

**Katz v 61 West 9 Tenants Corp.**

2014 NY Slip Op 31947(U)

July 23, 2014

Sup Ct, New York County

Docket Number: 102105/12

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

RACHELLE KATZ,  
Plaintiff,

Index No.: 102105/12

Motion Date: 03/08/13

- v -

Motion Seq. No.: 02

61 WEST 9 TENANTS CORP.,  
Defendant.

Motion Cal. No.: \_\_\_\_\_

The following papers, numbered 1 to 7 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits \_\_\_\_\_  
Answering Affidavits - Exhibits \_\_\_\_\_  
Replying Affidavits - Exhibits \_\_\_\_\_

PAPERS NUMBERED	
1 - 3	_____
4, 5	_____
6, 7	_____

Cross-Motion:  Yes  No

**FILED**

JUL 28 2014

NEW YORK  
COUNTY CLERK'S OFFICE

Upon the foregoing papers,

In this commercial landlord-tenant action where the residential cooperative is the landlord, the legal issue on the parties' dueling summary judgment motions is whether the plaintiff-tenant violated the Professional Lease dated October 27, 1983 between the defendant cooperative and the plaintiff's assignor (the "Lease"), by subletting the premises.

As the defendant concedes that the use of the premises by the plaintiff and the alleged sublessees is not itself violative of the Lease, the issue is whether the sublets are permissible

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  
 SETTLE/SUBMIT ORDER/JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING

and if so on what terms. Defendants, asserting that any subletting of the premises is subject to a Cooperative Sublet Policy adopted by the defendant's Board of Directors on April 1, 2008, served a Notice of Default with Notice to Cure upon plaintiff on February 22, 2012. The Notice asserts the plaintiff's alleged failure to pay sublet fees as the basis of the default.

Analysis of the parties' claims begins by noting that Paragraph 12 of the Lease provides in pertinent part that

Except as provided in Paragraph 34 of this lease, the Lessee shall not sublet the whole or any part of the apartment or renew or extend any previously authorized sublease, unless consent thereto shall have been duly authorized by a resolution of the Directors, or given in writing by a majority of the Directors or, if the Directors shall have failed or refused to give such consent, then by Lessees owning at least sixty-five (65%) percent of the then issued shares of the Lessors. . . There shall be no limitation on the right of Directors or Lessees to grant or withhold consent, for any reason or for no reason to a subletting.

Paragraph 11 of the Lease, "Use of Premises" states

The Lessee may occupy or use the apartment or permit the same or any part thereof to be occupied or used as a doctor's office only. However, Lessee has the option, at Lessee's sole expense, to perform the necessary alterations and to apply for and obtain a new or amended Certificate of Occupancy at any time so as to permit residential occupancy of Lessee's apartment, provided there is no material adverse effect upon any other tenant or any other shareholder, and, upon completion of such alteration and issuance of such new or amended Certificate of Occupancy, Lessee will have the right, upon request and in consideration for Lessee either assigning or surrendering this Lease (at the option of the Apartment Corporation) to the Apartment Corporation, to have the Apartment Corporation (1) allocate shares of

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its stock to the apartment and issue same to Lessee, and (2) to execute and issue a proprietary lease for the apartment in place and in stead of this Professional Lease, whereupon Lessee will become a tenant-shareholder of the Apartment Corporation. . .

