Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

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SAGAR CORPORATION,

Plaintiff(s),

- against -

ROCHDALE VILLAGE, INC., XYZ, INC, and JOHN DOES 1- 10,

Defendant(s).

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Index No.:6508/11

Motion Date:5/3/11

Motion Cal. No.: 27
Motion Seq. No: 1

The following papers numbered 1 - 7 read on this motion by the plaintiff for an order issuing a preliminary injunction or a Yellowstone injunction.

	Papers Numbered
Order to Show Cause-Affirmation-Exhibits.....	1 - 3
Affirmation in Opposition-Exhibits-Service.....	4 - 7

This court hereby sua sponte vacates its decision dated July 6, 2011 and decides the motion as follows:

This is an action seeking, *inter alia*, a declaratory judgment, preliminary injunction, Yellowstone injunction and damages for breach of contract. According to the complaint, on or about December 1, 1986, defendant, as landlord, and Sun Commodity Exchange Corp, plaintiff's predecessor-in-interest, as tenant, executed a six-year, commercial lease for retail space at the premises located at 169-77 137th Avenue, Jamaica, New York. Plaintiff asserts that this lease was subsequently assigned to it with the consent of the defendant. The lease was amended in March, 1992, January, 1999 and November, 2006 to extend its expiration date. It is uncontested that the lease expired in November 30, 2010.

Plaintiff asserts that, in, July, 2010, it contacted the defendant and expressed interest in renewing the lease. Plaintiff

further asserts that the defendant, through its manager, Jeffrey Hicks, orally assured plaintiff that the lease would be renewed for an additional six years. However, in February, 2011, defendant served plaintiff with a termination letter directing plaintiff to vacate the premises within thirty days. On or about March 1, 2011, plaintiff paid the current month's rent, which was accepted by the defendant. By letter dated March 15, 2011, defendant issued a second termination letter which terminated plaintiff's tenancy as of April 30, 2011.

This action was commenced on March 16, 2011 by the filing of a summons and complaint. With this Order to Show Cause, plaintiff seeks an order, pursuant to CPLR §6301, issuing a preliminary injunction and/or, pursuant to CPLR §6311, of a Yellowstone Injunction.

That portion of the instant application which seeks the issuance of a Yellowstone injunction is hereby denied. Yellowstone injunctions are granted to avoid forfeiture of a commercial tenant's interest prior to a determination of the merits (Post v 120 East End Ave. Corp., 62 NY2d 19 [1984]; First Natl. Stores v Yellowstone Shopping Ctr., 21 NY2d 630 [1968].) A tenant must demonstrate the existence of a commercial lease, receipt of a notice of default, a timely application for a temporary restraining order and the desire and ability to cure the alleged default (Purdue Pharma, LP v Ardsley Partners, LP, 5 AD3d 654 [2004].)

In this action, it is undisputed that the relevant lease between the parties expired in November, 2010. It is also undisputed that plaintiff continued to make rent payments, which were accepted by the defendant, until March 1, 2011. Plaintiff asserts that the oral negotiations between the parties and defendant's assurance that the lease would be renewed created either an oral six-year or one year commercial tenancy. In New York, the common law statute of frauds is incorporated by General Obligations Law §5-701(a)(1). ("GOL §5-701(a)(1)"). The statute requires a written contract for any agreement that cannot be fully performed within one year of its making. The statute of frauds was intended to prevent fraud in the proving of certain transactions that may be "particularly susceptible to deception, mistake and perjury" (Sheehy v. Clifford, Chance, Rogers and Wells, LLP, 3 NY3d 554 [2005] quoting D & N Boening Inc. v Kirsch Beverages, Inc., 63 N.Y.2d 449,[1984]). Thus, it is clear, if there was any valid oral extension of the commercial tenancy between the parties, it could not have been for a six-year term.

In the alternative, plaintiff argues that the extension of the expired lease was for a one-year term, thus falling within the limits of the statute of frauds. It is well-settled that the acceptance of rent from a holdover tenant generally creates a new month-to-month tenancy (See, Real Property Law § 232-c; Matter of

Jaroslow v Lehigh Val. R.R. Co., 23 NY2d 991 [1969]; Logan v. Johnson, 34 A.D.3d 758 [2d Dept. 2006]). In limited instances, tenants have demonstrated that their holdover tenancy created an implied year-to-year tenancy. In support of its proposition that a new year-to-year tenancy was created, plaintiff relies on the case 28 Mott Street v. Summitt Import Corporation (28 Mott Street v. Summitt Import Corporation, 34 Ad2d 144 [1st Dept. 1970]). In that action, the Appellate Division, First Department ruled that a year-to-year tenancy had been created. The tenant in 28 Mott Street submitted proof of a negotiated, but unexecuted ten-year lease, its six-year, undisturbed tenancy, without an executed lease, that substantial amounts had been paid by the tenant for capital improvements to the property and that the landlord had charged annual fees. (See, 28 Mott Street, supra). However, plaintiff in this action has failed to demonstrate to this court's satisfaction that a year-to-year tenancy was implied. Unlike the tenant in 28 Mott Street, plaintiff in this action previously had a written term lease with several written renewals. Additionally, in this action, no annual sums were charged by the defendant. Finally, defendant in this action first notified plaintiff that its lease was expired less than three months after the expiration, not several years into the holdover tenancy as in the 28 Mott Street action. Although plaintiff asserts that it has expended a sizeable amount of money to improve the premises, that alone is not enough to convince this court that a year-to-year, not a month-to-month tenancy was created. Thus, pursuant to Real Property Law § 232-c, this court hereby deems the relationship between the parties, after the natural expiration of the written lease, to be a month-to-month tenancy. Accordingly, without the ability to demonstrate the existence of a valid commercial lease, plaintiff's application, pursuant to CPLR §6311, for a Yellowstone injunction must be denied by this court.

