SHORT FORM ORDER

INDEX No. 13-9358

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. ANDREW G. TARANTINO, JR.
Acting Justice of the Supreme Court

MOTION DATE 10-30-13
ADJ. DATE 2-25-14
Mot. Seq. # 001 - MD

SPIRO & NIKETAS FOOD CORP., d/b/a MVP DINER,

Plaintiff,

- against -

MLO GREAT SOUTH BAY LLC and MALL PROPERTIES, INC.,

Defendants.

JAMES E. CLARK, ESQ.
Attorney for Plaintiff
57 West Main Street, Suite 220
Babylon, New York 11702

HERRICK, FEINSTEIN LLP
Attorneys for Defendants
Two Park Avenue
New York, New York 10016

Upon the following papers numbered 1 to 35 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 6 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 7-12; 13-16; 17-30 ; Replying Affidavits and supporting papers 31-35 ; Other Defendant's memoranda of law ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiff Spiro & Niketas Food Corp. for, inter alia, a preliminary injunction enjoining defendants MLO Great South Bay, LLC, and Mall Properties, Inc., from taking any further actions to construct additional commercial space for use by Red Robin International Inc. is denied; and it is

ORDERED that the Court, upon its own motion, searches the record pursuant to CPLR 3212(b) and awards defendants MLO Great South Bay, LLC, and Mall Properties, Inc., summary judgment dismissing plaintiff's complaint.

Plaintiff Spiro & Niketas Food Corp. commenced this action to recover damages it allegedly sustained as a result of the breach of a restrictive covenant contained in its lease agreement for use of commercial space inside the Great South Bay Shopping Center located in West Babylon, New York. MVP Diner Inc., the predecessor in interest under the lease, entered into a 10-year lease agreement with

Montauk Shopping Center Associates in February 2002, with an option to renew for five years at the end of that period. On January 31, 2005, Montauk Shopping Center Associates merged into defendant MLO Great South Bay, LLC, which possesses an ownership interest in the shopping center. After the merger, defendant Mall Properties, Inc., was hired as the managing agent for the premises. Shortly thereafter, in February 2006, Spiro & Niketas Food Corp. purchased MVP Diner, Inc. (herein referred to as MVP) and assumed the lease, which it renewed for an additional five years on August 27, 2012. The restrictive covenant contained in the lease allegedly prohibits the landlord from entering into new leases with any other "diner type" restaurants having a menu similar to MVP's menu. By its complaint, MVP alleges, inter alia, that MLO breached the restrictive covenant when it entered into new agreements for the lease of commercial space in the shopping center with nonparties Red Robin International ("Red Robin") and Panera Bread Company ("Panera Bread"). The complaint alleges five causes of action, including claims for breach of contract, tortious interference, and for the recovery of attorneys' fees and expenses incurred in connection with the prosecution of the action.

By way of an order to show cause dated October 15, 2013, MVP now moves for, inter alia, an order granting summary judgment on its first cause of action for breach of contract and enjoining MLO, during the pendency of this lawsuit, from taking any further actions to construct additional restaurant space for use by Red Robin. In support of its application, MVP submits copies of the pleadings, a copy of the lease agreement, copies of the restaurants' respective menus, and a map of the shopping center. MLO opposes the motion, arguing, among other things, that it did not breach the lease agreement, since Red Robin is not a "diner like" restaurant, and that MVP failed to establish its entitlement to the imposition of a preliminary injunction. MLO further asserts that MVP's request for injunctive relief, which was not pleaded in its complaint, is procedurally improper because it seeks to alter, rather than maintain, the status quo.

Section 1.1(1) of the subject lease agreement, entitled "Permitted Use" provides as follows:

> An eat in sit down restaurant in the diner format of both counter and table service, featuring a typical "diner menu" of burgers, salads, sandwiches, soups, eggs, other breakfast items, pastries, pies and non-alcoholic beverages, together with incidental take out service. Although the menu may contain incidental prepared food of Italian or Chinese origin, under no circumstances whatsoever, shall Tenant offer pizza or an extensive Italian or Chinese cuisine selection.

