

**RLR Invs., LLC v Truck-Rite Distrib. Sys. Corp.**

2020 NY Slip Op 32781(U)

August 17, 2020

Supreme Court, Kings County

Docket Number: 507985/19

Judge: Lawrence S. Knipel

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At an IAS Term, Part Comm-4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 17<sup>th</sup> day of August, 2020

P R E S E N T:

HON. LAWRENCE KNIPEL,  
Justice.

-----X  
RLR INVESTMENTS, LLC and RL ROBERTS, LLC,

Plaintiff(s),

- against -

Index No. 507985/19

TRUCK-RITE DISTRIBUTION SYSTEMS CORPORATION,

Defendant(s).

-----X

The following e-filed papers read herein:

NYSEF Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	<u>302, 304, 356, 359, 368, 376, 378</u>
Opposing Affidavits (Affirmations)_____	<u>318, 403, 404, 412, 427, 429, 430</u>
Reply Affidavits (Affirmations)_____	<u>420, 424</u>

Upon the foregoing papers, plaintiff RLR moves (MS #14) for an order, pursuant to CPLR 3124 and 3216, compelling nonparties FMC Company (FMC) and Old Dominion Freight Line, Inc. (ODFL) to appear for depositions and for sanctions. RLR moves (MS #15) for an order, pursuant to CPLR 3212, granting summary judgment on its complaint and counterclaim and dismissing the claims of defendant Truck-Rite Distribution Systems

Corporation (Truck-Rite). By separate motion, RLR moves (MS #16) for an order vacating the *Yellowstone* injunction entered in favor of Truck-Rite.

RLR commenced this action against its commercial tenant, Truck-Rite, for breach of lease and eviction based on Truck-Rite's permitting the neighboring owner and/or its tenant to utilize a certain driveway for parking and storage without RLR's prior consent. RLR is the owner of a parcel of property, designated as Block 2815, Lot 1 at 512 Gardner Avenue in Brooklyn. FMC owns adjacent property designated as Block 2815, Lot 2 at 500 Gardner Avenue in Brooklyn. ODFL is a tenant leasing FMC's property pursuant to a lease entered into on June 1, 2003 and extended by lease extension agreements dated May 18, 2007 and June 4, 2013. RLR's property is presently occupied by Truck-Rite pursuant to a lease dated April 21, 2011.

On May 3, 1991, FMC and the former owner of RLR's property entered into a "Declaration of Mutual Driveway Easement" granting a "perpetual and unobstructed easement over" a strip or driveway located between RLR's and FMC's properties "for trucks, automobiles and pedestrians for the purposes of ingress to and egress from" RLR's and FMC's properties "to and from" Gardner Avenue and "for the purpose of maneuvering vehicles therein." In the most recent lease extension agreement, dated June 4, 2013, FMC purportedly extended ODFL's leasehold to include the "additional paved yard area adjacent to" FMC's property, indicated in an exhibit to the lease extension agreement to constitute the driveway subject to the easement.

Shortly following the commencement of this action, Truck-Rite commenced an action seeking a judgment declaring that it is not in breach of the subject lease and for injunctive relief. Truck-Rite's concomitant motion (by order to show cause) for a Yellowstone injunction was granted by order dated June 21, 2019. In granting the Yellowstone injunction, the court determined that RLR's April 9, 2019 notice of termination of the lease was ineffective as it was served prior to the period afforded to Truck-Rite to cure the defaults alleged in RLR's April 2, 2019 notice to cure. The court also determined that an April 3, 2019 response by Truck-Rite to the notice to cure, wherein it claimed that RLR waived any objection to the neighboring owner's/tenant's use of the driveway and wherein it requested retroactive permission to sublet the driveway, did not constitute a repudiation of the lease by Truck-Rite. By order dated December 20, 2019, Truck-Rite's declaratory judgment action was consolidated with the instant action.

