

Flying Point, LLC v KillyBegs Realty Corp.

2013 NY Slip Op 30389(U)

February 21, 2013

Supreme Court, Suffolk County

Docket Number: 02521/2003

Judge: Ralph T. Gazzillo

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Supreme Court - State of New York
IAS PART 6 - SUFFOLK COUNTY

Post Trial Decision

PRESENT:

Hon. RALPH T. GAZZILLO
A.J.S.C.

-----X		
Flying Point, LLC,	:	Esseks, Hefter & Angel, Esqs.
	:	100 East Main Street
Plaintiff(s),	:	P.O. Box 279
- against -	:	Riverhead, N.Y. 11901
	:	
KillyBegs Realty Corp., a New York	:	Christopher P. Ring, Esq.
corporation, Clover Leaf Realty, Inc., a New York	:	292 Expressway Drive N.
corporation, Yassoo, L.P., a New York limited	:	Islandia, N.Y. 11749
partnership, Charos Joint Venture and	:	
Peter Charos,	:	D'Agostino, Levine, Landesman
	:	& Lederman, LLP
Defendant(s).	:	345 Seventh Avenue, 23 rd Floor
-----X		New York, N.Y. 10001

On September 24th, 25th, and 28th, 2012, the non-jury trial of this matter was conducted before the undersigned. As indicated within the trial record, both sides rested after the documentary evidence and exhibits had been submitted and the testimony completed. Counsel for each side, however, was afforded the opportunity to submit written arguments in lieu of summations as well as a memorandum of law. Those memoranda having since been received¹ and reviewed, the decision of the Court is as follows:

The complaint in this matter contains two causes of action. The first is against all the defendants except Peter Charos (hereinafter "Peter") and essentially

¹For a number of reasons, but with the consent of the Court and both sides, the submissions were delayed; they were finally submitted and received by the Court on February 1, 2013.

alleges they reneged on their contractual obligations; it seeks specific performance. The second is directed solely towards Peter Charos individually. It essentially alleges that he fraudulently misrepresented his authority to represent the other defendants; it seeks money damages. The defendants' answer contains no counterclaims but offers general denials and a number of affirmative defenses.

Preliminarily, a number of issues appear to be either uncontested or, in view of the evidence (predominately the documentary items), beyond serious dispute. For example, this matter involves three (3) contiguous parcels of land in Suffolk County. One of these parcels is owned by a limited partnership, Yassoo, L.P. (hereinafter Yassoo); one is owned by Killybegs Realty Corp. (hereinafter Killybegs); the remaining parcel is owned by Clover Leaf Realty, Inc. (hereinafter Clover). The latter two owners are New York corporations and all three entities have an office at 15 Eisenhower Drive, East Quogue, New York. That is also the residence of the defendant Peter Charos (hereinafter Peter). Yassoo, Clover and Killybegs formed the remaining defendant, Charos Joint Venture.

On December 6th, 2001, Marvin Hyman (since deceased) executed a document as "Managing Member" of the plaintiff Flying Point, LLC. The document listed Flying Point as lessee. The document was also signed by Peter as "Managing Partner" of the listed lessor, Charos Joint Venture. The Charos Joint Venture Agreement designates Yassoo as its Managing Partner and provides it with a broad array of powers including, *inter alia*, the ability to amend a then-anticipated lease with Sears as well as to negotiate "a new lease."

The December 6th, 2001, lease of the instant matter was intended to be the ground lease embracing the above-indicated three parcels of land. It contains a term of 49 years with an option for an additional eleven (11) year extension. Its fourth article states:

Article 4

Net Lease

This Lease is and shall be an absolutely net Lease, and Lessor is not nor shall be required to provide any services or do any act or thing with respect to the leased Premises or the improvements except as specifically provided herein. . . .

Article "6" specifies that the lessee is responsible for any improvements at

its sole cost and expense. Additionally, "Article 10 Quiet Possession" states that the lessor (Charos Joint Venture) "covenants that it has full right, power and authority to make" the lease. Rent was set to begin at \$250,000.00 per annum, and the agreement indicated it would be triggered and set to commence 30 days after the lessee obtained approval of a non-appealable site plan from the Town of Southampton. The lease also provides that at the completion of its term the property and all improvements would revert to the lessor.

On December 23rd, 2002, slightly over one year later, a one-page second document was executed. It was labeled "MEMORANDUM OF AGREEMENT AMENDMENT TO LEASE DECEMBER 6, 2002 (sic)."² Paragraph "1" specifically deletes the Yassoo property from the lease. In simple terms, the second through and including the sixth paragraphs referred to: a) an exhibit which was part of the 2001 lease, b) an annual initial base rent of \$175,000.00, c) rent increases every five (5) years, d) the timing and obligation of lessee's obligation to pay \$35,000.00 toward a construction loan, and e) a new \$20,000.00 security deposit. The seventh and final paragraph indicates "[the parties agree to execute a formal amendment within thirty (30) days from the date" thereof. At the bottom of the page are three (3) typewritten titles above lines for a signature. The first of these is indicated as "KILLYBEGS REALTY CORP."; the next is "CLOVER LEAF REALTY INC."; the last is "FLYING POINT, LLC". Peter's signature appears for Killybegs and Clover, Hyman's as Flying Point's managing member. Besides the first paragraph, Yassoo is not otherwise listed nor mentioned.

TESTIMONY

As regards the witnesses who supplied the trial's testimony, both sides called Peter on their direct case. In addition to him, the plaintiff also called Alfred Noe, John Lynch, Esq., and Stephen H. Schuster. The defendants also called Anthony Charos (hereinafter Anthony).

Peter testified that he is 89, having moved to this county in 1953. Since then, he has owned and managed two diners and continues to own one which is

² It was stipulated that the year indicated was a typographical error as it was the parties' intent and understanding that it referred to the ground lease executed in 2001.

not in any way a part of this litigation but abuts the Yassoo property.³ At times, the businesses he ran employed forty to fifty people. As to the three parcels of this matter, it was he who erected the For Rent sign and included his telephone number on it. At one point he owned all three parcels, but now they are owned separately by Yassoo, Killybegs and Clover. He is a general partner of Yassoo and the manager of Charos Joint Venture. He indicated that it was his “idea” to form Killybegs Realty Corporation, Clover Leaf Corporation, and the Yassoo Limited Partnership, as well as to thereafter form the Charos Joint Venture.

He retained Lynch after meeting Noe. On behalf of the lessors, no one other than he—Peter—dealt with Lynch. At the December 2001, lease meeting, no members of his family were present. He admitted he had accepted the plaintiff’s checks.

Due to the size of the proposed structure, the project was initially rejected by the town as contrary to a town regulation, a so-called “Big Box” ordinance put into place to restrict construction of large structures.⁴ After the “Big Box” rejection, Peter went to at least one town meeting but no one else in his family did.

At one time after this, he apparently had agreed with Noe to lease the properties to construct three (3) stores instead of one, but not at a reduced rent below \$250,000.00. With respect to his recollection of the early meetings with the lessee he was, however, sketchy, less than precise, and far from detailed.

He also admitted having executed a document as the managing partner of Charos Joint Venture for its submission to the Southampton Planning Board for a site plan. Additionally, he admitted that in November of 2002, he had been asked by the plaintiff’s representative to accept two leases for the property; he was willing to permit that, as long as there was a building on each of the three (3) parcels.

As to the final December 23, 2002, meeting, he contended that he knew it had to do with the leases, but was not advised it would be limited to the Killybegs

³ Specifically, the Yassoo property is behind the diner; the diner and its property sits between the Yassoo parcel and Montauk Highway.

⁴ There are indications that although the project might have been permitted when conceived, the town amended the controlling ordinance so as to prohibit it.

and Clover properties. What remains clear, however, is that he desired a higher rent.

He also admitted signing memorandum of agreement amendment for Killybegs and Clover at the December 23, 2002, meeting but stated that he hadn't discussed it with members of Killybegs or Clover prior to signing it.

