

Gallo Nero, Inc. v Mayer
2013 NY Slip Op 32887(U)
April 4, 2013
Sup Ct, New York County
Docket Number: 654264/2012
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EILEEN BRANSTEN

PART 3

Justice

**GALLO NERO, INC. a/k/a
GALLO NERO CORP.**

INDEX NO. 654264/2012

Plaintiff

-against-

**NANCY B. MAYER, SUSAN M. REEVES,
PETER J. MAYER, JOSEPH S. ISEMAN
and LARRY H. GINSBERG, solely in their
capacities as co-trustees of a trust for the
benefit of Susan M. Reeves and a trust for
the benefit of Peter Mayer, both created
pursuant to the Article Tenth of the Last
Will and Testament of Myron L. Mayer
(as amended by Article Six of the Second
Codicil to the Will), deceased, BORDELIW,
INC., BERTBERN REALTY, INC. a/k/a
BERTBERN REALTY CORP.,**

**MOTION DATE: March 18,
2013**

MOTION SEQ.: 1

Defendants

The following papers, numbered 1 to 3 were read on this motion (Seq. No. 1) for summary judgment granting plaintiff the right to renew its lease.

Notice of Motion / Order to Show Cause - Affidavits — Exhibits
Answering Affidavits - Exhibit
Replying Affidavits

PAPERS NUMBERED	
_____	1
_____	2
_____	3

CROSS MOTIONYES .X. NO

Plaintiff, GALLO NERO, INC. a/k/a GALLO NERO CORP. ("GALLO NERO") moves by Order to Show Cause ("OSC") seeking summary judgment on its claim for declaratory relief that: (1) it validly exercised its option to renew the subject commercial lease; (2) Defendants, NANCY B. MAYER, et. al.'s ("The Landlord") rejection of Gallo Nero's renewal option is declared without effect; and, (3) the term of the lease, as renewed, remains in effect until February 28, 2016 unless other factors come into being.

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

For the reasons stated on the March 18, 2013 record (Angela Tolas, OCR) and in this decision, the court grants Gallo Nero's relief requested in the OSC and declares the lease, as renewed, to be in effect until February 28, 2016, absent any intervening events which would interfere with the valid lease or cause the court to invalidate the commercial lease.

Gallo Nero entered into this commercial lease with Bordeliw, Inc. and Bertbern Realty, Inc. on February 15, 2001. The lease permitted the tenant to operate a restaurant at the premises. The lease required, among many other provisions, that the tenant maintain valid Insurance Policies to cover fire and comprehensive General Liability Insurance which was mandated to list the Owner as an additional insured or loss payee and which had an additional provision that the insurance could not be cancelled or amended. See Art. 47 Feb. 15, 2001 Lease.

The lease also included an Option to Renew which reads:

Provided the Tenant is not in default under the terms of this Lease, the Tenant shall have an option to renew this Lease for one (1) additional three (3) year term. The option to renew shall be exercised by delivery to the Landlord of written notice of Tenant's intention to exercise such option within one hundred and eighty (180) days prior to the termination of the original term of this Lease. . . .

(Art. 52, Feb. 15, 2001 Lease.) The lease ran from March 1, 2001 ("Commencement Date") to February 28, 2013 ("Expiration Date"). The "180 day period prior to the termination of the original term of this Lease" began on September 1, 2012.

It is agreed that Gallo Nero served their written notice of their intention to renew their lease on September 3, 2013. On September 13, 2012, the Defendant's attorney sent a letter to Gallo Nero "rejecting" the First Option Exercise Notice on the grounds that it was (a) untimely; (b) the letter was not served pursuant to the notice provisions of the Lease; (c) the notice "was received from an unknown attorney and did not contain proof of that attorney's authority to bind [Gallo Nero]"; and (d) Gallo Nero was in default of the Lease due to its failure to furnish proper insurance policies covering the Leased Premises. (Amended Complaint §13.)

At the hearing on this motion on March 17, 2013, the Court heard argument on each of the four (4) reasons the Landlord claimed it was correct in refusing to renew Gallo Nero's commercial lease.

The Landlord first claimed Gallo Nero's notice was untimely because Gallo Nero mailed its First Option Notice 178 days prior to the expiration of the lease term and mailed its Second Option Notice approximately 161 days prior to the lease

term expiration. Landlord stated that the language "The option to renew shall be exercised by delivery to Landlord of written notice of Tenant's intention to exercise such option *within* one hundred and eighty (180) days prior to the termination of the original term of the lease," Art. 52 September 1, 2001 Lease (emphasis added), actually meant that the Tenant had to give notice BEFORE the 180 day period.

Landlord stated: "Indeed, Plaintiff's nonsensical reading of the Article 52 renders Defendants' right to advance notice of the Option exercise effectively meaningless. . . .Plaintiff's absurd interpretation subverts the intent of the Option. . . ." Defendant's Memorandum of Law in Opposition (Memo in Opp.) p.11.

The Merriam-Webster's definition of "within" is: 1. inside; 2. inwardly. The court finds that the clear interpretation of "*within* one hundred and eighty (180) days" means from 180 days up until the day before "the termination of the original term of the lease." See *Lopez v. Fernandito's Antique, Ltd.*, 305 A.D.2d 218, 219 (1st Dep't 2003) ("Clear and unambiguous terms should be understood in their plain, ordinary, popular and nontechnical meaning."). While landlord's argument that Article 52 should be read that the notice had to be given *prior* to the 180 days, the language of the lease says "within." The lease and its Riders were prepared by the Landlord. Despite the Landlord's indignant arguments, the language of Article 52 does not clearly state that the Tenant has to exercise his option to renew the lease *before* 180 days prior to the termination of the lease. Based on the actual language of the contract, the court finds that Gallo Nero exercised its option in a timely manner.

The Landlord next complains that Gallo Nero was not served pursuant to the terms of the lease. Article 52 – Option to Renew – requires Gallo Nero to provide the Landlord with "written notice" or his exercise of the option to renew. Article 43 - Notices - states as follows:

43.1 Any notice . . . permitted or required to be given pursuant to the terms, covenants and conditions of this Lease . . . shall be in writing and, unless otherwise required by law or regulation, be sent registered or certified mail, return receipt requested.

On September 3, 2012, Gallo Nero through its attorney, served a written notice concerning its option to renew pursuant to Article 52 on all of the defendants at the address stated in Article 43.1.1 of the lease namely, "C/O Ira Meister, Matthew Adams Properties, Inc., 127 East 59th Street, Third Floor, New York, NY 10022." The Notice was signed by Michael J. Roberts, Esq., Roberts & Roberts and Gallo Nero Corp. By Marcello Assante, President. The Notice was sent Certified Mail, Return Receipt Requested. Attached to the OSC as Exhibit B is a copy of the receipt for the Certified Mail and a copy of the Return Receipt dated September 5, 2012. The return receipt bears the same identification number as the US Postal receipt for the certified mail.

On September 13, 2012, the Landlord sent a letter, by Certified Mail, Return Receipt Requested rejecting Gallo Nero's September 3, 2012 letter because "among other things: ". . . (iii) The Notice was received from an unknown attorney and did not contain proof of that attorney's authority to bind Tenant. . . ." (Letter from Newman Ferrara LLP, Sept. 13, 2012, p. 1.)

On September 19, 2012, Gallo Nero sent a second letter to all the Landlord names listed in the Lease from Marcello Assante, President of Gallo Nero, again notifying Landlord of the Tenant's desire to exercise its option to renew the lease. The letter was sent by Certified Mail Return Receipt Requested. On September 21, 2012, the Gallo Nero letter was received and signed for by a person. The identification numbers were same on the UPS receipt and on the Electronic Return Receipt signature page. The USPS.com generated a comprehensive receipt which further confirms that the letter was sent certified mail return receipt requested.

The court finds that both the first and second Notices were properly sent pursuant to the Notice provisions in the Lease. The first Notice, while under the letterhead of "Roberts & Roberts, Attorneys at Law" and signed by Michael J. Roberts, was countersigned by Marcello Assante with a signature identification line of "Gallo Nero Corp. By: Marcello Assante, President." The landlord's argument that the letter was "from an unknown attorney and did not contain proof of that attorney's authority to bind Tenant" ignores these clearly visible signatures on the letter. The face of the letter demonstrates that it was sent by an attorney, and the signature of the president of the Tenant next to the attorney's name, indicates authority. Defendants have offered no material issues of fact on this point.

The only remaining issue is Landlord's claim that "Gallo Nero was in default of the Lease due to its failure to furnish proper insurance policies covering the Leased Premises." (Amended Complaint §13.) Specifically, the attorney for the Landlord claimed in its September 13, 2012 letter that "Tenant is currently in default of the Lease in that Tenant has failed to maintain the insurance policies required by Articles 6, 8 and 47 of the Lease, and has failed to furnish Landlord with proof of the required insurance policies." (Letter from Newman Ferrara LLP, Sept. 13, 2012, p. 1.)

In response to this assertion, Marcello Assante avers in his reply affidavit that Gallo Nero "has continuously carried the requisite insurance coverage for the Leased Space in compliance with Article 47 of the Lease at all relevant times, including the time Defendants purported to 'reject' Gallo Nero's Notices in September 2012." (Reply Affidavit of Marcello Assante ("Reply Assante Aff.") §3.)

Marcello Assante, in support of this statement provides copies of the relevant insurance policies running from 12/30/10 to 12/30/11 (Reply Assante Aff. Ex. A); 12/30/11 to 12/30/12 (Reply Assante Aff. Ex. B). In both of these insurance policies, Gallo Nero listed as an "Additional Insured" Matthew Adam Properties. On August 2, 2012, Matthew Adam sent a letter addressed to "Dear Commercial Tenant" asking Gallo Nero to add Bleecker & Horatio Associates, c/o Matthew Adam Properties, Inc. as a new

additional insured in addition to Matthew Adam Properties, Inc. On September 17, 2012, Gallo Nero had its insurance policy amended to include both Matthew Adam Properties, Inc. and Bleecker & Horatio Associates c/o Matthew Adam Properties, Inc. as additional insured. (Reply Assante Aff. Ex. D.) Indeed, on November 15, 2012, Gallo Nero renewed its policy for another year from 12/30/12 to 12/30/13. (Reply Assante Aff. Ex. E.) This current policy has both Matthew Adam Properties, Inc. and Bleecker & Horatio Associates c/o Matthew Adam Properties, Inc. as additional insured. *Id.*

It is true, as Marcello Assante states in his affidavit, that Gallo Nero received two consecutive "Notice of Cancellations" for non-payment of the insurance premiums. The first on February 21, 2012 stating the policy would be terminated on March 9, 2012. (Reply Assante Aff. Ex. F.) On March 7, 2012, Gallo Nero received "Notice of Reinstatement" from AMIC (Reply Assante Aff. Ex. G) which states that the insurance was in full force and effect prior to the cancellation date of March 9, 2012. In the same way, Gallo Nero received a "Notice of Cancellation" on March 26, 2012 (Reply Assante Aff. Ex. H) which stated that the insurance policy would be terminated effective April 12, 2012. Gallo Nero received a "Notice of Reinstatement" from AMIC on April 9, 2012 (Reply Assante Aff. Ex. I) three days prior to the termination date of April 12, 2012.

After reading Marcello Assante's affidavit and reviewing all of the documents in the case, the Court finds that Gallo Nero has had valid insurance policies in effect from 2010 to the present day. It is clear that Gallo Nero did fail to properly notice the Landlord that there were valid insurance policies in effect. While the court admonished Gallo Nero not to fail to notify the Landlord again of anything and everything required under the lease, the court did not find that Gallo Nero's failure to notify to be so egregious as to require the lease not to be renewed.

(Order on the following page.)

It is therefore

ORDERED, that Gallo Nero's motion for summary judgment is granted in full;
and it is further


ORDERED, that the Plaintiff's request for a declaration that Gallo Nero validly
exercised its option to renew the subject commercial lease is granted; and it is further

ORDERED, that the subject lease is renewed for a term from March 1, 2013 until
February 28, 2016.

This constitutes the decision and order of the court.

Dated:

April 4, 2013


EILEEN BRANSTEN, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST