

E-Z Eating 41 Corp. v H.E. Newport, LLC

2018 NY Slip Op 32427(U)

September 21, 2018

Supreme Court, New York County

Docket Number: 653654/2012

Judge: Shlomo S. Hagler

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM PART 17
----- X

E-Z EATING 41 CORP. and E-Z EATING 47 CORP.,

Index No. 653654/2012
[Motion Sequence
Nos. 006 & 007]

Plaintiffs,

DECISION/ORDER

- against -

H.E. NEWPORT, LLC and HTS-NY LLC,
----- X
Defendants.

SHLOMO S. HAGLER, J.

This is an action to recover, inter alia, damages for breach of a commercial lease.

Plaintiffs move for summary judgment on the issue of liability on the first cause of action in their amended verified complaint alleging breach of the lease and dismissing defendants' counterclaim and certain affirmative defenses asserted by defendants (Motion Sequence No. 006). Defendants move for summary judgment dismissing the amended verified complaint in its entirety and on the issue of liability on their counterclaim (Motion Sequence No. 007). For the reasons that follow, plaintiffs' motion is denied in its entirety, and defendants' motion is granted in part and denied in part.

I. Background

A. The Lease

Elizabeth and Luan Sadik (the Sadiks) are the principals of plaintiffs E-Z Eating 41 Corp. (E-Z 41) and E-Z Eating 47 Corp. (E-Z 47). The Sadiks each own 50% of each corporation's shares. On or about July 3, 1997, E-Z 41 entered into a 20-year commercial lease with defendants' predecessor-in-interest for the rental of a ground floor store, together with a portion of

the basement of a building located at 485 Fifth Avenue in Manhattan (the lease). Elizabeth Sadik executed the lease on behalf of E-Z 41. As relevant here, the lease and riders include the following provisions.

Paragraph 2 of the lease states: "Tenant shall use and occupy demised premises for restaurant purposes. See Article 41. and for no other purposes. Tenant shall . . . not violate Article 37 hereof" (emphasis added). Subparagraphs (a) and (b) of article 41, entitled "Use and Occupancy," of a "Rider" to the lease state:

"(a) Tenant shall operate its business in the Demised Premises during the Term and occupy the Demised Premises solely as a restaurant with table-seating operated under the name and style of 'Burger King' for on and off site consumption of food and beverage and for no other purpose. The Tenant is prohibited from operating a bar within the Demised Premises. As a material inducement for Landlord to enter into this lease, Tenant shall not operate the Demised Premises or any portion thereof or permit the same to be operated during the Term, or any extension thereof, for dancing of any nature whatsoever or in any manner or for a purpose involving the playing or performance of any music, other than soft background music, provided such background music cannot be heard in the public or residential areas of the Building, the sidewalk area or anywhere else outside the Demised Premises.

(b) Tenant shall use, occupy, operate and maintain the Demised Premises through the Term as a restaurant with table-seating for on and off site consumption in a reputable manner and in a manner which shall not detract from the character, appearance or dignity of the Building. Tenant shall conduct its business in an orderly and neat manner with care and precaution so as not to cause annoyance, discomfort, and/or injury to the other residential and commercial tenants, occupants and users of the Building"

(emphasis added). Article 37 of the lease states: "Tenant agrees that Tenant will not bring or permit any obscene or pornographic material on the premises, and shall not permit or conduct any obscene, nude, or semi-nude live performances on the premises, nor permit use of the premises for nude modeling, cap sessions, or as a so called rubber goods shops or as a sex club of any sort, or as a 'massage parlor.'" Article 41(d) of the rider contains similar language.

Subparagraph (a) of article 53, entitled "Assignment or Subletting," of the Rider states:

"Tenant shall not assign this lease or sublease the Demised Premises without the prior written consent of Landlord. Landlord shall not unreasonably withhold or delay its consent to an assignment of this Lease or a subletting of the entire Demised Premises, provided that (i) *the proposed use of the premises shall be as a restaurant with table-seating for on and off site consumption and for no other purpose and shall not violate the terms of this lease or of any applicable law*; (ii) the proposed assignee or subtenant and its proposed use of the premises shall be in keeping with the character of the Building; (iii) Tenant is not in default in the performance of any of the terms and conditions of this lease; . . . (x) as to any subletting, the sublease expressly states that it is subject to all of the covenants, agreements, terms, provisions and conditions of this lease except such as are inapplicable in the landlord's sole discretion, and except as otherwise expressly set forth to the contrary herein"

(emphasis added). Article 3 of the "Supplemental Rider" to the lease states:

"Notwithstanding any provisions to the contrary contained in this Lease, this Lease may be assigned, or the Premises may be sublet in whole or in part, without the consent of the Landlord, to any corporation or other entity into or with Tenant may be merged or consolidated or to any corporation or other entity which shall be an affiliate, subsidiary, parent or successor of the Tenant, or of a corporation or other entity into or with which Tenant may be merged or consolidated.

An 'affiliate' shall mean any corporation which, directly or indirectly, controls or is controlled by or is under common control by the principals of Tenant."

Article 12 of a Supplemental Rider to the lease states:

"If in connection with the franchise agreement to be executed between Tenant and Burger King with respect to the Demised Premises, Burger King shall require non-monetary or immaterial modifications to the Lease, Owner will not withhold, delay or defer consent thereto provided that such modifications do not increase the term of this Lease nor increase the obligations, or decrease the rights, of Owner hereunder except that Owner may be required to give notices of any defaults by Tenant to Burger King and/or permit the curing of any such defaults by Burger King together with the granting of such additional time for the curing of any such non-monetary defaults as may be required by Burger King."

Lastly, article 68(d) of the Supplemental Rider provides:

"In the event Burger King or a (or similar franchisor of at least 250 stores) or any franchisee thereof is no longer the tenant, all signage and other decorations shall be subject to Landlord's prior written approval, which may be unreasonably withheld."

B. Factual Background

On or about October 15, 1997, the Sadiks entered into the franchise agreement with Burger King to operate a Burger King franchise restaurant on the demised premises, which they assigned to E-Z 41. E-Z 41 then began operating the Burger King on the demised premises. At the time, this was one of several Burger King restaurants operated in New York City by the Sadiks and/or their corporate entities.

Thereafter, a dispute ensued between Burger King and the Sadiks regarding the Sadiks' unwillingness to sell Burger King's "value menu" which, according to the Sadiks, required them to sell certain products that resulted in a loss in each store. In July of 2008, a federal district court in Florida granted permanent injunctive relief to Burger King, barring E-Z 41, its affiliate E-Z 47, and the Sadiks from operating a Burger King restaurant. As a result, the Burger King restaurants operated by them, including the one on the demised premises, were closed.

The Sadiks notified defendants, as the successors-in-interest to the original landlord, that they intended to open another burger restaurant that was not a Burger King on the demised premises. On July 30, 2008, defendants notified E-Z 41 that the lease did not permit EZ-41 to use the premises for any purpose other than the operation of a Burger King franchise restaurant without the successor landlord's consent. EZ-41 disagreed with defendants' interpretation of the lease and on September 11, 2008, commenced an action in Supreme Court, New York County, seeking a declaration that it was permitted to use the premises for a fast food burger restaurant in the style and manner of a Burger King and an injunction barring defendants from requiring it to seek their consent to use the premises for the purpose of operating such a restaurant (the prior action) (*E-Z Eating 41 Corp. v H.E. Newport, L.L.C.*, Index No. 112467-2008).

On or about September 30, 2008, defendants served E-Z 41 with a 15-day notice to cure in which defendants contended that E-Z 41 was in breach of the lease because subparagraph (a) of article 41 of the rider required that it operate its business on the demised premises *solely* as a Burger King restaurant. In the prior action, E-Z 41 moved by order to show cause, dated October 16, 2008, for a Yellowstone injunction tolling the running of the notice to cure and an injunction restraining defendants from taking steps to terminate its tenancy and from commencing any action to recover possession of the demised premises. On October 17, 2008, Supreme Court granted the requested relief in the form of a temporary restraining order, thereby tolling the running of the notice to cure, which otherwise would have expired on October 22, 2008.

On or about October 29, 2008, E-Z 41 and E-Z 47 entered into a “sublease agreement,” pursuant to which they agreed that as of October 1, 2008, E-Z 47 would sublease the premises from E-Z 41 to use “solely as a restaurant with table seating for on an off site consumption and for no other purpose.” The sublease specifically stated that article 41(a) of the rider was not binding upon the subtenant.

On October 30, 2008, the Supreme Court granted E-Z 47’s motion to intervene in the prior Supreme Court action, in which E-Z 47 alleged that the lease permitted E-Z 41, without defendants’ consent “to sublet the entire premises . . . for restaurant purposes with table-seating for on and off site consumption and for no other purpose to an affiliate, as defined in the lease, or to a subsidiary.” E-Z 47 alleged that it was such an affiliate and was therefore not required by the lease to operate a Burger King restaurant on the premises and any default under the lease by E-Z 41 had been cured. In its verified intervenor complaint, dated November 6, 2008, E-Z 47 sought a declaration that the lease was in full force and effect, any default had been cured, that the sublease

was binding on defendants, that E-Z 47 could operate a restaurant with table-seating for on and off site consumption of food and beverages, and that E-Z 47 was not required to operate a Burger King on the premises.

By order, dated March 24, 2009, and accompanying decision and order, dated March 25, 2009, Justice Edmead, in the prior Supreme Court action, denied E-Z 41's motion for Yellowstone relief and for an injunction restraining defendants from taking steps to terminate its tenancy and from bringing any action to recover possession of the premises (*E-Z Eating 41 Corp. v H.E. Newport, L.L.C.*, 23 Misc 3d 1125[A][Sup Ct, New York County 2009], order vacated, appeal dismissed 84 AD3d 401 [1st Dept 2011]). Justice Edmead held that the lease unambiguously precluded "the use of the premises by either [t]enant or its subtenant, for any purpose, other than 'as a restaurant with table-seating operated under the name and style of Burger King' for on and off site consumption of food and beverage." The court acknowledged that the lease permitted E-Z 41 to assign or sublet the lease to an affiliate without the consent of the landlord, but ruled that such an assignee or sublessee is required, absent the consent of the landlord, to operate a Burger King restaurant on the premises. For these reasons, and because it was undisputed that E-Z 41 and E-Z 47 were barred by the federal injunction from operating a Burger King franchise restaurant, Justice Edmead found that E-Z 41 could not cure its default, denied E-Z 41's motion, and dismissed both E-Z 41's and E-Z 47's complaints.

On March 27, 2009, defendants served a five-day notice of cancellation of the lease on E-Z 41. E-Z 41 and E-Z 47 then moved before the Appellate Division, First Department, for injunctive relief pending their separate appeals from Justice Edmead's orders. Specifically, they each sought an order tolling the notice of cancellation and enjoining defendants from interfering

with their possession and use of the premises. On April 2, 2009, a Justice of the Appellate Division granted an interim stay. However on May 14, 2009, a panel of the Court denied their respective motions (*see E-Z Eating 41 Corp. v H.E. Newport L.L.C.*, 2009 NY Slip Op 72471[U][1st Dept 2009]; 2009 NY Slip Op 72472[U][1st Dept 2009]).

On June 12, 2009, defendants commenced a summary holdover proceeding against E-Z 41 and E-Z 41 in Civil Court (the summary holdover proceeding). Defendants' petition sought possession of the premises, a money judgment against E-Z 41 for rent arrears in the amount of \$88,072.20 for use and occupancy of the premises, and a money judgment against E-Z 47 for use and occupancy of the premises. E-Z 41 and moved to dismiss the petition on the ground that the court lacked subject matter jurisdiction to entertain the summary proceeding. E-Z 47 moved to dismiss the petition on the ground that the court lacked personal jurisdiction over it.

In the decision, dated August 20, 2009, Civil Court granted E-Z 41's motion to dismiss defendants' petition in the summary holdover proceeding, reasoning that "because [E-Z 41] admits that it has surrendered possession of the premises, this holdover summary proceeding is unnecessary." The court dismissed the petition "without prejudice for the parties to commence a plenary action for any claims they may have against one another" and denied E-Z 47's motion to dismiss the petition as moot.

By a letter dated August 31, 2009, counsel for defendants advised the Appellate Division of the August 20, 2009 decision in the summary holdover proceeding. On May 3, 2011, the Appellate Division dismissed, as moot, the appeals from Justice Edmead's March 2009 orders and vacated the orders (*E-Z Eating 41 Corp. v H.E. Newport L.L.C.*, 84 AD3d 401 [1st Dept 2011]). The Appellate Division stated:

“Given that the time to cure the alleged lease default has expired, and that the E-Z Eating 41 Corp. has surrendered possession of the premises, the orders appealed are presently moot. . . .

While the general rule in New York is to simply dismiss an appeal which has been rendered moot, vacatur of an order or judgment on appeal has, in circumstances such as those presented here, been held to be an appropriate exercise of discretion where necessary in order to prevent a judgment which is unreviewable for mootness from spawning any legal consequences or precedent. . . .

Our vacatur is without prejudice to the parties seeking any further relief they deem appropriate”

(*id.* at 401-402 [internal quotation marks and citations omitted]).

Justice McGuire dissented, concluding that the appeals and the underlying actions were not moot (*id.* at 402). He then reached the merits of the appeal, concluding that he would reverse the orders appealed from and reinstate EZ 41's and EZ 47's complaints, on the ground that the relevant provisions of the lease are ambiguous and should be interpreted in light of any competent extrinsic evidence offered by the parties (*id.* at 408-412).

C. The Instant Action

On October 22, 2012, E-Z 41 and E-Z 47 initiated this action alleging that defendants wrongfully terminated the lease and constructively evicted them from the demised premises. They assert that since 2008, upon their purchase of the building, defendants engaged in a campaign to interfere with E-Z 41's rights under the lease and its quiet enjoyment of the demised premises. The amended verified complaint contains the following four causes of action: wrongful termination of lease and breach of lease (first cause of action); breach of covenant of quiet enjoyment (second cause of action); breach of implied covenant of good faith and fair dealing (third cause of action); and unjust enrichment (fourth cause of action). The defendants submitted an amended verified answer and interposed a counterclaim for damages, including attorney's fees, costs and

disbursements resulting from E-Z 41's breach and default under the lease.

Plaintiffs move for summary judgment (1) on the issue of liability on the first cause of action in the amended verified complaint alleging breach of the lease, (2) dismissing those of defendants' affirmative defenses that are based upon the franchise agreement between Burger King and the Sadiks and (3) dismissing defendants' counterclaim (Motion Sequence No. 006).

Defendants move for summary judgment (1) dismissing the amended verified complaint in its entirety and (2) on the issue of liability on their counterclaim (Motion Sequence No. 007).

II. Discussion

A. Motion for Summary Judgment Standard

"On a motion for summary judgment, facts must be viewed 'in the light most favorable to the non-moving party'" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]). The proponent of the "motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Once this showing has been made . . . , the burden shifts to the party opposing the motion . . . to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d at 324; see *Zuckerman v City of New York*, 49 NY2d at 562).

B. Plaintiffs' Motion (Motion Sequence No. 006)

On their motion for summary judgment, plaintiffs argue that defendants impermissibly base their defense strategy in this action on contractual obligations undertaken by the Sadiks in their

franchise agreement with Burger King. Plaintiffs assert that defendants lack standing to base either their affirmative defenses or their counterclaim on that franchise agreement because it not only post-dates the lease, but is a separate contract to which none of the parties in this action were signatories nor intended third-party beneficiaries. Plaintiffs also point out that the lease does not expressly incorporate the franchise agreement by reference. They assert that under the circumstances, defendants “lack standing” to invoke the franchise agreement, including its provisions, performance history, or termination of that agreement, as a defense in this action.

In addition, plaintiffs argue that the lease unambiguously empowers EZ-41 to operate a restaurant other than a Burger King on the demised premises. Plaintiffs assert that while this court has, in a prior order in this action, described the use and occupancy provisions as ambiguous,¹ the true intention of the parties can be discerned without a trial, by examining the lease as a whole. Plaintiffs contend that, examining the lease as a whole, there is only one reasonable interpretation - that the original signatories anticipated E-Z 41 would operate a Burger King franchise restaurant on the premises, but permitted otherwise compliant eat-in/take-out food service options, provided they did not involve alcohol, dancing, musical performance, or pornography. This interpretation, plaintiffs maintain, enforces every phrase in every subdivision of the lease, whereas defendants’ interpretation (i.e., that E-Z 41 is only permitted to operate a Burger King unless it obtains the landlords’ prior consent) does not.

In this regard, plaintiffs rely on the language in subparagraph (a) of article 41, stating: “The

¹ In a decision and order dated December 31, 2014, this Court granted defendants’ motion pursuant to CPLR 3211 to dismiss the complaint only to the extent of dismissing the second and sixth causes of action in the original complaint. In that decision, this Court found the lease to be ambiguous with regard to the issue of whether the tenant is permitted to operate the demised premises as a restaurant similar to, but not under the same name of “Burger King” (Decision and Order [12-31-14], at 12).

Tenant is prohibited from operating a bar within the Demised Premises. As a material inducement for Landlord to enter into this lease, Tenant shall not operate the Demised Premises or any portion thereof or permit the same to be operated during the Term, or any extension thereof, for dancing of any nature whatsoever or in any manner or for a purpose involving the playing or performance of any music, other than soft background music.” Plaintiffs assert that Burger King restaurants do not offer alcoholic beverages or dance floors and therefore, in order to accept defendants’ interpretation of the lease, one must ignore this language.

Plaintiffs also rely on article 37 of the lease and article 41(d) of the rider which prohibit the tenant from selling or displaying pornography on the premises. Plaintiffs argue that the foregoing, plainly worded prohibitions against particular uses undermine defendants’ self-serving focus on the first sentence of article 41(a) alone and treats the remainder of the paragraph as empty surplus language. Plaintiffs assert that the parties to the lease carefully negotiated all of these prohibitions because they understood that Burger King might decline to award a franchise to the Sadiks and agreed that a different restaurant would do, provided that it satisfied all other criteria considered material by the landlord. Plaintiffs contend that the parties only inserted references to Burger King in anticipation that a franchise would be forthcoming, but did not intend to scrap the deal if one did not materialize.

Plaintiffs also contend that New York law discourages contract interpretations purporting to bar otherwise legal commercial conduct absent unqualified prohibited language in the contract. Plaintiffs assert that defendants were not motivated to honor their 20-year lease so that plaintiffs could, in good faith, operate an otherwise legal, contractually compliant business. Rather, defendants created a legal pretext to oust plaintiffs from the demised premises in order to enable

defendants to re-purpose the space for an upscale, trendy hotel. Plaintiffs assert that defendants are improperly asking the court to read the first sentence of the use and occupancy provision of the lease in isolation because, like any provision in a contract between commercially sophisticated actors, New York law requires that provisions ostensibly intended to prohibit otherwise legal activity be strictly, and narrowly, construed. Moreover, defendants, as the parties advocating such a restrictive reading, must adduce clear and convincing evidence to support their interpretation, which they have failed to do.

Finally, plaintiffs contend that if after reading the lease as a whole, the court still considers the use and occupancy provisions of the lease to be ambiguous, parole evidence may be used to resolve the ambiguities in the contractual language. In this regard, they offer the affidavit of Luan Sadik, wherein he states that when entering into the lease, he and the original landlord understood that Burger King might decline to award a franchise to the Sadiks and agreed that a different restaurant operation would suffice, provided that the restaurant satisfied all other criteria considered material by the landlord. According to Sadik, they “negotiated other specific additional provisions in the lease to enable [them] to open another type of restaurant if Burger King or other franchise restaurant did not work out” and would never have signed a lease they might be unable to perform. Sadik further avers in his affidavit: “nor would we ever obligate ourselves to a 20 year term with total rent exceeding \$2,000,000, not including escalations, with no ability to operate a different restaurant. During the entire course of the lease negotiations that began in April 1997 and to the execution of the lease on July 3, 1997, we were not approved and we had not received a Burger King franchise agreement for the new E. 41st Street location. We needed to protect ourselves.” Plaintiffs assert that Luan Sadik’s affidavit constitutes parole evidence which may be

considered on this motion to elucidate the disputed portions of the lease.

In opposition, defendants emphasize that article 41(a) of the rider to the lease explicitly states that only one specific use of the demised premises is permitted: "a restaurant with table-seating operated under the name and style of 'Burger King' . . . and for no other purpose."

Defendants assert that this subparagraph unambiguously proscribes the use of the demised premises for anything other than a Burger King restaurant. Any change in the use would require the landlord's consent, which was never sought or obtained by plaintiffs.

Defendants assert that while plaintiffs maintain that they cured their default by subleasing the premises to E-Z 47 as of October 1, 2008, that position is without merit. Defendants point out in this regard that an assignment under the lease is effectuated under only two possible avenues: (1) articles 11 and 53 of the rider which require the landlord's prior consent and (2) article 3 of the supplemental rider which does not require the landlord's consent. Defendants assert that both types of assignment are still subject to the requirement in article 41(a) of the rider that the premises may be used only for a Burger King restaurant.

Pursuant to the lease, the landlord agreed not to unreasonably withhold consent to a sublet or assignment provided that the proposed sublet or assignment would not violate the terms of the lease. Defendants assert that the terms of the lease include article 41(a) which limits the use of the demised premises to a Burger King. Therefore, if the proposed use by the sublessee or assignee was other than that of a Burger King, the landlord was free to withhold its consent.

Further, defendants contend, even assuming *arguendo* that a different use is permitted, article 53 requires E-Z 41 to ask for the landlord's consent before assignment or sublet. Here, it is undisputed that E-Z 41 never asked for consent before subleasing to E-Z 47. As such, to the extent plaintiffs are relying on article 53 of the rider, such reliance is wholly misplaced and irrelevant.

Defendants also contend that plaintiffs cannot rely on article 3 of the supplemental rider to cure their default by subletting to an affiliate (which does not require the landlord's consent), because a sublease or assignment to an affiliate does not modify or otherwise render inapplicable the unambiguous use and occupancy provision in article 41(a). Defendants assert that article 3 of the supplemental rider contemplates a scenario "where either there is a merger or consolidation involving the tenant entity, or the original tenant entity (or its principals) desires to assign the lease or sublet the premises to another tenant entity that is, in every practical sense, the original tenant entity with a different corporate shell" (defendants' memorandum of law in opposition, at 9).

Defendants contend that in this limited circumstance, it makes sense why the landlord's consent would not be required inasmuch as the only thing changing is the legal entity through which the same individuals would conduct the same business. It can reasonably be inferred that the Sadiks negotiated that provision because they needed the tenant entity under the lease and the franchise entity under the franchise agreement to be one and the same. Thus, if the Sadiks wanted to consolidate one of their entities or merge one into another, for tax or administrative purposes, they could do so without the landlord's consent.

In light of the foregoing, defendants contend, article 3 of the supplemental rider is subject to, and does not modify or otherwise render inapplicable, the unambiguous requirement in article 41(a) of the rider that E-Z 41 must use the premises as a Burger King "and for no other purpose." Defendants assert that to interpret article 3 in any other way would contradict the principle that a court should not adopt an interpretation of a contract that would leave a provision without force or effect.

Defendants also contend that where there is an inconsistency between a specific provision and a general provision, the specific provision controls. Accordingly, article 41(b) does not modify

or otherwise render inapplicable the more specific provision in article 41(a), which does not permit E-Z 41 to operate anything other than a Burger King on the premises. Furthermore, where two seemingly conflicting contractual provisions can be reconciled, the court must give effect to both. Defendants maintain that subparagraphs (a) and (b) of article 41 serve two different purposes. Subparagraph (a) defines what business may be operated on the premises. Subparagraph (b) defines how that business is to be operated.

Defendants further contend that if the court finds that the use and occupancy provisions are ambiguous, the issue cannot be determined as a matter of law on a motion for summary judgment. They point out that the only parole evidence offered by plaintiffs is the self-serving affidavit of Luan Sadik alleging what he wanted in the lease. Defendants assert that Sadik's affidavit raises an issue of credibility inappropriate for summary judgment as defendants' should be given the opportunity to cross examine him on his statements and the veracity thereof.

Defendants assert that while the issue of Sadik's credibility is a matter reserved for trial, the terms of the franchise agreement already existing at the time the Sadiks entered into the lease establish that the Sadiks could not have operated a non-Burger King restaurant without violating the terms of that franchise agreement. Defendants contend that the text of the franchise agreement already existing between the Sadiks and Burger King for their operation of another Burger King restaurant on East 23rd Street in Manhattan, is inconsistent with Sadik's position that he negotiated the terms of the lease so that he could operate another type of restaurant on the premises. In this regard, defendants draw the court's attention to certain paragraphs of the franchise agreement, which they assert bar the Sadiks from (1) engaging in operational or management commitments in other non-Burger King businesses, (2) directly or indirectly using Burger King know-how to operate any non-Burger King restaurant and (3) owning, operating or having any interest in any

non-Burger King hamburger business during the term of the franchise agreement or in any fast-food business whatsoever for one year after the expiration or termination of the franchise agreement. Defendants contend that they are not seeking to enforce the terms of the franchise agreement in order to establish their defense or counterclaim. Rather, they are citing its terms in order to show that it contradicts plaintiffs' position as to the meaning of the use and occupancy provisions in the lease.

Lastly, defendants submit a "term sheet," dated April 3, 1997, which they contend was a starting point for the lease negotiations and contains no indication that a different use was contemplated by the parties. On the term sheet, Luan Sadik represented that "E-Z Eating Corp. was established for the purpose of operating a Burger King Franchise Restaurant." The term sheet was sent to three representatives from Burger King. Therefore, defendants aver, Burger King was apprised of the lease negotiations, and given the restrictive covenant in the existing franchise agreement, Sadik would not have been allowed to operate another type of restaurant on the premises.

In reply, plaintiffs assert that even assuming the lease is ambiguous as to whether or not it permitted them to operate a restaurant other than a Burger King on the premises, their interpretation is at least plausible and therefore, the court can and should consider parol evidence. They assert that Luan Sadik's affidavit supports their reading of the lease. Since defendants submitted no evidence to refute Sadik's assertion that the intent was to allow plaintiffs to operate a restaurant other than a Burger King, no question of fact exists. Plaintiffs point out in this regard that discovery is complete and defendants have not produced an affidavit or testimony from anyone involved in the negotiation of the lease. Since defendants set forth nothing by way of parol evidence to explain the ambiguity in the lease, summary judgment should be granted in plaintiffs'

favor. For the reasons that follow, plaintiffs' motion is denied.

