

**Noamex, Inc. v Domsey Worldwide Ltd.**

2019 NY Slip Op 34532(U)

November 12, 2019

Supreme Court, Kings County

Docket Number: Index No. 509566/18

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : COMMERCIAL PART 8

-----x  
NOAMEX, INC.,

Plaintiff,

Decision and order

- against -

Index No. 509566/18

DOMSEY WORLDWIDE LTD.,

November 12, 2019

Defendants,

-----x  
PRESENT: HON. LEON RUCHELSMAN

mv # 3 & 4

The plaintiff has moved seeking partial summary judgement pursuant to CPLR §3212 on the causes of action for a declaratory judgement, for ejectment and for use and occupancy. The plaintiff also seeks to dismiss the affirmative defenses filed by the defendant. The defendant has cross-moved seeking summary judgement dismissing the complaint entirely. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

On August 14, 2014 the plaintiff entered into a Prime Lease with the owner of the premises located at 625 Wortman Avenue in Kings County. At the same the plaintiff entered into a sublease with the defendant for a portion of the premises. On May 25, 2017 the owner of the property entered into a contract to sell the property to non-party GTR Realty L.P. The sublease stated that in the event the plaintiff would seek to terminate the Prime Lease the plaintiff was required to provide the defendant with "one year prior written notice of such intent, consistent with the Notice provisions of this Sublease" (see, Sublease Agreement,

¶ 10(A)). Indeed, the plaintiff sent the defendant a letter dated August 9, 2017 informing them the Prime Lease was being terminated as of August 14, 2018 and that likewise the sublease would terminate on that date as well. In a related action between the purchaser and the seller where the seller refused to close on the requisite closing date, the court granted the plaintiff's motion seeking specific performance. The closing was held and the defendant still has not left the premises. The defendant argues that pursuant to Article 15 of the Prime Lease, the termination notice to them was invalid. Article 15 of the Prime Lease provides that "in the event of the sale by the Landlord of the demised premises or the property of which said premises are a part, the Landlord or the purchaser may terminate this Lease on the thirtieth day of April of any year upon giving the Tenant notice of such termination prior to the first day of January in the same year" (see, Lease Agreement, ¶ 15). The defendant argues that clause forms the only basis upon which the sublease can be terminated and that since the provisions of Article 15 were not satisfied the termination was invalid and consequently the motion should be denied and the cross-motion should be granted.

#### Conclusions of Law

Summary judgement may be granted where the movant

establishes sufficient evidence which would compel the court to grant judgement in his or her favor as a matter of law (Zuckerman v. City of New York, 49 NY2d 557, 427 NYS2d 595 [1980]). Summary judgement would thus be appropriate where no right of action exists foreclosing the continuation of the lawsuit.

There is no merit to the argument the sublease cannot be terminated because the sale of the property did not occur and that is the only triggering event permitting termination. First, the defendant's interpretation of the leases in question would render termination impracticable. According to the defendant notice of any termination can only occur after a sale of the premises and is only effective by first providing notice and scheduling the termination on only one day of the year, namely April 30. That interpretation conflicts with Article 10(A) of the sublease noted above which provides that one year prior to the termination notice must be provided. Moreover, it is highly unusual for a contract to provide the requisite notice to a tenant after the sale has already taken place, requiring the sale to be subject to that tenancy for the specific amount of time provided in the lease. To be sure, parties may choose to agree to such terms but they are not mandated by the language of the Prime Lease. Second, the defendant's reliance upon Article 15 of the Prime Lease does not alter the plain meaning of Article 10 of the sublease. A careful examination of Article 15 reveals that

it is internally inconsistent rendering its utility impossible to apply. It states that termination can occur on the thirtieth day of April of any year as long as notice was provided prior to January 1 of the same year. However, there are no dates prior to January 1 of any year since it is the first of the year. Thus, there is no date where notice can be provided wherein termination can then follow. This anomaly might render the entire Article 15 unenforceable. The court need not reach that conclusion since to the extent Article 15 of the Prime Lease can be read as requiring at least one year notice prior to termination (as alluded to by the defendant in the Reply Memorandum, page 2) then surely at this late date such notice has been fully provided. As noted, notice was first provided to the defendant on August of 2017 for a termination date of August 18. Even indulging defendant's arguments they have not provided any explanation why termination was not effective on April 30, 2019, almost two years after receiving the notice. Moreover, although the sublease provides that the sublease is subject to the "various" articles of the Prime Lease, it is clear that the parties did not intend Article 15 to be included within the sublease. Indeed, Article 6 of the sublease states that "except as otherwise provided in this Sublease, the relationship between the Sublessor and Sublessee shall be governed by the language of the various articles of the Prime Lease as if they were typed out in this Sublease in full"

(see, Sublease, Article 6A)). As noted, the sublease does provide alternative notice requirements. This is particularly true, since as explained, the notice requirements of the Prime Lease are difficult if not impossible to understand.

Therefore, notice provided by the plaintiff was valid. Consequently, based on the foregoing the motion of the plaintiff seeking summary judgement on the causes of action of ejectment, declaratory judgement and use and occupancy is granted. The cross-motion is denied. Likewise, the plaintiff's motion seeking to strike the affirmative defenses is granted.


So ordered.

ENTER:



DATED: November 12, 2019  
Brooklyn N.Y.

Hon. Leon Ruchelsman  
JSC



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KINGS COUNTY CLERK  
FILED