Section 16.1 of the lease agreement sets forth the restriction prohibiting the landlord from entering into additional leases with "diner" type restaurants. It states, in relevant part, as follows:

> Provided Tenant is operating its business in the Leased Premises, as set forth in Sections 1.1(1) and 9.1 hereof, Landlord covenants, warrants and represents that it will not during the term of this Lease, rent or permit any space in the Shopping Center to be used predominantly (it being agreed that use of the fifteen (15%) percent or more of the sales area of any such space shall be deemed predominant) as a "diner" type restaurant, having a menu similar to that attached hereto, as Exhibit D.

Additionally, section 12.13 of the agreement, entitled "Interpretation," provides, in relevant part, as follows:

> All provisions of this Lease are to be construed as covenants and agreements as though the words importing such covenants and agreements were used in each separate provision hereof. Although this Lease was drawn by Landlord, this Lease shall not reason by thereof be construed for or against Landlord or tenant, but this lease shall be interpreted in accordance with the general tenor of the language in an effort to reach the intended result.

The lease agreement MLO entered with Red Robin contains the following restriction:

> Landlord covenants and agrees that, during the Lease Term, so long as Tenant is open and operating . . . Landlord will not knowingly and intentionally rent, lease or consent to any portion of the Shopping Center to be leased, managed, used or occupied for a sit down, full service, casual style restaurant or "fast casual" style restaurant engaged primarily or specializing in the sale of hamburgers on its current menu, including but not limited to Chili's, TGI Friday's, Max & Erma's, O' Charley's, Fuddruckers's, Ruby Tuesday's, Applebee's, Mimi's Café, Steak n' Shake, Cheeseburger in Paradise, The Greene Turtle, Five Guys Burgers and fries, Smashburger or any other entity whose name contains the words "hamburger" or "burger".

To obtain a preliminary injunction the movant has the burden of demonstrating a likelihood of success on the merits, irreparable injury in the absence of an injunction, and a balance of the equities in its favor (*see* CPLR 6301; ***Aetna Ins. Co. v Capasso***, 75 NY2d 860, 862, 552 NYS2d 918 [1990]; ***Dixon v Malouf***, 61 AD3d 630, 875 NYS2d 918 [2d Dept 2009]; ***Coinmach Corp. v Alley Pond Owners Corp.***, 25 AD3d 642, 643, 808 NYS2d 418 [2d Dept 2006]). "[A]bsent extraordinary circumstances, a preliminary injunction will not issue where to do so would grant the movant the ultimate relief to which he or she would be entitled in a final judgment" (***SHS Baisley, LLC v Restland, Inc.***, 18 AD3d 727, 728, 795 NYS2d 690 [2d Dept 2005]; *see also* ***St. Paul Fire & Mar. Ins. Co. v York Claims Serv.***, 308 AD2d 347, 765 NYS2d 573 [1st Dept 2003]). Furthermore, a preliminary injunction is inappropriate where the movant has failed to demonstrate that an award of money damages will not make it whole (*see* ***Somers Assoc. v Corvino***, 156 AD2d 218, 548 NYS2d 480 [1989]), or where its pleadings requests only an award of damages (*see* ***Credit Agricole Indosuez v Rossiyskiy Kredit Bank***, 94 NY2d 541, 545-46, 708 NYS2d 26 [2000]; ***Matter of Gebman v Pataki***, 256 AD2d 854, 855, 681 NYS2d 701 [3d Dept 1998]).

Here, MVP failed to establish its entitlement to the imposition of a preliminary injunction by demonstrating a likelihood of success on the merits, that the equities were balanced in its favor, or that it would otherwise suffer irreparable injuries (*see* CPLR 6301; ***Aetna Ins. Co. v Capasso***, *supra*; ***Credit Agricole Indosuez v Rossiyskiy Kredit Bank***, *supra*; ***Somers Assoc. v Corvino***, *supra*). Significantly, MVP, which did not assert a claim for injunctive relief in its complaint, failed to demonstrate that any harm it would suffer would not be compensable by money damages (*see* ***Lombard v Station Sq. Inn Apts. Corp.***, 94 AD3d 717, 942 NYS2d 116 [2d Dept 2012]; ***Trump on the Ocean, LLC v Ash***, 81

