SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE TRIAL/IAS PART 14

X

LIGHTHOUSE 925 HEMPSTEAD, LLC,

Plaintiff,

Index No.: 008798/11
Motion Sequence...01, 02
Motion Date...02/16/12
XXX

-against-

SPRINT SPECTRUM L.P.,

Defendant.

X

Papers Submitted:
Notice of Motion (Mot. Seq. 01).....x
Affirmation in Opposition.....x
Affirmation in Reply.....x
Notice of Motion (Mot. Seq. 02).....x
Affirmation in Opposition.....x

Upon the foregoing papers, the motion (Mot. Seq. 01) by the Defendant, Sprint Spectrum L.P., ("Sprint") seeking an order pursuant to CPLR § 3212 granting it summary judgment dismissing the complaint and the motion by the Plaintiff, Lighthouse 925 Hempstead, LLC, ("Lighthouse") also seeking an order pursuant to CPLR § 3212 granting it summary judgment on its cause of action for breach of contract are determined as hereinafter provided.

This is an action to recover damages for breach of contract.

On February 18, 2005, the Plaintiff, Lighthouse and the Defendant, Sprint entered into a Site Agreement wherein Lighthouse agreed to lease to Sprint the site described below:

> "Building interior space consisting of approximately 400 square feet for placement of base station equipment;
>
> Building exterior space for attachment of antennas; as well as space for 19 cable runs to connect its equipment on nine antennas in a [certain] location . . ."

Paragraph 1 of the Agreement further states that "The site will be used by Sprint for the purpose of installing, removing, replacing modifying, maintaining and operating, at its expense, communications service facilities, including, without limitation, antenna and base station equipment, cable, wiring, back-up power sources (including generators and fuel storage tanks), related fixtures and, if applicable to the site, an antenna support structure (the 'Facilities')."

Paragraph 2 provides that: "The term of this Agreement (the 'Initial Term') is five years commencing on the first day of the month following the date that both Owner and Sprint have executed this Agreement ('Lease Commencement Date'). This Agreement will be automatically renewed for four additional terms of five years each (each a 'Renewal Term'), unless Sprint provides Owner with notice of its intention to renew not less than 90 days prior to the expiration of the Initial Term or any Renewal Term."

Paragraph 3 states that: " Owner acknowledges receipt of the one-time aggregate payment of $100.00 which is the entire rent due for the period from the Lease

Commencement Date until the Rent Commencement Date. The Rent Commencement Date is defined as the earliest to occur of the following: (a) the first day of the month that is 60 days after the issuance of the Sprint building permit, or (b) the first day of the month that is 60 days after the date Sprint commences construction of the Facilities at the site. Starting on the Rent Commencement Date and on the first day of every month thereafter, Sprint will pay rent in advance in equal monthly installments of $2,250.00 until increased as set forth herein, as set forth on Exhibit 'F' attached."

Paragraph 11 states that: "Notwithstanding any provision contained in this agreement, Sprint may, in Sprint's sole and absolute discretion and at any time and for any or no reason, terminate this Agreement without further liability by delivering prior written notice to owner."

Paragraph 9 of the Modification Rider states as follows: "Add at the end of paragraph 11 the following: 'In the event Sprint terminates the lease pursuant to paragraph 11, Sprint shall pay a 'termination fee' equal to twelve (12) months of the then current monthly rent and in addition shall forfeit all prepaid rent, and the $15,000 payment contained in paragraph 10 of this modification rider.' "

Paragraph 10 provides that "[n]otwithstanding anything contained in the Site Agreement, concurrent with the payment of the first month's rent on the Rent Commencement Date, Sprint shall pay to Owner a one time up-front payment of $15,000."

On February 19, 2007, the Defendant, Sprint informed the Plaintiff, Lighthouse

that it was exercising its right to terminate the Site Agreement pursuant to paragraph 11 thereof and that "[n]o up-front payment (Modification Rider ¶ 10) nor termination fee will be required as Sprint never commenced rent at that location." (See letter dated February 19, 2007).

In 2011, Lighthouse commenced this action seeking to recover a termination fee in the amount of $27,000 (pursuant to ¶ 9 of the Site Agreement) and the additional amount of $15,000 pursuant to paragraphs 9 and 10 thereof.

In support of its dismissal motion, Sprint argues that "[p]laintiff is not entitled to recover any damages pursuant to the Site Agreement since the 'Rent Commencement Date' never occurred due to the fact that a Sprint building permit to construct the facilities was never issued, which was a condition precedent to plaintiff being entitled to recover any monies under the Site Agreement." (¶ 22 of Brian C. Axt's Affirmation).

In opposition and in support of its motion, the Plaintiff asserts that the Defendant breached the Site Agreement by failing to pay the termination fee of $42,000 and breached the implied covenant of good faith and fair dealing. The Plaintiff is essentially claiming that the February 18, 2005 Site Agreement commenced on March 1, 2005, and hence, Sprint was immediately required to start making payments in the amount of $2,250 per month.

The Plaintiff also argues that since the Lease Commencement Date was March 1, 2005, Sprint was required to pay a "termination fee" equal to twelve (12) months of the

then current monthly rent and the $15,000 payment contained in paragraph 10 of the modification rider when Sprint informed the Plaintiff on February 19, 2007 that the Site Agreement was being terminated and that it was exercising its option not to build the Facilities on the Site.

It is axiomatic that "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms." *W.W.W. Asociates, Inc. v. Giancontieri*, 77 N.Y.2d 157 [1990]; *South Road Associates, LLC v. Intern. Bus. Machines Corp.*, 4 N.Y.3d 272 [2005]; *Vermont Teddy Bear Co. v. 538 Madoon Realty* Co., 1 N.Y.3d 470, 475 [2004]. Where the language of a contract is unambiguous, the parties' intent is determined within the four corners of the contract. *See*, *IDT Corp. v. Tyco Group, S.A.R.L.*, 13 N.Y.3d 209 [2009]; *In re Matco-Norca, Inc.*, 22 A.D.3d 495 [2nd Dept. 2005]; *Slamov v. Del Col*, 174 A.D.2d 725 [2nd Dept. 2005] *aff'd* 79 N.Y.2d 1016]1992].

"Whether or not a writing is ambiguous is a question of law to be resolved by the courts" (*W.W.W. Asociates, Inc. v. Giancontieri*; *supra*; *Van Wagner Advertising Corp. v. S & M Enters.* 67 N.Y.2d 186, 191 [1985]) and extrinsic evidence may not be considered unless the document is ambiguous. *South Road Associates, LLC v. Intern. Business Machines, Corp.*, *supra*.

To establish a *prima facie* case for breach of contract, a plaintiff must establish the existence of a contract, the performance by the plaintiff, the defendant's breach and resulting damages. *JP Morgan Chase v. J.H. Elec. of New York, Inc.*, 69 A.D.3d 802, 803

[2nd Dept. 2010]; *Furia v. Furia*, 116 A.D.2d 694, 695 [2nd Dept. 2006].

"In New York, all contracts imply a convenant of good faith and fair dealing in the course of performance." *511 West 232nd Owners Corp. v. Jennifer Reality Co.*, 98 N.Y.2d 144, 153 [2002]. "This covenant embraces a pledge that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.' " *Id.* at 153 quoting *Dalton v. Educational Testing Serv.*, 87 N.Y.2d 384, 389 [1995]. "While the duties of good faith and fair dealing do not imply obligations 'inconsistent with other terms of the contractual relationship' they do encompass 'any promises which a reasonable person in the position of the promise would be justified in understanding were included.' " *Id.* at 153 quoting *Rowe v. Great Atl. & Pac. Tea Co.*, 46 N.Y.2d 62, 69 [1978].

Applying these principles to the case at bar, the Defendant has sustained its burden of establishing its entitlement to judgment as a matter of law dismissing the complaint.

In the present case, the plain meaning of the terms of the Site Agreement and modification rider are dispositive. Pursuant to Paragraph 3, Sprint paid a one-time payment of $100 that covered the period from the Lease Commencement Date up until the Rent Commencement Date. Further, Sprint was not required to make rent payments until the first day of the month after issuance of the Sprint Building Permit to install the facilities.

It is undisputed that a Sprint Building Permit was never issued at anytime.

Hence, the Rent Commencement Date never occurred. As the condition precedent of the occurrence of the Rent Commencement Date never took place, Sprint had no duty to commence payment of monthly rent. *See, IDT Corp. v. Tyco Group, S.A.R.L., supra.* Hence, the Plaintiff is not entitled to any damages under Part One of the termination fee provided in paragraphs 9 and 11 of the Modification Rider.

Paragraph 10 of the Modification Rider states "Notwithstanding anything contained in the Site Agreement, concurrent with the payment of the first month's rent on the Rent Commencement Date, Sprint shall pay to owner (Plaintiff) a one time up-front payment of $15,000." This one time up-front payment of $15,000 was to be made concurrently with the first month's rent on the Rent Commencement Date.

As noted above, a Sprint Building permit to construct the Facilities on the Site was never issued at anytime and, as a result, the Rent Commencement Date never occurred.

Accordingly, the condition precedent of the occurrence of the Rent Commencement Date never took place and, therefore, the Defendant, Sprint, had no duty to make a one time up-front payment of $15,000. *See, IDT Corp. v. Tyco Group, S.A.R.L., supra.*

In view of the foregoing, the Plaintiff's sole remedy under the Site Agreement is to retain the prepaid rent of $100 since the period of time from the Lease Commencement Date until the Rent Commencement Date was still ongoing at the time the Site Agreement was terminated.

Accordingly, the Defendant, Sprint, is entitled to summary judgment dismissing the complaint since the Plaintiff cannot make out a *prima facie* case on its breach of contract as the Defendant, Sprint, never breached any provision in the Site Agreement.

Accordingly, it is hereby

ORDERED, that the Defendant, Sprint's motion, (Mot. Seq. 01) pursuant to CPLR § 3212, seeking an order dismissing the Plaintiff's complaint, is **GRANTED**; and it is further

ORDERED, that the Plaintiff's contentions are without merit and its motion, (Mot. Seq. 02) pursuant to CPLR § 3212, seeking summary judgment is **DENIED**.

This constitutes the decision and order of the Court.

Dated: Mineola, New York
April 12, 2012

Hon. Randy Sue Marber, J.S.C.
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ENTERED
APR 17 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE