SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

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KEMCY INTERNATIONAL,
Plaintiff,

Index Number 110029/2011E

-against-

Mot. Seq. No. 001

REGUS MANAGEMENT GROUP, LLC,
Defendant.

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For the Plaintiff:	For the Defendant:
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E- filed papers considered in review of this motion for a preliminary injunction:

Papers	E-File Document Number
Order to Show Cause	3
Affidavit in Support of Motion	5
Exhibits	6-10
Memorandum of Law in Opposition	11
Affidavit in Opposition of Motion	12
Exhibits A - I	12 (1-9)
Affirmation in Reply, Exhibits, Aff. of Service	15, 15(1-3)

PAUL G. FEINMAN, J.[1]:

Plaintiff Kemcy International moves by order to show cause for a preliminary injunction to prevent defendant Regus Management Group, LLC, from interfering with plaintiff's ability to use and occupy Suite 5074 located at 11 Penn Plaza, and for an order that defendant continue to provide all services to the premises including telephone and internet service, reception services, and all other services provided pursuant to the Office Services Agreement executed by the

[1] The court gratefully acknowledges the assistance of law student intern Joseph Raffanello, New York Law School, 2L, in the preparation of this decision.

parties. Upon signing of the order to show cause, the court provided that plaintiff was to pay $550.00 for September of 2011 for use of the space, and that payment was to continue on a monthly basis pending a decision on this motion (Doc. 3 Order to Show Cause). Upon considering oral argument and after review of the papers, for the following reasons, this motion is denied.

BACKGROUND

This is an action seeking to permanently enjoin defendant from engaging in self-help and effectuating a wrongful eviction upon the plaintiff, as well as a declaratory judgment that a month to month tenancy exists between the parties; plaintiff also seeks attorney's fees (Doc. 2 Summons and Verified Complaint ¶¶ 9, 11, 13).

According to the affidavit of Kathryn Westbrooke, president of Kemcy International, on May 26, 2009, after negotiations with a Regus Management representative, Kemcy signed up for office space at 11 Penn Plaza, and authorized recurring credit card payments for fixed services including office rent, equipment, parking, and telecom charges, and variable services including videoconferencing, administrative, fax, and long distance (Doc. 5, Westbrooke Aff. ¶ 10; Doc. 6, ex. A [Credit Card Payment Authorization]). In October 2009, defendant Regus allegedly sent Kemcy a notice stating that it was in default in the amount of $3,000.00, an amount Westbrooke disputed as "exorbitant" given that the monthly office fee was only $521.00 (Doc. 5, Westbrooke Aff. ¶¶ 11, 12]). In November, Kemcy received an invoice for additional sums due (*id.*, ¶ 12). According to Westbrooke, she tried to resolve the matter, but in April 2010, Regus removed the lock cylinder from her office space without advance notice (*id.* ¶¶ 13,14). Ultimately, Westbrooke agreed to pay $2,200 and she was restored to the office space "some days later" (*id.* ¶ 15). However, in May 2010, defendant ceased providing phone and internet services (*id.*).

Kemcy alleges defendant's employees have made it increasingly uncomfortable for her and her clients when in the premises (*id.* ¶¶ 15, 16).

Although she continued to attempt to resolve any disputes, in May 2011, Kemcy was served with a Ten Day Notice to Quit (Doc. 5, Westbrooke Aff. ¶ 18; Doc. 7, ex. B [Ten Day Notice]). The Notice, dated May 26, 2010, indicates that Kemcy is a licensee, that its license is revoked and it is required to vacate the premises as of June 10, 2011 pursuant to RPAPL § 713 (7), otherwise a summary proceeding would be commenced (Doc. 7, ex. B). By letters dated August 1 and August 2, 2011, defendant's corporate counsel notified Kemcy and Kemcy's attorney respectively that because of Kemcy's failure to make payment since March 2010, and because its license had been revoked, as of September 1, 2011, its key card access would be terminated and any property not removed by that date would be held for 60 days after which it will be deemed abandoned (Docs. 8, ex. C; 9, ex. D [Letters). Kemcy commenced this action thereafter, seeking to enjoin defendant from using self-help to remove plaintiff, as well as a declaration as to whether plaintiff is a tenant or licensee.

Defendant Regus Management provides an affidavit in opposition from Paula Malakoff, its Area Director, who states that Regus Management Group operates "numerous business centers in the New York metropolitan area," and among other business services, offers licenses to use office space in its business centers, along with peripheral services such as a receptionist and a kitchen area, and can provide other services including phone and internet service, for an additional fee (Doc.12, Malakoff Aff. ¶ 2). Defendant appends a copy of the Office Service Agreement signed by Kemcy on July 29, 2009, which includes a page of "Terms and Conditions" (Doc. 12-1, Agreement). The document states that the "agreement is the commercial equivalent of an agreement for accommodations in a hotel," and that the signing

client "accepts that this agreement creates no tenancy interest, leasehold estate or other real property interest" (Doc. 12-1, Agreement ¶ 1.1). It states that if the client does not timely pay fees when due, Regus may impose late fees and "also reserves the right to withhold services (including . . . denying the [c]lient access to its accommodation(s))" (Doc. 12-1, Agreement ¶ 8.5).

According to Malakoff, Kemcy began occupying the office space on about September 1, 2009, and continues to occupy the space (Dec. 12, Malakoff Aff. ¶ 4). Kemcy received invoices indicating the amounts owed for the services used, but has failed to make "a single payment" since March 2010 (Doc. 12, Malakoff Aff. ¶¶ 5, 6; Doc. 12- 3, ex. C [Customer Account Summary Report]). Malakoff indicates that arrears were initially accrued from earlier use of Regus's services by Kemcy prior to entering into the Service Agreement (Doc. 12, Malakoff Aff. ¶¶ 16-20; Docs. 12-7 - 12-9, ex. G- I [Invoices, July-Sept.. 2009]). She does not dispute that Kemcy was mistakenly denied access to the office in "around March 2010," but states that Kemcy was without access to the office "for only a matter of hours" (Doc. 12-1 Malakoff Aff. ¶ 21). However, because of Kemcy's failure to make payments, in May 2010 defendant stopped providing Kemcy with certain business services, including internet access and voice mail (Doc. 12, Malakoff Aff. ¶ 7). By letter dated September 23, 2010, defendant notified Kemcy that it was in default under the Agreement and owed $4,083.88 which was to be paid in four days (Doc. 12-4, ex. D [Letter of 09/23/10]). By letter dated October 8, 2010, Regus notified Kemcy that because the balance remained unpaid, its license was revoked, defendant was terminating the Agreement "immediately," and plaintiff was to vacate the premises within five days; "[i]f you fail to do so we may institute a forcible-detainer or other similar action against you" (Doc. 12-5, ex. E).

Regus argues that as the Agreement was a license for Kemcy to use Regus facilities and services, and Kemcy received repeated notices that its license had been terminated based on failure to pay its outstanding and ongoing balances, Regus is fully within its rights to have stopped providing business services and to revoke Kemcy's access to the business center. It argues that plaintiff cannot demonstrate entitlement to a preliminary injunction.

DISCUSSION

CPLR 6301 provides, in pertinent part:

> "A preliminary injunction may be granted in any action where the defendant threatens or is about to do . . an act in violation of the plaintiff's rights respecting the subject of the action. . . or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff."

In order for a preliminary injunction to be granted the plaintiff must satisfy three criteria: 1) likelihood of ultimate success on the merits; 2) the prospect that irreparable harm will occur in the absence of a preliminary injunction; and 3) that the balance of equities tips in favor of the plaintiff (*Doe v Axelrod*, 73 NY2d 748, 749 [1988]). The burden of proof is on the plaintiff and is "particularly high" (*Council of the City of N.Y. v Giuliani*, 248 AD2d 1, 4 [1st Dept 1998], *app dismissed, lv denied* 92 NY2d 938 [1998]). Should the plaintiff fail to meet any one of the criteria, the injunction must be denied. As discussed below, Kemcy does not satisfy all three criteria, and therefore its motion seeking a preliminary injunction must be denied.

Likelihood of Success on the Merits

In order for plaintiff to prevail in its action seeking a permanent injunction in addition to other relief, it must establish that its agreement with defendant is a lease agreement with the attending statutory protections as set forth in Article 7 of the Real Property Actions and

Proceedings Law or, if the agreement is in fact a license, that defendant cannot use self-help to remove plaintiff from the office space.

"What defines the proprietary relationship between the parties is not its characterization or the technical language used in the instrument, but rather the manifest intention of the parties" (*American Jewish Theatre, Inc. v Roundabout Theatre Co., Inc.* 203 AD2d 155, 156 [1st Dept 1994]). Here, plaintiff argues that the Agreement, although called a "license," is actually a lease, and that only a summary proceeding can result in its eviction from the space.

"'A license is a personal, revocable and non-assignable privilege, conferred either by writing or parol, to do one or more acts upon land without possessing any interest therein'" (*Kohman v Rochambeau Realty & Dev. Corp.,* 17 AD3d 151, 153 [1st Dept. 2005], quoting *Greenwood Lake & Port Jervis R.R. Co. v New York & Greenwood Lake R.R. Co.*, 134 NY 435, 440 [1892]). "A license connotes use and occupancy of a grantor's premises while a lease connotes exclusive possession of a designated space, subject to rights specifically reserved by a lessor" (*Garza v 508 W 112th St., Inc.*, 22 Misc 3d 920, 924 [Sup Ct, New York County 2008], citing *American Jewish Theatre, Inc. v Roundabout Theatre Co.*, 203 AD2d 155). A lease is distinguished by its transfer of absolute control and possession subject to rights specifically reserved by the lessor, while a license "connotes use or occupancy of the grantor's premises," and is cancelable at will and without cause (*American Jewish Theatre,* 203 AD2d at 156; *see Matter of Dodgertown Homeowners Assn.*, 235 AD2d 538, 539 [2d Dept 1997], *lv denied* 89 NY2d 809 [1997] [holding that the "central distinguishing characteristic of a lease is the surrender of absolute possession and control of property to another party for an agreed-upon rental"]). A document denominated a "license" will be found to be a "lease" if it grants "not merely a revocable right to be exercised over the grantor's land without possessing any interest

therein but the exclusive right to use and occupy that land" (*Miller v City of N.Y.*, 15 NY2d 34, 38 [1964]).

The Office Service Agreement expressly states:

> "This agreement is the commercial equivalent for accommodation(s) in a hotel. The whole of the Center remains in Regus' possession and control. THE CLIENT ACCEPTS THAT THIS AGREEMENT CREATES NO TENANCY INTEREST, LEASEHOLD ESTATE OR OTHER REAL PROPERTY INTEREST IN THE CLIENT'S FAVOUR [sic] WITH RESPECT TO THE ACCOMMODATION(S). . . . This agreement is personal to the Client and cannot be transferred to anyone else."

(Doc. 12-1, Ex. A [Office Service Agreement § 1.1]). It further states:

> "This agreement lists the accommodation(s) Regus has initially allocated for the Client's use. The Client will have a non-exclusive right to the rooms allocated to it. Occasionally Regus may need to allocate different accommodation(s), but these accommodation(s) will be of reasonably equivalent size and Regus will notify the Client with respect to such different accommodation(s) in advance."

(Doc. 12-1, ex. A [Office Service Agreement § 2.1]). In addition,

> Regus may need to enter the Client's accommodation(s) and may do so at any time. . . Regus will attempt to notify the Client . . . in advance.

(Doc. 12-1, ex. A [Office Services Agreement § 3.1). The Agreement also restricts how the accommodation may be used. Under section 4.2 Kemcy cannot install any cable, IT or telecom connections without permission of Regus. In section 5, the use of the office space is restricted as to purpose and frequency of public visits. The House Rules, incorporated in the Agreement in section 1.1, add further restrictions to what Kemcy is allowed to do in and in the space, and reiterates that there is no real property interest (Doc. 12-2, ex. B [House Rules, nos. 8, 14, 15, 25).

The totality of the restrictions, in addition to the explicit language, defendant argues,

clearly show that the Agreement is meant to be a license. Plaintiff argues, however, that the Agreement does not provide a clear unlimited ability to terminate at will, and thus must be deemed a lease. Indeed, the Agreement provides that:

> "This Agreement lasts for the period stated in it and then will be extended automatically for successive periods equal to the initial term but not less than 3 months (unless legal renewal term limits apply[]) until brought to an end by the Client or by Regus."

(Sec. 1.3). The Agreement also provides that either Regus or its client may terminate the agreement at the end date or at the end of any extension or renewal period,

> "by giving at least three months written notice to the other. However, if this agreement, extension or renewal is for three months or less and either Regus or the Client wishes to terminate it, the notice period is two months or (if shorter) one week less than the period stated in this agreement."

(Doc. 12-1, Ex. A [Office Service Agreement § 1.4]). The section entitled "Ending this agreement immediately" reads in pertinent part:

> "To the maximum extent permitted by applicable law, Regus may put an end to this agreement immediately by giving the Client notice and without need to follow any additional procedure if (a) the Client becomes insolvent, bankrupt, goes into liquidation, or becomes unable to pay its debts as they fall due, or (b) the Client is in breach of one of its obligations which cannot be put right or which Regus has given the Client notice to put right and which the Client has failed to put right within fourteen (14) days of that notice, or (c) its conduct, or that someone at the Center with its permission or invitation, is incompatible with ordinary office use."

(Doc. 12-1, Ex. A [Office Service Agreement § 1.5]). Plaintiff contends that this provision does not state that Regus may terminate the Agreement at will and without cause, but only under these particular circumstances. Thus, it contends that the Agreement is in fact a lease and defendant must comply with Article 7 of the Real Property Actions and Proceedings Law (RPAPL) in order to remove plaintiff from possession. Plaintiff further argues that even if the Agreement is

a license, Regus has acknowledged that it must comply with Article 7 by employing a Ten Day Notice to Quit dated May 26, 2011, a vehicle prescribed under Article 7 of the RPAPL, to notify Kemcy that if it failed to pay, Regus could commence a summary proceeding (Doc. 15, Reply Aff. ¶¶ 5, 18; Doc. 7, ex. B [Ten Day Notice]).

Plaintiff's arguments are ultimately not convincing. It has been said that while the differences between a lease and a license are clear enough, there are "borderline cases" where the rules are harder to define (*Miller v City of N.Y.*, 15 NY2d at 37). Here, the totality of the terms of the Agreement clearly demonstrate the intent to establish a license, not a lease, between the parties. The Agreement does include a defined period of time in which a client is provided with a space and the various agreed-upon services, but also indicates that the assigned office space is not necessarily permanent, and that Regus may enter the space at any time, thus showing that the client's right to the particular space is not exclusive. Of more concern is that section 1.5 of the Agreement describes particular occurrences where Regus may "immediately" terminate the agreement, and otherwise discusses ending the agreement with three months' notice, or less, depending on the term of the agreement. However, when coupled with the statements that the whole premises remains in Regus's control, the office spaces are potentially changeable, and that Regus may enter the client's space at any time, it is apparent that section 1.5 serves more as a declaration of circumstances that may trigger Regus's immediate termination of the Agreement.

Plaintiff does not distinguish the decision cited by defendant, *P&A Brothers, Inc. v New York Dept of Parks & Recreation*, 184 AD2d 267 (1st Dept 1992), which concerned the operator of a newsstand who refused to vacate the stand after its permit expired and argued either that its permit should be renewed or that the Parks Department should be required to undertake legal

process to remove it. The trial court had ruled that the City should invoke formal legal proceedings to eject the plaintiff, citing to RPAPL 713 (7) which requires a 10-day notice to quit, followed by the commencement of a special proceeding because the plaintiff was a licensee whose license had been terminated. On appeal, the Appellate Division reversed, holding that RPAPL 713 "merely permits a special proceeding as an additional means of effectuating the removal of nontenants, but it does not replace an owner's common-law right to oust an interloper without legal process" (*P& A Brothers,* 184 AD2d at 268). The Court distinguished those whose interest in a property rises to the status of a tenancy from licensees and squatters who are not tenants as defined by RPAPL 711, and held that the owners of premises in the latter situation may resort to summary ouster (*id.*).

Regus served a 10-day notice to quit, but did not commence a special proceeding thereafter. Plaintiff points to nothing that requires Regus to continue with a special proceeding to evict her where it has another option for ouster. Plaintiff's argument that it has a binding agreement with defendant and is therefore entitled to additional protections is not persuasive, given that it does not allege that it is in compliance with all the terms of the Agreement, and given that Regus has sent repeated notices terminating the agreement. The termination of services and the voiding of the card key are peaceable measures and do not conflict with the intent of the law.

Moreover, plaintiff does not show any reason why, even if it were entitled to remain in the office space until the conclusion of a summary proceeding, it should be entitled to the resumption of business services for which it has not being paying. For all these reasons, plaintiff has not proved a likelihood of success on the merits. The court need not address the other prongs of the preliminary injunction standard as plaintiff cannot establish entitlement to a preliminary

injunction.

CONCLUSION

As plaintiff Kemcy International fails to satisfy the first prong of the preliminary injunction standard, its motion is denied. The temporary restraining order is vacated.

ORDERED that this motion is denied; and it is further

ORDERED that the temporary restraining order is vacated; and it is further

ORDERED that the parties will appear for a preliminary conference in Supreme Court, 60 Centre Street, room 212, on January 25, 2012, at 2:15 p.m.

This constitutes the decision and order of the court.

Dated: December 9, 2011
New York, New York

J.S.C.