151 Mulberry St. Corp. v Italian Am. Museum
2011 NY Slip Op 33896(U)
September 12, 2011
Supreme Court, New York County
Docket Number: 651017/10
Judge: Barbara R. Kapnick

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

PRESENT: BARBARA R. KAPNICK Justice PART 39

151 MULBERRY STREET CORP.

- v -

ITALIAN AMERICAN MUSEUM

INDEX NO. 651017/10

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided in accordance with the accompanying memorandum decision.

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

Dated: 9/12/11

BARBARA R. KAPNICK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

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151 MULBERRY STREET CORP. d/b/a IL PALAZZO,

Plaintiff,

-against-

ITALIAN AMERICAN MUSEUM, ITALIAN AMERICAN REAL ESTATE HOLDINGS, LLC, JEROME G. STABILE, III REALTY, L.L.C. f/k/a STABILE BROTHERS, L.L.C., JOSEPH V. SCELSA, RONALD MANNINO, and MICHAEL RICATTO,

Defendants.

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DECISION/ORDER
Index No. 651017/10
Motions Seq. Nos.
002 and 003

BARBARA R. KAPNICK, J.:

Plaintiff 151 Mulberry Street Corp. d/b/a Il Palazzo ("Mulberry" or "plaintiff") operates the Il Palazzo restaurant at the subject premises located at 151 Mulberry Street, New York, New York (the "Premises").

According to the Amended Verified Complaint ("Complaint"), defendant Jerome G. Stabile, III Realty, L.L.C., formerly known as Stabile Brothers, L.L.C. ("Stabile"), is the former owner of the contiguous properties located at 185 Grand Street, 187 Grand Street, 189 Grand Street and 151 Mulberry Street (the "Properties").

According to Mulberry, Stabile orally agreed to grant Mulberry Corp. a right of first refusal[1] to purchase the Premises if the properties were sold, in exchange for Mulberry developing and building the Premises (the "Covenant"), and in reliance upon the Covenant and in substantial performance thereof, Mulberry constructed, built and maintained the building known as 151 Mulberry Street, and the basements beneath the Premises, at a cost in excess of $1,000,000.

On or about March 26, 2008, Stabile sold the Properties to the individually named defendants, Dr. Joseph V. Scelsa ("Scelsa"), Ronald Mannino ("Mannino") and Michael Ricatto ("Ricatto") (collectively, the "Buyers"). Plaintiff contends that the Buyers knew about the Covenant prior to their purchase, and that the sale constituted a breach of the Covenant.

On or about December 31, 2008, the Buyers sold the Properties to defendant Italian American Real Estate Holdings, LLC ("Holdings"). Plaintiff claims that Scelsa was a member of Holdings when title was transferred from the Buyers to Holdings.

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[1] Plaintiff clarifies in its opposition papers that it "is not claiming a right of first refusal, where an accepted offer would be presented to Plaintiff and Plaintiff would have the right to match it; rather it is a right of first purchase - i.e., when Stabile decided to sell the property, he was required to first offer it to Plaintiff."

Defendant Italian American Museum ("IAM" or the "Museum"), a non-profit educational corporation, is the net lessee of the Properties, and Scelsa is the president of IAM.

IAM previously commenced a series of summary proceedings against Mulberry in the Civil Court, the first two of which were dismissed on procedural grounds. In resolution of a third litigation, IAM and Mulberry attempted to negotiate a lease, or sub-lease, for the Premises, which culminated in the drafting of a proposed lease (the "Proposed Lease"), which was executed by Mulberry and delivered to IAM on or about December 17, 2009. The Complaint alleges that "a written lease was executed by and between Plaintiff and IAM regarding the Premises." (Compl., ¶ 21). The Proposed Lease was conditioned on approval by IAM's bank.

According to the Complaint, IAM's bankers approved the "settlement" and all of the relevant material terms thereof. As a result of this approval, Mulberry and IAM negotiated the final terms of the Proposed Lease. Pursuant to the terms of the Proposed Lease, Mulberry paid IAM $165,000.00, and also an additional $15,000.00 for one month's rent. Pursuant to section 10.7 of the Proposed Lease, if IAM's bankers did not approve the final version of the Proposed Lease, IAM was required to return all amounts paid

on account of the Lease. Instead, the bankers did not approve the Proposed Lease, and IAM allegedly retained the funds anyway.

IAM further contends that after the Proposed Lease was rejected by the bank, Mulberry stopped paying rent, at which point IAM attempted to terminate what it claims was Mulberry's month-to-month tenancy by service of a 30-day notice of termination. IAM subsequently brought another holdover proceeding in the Civil Court under L&T Index No. 65580/10, in which a motion to dismiss by Mulberry was denied.

Mulberry then served an Answer in the L&T action with counterclaims for breach of contract, declaratory relief, money had and received, and unjust enrichment; asserted a third-party claim against Stabile for breach of contract; and a counterclaim/second third-party claim for rescission of the deed from Stabile to the Buyers, and the deed from the Buyers to IAM.

By Decision/Order dated November 19, 2010, on motion seq. no. 001, this Court ordered the holdover proceeding transferred to Supreme Court and consolidated with this action. The Order also directed Mulberry to continue to make use and occupancy payments to IAM in the amount of $10,000.00 per month.

[* 6]

Plaintiff's Amended Verified Complaint asserts claims for:

a) Breach of Contract against IAM based on its acceptance of $180,000.00 paid in reliance on the Proposed Lease, and IAM's subsequent failure to recognize the enforceability of the Proposed Lease or return the subject funds (first cause of action);

b) a Declaratory Judgment that IAM has breached the Proposed Lease and must return the $180,000.00 to plaintiff (second cause of action),

c) Money Had and Received against IAM (third cause of action);

d) Unjust Enrichment for IAM's failure to return the $180,000.00 (fourth cause of action);

e) Breach of Contract against Stabile for his failure to offer plaintiff a right of first refusal consistent with the Covenant (fifth cause of action);

f) Rescission of the deed documenting the sale of the Properties by Stabile to the Buyers (sixth cause of action) and the deed documenting the subsequent sale by the Buyers to Holdings (seventh cause of action), on the grounds that they were both inequitably granted and constituted breaches of the Covenant;

g) Tortious Interference with Contract against the Buyers, who were allegedly aware of and caused Stabile to breach the Covenant (eighth cause of action);

h) Specific Performance of the Covenant by Stabile, including an order directing Stabile to complete all necessary measure to

sever the Premises from the Properties so that the Premises is an independent tax lot (ninth cause of action); and

i) Rescission of the Net Lease between IAM and Holdings, based on the allegation that Holdings is not the legitimate owner (tenth cause of action).

Motion and Cross-Motion to Dismiss (mot. seq. no. 002)

Defendants IAM, Holdings, Scelsa, Mannino and Ricatto (collectively, the "IAM Defendants") move to dismiss plaintiff's First, Second, Third, Sixth, Seventh, Eighth, Ninth and Tenth causes of action as to them pursuant to CPLR 3211(a)(1), (a)(5) and (a)(7) (Motion Seq. No. 002).[2] Defendant Stabile cross-moves for an order dismissing the Fifth, Sixth, Seventh, Ninth and Tenth Causes of Action as to it, also pursuant to CPLR 3211(a)(1), (a)(5) and (a)(7).

The Proposed Lease

According to the IAM Defendants, plaintiff's First, Second and Third causes of action must be dismissed as a matter of law because they rely on enforcement of the Proposed Lease. The IAM Defendants

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[2] The IAM Defendants note that the Court discussed some of the issues that form the basis of their motion to dismiss in its November 19, 2010 Decision/Order granting consolidation of the holdover proceeding, but that any such discussion was solely for purposes of determining consolidation and no determination on the merits was made at that time.

contend that the failure of two conditions precedent render the Proposed Lease null and void and, therefore, unenforceable.

> First, Section 10.7 of the Proposed Lease provides,
>
> This lease is conditioned upon Landlord's [IAM's] obtaining M&T Bank's approval hereof. If M&T Bank does not approve this Lease by January 31, 2010,[3] this Lease shall be deemed null and void and of no further force and effect and all monies paid by Tenant on account of this Lease shall be returned to Tenant.

IAM argues that M & T Bank's rejection of the Proposed Lease constitutes a failure of this condition precedent.

Mulberry's Complaint does not allege that M&T Bank approved the Proposed Lease; rather, it alleges that "all of the material terms and conditions [found in the Proposed Lease] were approved by IAM's bank." (Compl., ¶31). Mulberry points to a written Letter of Intent ("LOI") dated September __, 2009, which it submits in opposition to the instant motion. According to Mulberry, the LOI contains all the material provisions of the Proposed Lease and was approved by M&T Bank prior to the drafting of the Proposed Lease. Once M&T Bank approved the LOI, plaintiff contends the parties entered into a months-long period of negotiations over the terms of

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[3] The approval deadline was subsequently extended to on or about March 3, 2010, according to an Affidavit submitted by Scelsa.

the Proposed Lease, with the final version being signed by plaintiff on December 17, 2009 and delivered to IAM's counsel the following day along with a check for $165,000.00, as required by the Proposed Lease. Plaintiff argues that the Proposed Lease contains "no new substantive or essential terms or obligations that are not contained in the LOI," and that the Proposed Lease should therefore be found enforceable against IAM, particularly considering that Mulberry paid $165,000.00 in consideration of the Proposed Lease, plus an additional $15,000, which IAM has refused to return in accordance with the second sentence of Section 10.7.

In addition, IAM contends that the execution and delivery requirements of the Proposed Lease were never completed, also rendering it unenforceable. Specifically, section 44.1 of the Proposed Lease provides that,

> This Lease is presented for signature by Tenant and it is understood that this Lease shall not constitute an offer by or be binding upon Landlord unless and until Landlord shall have executed and delivered a fully executed copy of this Lease to Tenant.

As IAM points out, Mulberry's Complaint alleges that the Proposed Lease "was executed by and between Plaintiff and IAM regarding the Premises (the 'Lease')" (Compl., ¶ 21) and that "[t]he [Proposed] Lease was fully executed by the parties hereto, Plaintiff and IAM . . . ." (Compl., ¶ 31). Plaintiff's Complaint does not allege

that an executed copy of the Proposed Lease was *delivered* to the plaintiff, nor could it, according to IAM.

Both Scelsa, in his Affidavit, and Richard Nardi of Loeb & Loeb LLP, transaction counsel to IAM during the Proposed Lease negotiations, attest that after Mulberry delivered signed copies of the Proposed Lease to IAM, IAM executed it and forwarded the executed copy to M&T Bank for approval. Because M&T Bank ultimately rejected the Proposed Lease, it was never delivered to Mulberry. As a result neither the delivery condition precedent nor the bank approval condition precedent were satisfied.

A condition precedent is "an act or event . . . which must exist or occur before a duty of immediate performance of a promise arises." *Lindenbaum v Royco Prop. Corp.*, 165 AD2d 254, 259 (1st Dept 1991), quoting Calamari & Perillo, Contracts § 138). "It is black letter law that the burden of proving the existence, terms and validity of a contract rests on the party seeking to enforce it." *Paz v Singer Co.*, 151 AD2d 234, 235 (1st Dept 1989).

"[W]hen parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms." *Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 (2004) (internal citation omitted).

As there is no dispute that the Proposed Lease contained both of the above-referenced conditions precedent, and further no allegation in the Complaint that either 1) the executed Proposed Lease was delivered to Mulberry, or 2) the Proposed Lease was approved by M&T Bank after execution, the Proposed Lease is null and void by its own terms.

The Complaint's allegations and Mulberry's argument in opposition to the motion, that the parties agreed on "the essential terms" of the Proposed Lease through the LOI,[4] which was also approved by M&T Bank, cannot rescue Mulberry's breach of contract claims. Mulberry has not alleged that the LOI itself was a legally enforceable agreement or that IAM breached it; in fact, such a claim would be contrary to the express terms of the LOI:

> This proposal is a statement of intent and is subject to the execution and delivery by all parties of appropriate binding lease documentation. Subject to the following sentence, these terms are *non-binding* and the terms of this proposal are valid for *ten (10) days after the date above.*[5] (emphasis added).

The language of both the Proposed Lease and the LOI are clear and unambiguous and, as such, must be enforced according to their

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[4] It should be noted, as IAM points out, that the LOI was 10 pages long, excluding signature pages, while the Proposed Lease was comprised of 58 pages, excluding signature pages and attached schedules.

[5] Letter of Intent, Page 10.

terms. The Court cannot imply, add or remove terms under the guise of interpreting those express terms. *Vermont Teddy Bear v 538 Madison Realty Co.*, supra at 475. Both provisions constitute conditions precedent, which Mulberry does not allege were satisfied.

As the Proposed Lease is unenforceable, Mulberry's First Cause of Action for breach of the Proposed Lease and Second Cause of Action for a declaratory judgment that IAM breached the Proposed Lease and must return the monies paid by Mulberry in consideration thereof, must be dismissed.

Money Had and Received

The Third Cause of Action alleges that IAM has retained the $180,000.00 Mulberry paid it, and has benefitted from its receipt. As plaintiff points out, defendants have not presented any legal basis for dismissing Mulberry's Third Cause of Action, except that the Proposed Lease is unenforceable. However, a cause of action for money had and received is based on principles of equity, not contract. As such, this cause of action will not be dismissed at this time.[6]

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[6] None of the defendants move to dismiss the Fourth Cause of Action, sounding in unjust enrichment.

The Oral Covenant

Defendant Stabile cross-moves to dismiss Mulberry's Fifth Cause of Action for breach of the Covenant. According to Stabile, enforcement of the alleged Covenant is barred by the Statute of Frauds, General Obligations Law ("GOL") 5-703(3), and that by seeking and accepting a Lease with a subsequent owner rather than enforcing its alleged ownership rights,[7] Mulberry abandoned any right of first refusal it may have had.

The IAM Defendants move to dismiss plaintiff's Sixth through Tenth Causes of Action. According to both Stabile and the IAM Defendants, the alleged oral Covenant is unenforceable as a matter of law and, therefore, the remaining claims which are based on the existence of such a Covenant must be dismissed.

According to the Complaint, "Stabile made an agreement with Plaintiff that in exchange for Plaintiff developing and building the Premises, Stabile would grant Plaintiff a right of first-refusal to purchase the Premises if they were sold ..." (Compl., ¶ 8). The Covenant was allegedly intended to "run with the land and to bind the title of the Premises." (Compl., ¶ 9). While the Complaint does not include any particulars as to when this alleged

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[7] Stabile points out that the Premises has actually been sold twice since this purported Covenant was allegedly entered into: once by Stabile to Buyers, and again by Buyers to Holdings.

Covenant was entered into, or with whom Stabile allegedly negotiated in coming to this agreement, counsel for Mulberry states in his affirmation that the Covenant was granted some time in the 1990s, and stated on the record on September 2, 2010 that Mulberry retained the right to purchase the Premises for $6 million. The Complaint also alleges that the Buyers are bound by the alleged Covenant because they were aware of it at the time Stabile sold the Premises to them, and that because defendant Scelsa was one of the Buyers and, later, also a member of Holdings at the time the Premises was sold by the former to the latter, Holdings can also be charged with knowledge of the Covenant.

GOL 5-703(3) provides that a contract to devise any interest in real property is void unless it is in writing, or a note or memorandum thereof is in writing, and subscribed by the party to be charged. GOL 5-703(4) contains an exception to this general rule, where the party seeking to enforce an oral agreement can demonstrate part performance, based on principals of equity, but only where the acts pleaded as a term of the oral agreement are "unequivocally referable" to the oral agreement and the Complaint pleads detrimental reliance. See *Messner Vetere Berger McNamee Schmetterer Euro RSCG v Aegis Group*, 93 NY2d 229 (1999).

The IAM Defendants and Stabile argue that construction in the 1990s is not "unequivocally referable" to an alleged right of first refusal, as required by GOL 5-703(4). Rather, there are several other plausible explanations for plaintiff's construction of the Premises; specifically that the Premises had to be altered, developed and converted for use as an Italian restaurant that could compete in Little Italy. Defendants claim that the restaurant has been in business at this location since at least 1995 and has enjoyed the fruits of its labor for more than 15 years. Further, the IAM Defendants claim that plaintiff's fixed rent was far below market value during its tenancy, which could be seen as consideration for the construction undertaken by plaintiff at the Premises, a claim sharply disputed by Mulberry as unsupported.

The IAM Defendants further point out that Mulberry admits the alleged Covenant included no guarantee that the Premises would ever be sold, contending that it is actually quite unlikely that a party would engage in $1 million worth of construction in exchange for a right that might never come to pass.

Mulberry's improvements spanned portions of three lots behind three other distinct buildings, the Properties, none of which are affected by the alleged Covenant, which is alleged to bind the title only to the Premises. Although all of the Properties were

sold together in this instance, there is no guarantee that the lots could ever be partitioned and/or subdivided in such a way as to grant Mulberry ownership of the property it developed, as it contends would have to be done to enforce the alleged Covenant, and which it seeks in its Ninth Cause of Action for Specific Performance.

Finally, while plaintiff alleges that defendant Jerome G. Stabile, III Realty, LLC f/k/a Stabile Brothers, L.L.C. entered into the alleged Covenant with it some time in the 1990s, presumably prior to 1995 at which time the restaurant was already open for business, the IAM Defendants submit a deed showing that Stabile did not acquire the Premises until March 6, 2003, when it was conveyed by Jerome G. Stabile, III, Joan D. Sclafani, Francis A. Forte and Marie L. Forte, to Stabile Brothers, L.L.C. During the 1990s, the Premises was held by Francis A. Forte (25 percent) and the Estate of Jerome Stabile, Jr. (75 percent), neither of which is alleged to have entered into the Covenant. Further, such an alleged Covenant could not be granted by one of the owners unilaterally. Accordingly, defendants argue, plaintiff cannot state a cause of action based upon the alleged Covenant and the Fifth through Tenth Causes of Action must be dismissed.

In opposition to the motion and cross-motion, Mulberry admits that it was possible that the Premises would never be sold and Mulberry would simply remain a tenant there indefinitely, but denies that it paid under-market rent. It also dismisses the argument that laches applies to bar Mulberry's claims based on the Covenant, contending that as soon as it learned of the sale of the property in 2008, Mulberry advised IAM and its counsel of its claim to rights of ownership and began the process of negotiating the Proposed Lease. Mulberry contends that the fact it initially chose to attempt to find an out-of-court resolution to the dispute, rather than litigate its ownership rights, is not grounds for finding inexcusable delay.

Mulberry does not dispute that the oral Covenant would otherwise be barred by GOL 5-703(3), but contends that the development of the Premises is evidence of its partial performance, invoking the exception set forth in GOL 5-703(4). Counsel for Mulberry contends in his Affirmation that Mulberry spent over $1 million to excavate and construct the building on the Premises in the 1990s, in order to prepare the space to operate as a restaurant. Counsel argues that no one would spend that kind of money just to run a restaurant and pay rent to a landlord, without some other benefit. That other benefit, according to plaintiff,

was the right to be offered the Premises for sale before anyone else.

It is well-established that in order to render an oral agreement enforceable by virtue of part performance, pursuant to GOL 5-703(4), the performance must be "'unequivocally referable' to the agreement, performance which alone and without the aid of words of promise is unintelligible or at lease extraordinary unless as an incident of ownership, assured, if not existing." *Burns v McCormick*, 233 NY 230, 232 (1922) (Cardozo, J.); see also *Messner Vetere Berger McNamee Schmetterer Euro RSCG v Aegis Group, supra; Cunnison v Richardson Greenshields Sec.*, 107 AD2d 50, 54 (1st Dept 1985); *Lebowitz v Mingus*, 100 AD2d 816, 817 (1st Dept 1984).

It is not enough that the plaintiff's performance be consistent with an agreement to convey property; it must be "inconsistent with any other explanation." *745 Nostrand Retail Ltd. v 745 Jeffco Corp.*, 50 AD3d 768, 769 (2d Dept 2008) (internal citation omitted). In cases where performance by a tenant is arguably as consistent with the landlord-tenant relationship as with any other alleged promise, New York courts have not hesitated to find that the performance is not "unequivocally referable." See *Wilson v La Van*, 22 NY2d 131, 134-135 (1968) ("A lessee of the property who derived his livelihood from working the farm might

have been as likely to make such improvements and purchases as an owner would."); *Lebowitz v Mingus*, supra at 817 ("[P]laintiff's alleged investment of $50,000 in renovating and improving the apartment was not 'unequivocally referable' to an oral contract to sell [the property, ... and] may be satisfactorily explained by her desire to improve the surroundings in which she was to live and work for a period of several years.").

Here, Mulberry admittedly constructed a building and excavated the basements of the surrounding buildings "for the exclusive use by the restaurant." While it is true that such construction is extensive, it is also undeniable that the modifications made were for the restaurant's benefit, that the location in the heart of Little Italy in Manhattan is highly desirable, and that Mulberry's lengthy tenancy could provide reason enough to invest in the Premises. Accordingly, this Court finds that the actions taken by Mulberry were not "unequivocally referable" to an oral Covenant for the right of first refusal or first purchase. As such, the Court finds that the alleged Covenant is barred by GOL 5-703(3).

Thus, plaintiff's Fifth Cause of Action against Stabile for breach of the alleged Covenant, Sixth and Seventh Causes of Action against Stabile and IAM for rescission of the two deeds reflecting transfers of the property, Eighth Cause of Action against IAM for

tortious interference with the Covenant, and Ninth Cause of Action against both IAM and Stabile for specific performance of the Covenant must all be dismissed.

Plaintiff's Tenth Cause of Action against IAM and Holdings, which seeks rescission of the net lease between those two parties, is based on the theory that the Premises was improperly transferred in violation of the Covenant and, therefore, Holdings has no legitimate right to the land. Accordingly, the Tenth Cause of Action must also be dismissed.

The only remaining claims in the Complaint are the Third Cause of Action, sounding in money had and received, and the Fourth Cause of Action for unjust enrichment, both of which are asserted against IAM alone.

Order to Show Cause for Possessory Judgment (mot. seq. no. 003)

By Order to Show Cause related to IAM's holdover proceeding, consolidated herein, IAM moves for an order:

a) pursuant to RPAPL 220 and 745(2), awarding it a possessory judgment and money judgment against plaintiff in the amount of $10,000.00 representing unpaid use and occupancy ("u and o") for February 2011, together with a warrant of eviction to issue and

execute forthwith, due to plaintiff's noncompliance with the Court's November 19, 2010 Decision/Order; and/or

b) pursuant to RPAPL 220 and 745(2), striking any defenses and/or claims relating to any alleged landlord-tenant relationship between the parties; and/or

c) setting the matter down for a hearing on the reasonable legal fees incurred by IAM as a result of plaintiff's seven alleged consecutive failures to comply with the Court's Order regarding use and occupancy; and/or

d) conditionally awarding defendant a judgment for possession together with a warrant of eviction to issue and execute forthwith unless, i) all outstanding use and occupancy together with all costs and fees associated with this motion are paid to IAM within five days; and ii) plaintiff pays use and occupancy *pendente lite* as set forth in this Court's November 19, 2010 Order so as to be received by IAM no later than the first of each month.

According to IAM, since this Court issued its Temporary Restraining Order on August 5, 2010, directing that plaintiff pay u & o in the amount of $10,000.00 per month on the first day of each month, it has had to incur legal and other fees every month unjustly because plaintiff has failed to deliver payment timely. IAM further argues that, pursuant to RPAPL 745(c)(i), because of plaintiff's failure to make payments as directed by the Court, the

Court must dismiss, without prejudice, the defenses and counterclaims interposed by the respondent and grant judgment for petitioner.

Plaintiff's counsel acknowledges that late payment of u & o has occurred, but states that "on every single occasion that the Museum's counsel has notified me that the U&O has not been received, I have immediately made arrangements to pick up the check from the Plaintiff's bookkeeper and to have it hand-delivered to the Museum's counsel, as instructed by the Museum's counsel."

Plaintiff's counsel states that plaintiff has, on occasion, tried to hand-deliver payment to IAM, right next door, but has found it closed or that no one there was authorized to accept the check.

According to plaintiff, this motion is entirely unnecessary, as this dispute has been resolved each month when IAM has notified him of the outstanding payment.

In reply, IAM points to counsel's Affirmation in opposition as proof of why a conditional order, at least, is required, since plaintiff's counsel acknowledges that in order to get paid use and occupancy, IAM is required each month to affirmatively seek it.

Counsel for IAM denies that it has ever instructed plaintiff to serve all payments on his office, and notes that IAM can receive mail. Further, even as of March 8, 2011, when the reply papers were drafted, IAM claims that March's u & o had not been received.

Subsequent to this motion being submitted and oral argument having been held, the parties entered into a Stipulation by which they resolved certain outstanding, but unrelated, issues regarding use of the Premises, including plaintiff's participation in the Mulberry Street Mall. As part of this Stipulation, which was so-ordered by this Court on June 13, 2011, the parties also agreed to increase u & o for certain months.

Accordingly, IAM's motion is granted only to the extent that plaintiff is ordered to comply with this Court's prior orders and directives regarding u & o payments and to make the payments by the first day of each month. To the extent that any such payments are currently outstanding, plaintiff must remit full payment within 20 days of entry of this Decision and Order. Should plaintiff fail to comply, the Court will entertain a renewed Order to Show Cause to grant defendant possession.

Counsel for the remaining parties shall appear for a conference in IA Part 39, 60 Centre Street, Room 208 on October 26, 2011 at 10:30 a.m.

This constitutes the decision and order of this Court.

Dated: September 12, 2011

BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.