That portion of the instant application which seeks a preliminary injunction is also denied. A preliminary injunction may be granted by the court, pursuant to CPLR §6301, when the party seeking such demonstrates (1) the likelihood of ultimate success on the merits of the underlying pending action, (2) the prospect of irreparable harm if the request for said preliminary injunction is denied, and (3) the balance of equities tipping in the moving party's favor (*Doe v. Axelrod*, 73 N.Y.2d 748 [1988]; *1659 Ralph Ave. Laundromat Corp. v. Ben David Enters., LLC*, 307 A.D.2d 288 [2d Dept. 2003]; *McVay v. Wing*, 303 A.D.2d 727 [2d Dept. 2003], *appeal dismissed* 100 N.Y.2d 577 [2003]). The granting or denial of a preliminary injunction is a matter which is ordinarily committed to the sound discretion of the court, and the appellate courts' power to review such decisions is limited to determining whether the lower court abused, or exceeded, its discretion (*Doe v. Axelrod*, *supra*). As the issuance of a preliminary injunction is used to prevent litigants from taking actions prior to the adjudication of the action on its merits, New York courts have

ruled that preliminary injunctions should be issued only where such injunction is needed to maintain the *status quo* (See, *Coinmach Corp. v. Alley Pond Owners Corp.*, 25 AD3d 642 [2d Dept. 2006]; *Putter v City of New York* [1st Dept. 2006]).

In the instant action, plaintiff has amply demonstrated the prospect of irreparable harm if its request for a preliminary injunction is denied and that the balance of equity tip in its favor. The issuance of a preliminary injunction would maintain the *status quo* during the pendency of this action (See, *Usman, Inc. v. Beech 140 LLC, et al.*, 68 Ad3d 932 [2d Dept. 2009]). This court is not without sympathy for the fact that the plaintiff has operated its business at the subject location for more than twenty years and that, without the issuance of an injunction, it will lose a valuable and long-standing tenancy.

However, plaintiff has failed to establish that it has a likelihood of success on the merits. Plaintiff asserts that it was induced to rely on the past practices of the parties and the assurances of Jeffrey Hicks, the defendant's manager that the lease would be renewed. However, plaintiff also admits that it never received a written amendment to extend the lease terms beyond its November 30, 2010 and that all prior amendments were in writing and were approved by both the defendant corporation's Board of Directors and by the New York State Division of Housing and Community Renewal ("DHCR"). In opposition to the motion, Jeffrey Hicks asserts that he never told the plaintiff that the subject lease would be renewed and, in August or September, 2010, informed plaintiff of the defendant's decision not to renew the lease. Where the facts are in dispute as to the movant's claim for relief, the application for a preliminary injunction should be denied (See, *Matos v. New York City Transit Authority*, 21 Ad3d 936 [2d Dept. 2005]; *Blueberries Gourmet Inc., v. Arias Realty Corp.*, 255 Ad2d 348 [2d Dept. 1998]).

Assuming, *arguendo*, that plaintiff was assured by Mr. Hicks that the lease would be renewed, it is clear that plaintiff knew that Mr. Hicks, acting alone, was without power to extend the terms of the lease. Plaintiff admits that it was aware that the renewal must be approved by the defendant's Board of Directors and by DHCR to be effective. Where a third-party is aware that an agent of a principle is without authority to enter into a transaction, reliance on the representations made only by the agent, is not reasonable (See, generally, Kirschner v. KPMG, LLP, et al., 15 NY3d 446 [2010]); Hallock v. State of New York, et al., 64 NY2d 224 [1984]). If plaintiff can prove that Mr. Hicks assured it of the defendant's intention to renew the lease, plaintiff must still demonstrate that its reliance on the assurances of Mr. Hicks was reasonable in order to prove that it has a likelihood of success on the merits. As plaintiff has failed to demonstrate that it has a likelihood of success on the merits, its application, pursuant to

CPLR §6301, must be denied by this court.

Accordingly, plaintiff's application for the issuance, pursuant to CPLR §6301, of a preliminary injunction and/or the issuance, pursuant to CPLR §6311, of a Yellowstone Injunction is hereby denied in its entirety. The foregoing constitutes the decision, judgment and order of this court.

Dated: August 5, 2011

JANICE A. TAYLOR, J.S.C.

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