With respect to that meeting, he stated that he arrived late, after the others. He recalls some discussion about rent. He reiterated that he wanted a higher rent. He also stated that Lynch was in a hurry and had told him to sign the amendment, assuring him there could be changes. As to the one page amendment agreement, Peter claims he didn't read "the whole thing" but saw it said "you have got 30 days for something."⁵ Days after he signed, he called Lynch and indicated he didn't know if he was authorized.

Peter's testimony also disclosed there had been a separate action brought by the defendants herein against Lynch and his law partner. In essence, the plaintiffs-therein/defendants-herein alleged that Lynch and his firm represented them in lease negotiations with Flying Point and wrongfully caused them to execute a document which "bound" them to a "lease which they did not intend nor wish to enter into." In addition to costs, etc., that suit demanded \$10,000,000.00 in damages. Peter acknowledged that the sole signature which verified that action's complaint is his.

Noe's testimony may be summarized as follows: He is the owner and managing member of Flying Point and has been so since its beginning. Prior to his death, Hyman served in similar capacities. In the Fall of 2001, Noe saw a sign on the properties listing their rental availability and a telephone number. He called and spoke with Peter. Shortly thereafter, the two met and discussed Noe's entity developing the property; Peter wanted to develop the properties, but didn't know how. In due course, Lynch, Peter's attorney, sent Noe a proposed term sheet outlining the proposal and listing Yassoo, Killybegs, and Clover as owners of the properties and as joint venturers. Noe indicated that until then he had been unaware of their ownership of the properties. During a discussion between him

⁵ For the sake of clarity and completeness, in its entirety, the seventh and last clause states: "The parties agree to execute a formal amendment within thirty (30) days from the date hereof."

and Peter, Peter indicated that he owned the business entities. Thereafter, on a regular, at least once-a-week basis, the two spoke and Noe discussed the terms exclusively with Peter and no one else. The lease was signed on December 6, 2001, by Peter and Hyman in the presence of Noe and Lynch. The ground lease generally followed the outline of the proposed term sheet but material changes (term, rent, time line, etc.) were made. According to Noe, these changes resulted from discussions between him and Peter. A number of checks and notes were issued to Lynch and Peter, including \$25,000.00 as a security deposit, \$15,000.00 partial payment for environmental studies, \$30,000.00 for architectural services. None of those funds were ever returned.

Afterwards, the plaintiff tried to secure the necessary permits from the town. The project was rejected as contrary to the so-called "Big Box" ordinance. Peter was at the town meeting when the project was rejected. Hyman and Noe met with town officials in an effort to save the project; this was with Peter's knowledge. Apparently Peter was anxious to move the project forward, saying, "How do we get this deal done?" By that time, Peter and Noe still were speaking on a weekly basis. There was also an indication that Peter was due to speak to the town's board but he never did. These meetings and discussions resulted in the proposal that three buildings would be constructed instead of one large building. This suggestion was made by a town board member in the presence of Peter.⁶ Discussions followed and evolved into developing only two of the three parcels. Ground leases were prepared: one to lease the Yassoo property and a separate lease encompassing both the Killybegs and Clover parcels. Noe also requested Peter recalculate the rent predicated on smaller structures. By September, Noe was conducting these negotiations with Lynch. They only focused on two of the parcels (Killybegs and Clover) but not the remaining, Yassoo parcel as it had a potential environmental impediment which stood in the way of its expeditious development.

On December 23, 2002, the above-noted memorandum of agreement amendment was signed. This occurred at Hyman's office following a meeting which lasted three or more hours and was attended by Lynch, Peter, Hyman, and Noe. Peter wanted the rent increased and the rental of the Yassoo property. As to the latter issue, it was not completely settled but that parcel's potential use as a

⁶As was indicated on cross-examination, the town's refusal and talk of three separate buildings made Peter "livid."

parking lot was discussed but not resolved; essentially, the issue was tabled. Noe also indicated that prior to that meeting he had discussed the proposal and Peter had agreed to lease the Killybegs and Clover properties.

Days after the meeting, Peter indicated he didn't have the authority to sign the memorandum of agreement amendment.

Meanwhile, the plaintiff had issued more checks to complete the project. Also during the negotiations, a rent adjustment was made for the smaller parcel of two rather than three lots. This was a result of calculating the original charge for square foot under the first lease and applying that amount to the total square footage of the two parcels. Peter proposed increasing the base rent as the total square footage was less. Finally, it was agreed that \$9.00 per square foot would be the multiplier. Additionally, as to the Yassoo parcel, it was agreed that should that parcel become usable, the \$9.00 figure would also apply.

Lynch's testimony was not as long nor as involved. He has been practicing law since December of 1964. Peter had been his client since February or March of 2001. During that period, Peter called him and asked if he wanted to be involved in a land deal. Thereafter, they met for the first time at Peter's home. Lynch was asked to draft a letter of intent and term sheet. He did so, based upon notes from Peter. As indicated on the term sheet, the owners of the properties were Yassoo, Clover and Killybegs "as joint venturers." He had no knowledge of the management of the entities but as to the joint venture, the only person he dealt with was Peter and it was his understanding that Peter was the only one who would act on behalf of the joint venture. Lynch had no part in the lease's negotiations, but represented the joint venture until early January of 2003. He prepared the ground lease and the December 23rd, 2002, memorandum of agreement amendment and saw it signed.

During the December 23rd meeting at Hyman's office, Noe, Peter, Hyman and he discussed what was necessary to keep the project going. The memorandum of agreement amendment resulted. Lynch handwrote a draft, Hyman's secretary typed it, it was read by all and he saw Peter sign it. During the period between the ground lease and the memorandum of agreement amendment, Lynch had dealt with Hyman and Peter and only spoke with them about the amendments. As to the lessors, he only dealt with Peter, not his sons, nor anyone else. Moreover, Lynch never discussed with Peter who might have interests in Yassoo, Clover, or

Killybegs. Upon notification about the “Big Box” law, Hyman discussed modifying the lease into three (3) separate parcels, but this was never acted upon. There were proposals which would cover the rear of the diner—the Yassoo piece—and another lease for the other two.

After the amendment was signed, Peter called Lynch and said that he (Peter) was not authorized to sign. Lynch then called Hyman and indicated the deal should not go forward. Thereafter, Lynch never prepared the formal agreement contemplated by paragraph “7” of the December 23rd memorandum. He was never paid for his services and the \$25,000 he received for the ground lease was placed in his trust account. Thereafter, he was the defendant in a lawsuit based upon the verified complaint of Peter and brought in the names of Yassoo, Clover, Killybegs, Charos, and Peter. That action was discontinued a week before the instant trial began.

Stephen Schuster is and has been a real estate appraiser and consultant since 1960. Licensed and having an array of other professional credentials, he has previously testified as an expert in New York and several other states’ courts. With respect to the matter at bar, after explaining his methodology, he estimated the value of the leasehold as of January, 2003, at \$30.00 a square foot to be \$2,750,000.00; at \$35.00 a square foot to be \$4,250,000.00; and at \$25.00 a square foot to be \$1,250,000.00. He indicated that the \$25.00 a square foot figure is clearly less than what he thinks it’s worth.

Anthony Charos’ testimony was brief and may be outlined as follows: He is Peter’s son and a resident of New Jersey. Anthony has interest in Clover and Killybegs, but doesn’t know how many shares or his percent of the ownership. He “believes” he is vice-president of Killybegs. He is not aware if Clover owns any other property. He is also not aware if anything was paid for the deed to the Clover parcel. He is similarly unaware of the Killybegs property. He believes Yassoo is a “holding company” and doesn’t know who its members are and “not sure” if he was a member. He further stated that his father acted on behalf of Yassoo. As to the joint venture, he didn’t know if he was a member but “would assume” he is. His father also acted on the joint venture’s behalf. Additionally, his father took care of leasing the properties while Anthony never did anything to market them. His father told him about Noe and Hyman’s interest, but he never met them nor Lynch. In the lawsuit against Lynch, his father was the representative of Killybegs, Clover and Yassoo. Anthony didn’t recall ever seeing

that matter's complaint or speaking with any attorneys, nor did he recall meeting as a corporation to authorize the litigation. Lastly, he believes his father has "full authority to sign on behalf of the joint venture. . . ."

LAW

First and foremost, having observed the witnesses, "the very whites of their eyes," on direct as well as cross-examination, the so-called "greatest engine for ascertaining the truth," *Wigmore on Evidence*, Sec 1367, the Court is satisfied that the exercise has been fruitful and more than sufficient to determine the credible information as well as to simultaneously filter out that which is less than reliable. Secondly, it should go without saying that in evaluating each witness' contributions to the resolution of the controversies in this matter—as well as all such determinations—it is hornbook law that the quality of the witnesses, not the quantity, is determinative. *See, e.g., Fisch on New York Evidence*, 2d ed., Sec 1090. As to the quality of any given witness, the flavor of the testimony, its quirks, a witness' bearing, mannerisms, tone and overall deportment cannot be fully captured by the cold record; the fact-finder, of course, enjoys a unique perspective for all of this, and the ability to absorb any such subtleties and nuances. Also worthy of consideration is any witness' interest in the litigation. *See, e.g., 1 NY PJ2d 1:91 et seq.*, at p.172. The length of time taken by either side's case or any witness' testimony is, however, clearly non-conclusive. Lastly, it should be underscored and acknowledged that during the course of gauging a witness' credibility as well as conducting the fact-finding analysis, the undersigned's continuous tasks also included, of course, segregating the competent evidence from that which was not, an undertaking for which the law presupposes a court's unassisted ability. *See, e.g., People v. Brown*, 24 NY2d 168 (1969); *Matter of Onuoha v. Onuoha*, 28 AD3d 563 (2d Dept 2006).

Those tasks and duties aside, even in the limited inquiry of this proceeding, there remains the purpose and goal of the trial, *viz.*, to try or test the case. It is hornbook law that the yardstick for measuring causes of actions such as the matter at bar is the same whether the trial is by bench or jury: The burden of proof rests with the plaintiff or plaintiffs who must establish the truth and validity of each claim by a fair preponderance of the credible evidence. Stated otherwise, in order for a plaintiff to prevail on any individual claim, the evidence that supports that claim must appeal to the fact-finder as more nearly representing what took place than the evidence opposed to it. If the evidence does not, or if that evidence

weighs so evenly that the fact-finder is unable to indicate that there is a preponderance on either side, then the question is decided in favor of the defendant. Only when the evidence favoring a plaintiff's claim outweighs the evidence opposed to it may that plaintiff prevail.

General evidentiary and procedural law aside and focusing instead on the substantive law more specific to the matter at bar, neither the Court's nor counsels' research have revealed any case squarely on all fours with the facts at bar. There are, however, a number of decisions which offer some guidance.

For example, it has been held that the mere fact that parties to a written agreement leave some matters subject to future negotiations does not render the agreement an unenforceable contract. *See, e.g., Bed Bath & Beyond, Inc. v. IBEX Constr., LLC*, 52 AD23 413 (1st Dept 2008); *cf., Breslin Realty Dev. Corp. v. Incorporated Vil. of Freeport*, 155 AD2d 576 (2d Dept 1989). Indeed, where the agreement's plain language manifests the parties' intent to be bound, absent any indication that the undertaking is subject to a more formal agreement, the contract is binding. *Bed Bath and Beyond, Inc. v. IBEX Constr., LLC*, *supra*. Similarly, it has been held that a lease is enforceable even if it requires the landlord's approval of the tenant's future alteration plans and such an undertaking is not an "agreement to agree." *Melbourne Leasing Co. v. Jack LaLanne Fitness Ctrs.*, 211 AD2d 765 (2d Dept 1995). Where a lease contains all of the essential elements and terms, the parties' intent to subsequently arrive at a "fuller agreement" is not a bar to its validity. *Conopco, Inc. v. Wathne Ltd.*, 190 AD2d 587 (1st Dept 1993). Similarly, contemplation of a "more formal instrument" is not a fatal bar. *Healy v. Gumienny*, 142 AD2d 629 (2d Dept 1988). Indeed, it has been held that "[a] contract does not necessarily lack all effect merely because it expresses the idea that something is left to future agreement." *Conopco, Inc. v. Wathne Ltd, supra*, at 588 (citation omitted); *LoCascio v. James v. Aquavella, M.D., P.C.*, 206 AD2d 96, 100 (4th Dept 1994)(citation omitted). One of the essentials to arriving at such a result is to determine, objectively, whether there was a meeting of the minds; if that is found, their anticipation of a "fuller agreement" does not negate the contract's vitality. *TAJ Intl. Corp. v. Bashian & Sons*, 251 AD2d 98 (1st Dept 1998). Moreover, when the contract otherwise passes muster, the mere lack of a contemplated "more formal document" is not necessarily a bar to specific performance. *See, e.g., Healy v. Gumienny, supra*.

With respect to apparent authority, common sense and the law recognize

that an executive of an organization is presumably clothed with the powers that inhere to that position. *See, e.g., Odell v. Broadway Condominium*, 284 AD2d 52 (1st Dept 2001). Any such acts are binding on the organization against anyone who is ignorant of any limits on that power; this would include the power to enter into contracts if such responsibilities would normally accompany the position. *Id.* Additionally, “the existence of ‘apparent authority’ depends upon a factual showing that the third party relied upon the misrepresentations of the agent because of some misleading conduct on the part of the principal.” *Health-Loom Corp. v. Soho Plaza Corp.*, 272 AD2d at 179 (1st Dept 2000)(citation omitted). The test for such misleading conduct has been found satisfied where 1) the purported agent was given complete authority to act on the principal’s behalf, “such that [he] was the only person to represent [the principals] in any dealings with” the third party; and 2) the principals remained utterly silent for a substantial period.⁷ *Id.* at 182.

As to the matter of anticipatory breach of a contract, typically, that concept may be applicable where there is a “definite and final communication evincing an intention to forego performance under the contract” *D’Abreau v. Smith*, 240 AD2d 616 at 17 (2d Dept 1997)(citing *Rachmani Corp. v. 9 E. 96th St. Apt. Corp.*, 211 AD2d 262 at 267 (1st Dept 1995). Once that occurs, “the other party may treat the entire contract as broken and may sue immediately for the breach.” *Rachmani Corp. v. 9 E. 96th St. Apt. Corp.*, *supra*, at 265 (citation omitted).

A further issue of the instant matter merits review: the impact of signing a contract. The law in this area is clear and well-settled: “Under long accepted principles one who signs a document is, absent fraud or other wrongful act of the other contracting party, bound by its contents.” *Da Silva v. Musso*, 53 AD2d 543 (1981)(citations omitted). Moreover, any “‘party who signs a document without any valid excuse for having failed to read it is ‘conclusively bound’ by its terms.’” *Daniel Gale Assoc. v. Hillcrest Estates*, 283 AD2d 386 at 387 (2d Dept 2001)(citations omitted). It deserves noting that in that case the rule prevailed under facts demonstrating that the case involved a “sophisticated businessman who was involved in the sale of a property worth several million dollars” who alleged that he did not have his glasses *and had relied upon misrepresentations of the other party.*

⁷ One of the facts before the members of the *Health-Loom Corp.* panel was the principal’s silence during court appearances, which included the agent’s signing of pleadings.

With relation to claims of “mistake,” the law allows for a denial of specific performance for a mistake despite the fact that a) the mistake is the non-moving party’s act or omission and b) for which the plaintiffs is totally blameless and without any responsibility. *Da Silva v. Musso, supra*. “However, when the mistake is the result of the defendant’s own carelessness, not contributed to by conduct of the plaintiff, specific performance will be denied only in a case ‘of considerable hardship . . . when the plaintiff must himself have been aware of the mistake.’” *Id.* at 548 (citation omitted). “Mistake, to be available in equity, must not have arisen from negligence, where the means of knowledge were easily accessible.” *Id.* at 551 (citation omitted). The *Da Silva* court found failing to read the document (which the panel noted to be a readily available method of insuring against the “mistake”) was sufficient negligence.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Focusing initially on the witnesses, an objective review of Noe’s presentation reveals it to be worthy of belief and portraying a credible and logical account of the relevant facts and issues. The undersigned fully and without reluctance credits his recollection and explanation of those facts which are relevant and pivotal. Indeed, his overall account made sense and was in accord with the other evidence and logic while finding support in other portions of the record, including the testimony of Lynch. Moreover, on a number of key points, he was as convincing as he was consistent; additionally, he, his demeanor, and his account withstood a cross-examination which, although valiantly attempted, gained little traction.

An evaluation of Lynch’s testimony yields a similar result. He appeared credible, and his testimony logical, supported and worthy of belief. While he had a limited knowledge of the initial facts, his account of the matters in which he was involved is believable and adequately comports with the other evidence. Perhaps most relevant to the resolution of this litigation, his testimony supports and is consistent with the plaintiff’s contentions. Lastly, although placed in the unenviable and thankfully rare position *vis-a-vis* a former client as well as a prior adversary, he conducted himself professionally and without any apparent bias.

Similarly believable was Schuster’s testimony. His qualifications are unchallenged and his experience remarkable. Somewhat similarly, his

methodology is professional, logical, objective, and apparently well-founded. Indeed, even when exposed to the test of cross-examination, he, his presentation, his analysis and his conclusions withstood scrutiny unscathed.

Conversely, the testimony provided by the defense could not carry the day. Indeed, while Peter appeared confused⁸ and either could not or would not supply any information beyond a bare-boned sketch of the events. His testimony was at best abbreviated and little less than a broad strokes outline of his version of the events. While some of that may be occasioned by his age, that may excuse his poor performance but not his lack of believability. Most troubling and telling in this regard is that his version of the facts, his acts and his omissions, is not what would be expected of a person with his vast years of business experience, his admirable accomplishments, and his accumulation of substantial and enviable holdings. Stated otherwise, his apparently self-made success is a remarkable achievement, yet his purported conduct in this matter reflects a incompatible naivete. Clearly, this is not what would be expected from a successful entrepreneur who has first-hand familiarity with the concepts of various business models, i.e., corporate, limited partnerships, and joint ventures. In respectful deference to his age, suffice to note that while not inclined to specifically pass on the veracity or truthfulness of his account, clearly neither the quality of his presentation nor his recall is by any means compelling. Indeed, whether weighed individually and collectively, both are far less than impressive.

As regards Anthony, other than underscoring his father's authority and control over the properties, his testimony was unimpressive. Indeed, his presentation was consistent with control of his business interests being totally held by his father and precious little of that control—*if any*—so much as even shared with him. Stated otherwise, when it came to the properties, it appears that Anthony was little more than a strawman or just a name on a piece of paper. Indeed, he was factually less than informative. Moreover, as regards to the suit against Lynch, the inescapable conclusion is that he was clearly uninformed, a stranger and an outsider. As to the intricacies and history of the instant litigation, he appeared to be similarly unilluminating and ignorant. While he was no doubt an overall generally credible witness, his testimony is consistent and supportive of the plaintiff's theory of the case.

⁸Indeed, at one point, he admitted his confusion.

Therefore and upon that basis, the undersigned finds that the following facts have been proven by a clear and complete preponderance of the credible evidence:

First of all, the undersigned specifically finds that contrary to the defendants legal and factual arguments, the documents herein - specifically the first lease and the amendment - comprise a valid, complete and enforceable contract. Indeed, these conclusions are consistent with the determination of this Court on February 10, 2004, and July 8, 2009, by my late brother (Costello, J.) and neither the evidence nor the arguments presented in this matter in any way convince much less persuade the undersigned to disagree with those prior conclusions. Moreover, that result finds further support in the sworn allegations contained within the complaint against Lynch's law firm.

Additionally, both the original lease and the amendment were prepared by defendants' counsel, executed by Peter, were and remain valid and binding. The fact that the amendment anticipated a more formal document to follow does not change that result. *See, e.g., Bed Bath & Beyond, Inc. v. IBEX Constr., LLC, supra; TAJ Intl. Corp. v. Bashian & Sons, supra; LoCascio v. James v. Aquavella, M.D., P.C., supra; Conopco, Inc. v. Wathne Ltd., supra; Healy v. Gumienny, supra.*

Furthermore, Peter's post-amendment withdrawal constituted an anticipatory breach. *D'Abreau v. Smith, supra.*

As to the question of Peter's authority, the answer is reflected in the documents as well as in his actions. For example, prior to the execution of both documents, there were continual discussions and negotiations between the parties, and they continued up to and including the execution of the amendments. At all times, Peter held himself out as possessing full authority to all concerned (including his attorney), and at no time did he express or imply anything to the contrary. Additionally, his position carried his authority. *See, e.g., Odell v. Broadway Condominium, supra.* His complete and sole authority was demonstrated by his single-handed role and involvement in every stage of the properties' history, including their advertising, the initial meetings, the retention and consultation with the attorney, the negotiations, the town board meetings, and the execution of the documents (including the verification of the suit against prior counsel). His rule/role was underscored by the testimony of his son. By design or default, Peter was unquestionably in total control. *Health-Loom Corp. v. Soho Plaza Corp., supra.* (Parenthetically, it seems beyond mere coincidence that while

Anthony is a New Jersey resident, Peter's residence is also the address of all of the defendants.)

As regards the amendment, it was explained to him prior to his execution. This is demonstrated by the facts of both his acts and omissions and, other than his testimony, there is no support for a contrary contention. His allegation that he did not read it first is, under the circumstances, of no defense. *Daniel Gale Assoc. v. Hillcreast Estates; supra, Da Silva v. Musso, supra*. He is a successful businessman with years of experience and demonstrable knowledge of commercial enterprises. It is difficult to perceive him as so careless as to sign an unread document, especially when his counsel was readily available. *Da Silva v. Musso, supra*. Additionally, Lynch is an attorney with generations of practice behind him. It is difficult to perceive such experienced counsel proceeding in such a manner, much less with so successful and experienced a client as Peter. Moreover, examination of the document reveals the seven "Paragraphs" are in fact structured as follows: the first, second, fourth, and seventh are each comprised of a single, simple sentence, and the remaining three (the third, fifth, and sixth) are each comprised of two simple sentences. Stated otherwise, the seven "paragraphs" are merely ten (10) simple sentences. Reading the document is an equally simple exercise which consumes but a mere few moments. Also, the fact that the amendment did not provide for his signature on behalf of Yassoo but did require him to sign for the others is not insignificant. First of all, it is consistent with the objective of excluding the Yassoo property⁹; secondarily, under Peter's contention that he was ignorant of Yassoo's exclusion from the deal, that omission should have raised a question. Moreover, the rental of the other properties without immediately leasing Yassoo provides a logical solution to the Peter's stated objective: "How do we get this deal done?"

Lastly, and not to be overlooked, the matter a bar evolves from a "ground lease" and the terms and conditions of the parties' agreement and the amendment are not a hindrance to specific performance.

DETERMINATION

In sum, therefore, by a clear and overwhelming preponderance of the credible evidence, the plaintiff has established the factual and legal merits of its

⁹ It is also consistent with that parcel's future use being subject to future negotiations.

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first cause of action. Simultaneously, the defendants have failed to raise much less demonstrate the merits of any defense. The plaintiff is, therefore, entitled to the relief requested: specific performance of the lease and its amendment.

In view of the forgoing, the plaintiff's second, the alternative cause of action for fraud, is therefore dismissed.

The foregoing constitutes the decision and order of the Court.

Submit Judgment on notice.

Dated: 2/21/13
RIVERHEAD, NY



Ralph T. Gazzillo
A.J.S.C.

FINAL DISPOSITION