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

Index Number : 651467/2011

147 COMMERCIAL L.P.

vs.

THOMPSON APARTMENT CORP.

SEQUENCE NUMBER : 001

PRELIMINARY INJUNCTION

PART _____

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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: ☐ **Yes** ☐ **No**

Upon the foregoing papers, it is ordered that this motion

Motion is decided in accordance with accompanying Memorandum Decision.

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

Dated: 3/23/12

CHARLES E. RAMOS *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 :COMMERCIAL DIVISION
----------x
147 COMMERCIAL, L.P.,

Index No. 651467/11

Plaintiff,

- against -

THOMPSON APARTMENT CORP.,

Defendant.
----------x

Charles Edward Ramos, J.S.C.:

In this action for declaratory and injunctive relief, plaintiff, 147 Commercial L.P. moves by order to show cause to enjoin defendant, Thompson Apartment Corp., from (1) interfering with the use of a ground floor water closet by plaintiff, its subtenants, employees, and customers; (2) installing a lock on the ground floor water closet, converting the water closet into a storage unit, or otherwise changing the use of the water closet; (3) interfering with the use, access, or possession of the basement by plaintiff or its subtenants, or removing property belonging to plaintiff or its subtenants from the basement; and (4) installing a lock on the door to the basement.

BACKGROUND

Defendant is the owner of a six-story apartment building located at 105 Thompson Street, New York, New York (the "Building"). The Building contains 22 residential units, two in the rear of the ground floor, and four each on the second through six floors. The Building also has two commercial units and one

functioning water closet[1] on the ground floor, as well as a basement. A hallway running from a secure front door, and between the two commercial units, provides access to the commercial and residential units, stairs, water closet, and basement. The commercial units may also be accessed from the street. However, the commercial tenants can only access the basement from the ground floor hallway.

In 1981, the Building was converted into a Cooperative, pursuant to an Offering Plan. By two commercial lease agreements, both dated August 11, 1981, defendant, as owner, leased to plaintiff's predecessor-in-interest, as tenant, the ground-floor commercial units and basement in the Building for a term of 99 years. The commercial lease agreements describe the demised spaces as the "South Store and basement" and "North Store and basement," and permit the tenant to use the premises for "any lawful purpose" (Standard Form of Store Leases, Order to Show Cause, Exh D; E).

The two commercial lease agreements contain identical Riders. Article 50 of the Riders state, in part, that "[t]he Lessee has been advised that there is a Tenant presently occupying the premises ..." (*id.*). The leases also contain identical Rules and Regulations, which are attached to and made a part of the lease in accordance with Article 35 thereof. Article

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[1]The parties note that there is a second water closet on the ground floor, but they are unsure of its condition.

3 of the Rules and Regulations states that "[t]he water and water closets and plumbing fixtures shall not be used for any purposes other than those for which they were designed or constructed" (Order to Show Cause, Exh I, pp 21F; 21M).

Pursuant to a subsequent assignment agreement (*see* Assignment, Order to Show Cause, Exh F) and name change, plaintiff became the tenant of record of the demised commercial units. In July 2007, plaintiff entered into a 10-year sublease agreement for the South Store with non-party Snack Company LLC ("Snack Co.") (Sublease, Order to Show Cause, Exh J). In October 2010, plaintiff entered into a 10-year sublease agreement for the North Store with non-party Vai Enterprises LLC d/b/a Vaispuntino Bar ("Vai") (Sublease, Order to Show Cause, Exh K).

Plaintiff reportedly also sublet the basement to a separate commercial entity. Initially, plaintiff's managing agent, Shari Santanastaso, represented that there is a single bathroom in the basement under the exclusive control of and accessible only to the commercial subtenant there (*see* Santanastaso Affid, Order to Show Cause, fn 3). However, the managing agent now asserts that an inspection after the commercial subtenant vacated the basement revealed no bathroom there (Santastanastaso Affid, Affid in Further Support, fn 1). Defendant offers nothing to counter the latter assertion, and only relies on plaintiff's initial representation that there is a separate bathroom in the basement.

In any event, it is undisputed that the demised spaces do not contain any bathrooms. As such, the occupants of the commercial units, their employees, and customers all use the ground floor water closet, and have done so since before defendant acquired the Building.

Defendant claims that the use of the ground floor water closet by the employees and patrons of the commercial subtenants creates a security risk to the Building. Defendant maintains that the use of the ground floor water closet provides the commercial occupants with unfettered access to the residential units, and is otherwise disruptive to the residential tenants. Specifically, defendant asserts that Vai, the subtenant in the North Store, is open until very late at night and serves alcohol to its patrons. Defendant also asserts that the patrons of Vai congregate in the hallway while waiting to use the water closet. Defendant maintains that the patrons are often loud, boisterous, and a nuisance to the residential tenants in the building. Defendant also asserts that the situation has continued unabated, and that the residential tenants have complained to the Board about the security risk and disturbance.

On April 11, 2011, the Board met to discuss the concerns of the residential tenants. The Board resolved to convert the ground floor water closet to a storage closet, and instructed all shareholders to remove their personal belongings from the public spaces in the Building. Thus, by letter, dated April 23, 2011,

the Board of the Cooperative notified all shareholders, as follows:

> At the most recent Board meeting, the Board resolved to clean out the basement of all non-building related items as well as the roof, backyard, and all public hallways and stairs. Additionally, the bathroom on the ground floor in the hallway will be turned into a superintendent storage closet.
>
> Please remove *any and all items* you may have before May 31, 2011 as after this date *all items will be disposed of without further notice*

(Letter, Order to Show Cause, Exh B [emphasis in original]). This action ensued.

The Complaint alleges causes of action for judgment declaring that the basement and ground floor water closet are included in the commercial premises leased to plaintiff (first and second causes of action); an injunction restraining defendant or its agents from interfering with the use or possession of the ground floor water closet by plaintiff, its subtenants, their employees and customers (third and fourth causes of action); and an injunction restraining defendant or its agents from interfering with the use and possession of the basement by plaintiff or its subtenants (fifth and sixth causes of action).

Plaintiff now moves, by order to show cause, for a preliminary injunction and temporary restraining order enjoining defendant from (1) interfering with the use of a ground floor water closet by plaintiff, its subtenants, their employees and customers; (2) installing a lock on the ground floor water

closet, converting the water closet into a storage unit, or otherwise changing the use of the water closet; (3) interfering with the use, access, or possession of the basement by plaintiff or its subtenants, or removing property belonging to plaintiff or its subtenants from the basement; and (4) installing a lock on the door to the basement.

On June 1, 2011, this Court issued an order granting plaintiff temporary injunctive relief pending a hearing on this motion for a preliminary injunction.

DISCUSSION

CPLR 6301 states that

> A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, 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. A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.

In order to be entitled to a preliminary injunction, a party must show a likelihood of ultimate success on the merits, irreparable injury in the absence of an injunction, and a balancing of the equities in the party's favor (*Aetna Ins. Co. v Capasso*, 75 NY2d

860, 862 [1990]). Preliminary injunctive relief is a drastic remedy that will not be granted unless a clear right to it is established under the law and upon undisputed facts found in the moving papers (*Anastasi v Majopon Realty Corp.*, 181 AD2d 706, 707 [2nd Dept 1992]). The burden of showing an undisputed right rests upon the movant (*id.*).

Here, plaintiff has satisfied its burden of demonstrating a likelihood of success on the merits of its claim to preclude defendant from interfering with its access to and use of the basement in the Building. As stated, the commercial lease agreements between the parties clearly describe the demised spaces as the "South Store and basement" and "North Store and basement."

It is settled that the interpretation of the provisions of a lease agreement is governed by the same rules of construction applicable to other agreements (*Horwitz v 1025 Fifth Ave., Inc.*, 34 AD3d 248, 249 [1st Dept 2006]). "[A] contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed" (*Matter of Wallace v 600 Partners Co.*, 86 NY2d 543, 548 [1995]). Thus, where the intent of the parties is clear and unambiguous from the language employed on the face of the agreement, the writing must be enforced according to its terms (*id.*).

The issue of whether a writing is ambiguous is one of law to be resolved by the Court (*W.W.W. Assoc. v Giancontieri*, 77 NY2d

157, 162-163 [1990]). Furthermore, the rules governing the construction of ambiguous contracts are not triggered unless the court first finds an ambiguity.

Here, the Court concludes that the terms used to describe the demised spaces in commercial lease agreements are clear and complete, have a definite and precise meaning, and allow for clear interpretation (*Matter of Wallace*, 86 NY2d 543 [1995], *supra*). Thus, the lease agreements must be enforced according to the express terms employed therein. The express terms of the agreements grant plaintiff the unfettered right to use the basement in the Building.

Defendant's attempt to create ambiguity in the terms of the commercial lease agreements is unavailing. Defendant contends that only certain portions of the basement were leased to plaintiff, and that defendant retained ownership and possession of the other areas of the basement. In particular, defendant asserts that the terms "South Store and basement" and "North Store and basement" refer to the portions of the basement that were located under the two stores. Defendant also asserts that it regularly used the back portions of the basement for residential storage.

Defendant's assertions are not supported by the plain language appearing in the agreements. Courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under

the guise of interpreting the writing (*Morlee Sales Corp. v Manufactures Trust Co.*, 9 NY2d 16, 19-20 [1961]). Here, the agreements do not contain any terms limiting plaintiff's right to use the basement. Thus, any attempts by defendant to do so would violate the terms of the commercial leases.

Plaintiff also demonstrates a likelihood of success on its claim to preclude defendant from interfering with the use of the ground floor water closet by plaintiff, its subtenants, their employees and customers. Plaintiff essentially asserts that the ground floor water closet is appurtenant to and, thus, a part of the demised commercial units. Defendant counters that plaintiff retained only a revocable license to use the ground floor water closet.

Whereas a license connotes the use and occupancy of the landlord's premises by the tenant (*see American Jewish Theatre v Roundabout Theatre Co.*, 203 AD2d 155, 156 [1st Dept 1994]), an appurtenance to a lease contemplates rights outside of the demised premises that pass to the tenant (*Second on Second Café, Inc. v Hing Sing Trading, Inc.*, 66 AD3d 255, 267 [1st Dept 2009]). Thus, a license exists when the landlord agrees to allow a tenant to use or occupy certain space, which the landlord controls and which was never leased to the tenant (*see American Jewish Theatre*, 203 AD2d 155 [1st Dept 1994], *supra*). A license is revocable at will and does not constitute a permanent right to the tenant's unfettered use or occupancy of the space (*id.*).

On the other hand, an appurtenance to a lease includes everything that is necessary and essential to the beneficial use and enjoyment of the thing leased or granted (*Greenblatt v Zimmerman*, 132 AD 283, 285 [1st Dept 1909]). The appurtenance concept is most frequently applied to uses of the landlord's property that existed at the time the lease was made (*Second on Second Café, Inc.*, 66 AD3d 255 [1st Dept 2009], *supra*). A lease need not refer to "appurtenances" in order to pass them to the tenant (*id.*), and an appurtenance may be revoked only at the termination of the lease (*Greenblatt*, 132 AD 283 [1st Dept 1909], *supra*).

Access to a bathroom is clearly essential to the beneficial use and enjoyment of the demised commercial and, as stated, the demised spaces do not contain any bathrooms. Plaintiff, their subtenants, their employees and customers all use the ground floor water closet, and have done so since the inception of the lease agreements between the parties. Thus, plaintiff's appurtenant rights arose from the parties' evident intent at the time the parties entered into the commercial leases (*see Second on Second Café, Inc.*, 66 AD3d 255 [1st Dept 2009], *supra*), and are revocable only upon the termination of said leases.

Furthermore, the lease agreements clearly contemplate the use of the ground floor water closet. In addition, the Rules and Regulations of the commercial leases preclude the parties from using the water closets for any purposes other than those for

which they were designed or constructed. Thus, defendant may not lawfully interfere with its use by plaintiff, its subtenants, their employees and customers.

Defendant's assertion that there is a bathroom in the basement available for use by the commercial tenants is refuted by the affidavit of plaintiff's managing agent. Furthermore, the use of a basement bathroom by the occupants of the demised units would not alleviate any of the concerns expressed by defendant since, as stated, the commercial tenants can only access the basement from the ground floor hallway. Moreover, the commercial lease agreements do not require plaintiff to construct a bathroom in an alternate location. In addition, contrary to defendant's position, the decision of the Board regarding plaintiff's access to and use of the basement and ground floor water closet cannot be sustained under the business judgment rule since the decision violates the terms of the commercial lease agreements between the parties (*see Matter of Renauto v Board of Directors of Valimar Homeowners Assn.*, 23 AD3d 564 [2nd Dept 2005]).

Plaintiff also demonstrates that it will be irreparably injured in the absence of an injunction. Absent an injunction, plaintiff will be deprived of its right to use the basement, and plaintiff, its subtenants, their employees and customers will have no access to the ground floor water closet. Such interference risks injury to the viability of the commercial enterprises for which monetary damages will be inadequate (*see*

Mr. Natural v Unadulterated Food Prods., 152 AD2d 729, 730 [2nd Dept 1989]).

A balance of the equities favors plaintiff's position. Plaintiff is simply seeking to enforce its rights under the commercial lease agreements, which was entered into by the parties pursuant to an arms length transaction. By contrast, defendant may explore reasonable alternatives to alleviate its concerns that do not infringe on plaintiff's rights under the commercial lease agreements.

Therefore, due deliberation having been had, and it appearing to this Court that a cause of action exists in favor of the plaintiff and against the defendant and that the plaintiff is entitled to a preliminary injunction on the ground that the plaintiff has demanded and would be entitled to a judgment restraining 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, as set forth in the aforesaid decision, it is

ORDERED that the undertaking is fixed in the sum of $5,000,00 conditioned that the plaintiff, if it is finally determined that it is not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of this injunction; and it is further

ORDERED that defendant, its agents, servants, employees and all other persons acting under the jurisdiction, supervision or

direction of defendant, are enjoined and restrained, during the pendency of this action, from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under the supervision or control of defendant or otherwise, any of the following acts:

(1) interfering with the use of a ground floor water closet by plaintiff, its subtenants, employees, and customers;

(2) installing a lock on the ground floor water closet, converting the water closet into a storage unit, or otherwise changing the use of the water closet;

(3) interfering with the use, access, or possession of the basement by plaintiff or its subtenants, or removing property belonging to plaintiff or its subtenants from the basement; and

(4) installing a lock on the door to the basement.

This shall constitute the decision and order of this Court.

Dated: March 23, 2012

ENTER:

J. S. C.

CHARLES E. RAMOS