AD3d 713, 916 NYS2d 177 [2d Dept 2011]; ***Mar v Liquid Mgt. Partners, LLC***, 62 AD3d 762, 880 NYS2d 647 [2d Dept 2009]). Further, the equities are not balanced in MVP's favor, since it is undisputed that MVP failed to seek injunctive relief for nine months following the filing of its complaint, during which time MLO and Red Robin expended in excess of $700,000 in evaluating and constructing the new restaurant (*see* ***Bailey v Chernoff***, 45 AD3d 1113, 846 NYS2d 462 [2d Dept 2007]; ***County of Orange v Lockey***, 111 AD2d 896, 490 NYS2d 605 [2d Dept 1985]). Additionally, where, as here, the restrictive covenant in question fails to define "diner type restaurant" and requires the parties to consult extrinsic evidence, namely the menu of the proposed new restaurant, to determine its meaning, MVP has failed to demonstrate its likelihood of success on the merits of the case (*see* ***Halfond v White Lake Shores Assn., Inc.***, 114 AD3d 1315, 981 NYS2d 499 [4th Dept 2014]; ***Birch Tree Partners, LLC v Windsor Digital Studio, LLC***, 95 AD3d 1154 [2d Dept 2012]). Therefore, the branch of MVP's motion seeking the imposition of a preliminary injunction enjoining MLO from taking any further actions to construct additional commercial space for use by Red Robin is denied.

As to the branch of MVP's motion for partial summary judgment on its breach of contract claim, it is well settled that the law favors the free and unobstructed use of real property (*see* ***Witter v Taggart***, 78 NY2d 234, 237, 573 NYS2d 146 [1991]; ***Huggins v Castle Estates***, 36 NY2d 427, 430, 369 NYS2d 80 [1975]; ***E.M.R. Management Corp. v Halstead Harrison Assocs.***, 299 AD2d 393, 749 NYS2d 569 [2002]; ***Turner v Caesar***, 291 AD2d 650, 737 NYS2d 426 [2002]; ***Thrun v Stromberg***, 136 AD2d 543, 523 NYS2d 163 [2d Dept 1988]). Therefore, a restrictive covenant must be strictly construed (*see* ***Witter v Taggart***, *supra*; ***Huggins v Castle Estates***, *supra*; ***Thrun v Stromberg***, *supra*), and will not be enforced unless the party seeking to enforce it establishes a violation by clear and convincing evidence (*see* ***Witter v Taggart***, *supra*; ***Bear Mt. Books v Woodbury Common Partners***, 232 AD2d 595, 649 NYS2d 167 [2d Dept 1996]). Additionally, whether a provision of a contract is ambiguous is generally a question of law (*see* ***Hartford Acc.& Indem. Co. v Wesolowski***, 33 NY2d 169, 172, 350 NYS2d 895 [1973]), and even if an ambiguity is found to exist, summary judgment is appropriate where "the equivocality [may] be resolved wholly without reference to extrinsic evidence" (***Hartford Acc.& Indem. Co. v Wesolowski***, *supra* at 172; ***Carpinelli v MDF Dev., LLC***, 245 AD2d 866, 666 NYS2d 337 [3d Dept 1997]; ***Gitlen v Gallup***, 241 AD2d 856, 660 NYS2d 500 [3d Dept 1997]). Furthermore, where the language used in a restrictive covenant is equally capable of two interpretations, the interpretation which limits the restriction must be adopted (*see* ***Huggins v Castle Estates***, *supra*; ***Kaufman v Fass***, 302 AD2d 497, 756 NYS2d 247 [2d Dept 2003]; ***Mambretti v Poughkeepsie Galleria Co.***, 288 AD2d 443, 732 NYS2d 909 [2d Dept 2001]; ***Sunrise Plaza Assocs. v International Summit Equities Corp.***,152 AD2d 561, 543 NYS2d 490 [1989]; ***Gitlen v Gallup***, 241 AD2d 856, 660 NYS2d 500 [3d Dept 1997]; ***Thrun v Stromberg***, *supra*).

Here, plaintiff failed to establish by clear and convincing evidence that the restrictive covenant in question, which purports to exclude other "diner type" restaurants, prohibits MLO from leasing commercial space in the shopping center to Red Robin and Panera Bread (*see* ***Blueberries Gourmet, Inc. v Aris Realty Corp.***, 291 AD2d 520, 737 NYS2d 644 [2d Dept 2002]; ***Mambretti v Poughkeepsie Galleria Co.***, *supra*; ***Bear Mt. Books v Woodbury Common Partners***, *supra* ***Carpinelli v MDF Dev., LLC***, *supra*; ***Gitlen v Gallup***, *supra*). Significantly, the word "diner" has been defined as "a small, informal, and inexpensive restaurant that looks like a railroad car" (*see* http://www.learnersdictionary.com/definition/diner). Although the lease agreement does not explicitly

define the word, section 1.1(1) of the lease evinces the parties' expectation that a "diner type" restaurant would be limited to a small "eat in sit down restaurant in the diner format of both counter and table service, featuring a typical "diner menu" of burgers, salads, sandwiches, soups, eggs, other breakfast items, pastries, pies and non-alcoholic beverages." Consistent with this language, the list of items contained in MVP's menu, which was incorporated into the lease agreement, are limited to these categories, are relatively inexpensive, and are more reflective of classic American cuisine. In contrast, the menus of Panera Bread and Red Robin are more formulaic, purport to offer signature items unique to their respective chain restaurants, and are more formatted to invoke food items associated either with a "bakery" or a "fast casual" style restaurant. Furthermore, even assuming, arguendo, that the term "diner type" restaurant was ambiguous and, therefore, susceptible to more than one reasonable interpretation, the Court would still be required to adopt the less restrictive interpretation of the covenant, thereby, concluding that Panera Bread and Red Robin are not among the "diner type" restaurants restricted thereunder (*see* ***Huggins v Castle Estates***, *supra*; ***Ernie Otto Corp. v Inland Southeast Thompson Monticello, LLC***, 91 AD3d 1155, 936 NYS2d 756 [3d Dept 2012]; ***Kaufman v Fass***, *supra*; ***Mambretti v Poughkeepsie Galleria Co.***, *supra*; ***Sunrise Plaza Assocs. v International Summit Equities Corp.***, *supra*). The Court notes that it did not consider the copies of MVP's current menu and pictures of its restaurant, submitted for the first time with its reply papers (*see* ***Klimis v Lopez***, 290 AD2d 538, 736 NYS2d 697 [2d Dept 2002]; ***Dannasch v Bifulco***, 184 AD2d 415, 585 NYS2d 360 [1st Dept 1992]). Accordingly, MVP's motion for partial summary judgment in its favor is denied.

In light of the foregoing determination, the court, upon its own motion, searches the record and awards defendants MLO and MPI summary judgment dismissing plaintiff's complaint. Significantly, having determined that MLO did not breach the restrictive covenant when it leased commercial space to Red Robin and Panera Bread, plaintiff's first and second causes of action asserting breach of contract are without merit. For the same reason, plaintiff's third and fourth causes of action alleging that MPI tortiously interfered with its contract when it caused MLO to enter new lease agreements with Red Robin and Panera bread are invalid (*see* ***NBT Bancorp v Fleet/Norstar Fin. Group***, 87 NY2d 614, 641 NYS2d 581 [1996]; ***Alavian v Zane***, 101 AD3d 475, 956 NYS2d 10 [1st Dept 2012]; ***Ulysses I & Co., Inc. v Feldstein***, 75 AD3d 990, 906 NYS2d 380 [3d Dept 2010]). Lastly, plaintiff's fifth cause of action asserting a claim pursuant to paragraph 11.2 (e) of the lease agreement, which requires MLO to pay MVP's attorneys fees if it breaches the restrictive covenant, is similarly deficient.

Dated: 6.4.2014

A.J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION