provisions, like those in Article VIII and IX which

retain to HPD the right to access the premises, books, records, accounts and statements, are typical of a property management agreement, not a net lease.

Article V contains the language which is central to the instant dispute, and contrary to CHDFC's assertion, Section 5.5 is not dispositive and does not constitute irrefutable evidence of its authority to terminate WIC's tenancies. Section 5.5 purports to grant CHDFC the authority to terminate the leases of a tenant in default, stating that "Lessee shall engage counsel, institute and maintain appropriate legal actions or proceedings for the collection of rent from tenants or the eviction of tenants or other persons from the Premises and shall notify Lessor when any such actions are taken. Such actions shall be brought in the name of Lessee." However, Section 5.1 puts CHDFC on notice that it takes the premises "subject to the rights of all lawful Tenants and persons with right to occupy the premises." The lawful rights of WIC, as a tenant already in occupancy, are set forth in the 1996 Agreement/Commercial Lease which, at Section 10, prohibits any changes to its terms without

an agreement in writing, executed and acknowledged by Lessor [HPD] and Lessee [Margot Lewitin d/b/a Women's Interart Center, Inc.], which refers expressly to this Lease. This agreement contains all of the terms and conditions agreed upon by Lessor and Lessee, and no other representation, statement or agreement, oral or written, regarding the subject matter of this agreement shall be binding upon any of the parties hereto.

Therefore, even if the agreement were a true net lease, the City/HPD could not unilaterally empower CHDFC, an unrelated third party, to take over any of its obligations or responsibilities as set forth under the 1996 Agreement/Commercial Lease without first obtaining the necessary written approval of both parties. This includes (and precludes) any unilateral changes to Section 18 of the 1996 Agreement/Commercial Lease which authorizes only

City/HPD to take the necessary and appropriate actions in the case of a default by WIC, including “serv[ing] the Lessee with a written notice terminating this Lease.”

Among the other submissions which confirm that what CHDFC and City/HPD created was a management agreement which named CDHFC as the managing agent for both 500 West and the 549 Building are a March 31, 2006 letter from City/HPD to WIC, and a March 9, 2007 letter from the City of New York Manhattan Community Board No. 4 to City/HPD. The March 31, 2006 letter states:

Please be advised that effective May 1, 2006, the Clinton Housing Development Company, Inc., will assume management of the property that you currently lease from the Department of Housing Preservation and Development. Rent payments, as of that date, should be sent to: Clinton Housing Development Company, Inc./ 300 West 46th Street/ New York, NY 10036
If you have any questions, prior to that date, please contact me at (212) xxx-xxxx.

Other than where to mail it, no mention is made of any changes pertaining to payment or failure to make payment of rent, nor does the letter provide any other indicia of a change in the City/HPD’s proprietary interest in the subject tenancies.

The March 9, 2007 letter announces the Community Board’s support for the proposal for CHDFC to take over management and operational duties for the City/HPD-owned 549 Building. Again, there is no indication that CHDFC was given any greater authority, in fact, it makes reference to the fact that the “current prime tenants” lease their space in the 549 Building from “the City of New York” (Notice of Motion, Exhibit R-E).

It is well settled that,

[i]t is the transfer of absolute control and possession of property at an agreed rental which differentiates a lease from other arrangements dealing with property rights. . . . [w]e must look to the rights it [the agreement] confers and the obligations it imposes in order to determine the true nature of the transaction and the relationship of the parties

(*Feder v Caliguira*, 8 NY2d 400, 404 [1960] [internal quotation marks and citations omitted]).

Rather than giving CHDFC the requisite possessory rights to 500 West or the 549 Building, the “Net Lease” dictates CHDFC’s management obligations with respect to these and other properties identified on the annexed lists. It is a month-to-month property management agreement through which the City/HPD did not grant any rights of agency, and retained for itself numerous rights and ultimate control (*see Metropolitan Realty Group v McSwain*, 27 Misc 3d 1216[A], 2010 NY Slip Op 50769[U] [Civ Ct, NY County 2010]; RPAPL 721).

Accordingly, not only does WIC have the right to challenge CHDFC’s authority to effect its tenancies in 500 West and the 549 Building, but CHDFC is not the proper party, and therefore lacks standing to bring the summary holdover proceedings under Civil Court L&T index numbers 63767/08, 63771/08, 63772/08, 63773/08, 63774/08, and 63775/8.

Plaintiff appears, through its memorandum of law, rather than through motion papers, to cross move for summary judgment in its favor. Regardless of this failing, it is well settled that “a motion for summary judgment, irrespective of by whom it is made, empowers a court . . . to search the record and award judgment where appropriate” (*Grimaldi v Pagan*, 135 AD2d 496, 496 [2nd Dept 1987]; CPLR 3212 [b]). In this matter, although defendant served the appropriate motion papers, it has not demonstrated entitlement to either a summary judgment dismissal of the complaint or to a severance of the L&T actions. A review of the record reveals that partial summary judgment should be granted to WIC on its cause of action for a declaratory judgment with respect to CHDFC’s authority under the Net Lease to terminate WIC’s tenancies in the 500 West and 549 Building.

Accordingly, it is

ORDERED that the motion by defendant Clinton Housing Development Fund Corp. for an order granting a summary judgment dismissal of the complaint is denied; and it is further

ORDERED that the motion by defendant Clinton Housing Development Fund Corp. for an order severing the summary holdover proceedings and transferring them back to Civil Court is denied; and it is further

ORDERED that plaintiff Women's Interart Center, Inc. is entitled to a declaratory judgment with respect to the subject of the complaint's first cause of action to the extent that it is hereby declared that:

- 1) CHDFC is not a net lessee of either 500 West 52nd Street, New York, New York or 549 West 52nd Street, New York, New York;
- 2) CHDFC does not have a property interest in 500 West 52nd Street, New York, or 549 West 52nd Street, New York, New York;
- 3) CHDFC has no legal authority to terminate or otherwise encumber the tenancies of plaintiff in either building;
- 4) The Notices of Termination with respect to plaintiff's tenancies in 500 West 52nd Street, New York, New York and 549 West 52nd Street, New York, New York, and as set forth in Civil Court L&T index numbers 63767/08, 63771/08, 63772/08, 63773/08, 63774/08, and 63775/8, are null, void and dismissed; and it is further

ORDERED that plaintiff's second cause of action seeking a permanent injunction is dismissed as moot; and it is further

ORDERED that the first and second causes of action are severed and the Clerk is to enter

judgment accordingly, and it is further

ORDERED that the action shall continue as to the fourth cause of action sounding in prima facie tort, incorrectly designated as plaintiff's second "As and For a Third Cause of Action"; and it is further

ORDERED that counsel are directed to appear for a further conference in Room 103 at 80 Centre Street on October 21, 2010, at 2:00 P.M.

Dated: August 19, 2010

ENTER:



KAREN S. SMITH, J.S.C.

FILED
AUG 23 2010
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