"Where a contract is straightforward and unambiguous, its interpretation presents a question of law for the court to be made without resort to extrinsic evidence" (*Ruttenberg v Davidge Data Sys. Corp.*, 215 AD2d 191, 192 [1st Dept 1995]; see *Kass v Kass*, 91 NY2d 554, 566 [1998]["Whether an agreement is ambiguous is a question of law for the courts"]. The Court of Appeals has stated:

"To determine whether a writing is unambiguous, language should not be read in isolation because the contract must be considered as a whole. . . . Ambiguity is determined within the four corners of the document; it cannot be created by extrinsic evidence that the parties intended a meaning different than that expressed in the agreement and, therefore, extrinsic evidence may be considered only if the agreement is ambiguous. . . . Ambiguity is present if language was written so imperfectly that it is susceptible to more than one reasonable interpretation"

(*Brad H. v City of New York*, 17 NY3d 180, 185-186 [2011][internal quotation marks and citations omitted]; see *Impala Partners v Borom*, 133 AD3d 498, 499 [1st Dept 2015]).

"Where . . . the language of a contract is ambiguous, its construction presents a question of fact which may not be resolved by the court on a motion for summary judgment" (*NFL Enters. LLC v Comcast Cable Communications, LLC*, 51 AD3d 52, 61 [1st Dept 2008], quoting *Pepco Constr. of N.Y., Inc. v CNA Ins. Co.*, 15 AD3d 464, 465 [2d Dept 2005]; see *Ruttenberg v Davidge Data Sys. Corp.*, 215 AD2d at 193). "Summary judgment is appropriate only where the intent of the parties can be ascertained from the face of their agreement" (*Bank of N.Y. Mellon Trust Co., N.A. v Merrill Lynch Capital Servs. Inc.*, 99 AD3d 626, 628 [1st Dept 2012], quoting *Ruttenberg v Davidge Data Sys. Corp.*, 215 AD2d at 197). "If there is ambiguity in the terminology used . . . and determination of the intent of the parties depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence, then such determination is to be made by the jury" (*Hartford Acc. & Indem. Co. v Wesolowski*, 33 NY2d 169,

172 [1973]; see *Amusement Bus. Underwriters v American Intl. Group*, 66 NY2d 878, 880 [1985]; *Mallad Constr. Corp. v County Fed. S&L Assn.*, 32 NY2d 285, 291 [1973][“where a question of intention is determinable by written agreements, the question is one of law, appropriately decided . . . on a motion for summary judgment. Only where the intent must be determined by disputed evidence or inferences outside the written words of the instrument is a question of fact presented”][internal citations omitted]; *Yizheng Zhao v Evans*, 154 AD3d 624, 626 [1st Dept 2017][“if the terms of the lease are not clear from the four corners of the document, and extrinsic evidence is needed to interpret those terms, then this . . . raises an issue of fact”)].

Here, as determined by this court in the decision and order dated December 31, 2014, and as articulated by Justice McGuire in his dissent in the prior action between these parties, the lease’s use and occupancy provisions are ambiguous concerning the issue of whether the tenant is permitted to operate the premises as a restaurant similar to, but not under the same name of Burger King.² Ascertaining the intent of the parties involves making a credibility determination with respect to Sadik’s affidavit and examining documents outside of the lease. Therefore, the construction of the lease presents a question of fact that may not be resolved by the court on a motion for summary judgment. As such, those branches of plaintiffs’ motion which seek summary judgment on their first cause of action and to dismiss defendants’ counterclaim are denied.

That branch of plaintiffs’ motion which seeks summary judgment dismissing those of defendants’ affirmative defenses that are based upon the franchise agreement between Burger King

² This Court also determined in the decision and order dated December 31, 2014 that since the Appellate Division, First Department vacated Justice Edmead’s March 2009 orders in the prior Supreme Court action, and indicated that those orders should not have any legal consequences or precedent, those orders are not the law of the case and have neither precedential value nor any binding legal effect (Decision and Order [12-31-14], at 11). Therefore, this Court concluded, the issue of whether the lease is ambiguous can be revisited and reviewed by this Court de novo (Decision and Order [12-31-14], at 12).

and the Sadiks is also denied. Defendants are not seeking to enforce the terms of the franchise agreement. They merely rely on it as extrinsic evidence of the intention of the parties to the lease.

C. Defendants' Motion (Motion Sequence No. 007)

Defendants move for summary judgment dismissing the amended verified complaint in its entirety and on the issue of liability on their counterclaim. They argue that plaintiffs' decision to stop paying rent on the lease in October 2008, and their abandonment and surrender of the premises prior to the lease being purportedly terminated by defendants on March 27, 2009 (via the notice of cancellation), was an election of remedies, precluding them from establishing full performance under the lease. Defendants assert that full performance is a necessary element for plaintiffs' cause of action seeking damages for breach of contract and a condition precedent for the cause of action for breach of the covenant of quiet enjoyment. Therefore, the first and second causes of action must be dismissed. In addition, the second cause of action for breach of the implied covenant of good faith and fair dealing is duplicative of the first cause of action for breach of contract and the fourth cause of action for unjust enrichment should be dismissed because the subject matter of the claim is governed by the lease. Accordingly, defendants assert, they are entitled to summary judgment.

Specifically, defendants allege that in violation of the lease, plaintiffs have not paid rent since September 2008 and cancelled the insurance policy for the premises in November 2008. Further, plaintiffs took the position in the summary holdover proceeding that they were constructively evicted from the premises on December 16, 2008 due to defendants failing to provide heat and gas, restricting access to the premises, and creating an unsafe condition. Plaintiffs also took the position in that proceeding that E-Z 41 vacated the premises in April 2008. Based on

those assertions, the court in the summary holdover proceeding dismissed the petition on the ground that E-Z 41 surrendered possession of the premises and defendants had regained full legal possession.

Defendants assert that plaintiffs could have defended against the 2009 summary holdover proceeding by means other than surrendering the premises, but they voluntarily, with the advice of counsel, chose not to do so. Defendants contend that plaintiffs chose to surrender possession of the premises simply because it made no legal sense for them to continue to keep it. Burger King terminated their restaurant business at all five of their locations, including the demised premises, they were not making money, and by taking the position that they were constructively evicted, they would be "off the hook" for further liability under the lease.

Defendants contend that plaintiffs obtained the relief they sought in the 2009 summary holdover proceeding - i.e., dismissal of defendants' petition - by arguing that they had surrendered possession of the premises before the notice of cancellation was served and they should, therefore be judicially estopped from taking a contrary position in the instant action. Since all four causes of action rely on the lease being wrongfully terminated, plaintiffs' complaint should be dismissed inasmuch as plaintiffs should be judicially estopped from claiming that they were evicted as a result of any purported termination of the lease or that they otherwise incurred damages as a result.

Defendants claim that since plaintiffs abandoned the premises and the lease prior to the notice of cancellation and failed to pay rent prior to and up to the time they abandoned the premises, they elected their remedy and failed to meet a necessary element and condition precedent to their causes of action. They point out that plaintiffs did not challenge the notice of cancellation, did not seek to stay the 2009 summary holdover proceeding pending their appeal in the prior

action, or express any desire to take back possession of the premises. In sum, defendants argue, plaintiffs abandoned the premises, abandoned any claim that they had possession of the premises, and by admitting that they had surrendered possession, abandoned and waived any challenges they may have had to the notice of cancellation. They made no effort to obtain possession of the premises or otherwise enjoin defendants from re-letting it pending their appeal in the prior action. Their appeal was decided on May 3, 2011. They still did nothing to obtain possession of the premises. Instead of taking action to assert the rights they now claim to have had in the lease and premises at the time when they could have re-obtained possession, plaintiffs commenced this action in October 2012, opportunistically seeking millions of dollars in damages from defendants for having been purportedly wrongfully evicted from the premises and the lease wrongfully terminated. Defendants assert that plaintiffs wanted out of the lease, while at the same time wanted to maintain a multimillion dollar claim for damages and cannot have it both ways.

Further, if a summary holdover petition is dismissed, the underlying notices fall with the dismissal. Therefore, when the Civil Court dismissed the petition in the proceeding the notice of cancellation because a nullity, together with any legal effect that may have stemmed from it. Defendants did not gain possession of the premises as a result of the notice of cancellation, but by plaintiffs' decision to voluntarily surrender the premises. Therefore, the notice of cancellation and by extension, the termination of the lease as a result thereof, cannot be relied upon by plaintiffs as a basis for their claims.

Defendants also argue that E-Z 47 has no basis for its claim against them. There is no privity of contract nor a landlord-tenant relationship between them. Therefore, E-Z 47 cannot bring a breach of contract or constructive eviction claim against defendants. Moreover, the

purported sublease is void inasmuch as under New York law, a tenant cannot confer to a sub-tenant any greater rights in the demised premises than those to which the tenant is entitled. Defendants never consented to the sublease nor did they otherwise grant E-Z 47 greater rights than the limited rights which E-Z 41 had in the lease and the demised premises. Therefore, the sublease should be deemed null and void and E-Z 47's causes of action should fall together with the sublease.

Finally, defendants assert that since plaintiffs failed to pay rent from October 2008, through and including the time they abandoned and surrendered the premises, they breached the lease. Therefore, under article 18 of the lease, they are entitled to the rent due up to the time of defendants' recovery of the premises as well as liquidated damages, unpaid rent, and attorney's fees. Therefore, defendants contend, they are entitled to summary judgment on the issue of liability on their counterclaim.

In opposition to defendants' motion, plaintiffs assert as to the issue of rent, that after receiving the 15-day notice to cure for allegedly failing to comply with the lease in October 2008, they moved for a Yellowstone injunction and began paying rent into an escrow account held by their attorney Barry Karson. They allege that they repeatedly notified defendants that \$68,500 was being held in escrow and that defendants never demanded payment from the escrow account. Therefore, plaintiffs assert, they satisfied their rental obligations. They further assert that defendants should be barred by the doctrine of laches from relying on their non-payment of rent as a defense to this action.

Plaintiffs also argue that by actively litigating the central issue of the lease construction without regard to plaintiffs' purported obligation to pay rent, defendants waived their defense that any breach of the lease precludes plaintiffs from maintaining this action. They assert that at the

very least, a question of fact exists over the parties' conduct as to the allegedly withheld payments.

Moreover, plaintiffs assert that even assuming they withheld rent, defendants' prior material breach of the lease would have entitled them to do so. Further, plaintiffs' position that they were constructively evicted from the premises in 2008-2009 is not inconsistent with the position that defendants breached the lease by cancelling it as of April 6, 2009. Therefore, the doctrine of judicial estoppel has no application here and, in any event, defendants cannot claim that the dismissal of the summary holdover proceeding was to their detriment since the court dismissed the petition without prejudice for the parties to commence a plenary action for any claims they may have against one another.

In reply, defendants contend that while plaintiffs assert that after October 2008, they placed the rent in their attorney's escrow account, the bank statements they provided in support of their motion shows that their attorney promptly returned such payments back to plaintiffs. Further, the bank records submitted by plaintiffs evince that the rent was not deposited into the escrow account until March, April, and May of 2009, whereas plaintiffs stopped paying rent in October 2008 after being served with the notice to cure. Therefore, defendants contend, defendants breached the lease by failing to pay rent and are thus precluded from maintaining this action. The foregoing issues are decided as follows.

Failure to Pay Rent

On September 30, 2008, defendants served E-Z 41 with a notice to cure stating that they were in breach of the lease because they were unable to operate a Burger King on the premises, which, according to the notice, was the only business plaintiffs were permitted to operate on the premises pursuant to the lease. In light of the disagreement over the use and occupancy provisions

of the lease, plaintiffs began withholding rent and subsequently made rent payments into an escrow account. Regardless of whether plaintiffs were entitled to do so, defendants never objected to this course of conduct. Given defendants' delay in doing so and the prejudice caused to plaintiffs as a consequence of such delay, defendants are estopped, under the doctrine of laches, from asserting this course of conduct as a defense in this action (*see generally Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 816 [2003])[laches is "an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party"]).

Judicial Estoppel

"It is settled that the doctrine of judicial estoppel 'precludes a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed'" (*Gale P. Elston, P.C. v Dubois*, 18 AD3d 301, 303 [1st Dept 2005] , quoting *Ford Motor Credit Co. v Colonial Funding Corp.*, 215 AD2d 435, 436 [2d Dept 1995]). As discussed above, defendants contend that plaintiffs are precluded, by judicial estoppel, from taking the position in this action that they were "wrongfully evicted" or that the lease was "wrongfully terminated" by defendants in April 2009 because in the summary holdover proceeding, plaintiffs took the position that they were constructively evicted from the premises on December 16, 2008 due to defendants failing to provide heat and gas, restricting access to the premises, and creating an unsafe condition. However, the doctrine of judicial estoppel is not applicable given that plaintiffs did not secure a judgment in their favor in the summary holdover proceeding. Rather that proceeding was dismissed "without prejudice for the parties to commence a plenary action for any claims they may have against one another" and did not result in a judgment.

E-Z 41's Claims Against Defendants

In the decision and order dated December 31, 2014, this Court rejected defendants' contention that E-Z 47's claims should be dismissed on the ground that it was an unauthorized and unapproved sub-tenant/sub-lessee, not in privity with defendants. On this motion, defendants also contend that the sublease is void because it granted E-Z 47 more rights than those offered in the original lease (i.e., the right to operate the premises as a restaurant similar to, but not under the same name of "Burger King"). However, for the reasons discussed above, it cannot be determined as a matter of law whether the sublease granted the sub-lessee more rights than those granted to the tenant.

Cause of Action for Breach of the Implied Covenant of Good Faith and Fair Dealing

"A cause of action for breach of the implied duty of good faith and fair dealing cannot be maintained where the alleged breach is 'intrinsically tied to the damages allegedly resulting from a breach of the contract'" (*Hawthorne Group, LLC v RRE Ventures*, 7 AD3d 320, 323 [1st Dept 2004], quoting *Canstar v Jones Constr. Co.*, 212 AD2d 452, 453 [1st Dept 1995]; see *Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440, 443 [1st Dept 2009])["claim that defendants breached the implied covenant of good faith and fair dealing was properly dismissed as duplicative of the breach of contract claim because both claims arise from the same facts"]. Here, the conduct and resulting injury alleged in the third cause of action for breach of the implied covenant of good faith and fair dealing are identical to those alleged in the first cause of action for breach of contract. Therefore, the third cause of action is dismissed as duplicative of the first cause of action for breach of contract.

Cause of Action for Unjust Enrichment

Finally, defendants correctly contend that a "party may not recover in . . . unjust enrichment where the parties have entered into a contract that governs the subject matter" (*Pappas v Tzolis*, 20 NY3d 228, 234 [2012], quoting *Cox v NAP Constr. Co., Inc.*, 10 NY3d 592, 607 [2008]). Since the lease governs the subject matter of plaintiffs' claim for unjust enrichment, plaintiffs may not recover damages for unjust enrichment (*see Connaughton v Chipotle Mexican Grill, Inc.*, 135 AD3d 535, 540 [1st Dept 2016], *affd* 29 NY3d 137 [2017]; *De La Rosa v All Taxi Mgt., Inc.*, 107 AD3d 553, 554 [1st Dept 2013]). Therefore, the fourth cause of action for unjust enrichment is dismissed.

Conclusion

In accordance with the foregoing, it is hereby


ORDERED that plaintiffs' motion for summary judgment is denied; and it is further

ORDERED that defendants' motion for summary judgment is granted only to the extent of dismissing the third and fourth causes of action in the amended complaint and the remaining branches of defendants' motion are otherwise denied.

This constitutes the decision and order of the Court.

Dated: September 21, 2018

ENTER:



J.S.C.

SHLOMO HAGLER