RLR's motion to compel and for sanctions must be summarily denied as it was made without an affirmation of good faith as required by 22 NYCRR 202.7 (a) (*see Starzyk v Heslinga*, 177 AD3d 624, 626 [2d Dept 2019]). At any rate, in its order dated November 8, 2019, denying the motion of FMC and ODFL to quash the subpoenas issued by RLR, the court directed that the depositions of non-parties "shall proceed only after depositions of parties." Insofar as the deposition of a party, RLR, is outstanding, FMC and ODFL cannot presently be deemed in noncompliance with RLR's demand to appear for depositions. Denial

of the instant motion to sanction/compel is without prejudice to RLR to seek relief based on any delay or refusal of Truck-Rite to notice and schedule the deposition of RLR.

The proponent of a summary judgment 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]). Failure to make such prima facie showing requires a denial of the motion regardless of the sufficiency of the opposing papers (*id.*) The proof submitted to the court should be scrutinized carefully in the light most favorable to the party opposing the motion (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). It is not sufficient for the moving party to simply point to alleged deficiencies in the proof of the party opposing the motion (*see Davies v Haym Solomon Home for Aged*, 4 AD3d 447, 448 [2d Dept 2004]).

There is no dispute that Truck-Rite granted FMC and/or ODFL permission to use the subject driveway for storage. RLR contends that the granting of such permission and allowing FMC/ODFL to use the driveway for storage, without first obtaining the written consent of RLR, violates sections 1, 20 and 24 of its lease with Truck-Rite.

“It is axiomatic that, ‘when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms’” (*Skanska USA Bldg. Inc. v Atlantic Yards B2 Owner, LLC*, 31 NY3d 1002, 1006 [2018], quoting *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]; *see Reiss v Financial Performance Corp.*, 97 NY2d 195, 198 [2001]). “In that regard, ‘[c]ourts may not, through their interpretation of

a contract, add or excise terms or distort the meaning of any particular words or phrases, thereby creating a new contract under the guise of interpreting the parties' own agreements," (*id.*, quoting *Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc.*, 30 NY3d 572, 581 [2017]).

Section 1 of the lease provides:

Leased Premises. The Leased Premises is the real property located at 500 Scott Avenue, Brooklyn, New York consisting of approximately 3,750 +/- sq. ft. of office space, a (52) door cross-dock truck terminal and a 1,673 +/- sq. ft. maintenance shop, situated on approximately 5.0 +/- acres, as further depicted by the site plan, attached hereto and incorporated by reference herein as Exhibit A, and subject to all easements, restrictions, and other matters of record, including those items listed on Schedule B of Title No. LT990371 of the Lawyers Title Insurance ProForma Policy, attached hereto and incorporated by reference herein, as Exhibit B (the "Leased Premises").

The foregoing section appears to be nothing more than a description of the leased premises and an incorporation of the easements and restrictions pertaining thereto. While the subject easement contemplates that RLR/Truck-Rite and FMC/ODFL share unobstructed mutual access to the driveway which cannot be defeated by the neighboring property owner/tenant, neither the easement nor the lease contains any express prohibition against a tenant temporarily surrendering or waiving its own rights to unobstructed access by granting a license to the neighboring property to utilize the driveway for other purposes.

Section 24 of the lease expressly required Truck-Rite to obtain RLR's prior written consent before subletting or assigning any portion of the property, and required Truck-Rite to obtain from any sublessee or assignee their agreement in writing to be bound by the Lease:

Only upon prior written approval of [RLR], which approval shall not be unreasonably withheld or delayed, shall [Truck-Rite] have the right to sublet or assign all or part of its interest in the Leased Premises during the Term of any renewal of this Lease, provided such subletting or assignment shall not eliminate or reduce any of [Truck-Rite]'s rights, obligations, liabilities, and responsibilities pursuant to all of the terms and conditions of this Lease. In the event of any sublease or assignment by [Truck-Rite], the sublessee or assignee shall agree in writing for the benefit of [RLR] to be bound by this Lease and [Truck-Rite] shall remain obligated hereunder.

Further, section 20 of the lease provides:

Default of Lessee. The occurrence of any of the following shall constitute a material default by Lessee of this Lease Agreement, in which case the Lease shall become voidable at Lessor's sole discretion, upon Lessor giving Lessee written notice, and Lessee being afforded (10) days to vacate the Leased Premises or to cure the default. In the event that Lessee cures said default within said ten (10) day period all other provisions and conditions of this Lease shall remain in full force and effect.

\* \* \*

20.7 Lessee attempts to make an unauthorized assignment of this Lease, or attempts to sublease any portion of the Leased Premises without the written consent of Lessor, which consent shall not be unreasonably withheld.

There is no express provision in the lease prohibiting Truck-Rite from granting a license or permission to the neighboring owner/tenant to use the subject driveway without the consent of RLR. Thus, the question of whether Truck-Rite violated the aforesaid

provisions regarding unauthorized subleases or assignments turns on a finding that the “permission” granted by Truck-Rite to FMC/ODFL constitutes a “sublease” or an “assignment” as opposed to a license. “A sublease is defined as a ‘transfer by a tenant of ... part of his [or her] estate or interest in the whole, or in a part, of the leased premises’” (*BLF Realty Holding Corp. v Kasher*, 299 AD2d 87, 94 n 4 [1st Dept 2002], *lv dismissed* 100 NY2d 535 [2003], quoting Rasch, *New York Landlord & Tenant*, Fourth Ed., 9.2 [1998]; *see 520 East 81st Street Assocs. v Roughton-Hester*, 157 AD2d 199, 201 [1st Dept 1990]). “An assignment ... transfers an existing estate into new hands” (*Collins v Hasbrouck*, 56 NY 157, 162 [1874]). “The nature of the transfer of absolute control and possession is what differentiates a lease from a license. . . [w]hereas a license connotes use or occupancy of the grantor’s premises, a lease grants exclusive possession of designated space to a tenant, subject to rights specifically reserved by the lessor. The former is cancellable at will, and without cause” (*American Jewish Theatre v Roundabout Theatre Co.*, 203 AD2d 155, 156 [1st Dept 1994]). The “critical question in determining the existence of a lease . . . is whether exclusive control of the premises has passed to the tenant” (*Women’s Interart Ctr., Inc. v New York City Economic Dev. Corp.*, 97 AD3d 17, 21 [1st Dept 2012], *lv dismissed* 20 NY3d 1034 [2013]).

RLR does not submit or refer to any proof of an agreement between Truck-Rite and FMC/ODFL whereby Truck-Rite intended to transfer any interest or estate in the leased premises or surrender exclusive possession or control of the disputed space to FMC/ODFL.

The evidence submitted by RLR on its summary judgment motion, including the deposition testimony and affidavits of Truck-Rite's president, Paul Pompa, at best demonstrate that a mere license was granted to FMC/ODFL; something not expressly prohibited by the terms of the lease. At his deposition, Pompa testified:

Q. ...So what was the form of the permission that you gave to Mr. Carillo of FMC to use the mutual driveway easement property for Old Dominion to park trucks and trailers and equipment?

A. Verbal.

Q. Verbal. And did you have in your mind what kind of agreement this was?

A. He asked me to do him a favor, and I said yes, and there was no compensation. I never asked him for any money, never received any money from Old Dominion. I just did a friend a favor.

Q. And did Mr. Carillo say he wanted a license or an assignment or a sublease or something else?

A. Not that I recall, no.

Q. He just said he wanted permission?

A. Yeah (NYSCEF Doc No. 360, p. 66).

\* \* \*

Q. ...Are you aware of anything that prohibits you right now from terminating your permission to FMC to use the mutual driveway easement property?

A. No (*id.*, p. 68).

The court does not find that Truck-Rite's invocation of the prohibition against unreasonable withholding of approval for subleases and assignments, made in response to and in defense of RLR's allegations of default, constitutes proof or an admission that a sublease or assignment was in fact granted. Further, the court is not bound by the assertions set forth in RLR's statement of undisputed facts submitted in accordance with 22 NYCRR § 202.70, Rule 19-a (*see Abreu v Barkin & Assoc. Realty, Inc.*, 69 AD3d 420, 421 [1st Dept 2010]).

Insofar as the court finds that the proof submitted by RLR on its summary judgment motion fails to eliminate all issues of fact as to whether Truck-Rite is in breach of its lease, RLR's motion for summary judgment and motion to vacate the Yellowstone injunction are denied.

The foregoing constitutes the decision and order of the court.

E N T E R,



J. S. C.

Justice Lawrence Knipel