

**DEMD 860, LLC v Toobian**

2011 NY Slip Op 31905(U)

July 8, 2011

Sup Ct, NY County

Docket Number: 603451/08

Judge: Martin Shulman

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

PRESENT: **MARTIN SHULMAN**  
J.S.C.

PART 1

Index Number : 603451/2008

DEMD 860, LLC

vs.

TUBIN, CHAIM M.D.

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO.

603451/08

MOTION DATE

MOTION SEQ. NO.

003

MOTION CAL. NO.

this motion to/for

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits A-N  
Answering Affidavits — Exhibits 1-4  
Replying Affidavits

PAPERS NUMBERED

1  
2  
3

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

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

**FILED**

JUL 12 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: July 8, 2011

**MARTIN SHULMAN** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 1

-----X  
DEMD 860, LLC also known as DEMD, LLC,

Plaintiff,

Index No. 603451/08

**Decision & Order**

-against-  
PAYAM TOOBIAN, M.D. ALSO KNOWN AS  
CHAIM TUBIN, M.D.,  
Defendant.

**FILED**

JUL 12 2011

-----X  
**Hon. Martin Shulman, J.S.C.:**

NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiff DEMD 860, LLC also known as DEMD, LLC ("DEMD" or "Plaintiff") is the  
proprietary lessee of a commercial cooperative unit used as a medical office. DEMD  
commenced this action against defendant Payam Toobian, M.D. also known as Chaim  
Tubin, M.D. ("Defendant") alleging two causes of action for breach of contract and  
anticipatory repudiation based upon Plaintiff's purported lease of a portion of the office  
space to Defendant. Defendant now moves for summary judgment dismissing the  
second amended complaint and Plaintiff opposes the motion.<sup>1</sup>

**FACTS**

On May 9, 2008, DEMD and Defendant entered into the following written  
agreement:

- Ultra sound room
- Lease agreement between DEMD LLLC (sic) and Chaim Tubin MD
- Premises at 860 fifth avenue (sic) New York
- Adherence to the rules and regulation (sic) of the 860 Fifth Ave Corp is required

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<sup>1</sup> Defendant's second amended answer asserts the following three (3) counterclaims: 1) Plaintiff breached his promise, duty and obligation to present a formal and valid lease to Defendant; 2) constructive eviction; and 3) resulting business losses. This motion for summary judgment does not seek summary judgment on the counterclaims.

This agreement is for a period of two years.

Rental of a furnished ultrasound room one day weekly for ultra sound studies of the heart, carotid arteries and extremities.

Includes use of a furnished waiting room, electric, heating and toilet facilities.

\$1,250 per week payable each month in advance

Appointment room

Lease agreement between DEMD LLLC (sic) and Chaim Tubin MD

Premises at 860 fifth avenue (sic) New York

Adherence to the rules and regulation (sic) of the 860 Fifth Ave Corp is required

This agreement is for a period of two years.

Rental of an appointment room room (sic) one day weekly for radiology, MRIs, CAT scans and general radiology

Includes use of furnished waiting room, electric, heating, and toilet.

\$2000 per month payable on the first of each month.

Rent deposit \$2,000

Upon signing the agreement, Defendant paid Plaintiff \$5,000 but made no further payments thereafter. Defendant's technician used the premises approximately six times but eventually ceased. (Herrera Aff. at Exh. 3 to Arce Aff. in Opp.). Defendant never responded to Plaintiff's written demands for payment of the agreed weekly fee.

### ARGUMENTS

Defendant makes two arguments in support of his motion for summary judgment. First, relying upon the complaint's characterization of the agreement as a lease and the agreement's provision requiring adherence to 860 Fifth Avenue Corporation's (the "cooperative") rules and regulations, Defendant argues that the agreement is void and unenforceable as a lease because Plaintiff failed to obtain written consent to sublease as required by Plaintiff's Proprietary Lease with the cooperative. Defendant further contends the agreement is not a lease because it does not grant him exclusive use and

control of the relevant office spaces within the cooperative unit. Plaintiff's opposition does not address this point. However, in the event this court determines the agreement is a valid lease, Plaintiff disputes that the cooperative's consent is required.<sup>2</sup>

Second, Defendant argues that, at most, the parties entered into a license agreement which is terminable at will by either party. To this, DEMD responds that a license is revocable only by the licensor and not by the licensee.

### DISCUSSION

An award of summary judgment is appropriate when no issues of fact exist. See CPLR 3212(b); *Sun Yau Ko v. Lincoln Sav. Bank*, 99 AD2d 943 (1<sup>st</sup> Dept.), *aff'd* 62 NY2d 938 (1984); *Andre v. Pomeroy*, 35 NY2d 361 (1974). In order to prevail on a motion for summary judgment, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986). Indeed, the moving party has the burden to present evidentiary facts to establish his cause sufficiently to entitle him to judgment as a matter of law. *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 NY2d 1065 (1979).

The movant's failure to make a *prima facie* showing requires denial of the motion regardless of the sufficiency of the opposing papers. *JMD Holding Corp. v. Congress*

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<sup>2</sup> Plaintiff summarily claims that he obtained the cooperative board's verbal consent and has sublet the space in the past without said board's objection. However, as Defendant notes, Article II, Section "SIXTH" of the Proprietary Lease expressly requires written consent from the board and Article V, Section "FIFTH" prohibits oral modifications thereto.

*Fin. Corp.*, 4 NY3d 373, 384 (2005). However, if the movant makes such a showing, the burden shifts to the non-movant to demonstrate the existence of factual issues requiring trial. *Dallas-Stephenson v. Waisman*, 39 AD3d 303, 306 (1<sup>st</sup> Dept 2007).

The first issue to determine is whether the agreement in question is a lease or a license. The transfer of absolute control and possession is what differentiates a lease from a license. *American Jewish Theater, Inc. v. Roundabout Theater Co., Inc.*, 203 AD2d 155, 156 (1<sup>st</sup> Dept 1994), citing *Feder v. Caliguira*, 8 NY2d 400, 404 (1960). "Whereas a license connotes use or occupancy of the grantor's premises, a lease grants exclusive possession of designated space to a tenant. . ." *Id.*; *Garza v. 508 W. 112th St., Inc.*, 22 Misc3d 920, 924-925 (Sup. Ct., NY County, 2008), *aff'd* 71 AD3d 567 (1<sup>st</sup> Dept 2010). Additionally, "[a] license does not imply an interest in land . . . and is a mere personal privilege to commit some act or series of acts upon the land of another without possessing any estate therein." *Cioppa v. Turri*, 67 Misc2d 127, 129 (Sup. Ct., Monroe County, 1971).

Here, Defendant was not given exclusive use and possession of the offices in the agreement. Possession was shared with DEMD and, in fact, Defendant only had possession once a week. For the remaining days each week, the offices remained in Plaintiff's possession. Further, Defendant had no interest in the property; rather, he merely had the privilege of using the property once a week. As Plaintiff did not completely surrender control of the premises or grant exclusive use to Defendant, the agreement herein is a license rather than a lease. See *Dental Mgt. & Dev., Inc. v. Bronx-Lebanon Hosp. Ctr.*, 68 AD3d 621 (1<sup>st</sup> Dept 2009). In light of the foregoing

finding, the court need not address the parties' arguments regarding the failure to obtain the cooperative's approval to sublet.

While Defendant correctly argues that the agreement is a license, the court rejects his claim that he can escape liability to DEMD because he has the right to revoke the license at will. "The well-settled doctrine of the common law is that a license in respect of real property is revocable at the will of the licensor." *Cloppa v. Turri, supra*, citing 17 N.Y. Jur., Easements and Licenses, § 211. Further, "where a license is given pursuant to contract for a definite term, on valuable consideration, a revocation of the license before expiration of the term ordinarily constitutes a breach of contract and gives rise to a personal action." *In re Yachthaven Restaurant, Inc.*, 103 BR 68, 73 (Bankr. EDNY 1989) (internal citation omitted); see also, *Nemmer Furniture Co., Inc. v. Select Furniture Co., Inc.*, 25 Misc2d 895, 899 (Sup. Ct., Erie County, 1960). In this case there was a signed agreement for a fixed term of two years and valuable consideration was paid in the form of \$5,000. Consequently, Defendant fails to make a prima facie showing of entitlement to judgment in his favor and it is hereby

ORDERED that Defendant's motion for summary judgment is denied in its entirety.

Counsel for the parties are directed to proceed to mediation as scheduled.

The foregoing constitutes this court's decision and order. Courtesy copies of this decision and order have been provided to counsel for the parties.

Dated: New York, New York  
July 8, 2011



HON. MARTIN SHULMAN, J.S.C.

**FILED**

JUL 12 2011