Paragraph 34 (a) states that

The term "Unsold Leases" means and has exclusive reference to the leases for the professional apartments at the building which were issued to the Lessor's grantor(s) or individuals produced by the Lessor's grantor(s) pursuant to the Offering Statement-Plan of Cooperative Organization or Contract of Sale under which the Lessor acquired title to the building; and, all leases which are Unsold Leases retain their character as such (regardless of transfer) until (1) such leases are held by a purchaser for bona fide occupancy (by himself or a member of his family) of the apartment to which such shares are allocated, or (2) the holder of such lease (or a member of his family) becomes a bona fide occupant of the apartment. This Paragraph 34 shall become inoperative as to this lease upon the occurrence of either of said events with respect to the Unsold Lease held by the Lessee named herein or his assignee. In connection with the sale of Unsold Leases, Lessor will, on request, deliver to the Lender the standard recognition agreement then being used by banks or other lenders. Upon sale of this Lease by Lessor's grantor or by individuals produced by Lessor's grantor (or if this Lease is originally issued to individuals who are not Lessor's grantors or produced by Lessor's grantors), Lessor's grantors shall be completely relieved from any further obligation or liability under this Lease and Lessor will have no recourse against Lessor's grantor with respect to this Lease.

And Paragraph 34 (b) of the Lease provides

(b) Neither the subletting of the apartment from time to time nor the assignment of this lease by the holder of an Unsold Lease for a professional apartment of shall require any consent whatever or the payments of any fees, expenses, charges or contributions of any sort whatsoever by the holder of an Unsold Lease. Without limiting the extent of the foregoing, no such subletting or assignment shall require the consent to which reference is made in Paragraphs 12 and 13(a) (iv) of this lease or the payment

of the fees or expenses to which reference is made in Paragraph 13(a)(iii). No charge of any kind shall be asserted or levied by Lessor or its agents in connection with such subletting or assignment of lease.

Therefore the Lease governing the premises at issue in this case makes clear that a sublease by the plaintiff requires the consent of the defendant unless the Lease comes within the definition of an Unsold Lease. Plaintiff argues that because the Lease qualifies as an Unsold Lease, the premises can be sublet without consent or any charge by the defendant.

According to the plaintiff, in or about 1990, Iron Bound Metal Products, Inc., a corporation owned or controlled by plaintiff's father, purchased the Professional Lease for the aforementioned premises. Pursuant to an Assignment of Lease dated October 3, 2003, a copy of which is annexed to the moving papers (the "Assignment"), Iron Bound Metal Products, Inc. assigned the Professional Lease to plaintiff. Plaintiff's father signed the Assignment as President of Iron Bound. The Assignment as executed contained a paragraph that was struck out and initialed pursuant to which Iron Bound would have confirmed that Iron Bound and Katz were holders of an Unsold Lease pursuant to Section 34 of the Lease. As part of the assignment transaction, plaintiff executed a letter agreement dated October 3, 2003, in favor of defendant seeking defendant's consent to the assignment. Plaintiff agreed that in the event of any future sale a sum equal

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to five percent of the plaintiff's net profit from the sale would be payable by plaintiff to defendant.

The court agrees with plaintiff's argument that under the facts presented the Lease at issue here retains its character as an Unsold Lease based upon a reasonable interpretation of its terms. There is no dispute that at the time the Lease was entered into the covered premises was a "professional apartment" as defined in Paragraph 34 (a) of the Lease based upon the restriction of use in Paragraph 11 of the Lease which states that the premises is to be used as a "doctor's office only." The original tenant on the Lease was "61 West 9 Associates" and plaintiff here is the assignee of that tenancy pursuant to the Assignment.

Defendant argues that plaintiff cannot avail herself of the status of the holder of an Unsold Lease because pursuant to Paragraph 34 (a) of the Lease plaintiff is holding the Lease for her occupancy and she is a family member of the assignor pursuant to the Assignment. However, the court agrees with plaintiff's assertion that the "bona fide occupancy" referred to in Paragraph 34 (a) refers to "residential occupancy" as set forth in Paragraph 11 of the Lease. The construction proposed by the defendant, that plaintiff's occupancy and use of the premises as a business comes within the termination of Unsold Lease provision of Paragraph 34 (a) is contrary to the nature of the Lease as set

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forth in Paragraph 11 which clearly states that the premises may only be used for a doctor's office unless the premises is converted to residential occupancy at which time shares may be allocated to the premises. Such shares as described in Paragraph 34 (a) do not exist in this case of the plaintiff because no conversion has taken place. To the extent that defendant relies upon Paragraph 34 (a) (2) that plaintiff's occupancy without conversion terminates the leasehold's status as an Unsold Lease, defendant misreads that provision by failing to acknowledge that Paragraph 11 of the Lease specifically authorizes plaintiff to occupy the apartment as a doctor's office. Therefore the only plausible interpretation of "occupancy" in Paragraph 34 (a) of the Lease is residential occupancy. " See Katsam Holdings LLC v 419 W. 55th St. Corp., 58 AD3d 444, 445 (1<sup>st</sup> Dept 2009) (court correctly found plaintiff to be a holder of unsold shares entitled to use the unit as a veterinary clinic, and to make alterations for such use, without the coop's consent where lease expressly permitted such use and there was mutual mistake in utilizing residential lease language); see also Kralik v 239 E. 79th St. Owners Corp., 54 AD3d 267, 268 (1<sup>st</sup> Dept 2008) (plaintiffs declared holders of unsold shares where no issue of fact as to lack of evidence of plaintiffs' residential occupancy); contrast Thompson v 490 W. End Apartments Corp., 252 AD2d 430, 434-35 (1<sup>st</sup> Dept 1998) (status as holder of unsold

shares was extinguished, pursuant to paragraph 38 (a), by plaintiff's purchase of the shares with the intention of occupying the premises as a residence based upon evidence of residential loan application).

Evidence cited by defendant that plaintiff failed to confirm her status as the holder of an Unsold Lease in the text of the Assignment does not change this result as there is no requirement in the controlling document, the Lease, that an assignee confirm such status and in the absence of an express waiver such status is not lost. See L J Kings, LLC v Woodstock Owners Corp., 46 AD3d 321, 322 (1<sup>st</sup> Dept 2007) (whether plaintiff waived or forfeited its rights as a holder of unsold shares is issue of fact to be established by challenger).

Therefore, pursuant to the terms of the controlling Lease, the court finds that plaintiff is the holder of an Unsold Lease and is therefore entitled to sublet the premises without consent or fee pursuant to the Lease terms. See Likokoas v 200 E. 36th St. Corp., 48 AD3d 245, 246 (1<sup>st</sup> Dept 2008) (plaintiffs are expressly exempt from defendant's subletting fees and the requirement that defendant consent to any subletting).

The court will however grant defendant's motion for summary judgment dismissing the third and fourth causes of action for breach of contract and attorney's fees respectively as plaintiff has failed to adduce any evidence that any term of the subject

Settlement Agreement was breached. As the Settlement Agreement did not concern either the subletting of the premises or the plaintiff's status as a holder of an Unsold Lease, these causes of action are properly dismissed.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is GRANTED as to the first and second causes of action in the complaint; and it is further

ORDERED AND ADJUDGED that defendant is hereby PERMANENTLY ENJOINED and RESTRAINED from taking any action to terminate plaintiff's leasehold interest based upon the February 22, 2012 Notice of Default with Notice to Cure; and it is further

ORDERED, ADJUDGED and DECLARED that plaintiff is the holder of an Unsold Lease pursuant to the Professional Lease dated October 27, 1983 between the defendant and the plaintiff's assignor and that pursuant to Paragraph 34 (b) of said Lease no consent of defendant is required to sublet the premises nor shall defendant assert any charge or levy in connection with any sublet; and it is further

ORDERED that plaintiff's motion for summary judgment is otherwise denied; and it is further

ORDERED and ADJUDGED that defendant's cross-motion for summary judgment is GRANTED only to the extent that the third and

fourth causes of action in the complaint are hereby DISMISSED;  
and it is further

ORDERED that the Clerk is directed to enter judgment in  
accordance with the foregoing.

This is the decision and order of the court.

Dated: July 23, 2014

ENTER:

*[Handwritten Signature]*

J.S.C.

**DEBRA A. JAMES**

**FILED**  
JUL 28 2014  
NEW YORK  
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