

23 E. 10 L.L.C. v Albert Apt. Corp.

2010 NY Slip Op 32970(U)

October 14, 2010

Supreme Court, New York County

Docket Number: 110796/07

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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23 EAST 10 L.L.C., previously known as CORBO
COMPANY, and PATSY'S PIZZERIA 87TH CORP.,

INDEX NO. 110796/07

Plaintiffs,

- against -

ALBERT APARTMENT CORP.,

Defendant.

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JOAN A. MADDEN, J.:

Plaintiffs tenant and subtenant commenced this action as a result of defendant landlord's refusal to provide them with access to and use of certain portions of the building's basement. Defendant moves for summary judgment dismissing the complaint. Plaintiffs oppose the motion and cross-move for summary judgment.¹

Defendant Albert Apartment Corp. ("Landlord") is the owner of the building located at 23 East 10th Street, which is a residential cooperative apartment building with 10 commercial units at street level. On January 3, 1985, defendant as landlord and plaintiff 23 East 10 L.L.C.'s on of the commercial units known as "Store #10" ("Commercial Lease"). The Commercial Lease for Store #10 was subsequently modified by agreements dated June 5, 1986 and May 23, 1994. Under the Commercial Lease and the modifications, the demised premises consist of a first floor restaurant and a portion of the basement.

¹Plaintiffs argue that defendant's motion is defective for not including an affidavit from a person with knowledge of the facts. Defendant's motion is not defective, as defendant properly relies on documentary proof and deposition testimony.

By Standard Form of Store Lease ("Sublease") dated September 7, 1995, Tenant subleased Store #10 to co-plaintiff Patsy's Pizzeria 87th Corp. (Subtenant), for use as a restaurant. The Subtenant's premises are comprised of a first-floor restaurant and a portion of the basement ("Basement"), which contains a kitchen, storage space and restrooms. Steps inside the first-floor restaurant lead down to the Basement, which can also be accessed from outside the building through a hatch or entrance in the sidewalk ("sidewalk entrance"). From the sidewalk entrance, a ladder leads down into the vault space to corridors that lead to the subtenant's Basement space.

Neither the Commercial Lease nor the Sublease designates the sidewalk entrance, the vault space and the basement corridors as part of the demised premises. However, the 1994 modification agreement included a paragraph 7, entitled "Use of and Access to Basement Space," which provided as follows:

The present use by the Tenant and all subtenants, licensees, and occupants of the Premises of the entrance to the cellar of the Building located on Eleventh Street and the sidewalk entrance to the cellar of the Building located on University Place (i.e., through the abandoned sidewalk elevator shaft) is hereby acknowledged and hereafter approved by the Landlord, provided that such use complies with applicable law. Landlord acknowledges and agrees that (I) it will not make any claim, or make any legally binding admission, that such use does not comply with applicable law, (ii) it will cooperate with and use all best efforts to assist Tenant, its subtenants, licensees and other occupants of the Premises to preserve the continued right to the use of such entrances, and (iii) it will join in any applications, proceedings or other procedures reasonably necessary to preserve or permit the use of such entrances by Tenant, its subtenants, licensees and other occupants of the Premises. In the event the current use of the cellar space is determined to be in violation of applicable law, Landlord shall, to the extent practicable, provide for alternate methods of ingress and egress through the cellar space at Tenant's sole cost and expense. Tenant agrees to provide at its sole cost and expense, adequate security measures in connection with the use of such secondary means of ingress and egress.

Pursuant to the foregoing provision, Landlord expressly acknowledged and approved Tenant's and Subtenant's use of the sidewalk entrance. It is not disputed that Tenant and Subtenant were permitted to use and did use the sidewalk entrance, the vault space and the basement corridors, until Landlord prevented them from doing so in March 2007. Subtenant used the sidewalk entrance for removing its garbage and for receiving deliveries.

The 1986 modification of the Commercial Lease gave Tenant the option of acquiring the cooperative shares allocated to Store #10. Once Tenant elected to exercise that option, it engaged in negotiations with the Landlord. On December 1, 2005, Tenant and Landlord entered into a Surrender of Lease and Survival Agreement (the Surrender Agreement), which terminated the Commercial Lease and simultaneously exchanged it for a Proprietary Lease (the "Proprietary Lease"). The Proprietary Lease provided that the Sublease would survive the issuance of the Proprietary Lease and be deemed a sublease of the Proprietary Lease. The Proprietary Lease omits any mention of the right of the Tenant or the Subtenant to use the sidewalk entrance, the vault and the basement corridors. Tenant claims that such omission was a mistake, and Landlord claims that the omission was intended by both parties.

In October 2006, defendant Landlord began repairing the sidewalk around the sidewalk entrance. Plaintiffs allege the Landlord wanted them to pay for the repairs, but they refused. Upon finishing the repairs in March 2007, Landlord padlocked the sidewalk entrance and refused to give plaintiffs a key. Plaintiffs allege Landlord was retaliating for their refusal to pay for the sidewalk repairs. Since March 2007, plaintiffs have not been able to exit or enter the basement through the sidewalk entrance, and have not been able to use the vault space and basement corridors.

On August 7, 2007, plaintiffs commenced the instant action. The amended complaint asserts eight causes of action for declaratory, injunctive and monetary relief. The first cause of action for breach of the Proprietary Lease, the fourth cause of action for breach of the covenant of quiet enjoyment and the fifth cause of action for breach of the Surrender Agreement seek an identical injunction stopping defendant from interfering with plaintiffs' continuous access to and use of the sidewalk entrance, the vault space and the basement corridors.

The second cause of action seeks a declaratory judgment that the sidewalk entrance, the vault space and the basement corridors are necessary appurtenances for the use of the premises by Subtenant and Tenant. The second cause of action also seeks an order compelling defendant to provide Subtenant and Tenant with access to and use of the sidewalk entrance, the vault and the basement corridors; an order declaring the rights and other legal obligations of the parties; and an injunction identical to the injunction sought in first, fourth and fifth causes of action, i.e. stopping defendant from interfering with plaintiffs' access to and use of the sidewalk entrance, the vault and the basement corridors.

The third cause of action seeks money damages for partial actual eviction. As an alternative to the second cause of action for a declaration as to a necessary appurtenance, the sixth cause of action seeks reformation of the Proprietary Lease to provide explicitly for plaintiffs' continued right to use the sidewalk entrance, the vault space and the basement corridors. The seventh and eight causes of action allege that defendant is violating Business Corporation Law § 501 (c) by treating plaintiffs "unequally" with respect to the collection and removal of refuse. The seventh causes of action seeks a declaration as to such violation, and the eighth cause of action seeks an injunction requiring defendant to collect, bag and remove

plaintiffs' refuse from the basement. Plaintiffs also seek on "all causes of action," an award of costs and disbursements, including reasonable attorney's fees.

Defendant's answer to the amended complaint asserts the following affirmative defenses:

1) Subtenant lacks standing; 2) Subtenant lacks privity with defendant; 3) neither the proprietary lease nor statute provides a basis for plaintiffs to recover attorney's fees; 4) plaintiffs have failed to mitigate their damages; 5) the complaint fails to state a claim; 6) the complaint must be dismissed based on documentary evidence, including the Surrender Agreement and the Proprietary Lease; 7) the Sixth Cause of Action for reformation of the Proprietary Lease must be dismissed, as there was no mistake or omission, either inadvertent or otherwise; 8) the business judgment rules precludes the granting of any relief sought in the complaint; 9) the business judgment precludes judicial review of plaintiffs' allegations; and 10) the complaint must be dismissed based on the principles of waiver, estoppel and laches. The amended answer also asserts a counterclaim against plaintiff Tenant for an award of attorney's fees based on paragraph 28 of the Proprietary Lease. Defendant asserts a separate counterclaim against Subtenant, alleging that "if there is a determination in favor of plaintiff 23 East 10-LLC against the Coop on those causes of action which seek to compel the Coop to collect, bag and transport the refuse of Patsy's Pizzeria 87th Corp., plaintiff Patsy's Pizzeria 87 Corp. will be solely responsible pursuant to the terms" of the May 12, 2005 lease modification and extension.

Defendant is now moving for summary judgment dismissing the amended complaint in its entirety. Plaintiffs oppose the motion and cross-move for summary judgment on each of the

causes of action in their amended complaint.²

Summary judgment may be granted upon a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence sufficient to eliminate material issues of fact (CPLR 3212 [b]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). When the moving party makes the required showing, the opponent defeats the motion by producing evidence to show that there is a material question of fact (*Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872 [1980]). In opposing such a motion, the party must “lay bare” its evidentiary proof (*Silberstein, Awad & Miklos, P.C. v Carson*, 304 AD2d 817, 818 [2d Dept 2003]). Conclusory allegations are insufficient to defeat the motion (*Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]). In deciding the motion, the court must draw all reasonable inferences in favor of the non-moving party and must not decide credibility issues (*Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, 204 [1st Dept 1990]).

The primary issue in this action is whether plaintiffs Tenant and Subtenant have a right to access to and use of the sidewalk entrance, the vault space and the basement corridors. For the reasons that follow, the court concludes as a matter of law that the sidewalk entrance, the vault and the basement corridors are necessary appurtenances to plaintiffs’ use of the premises, and plaintiff is entitled to the declaratory and injunctive relief requested in the second cause of action.³

²Neither the motion nor cross-motion seeks any relief with respect to defendant’s counterclaims.

³As noted above, the injunctive relief sought in the second cause of action is identical to the injunctive relief sought in the first (breach of the Proprietary Lease), fourth (breach of the covenant of quiet enjoyment), and fifth (breach of the Surrender Agreement) causes of action. Since the court has determined that plaintiff is entitled to such relief based on the second cause of

I. Appurtenance

As stated in a recent First Department case concerning an appurtenance for a tenant restaurant:

Under a lease, the tenant acquires not only rights to the premises specifically leased, but also "rights outside the demised premises that pass to the tenant whether or not mentioned" (1 Friedman on Leases § 3:2.2, at 3-14 [Randolph 5th ed]). Rights of the latter kind are known as appurtenances and are generally defined as "incorporeal easements or rights and privileges which are essential or reasonably necessary to the full beneficial use and enjoyment of the property conveyed or leased" (1 Dolan, Rasch's Landlord and Tenant-Summary Proceedings § 7:5 at 304-305 [4th ed]).

(*Second on Second Café, Inc. v Hing Sing Trading, Inc.*, 66 AD3d 255, 267 [1st Dept 2009]).

"When premises are leased for an expressed purpose, everything necessary to the use and enjoyment of the demised premises for such expressed purpose must be implied where it is not expressed in the lease" (*id.* at 256 [citations omitted]). Unless specially reserved, an appurtenant right passes to the tenant along with the demised premises (*Henry A. Fabrycky, Inc. v Nad Realty Corp.*, 261 App Div 268, 269 [2d Dept 1941]; *Telesca v Bruenn Co.*, 71 Misc 2d 208, 210 [New Rochelle City Ct 1972]). An appurtenance may not be revoked or otherwise terminated until the lease ends (*Blenheim LLC v Il Posto LLC*, 14 Misc 3d 735, 740 [Civ Ct, NY County 2006])

When a landlord permits a tenant to use and occupy the basement, and such usage is essential to the tenant's use and enjoyment of the demised premises, the basement is an appurtenance (*Greenblatt v Zimmerman*, 132 App Div 283, 285 [1st Dept 1909]; *Riccardo's Lounge Inc. v Maggio*, 9 Misc 3d 1112[A], [Sup Ct, Nassau County 2005]). Mere convenience

action, the court need not consider the merits of the other claims seeking the identical relief. The court also need not consider plaintiffs' claim for reformation of the Proprietary Lease, which is pleaded in the alternative (sixth cause of action). Thus, the first, fourth, fifth and sixth causes of action are dismissed as moot.

will not an appurtenance make; the facility must be essential to the tenant's business (*Blenheim*, 14 Misc 3d at 741), or reasonably necessary to the tenant's beneficial, comfortable, or full enjoyment of the leased premises (*Second*, 66 AD3d at 267; *Lemkin v Gulde*, 25 Misc 2d 144, 149 [Sup Ct, Nassau County 1960]). The facility need not be "absolutely necessary to the enjoyment of the property" (*Lemkin*, 25 Misc 2d at 149).

A basement is not an appurtenance, where it is a mere convenience, not essential to the tenant's use and enjoyment, and the tenant has alternative space (*see Oberfest v 300 West End Ave. Assocs. Corp.*, 34 Misc 2d 963, 965 [Sup Ct, NY County 1962]; *Telesca*, 71 Misc 2d at 211 [storage space in the basement was convenient for insurance agency, but not necessary]; *see also Prospect Owners Corp. v Sandmeyer*, 62 AD3d 601, 602 [1st Dept 2009] [the roof not an appurtenance where it was used primarily for recreational and storage purposes, and alternative premises existed]). Conversely, basement appurtenances have been found where the tenant had alternatives, but they were impractical (*Blenheim*, 14 Misc 3d at 742), unreasonable or expensive (*Greenblatt*, 32 App Div at 285; *Hamilton v Graybill*, 19 Misc 521, 522 [Sup Ct, App Term 1897] [access to a common hallway from the tenant's private office was an appurtenance, although the tenant still had access to the hallway from his general, outer office]).

The right to enter or exit the premises by the usual way may also pass to the tenant through the lease as an appurtenance, although not specifically mentioned in the lease (*34 Crescent St. Assocs. LLC v U.S. Fish Depot Corp.*, 4 Misc 3d 143A [App Term, 2d & 11th Jud Dists 2002]; *Hamilton*, 19 Misc at 522). Appurtenances arise by implication, given that they are not generally mentioned in the lease, and the law in this area is often informed by the law on implied easements (*Second*, 66 AD3d at 268). An easement may be implied based upon the

tenant's pre-existing and necessary use of the property (*Jhae Mook Chung v Maxam Properties*, 73 AD3d 505, 506 [1st Dept 2010]; *Board of Mgrs. of Atrium Condominium v West 79th St. Corp.*, 2 AD3d 246, 247 [1st Dept 2003]). Appurtenant rights also arise from the parties' intent as found in the lease (*Second*, 66 AD3d at 268; *Rainbow Shop Patchogue Corp. v Roosevelt Nassau Operating Corp.*, 60 Misc 2d 896, 898 [Sup Ct, Kings County 1969], *affd* 34 AD2d 667 [2d Dept 1970]). The parties' intent may be discerned by examining their "practical construction" of the lease and their "established practice" thereto (*Oberfest*, 34 Misc 2d at 965; *see also Chung*, 73 AD3d at 506 [although document containing the express easement was ambiguous, "surrounding circumstances" showed that at time of purchase, plaintiff was granted the usage constituting the easement]; *Bardach v Mayfair-Flushing Corp.*, 26 Misc 2d 32, 34 [Sup Ct, Queens County 1960], *mod* 13 AD2d 542 [2d Dept], *affd* 10 NY2d 962 [1961] [implied easement or appurtenance proved by conduct showing an intention to include it in the lease]).

Here, Nick Tsoulos, an owner and officer of Subtenant, was deposed and testified as follows. Restaurant hours are from 11:00 a.m. to 11:00 p.m. The restaurant previously kept its garbage, amounting every day to about 15 to 20 bags, in the vault space. Around 10:00 p.m., the garbage would be taken from the vault out through the sidewalk entrance and placed on the sidewalk for collection. After Landlord barred the sidewalk entrance, the restaurant was forced to keep its garbage in the Basement storage area until the restaurant closes, when the garbage is brought up to the ground floor and taken through the restaurant out to the sidewalk. This process has doubled the work. Since garbage is being kept there, workers spend more time cleaning the store room. The garbage cannot be removed until the restaurant is closed for the evening. Two to three employees must stay an hour longer than before to take out the garbage. Sometimes

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garbage bags leak and water or garbage is on the floor. The floor must then be mopped. The vault floor is cement, so that when Subtenant had the use of that space, after the garbage was taken out, the floor would be hosed down. Taking the garbage upstairs from the Basement to the restaurant damages the stairs and the walls.

Tsoulos further testified that deliveries were previously taken through the sidewalk entrance, and the main part of the restaurant was rarely used for deliveries. Now that deliveries must be through the front door, one or two extra porters and a manager come in an hour to an hour and a half earlier than previously to take deliveries before the restaurant opens. The business has incurred extra expenses as a result of increased work hours and extra workers, but the restaurant's sales have not been affected.

Based on the foregoing testimony, which is uncontroverted, plaintiffs have established as a matter of law that the use of the sidewalk entrance, vault space and basement corridors created an appurtenance. Subtenant's use of those spaces to dispose of refuse and take deliveries is reasonably necessary to the full beneficial use and enjoyment of its business. Although the garbage can be taken out through the front door, given the nature of running a restaurant, such disposal is not as practical as the barred alternative. Subtenant's present method of removing garbage and taking deliveries is more time consuming and expensive. Another consideration is that plaintiffs have the right to the accustomed ingress and egress pertaining to the premises. Notably, the Landlord consented to use of the sidewalk entrance and related spaces from 1985 when the Commercial Lease was executed, through 1995 when the Sublease was executed, and through 2005, when the Proprietary Lease was executed, and thereafter until March 2007, when the Landlord padlocked the sidewalk entrance and refused to give plaintiffs a key.

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In its memorandum of law, defendant concedes that plaintiffs were entitled to use of the sidewalk entrance and access to the basement through that entrance prior to the execution of the Proprietary Lease and the Surrender Agreement in December 2005. Defendant argues that after that time, however, plaintiff Tenant was no longer entitled to the access because the Proprietary Lease did not provide for basement access and the prior agreements did not survive. Defendant's arguments are not persuasive. The fact that the appurtenant use is not explicitly mentioned in the Proprietary Lease is not dispositive, as a lease need not refer to an appurtenances in order for it to pass to the tenant (*Second*, 66 AD3d at 267). As noted above, the general rule is that appurtenances reasonably essential to the enjoyment of demised premises pass as an incident to premises unless specially reserved (*Fabrycky, Inc.*, 261 App Div at 269). Here, the appurtenance uses were not reserved in the Proprietary Lease, and plaintiffs continued to use the sidewalk entrance for more than one year after the execution of the Proprietary Lease, without any objection from Landlord.

II. Partial Actual Eviction

The third cause of action asserts a claim for damages based on partial actual eviction. A partial actual eviction occurs when a landlord wrongfully ousts a tenant from physical possession of a portion of the leased premises (*Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 83 [1970]; *Fifth Ave. Bldg. Co. v Kernochan*, 221 NY 370, 373 [1917] [lost use of vault space constituted partial eviction]). Interference with a tenant's appurtenant rights may constitute a partial eviction (*Second*, 66 AD3d at 268, citing *487 Elmwood, Inc. v Hassett*, 107 AD2d 285, 287 [4th Dept 1985] [changing or limiting a tenant's means of ingress and egress, albeit without denying access to the leased premises, can amount to a partial eviction]; *Hamilton*,

13] 19 Misc at 523 [the landlord partially evicted the tenant by cutting off access to a common hallway from the tenant's private office]; *see also Broadway-Spring St. Corp. v Jack Berens Export Corp.*, 12 Misc2d 460, 465 [Mun Ct, Borough of Manhattan 1958]).

Here, however, the landlord's interference with plaintiffs' use of the sidewalk entrance did not result in a partial actual eviction, as plaintiff have not been deprived of access to the demised premises, but only that access for the purposes of disposing of refuse and accepting deliveries is impractical unreasonable and more expensive (*see e.g. Cut-Outs, Inc. v. Man Yun Real Estate Corp.*, 286 AD2d 258 [1st Dept 2001], lv app den 100 NY2d 507 [2003] [landlord's interference with ingress and egress to building did not result in partial actual eviction where tenant did not contend it was deprived of access, but only that access was slower, less convenient and less pleasant); *Graubard, Mollen, Horowitz, Pomeranz & Shapiro v. 600 Third Avenue Assocs.*, 240 AD2d 161 [1st Dept 1997] [no partial actual eviction where landlord's reduction in elevator service never resulted in denial of access]. Thus, the third cause of action must be dismissed.

III. Violation of Business Corporation Law § 501 (c)

BCL § 501 (c) prohibits the unequal treatment of shareholders holding the same class of shares in a cooperative corporation (*see Spiegel v 1065 Park Ave. Corp.*, 305 AD2d 204, 204 [1st Dept 2003] [proprietary lease violated the law by giving original purchasers more favorable subletting rights than non-original purchasers]). According to plaintiffs, this law obligates Landlord to collect Tenant's and, by implication, Subtenant's garbage, and place it on the sidewalk for collection, as Landlord allegedly does for residential tenants.

A cooperative corporation, such as Landlord, is under a fiduciary duty to treat its shareholders fairly and evenly (*Louis & Anne Abrons Found. Inc. v 29 E. 64th St. Corp.*, 297 AD2d 258, 260 [1st Dept 2002]). Any differential treatment must be pursuant to a justifiable and genuine business purpose (*id.*). In *Abrons Found.*, a shareholder who sublet commercial units complained of a sublet fee affecting only those units. Because a restriction prohibiting residential subleases was in place at the time the board instituted the sublet fee, the fee would necessarily have fallen exclusively on the shareholder. The court concluded that there was a material issue of fact as to whether the board treated the shareholder unequally.

In response to defendant's argument that BCL § 501 (c) applies only to corporate finance, (*Mogulescu v 255 W. 98th St. Owners Corp.*, 135 AD2d 32, 39 [1st Dept 1988]), plaintiff cites to *Spiegel*, which dealt with the unreasonable withholding of consent to subletting rather than financial matters, such as fees (305 AD2d at 204). Assuming that the statute applies to garbage collection, plaintiffs nonetheless fail to show that Landlord engaged in unequal treatment. Plaintiffs do not explain exactly what the Landlord does for residential tenants. Moreover, plaintiffs do not allege that the garbage of the other commercial units is handled by Landlord. More importantly, however, paragraph 19 of the Rider to the Sublease explicitly requires the Subtenant to place garbage in securely sealed plastic bags, to place it outside for collection and to engage a rubbish removal contractor for "daily removal of all rubbish, debris and waste from Tenant's operation." Under the Sublease, the responsibility for garbage rests exclusively with the tenant, which is consistent with Tsoulos' testimony that Subtenant has always handled its own garbage. Thus, defendant is entitled to summary judgment dismissing the seventh and eight causes of action.

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IV. Counterclaims

Although neither the motion or cross-motion requests any relief with respect to defendant's counterclaims, in view of the determination herein above, the counterclaims must be dismissed. In the first counterclaim, defendant seeks an award of attorney's fees pursuant to the Proprietary Lease, which provides that if Tenant's default under the lease causes Landlord to incur expenditures, Tenant is obligated to pay Landlord's reasonable attorneys' fees and disbursements. Since defendant Landlord is not the prevailing party in this action, it is not entitled to such recovery. Defendant's second counterclaim is dismissed as moot, in light of the dismissal of plaintiff's BCL § 501 (c) claims.

Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted only to the extent of dismissing the third, seventh and eighth causes of action; and it is further

ORDERED that plaintiffs' cross-motion for summary judgment is granted only to the extent that plaintiff is entitled to judgment on the second cause of action, and the first, fourth and fifth causes of action are dismissed as moot; and it is further

ORDERED that defendant's counterclaims are dismissed; and it is further


ADJUDGED AND DECLARED that the sidewalk entrance, vault space and basement corridors constitute an appurtenance and plaintiffs may use those areas as they did before usage was barred by defendant; and it is further

ORDERED AND ADJUDGED that defendant, its agents, servants, employees and all other persons acting under the jurisdiction, supervision, and/or direction of defendant, are enjoined and restrained from preventing plaintiffs from using and accessing the sidewalk

entrance, vault space and basement corridors, and within five days of service of a copy of this order with notice of entry, defendant shall provide plaintiff 23 East 10 L.L.C with two keys to the sidewalk entrance to the basement of the building.

Dated: October 14, 2010

ENTER:



J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).