SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **07**

Justice

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RICHARD STOLZMAN,

Plaintiff,

- v -

210 RIVERSIDE TENANTS, INC.,

Defendant.

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INDEX NO. 651058/2020

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134

were read on this motion for SUMMARY JUDGMENT.

Armstrong Teasdale LLP, New York, NY (Thomas V. Juneau, Jr. of counsel), for plaintiff.
Braverman Greenspun PC, New York, NY (Maria Boboris and Manu Davidson of counsel), for defendant.

Gerald Lebovits, J.:

This action involves a disagreement between a co-op resident and the co-op over the scope of the resident's right to have an air conditioner on the roof of the co-op building.

Plaintiff, Richard Stolzman, owns the shares allocated to Apartment 12F of 210 Riverside Drive, a residential cooperative apartment building in Manhattan. Defendant, 210 Riverside Tenants, Inc., is the cooperative corporation that owns the building. In 1991, Riverside granted Eric Howkins, Stolzman's predecessor lessee, a license to use a 20-square-foot space on the roof of the building for an air-conditioning unit. The original unit is now approaching the end of its useful life. Stolzman and Riverside dispute whether the 1991 agreement, as amended in 2002, permits Stolzman to use only the existing air-conditioning unit, or also to remove that unit and install a new one. That dispute led to this action.

This court previously granted in part and denied in part Riverside's motion to dismiss under CPLR 3211. Stolzman now moves for summary judgment under CPLR 3212 on his remaining claim, seeking damages for breach of the license agreement. The motion is denied as well.

BACKGROUND

Stolzman is a shareholder in Riverside, owning the shares and proprietary lease appurtenant to Apartment 12F of the co-op building. The apartment, located on the top floor of the building, is air-conditioned through a unit located on the building's roof. That air-conditioning unit was installed there in 1991 by Stolzman's predecessor lessee, Howkins, in accordance with a license agreement drawn up the same year between Howkins and Riverside. (*See* NYSCEF No, 97.) The 1991 license agreement had a renewable term of 10 years. The agreement provided that during its term, Howkins and his heirs, successors, and assigns were permitted to "use the space for the installation of an air conditioning unit . . . serving the apartment and for no other purpose." (*Id.* at 1.) In exchange, Howkins paid Riverside $1,250. (*Id.* at 2.) Howkins owed Riverside another $1,250 at the beginning of every 10-year term following the initial payment. (*Id.* at 2.)

In 2002, Howkins and Riverside amended the license agreement. The 2002 agreement, in force today, does not expressly provide a term limit for the license, and specifies that the license is "irrevocable." (*See* NYSCEF No. 100 at 1.) Under the 2002 agreement, Howkins and his successors and assigns "may use the space for *an* air-conditioning unit . . . serving the Apartment, and for no other purpose." (*Id.* at 1 [emphasis added].) The next sentence provides that the licensee "shall maintain such Air Conditioning in accordance with all applicable legal requirements." (*Id.* at 1.) The 2002 agreement obligates the licensee to pay Riverside a maintenance fee of $85 per month, and provides that this fee will increase in proportion to increases in maintenance fees throughout the building generally. (*Id.* at 1.) The 2002 agreement also provides that Riverside may move the air-conditioning unit to accommodate construction either of a roof deck or an additional floor of the building. Any associated costs would be split equally between the licensee and Riverside. (*Id.* at 2.)

Stolzman purchased the shares appurtenant to Apartment 12F (and moved in) in 2010. Stolzman now wishes to sell Apartment 12F, but has experienced difficulty in doing so. This difficulty stems from the fact that the air-conditioning unit, now 30 years old, will need to be replaced in the near future. Riverside contends that the current license agreement covers only use of the existing air-conditioning unit, and does not permit replacement of the unit. Riverside has taken the position that it will permit Stolzman (or any successor to the lease) to replace the unit only upon execution of a new license agreement on terms more favorable to Riverside. (*See* NYSCEF No. 113 [proposed new agreement].) Stolzman has alleged that Riverside's restrictive position on the air-conditioning unit has cost him several satisfactory buyers.

Stolzman brought this action against Riverside, seeking money damages for its alleged breach of the co-op lease, breach of the license agreement, and tortious interference with prospective business relations. Riverside moved under CPLR 3211 to dismiss the complaint in its entirety. Stolzman cross-moved under CPLR 3001 for a declaratory judgment in his favor; and Riverside contended that Stolzman's declaratory-judgment claim should be dismissed as well. This court dismissed Stolzman's breach-of-lease and tortious-interference claims, but denied dismissal of Stolzman's breach-of-license agreement claim. (*See Stolzman v 210 Riverside Tenants, Inc.,* 2020 NY Slip Op 50972[U] [Sup Ct NY County Aug. 31, 2020].) This court also

denied Stolzman's cross-motion for declaratory judgment, and granted dismissal of that claim, because the claim duplicated Stolzman's breach-of-license cause of action. (*See id.* at *3.)

Stolzman now moves under CPLR 3212 for summary judgment against Riverside with respect to his breach-of-license claim. The motion is denied.

DISCUSSION

The parties' dispute on this motion concerns the proper interpretation of the 2002 license agreement. In particular, Stolzman and Riverside disagree over whether the agreement permits Stolzman to replace the existing air-conditioning unit. The agreement does not contain any explicit provision addressing replacement. (*See generally* NYSCEF No. 100.) Nor does it contain an express term limit. (*See id.*) Each party contends that the plain language of the 2002 agreement unequivocally supports its position. This court holds, however, that the agreement is ambiguous with respect to the question of replacement.

A contract is ambiguous if it is reasonably subject to multiple interpretations. (*See Ellington v EMI Music, Inc.,* 24 NY3d 239, 244 [2014].) A court may grant summary judgment in a contract dispute even when the contract is ambiguous. If the extrinsic evidence points decisively toward one reading of a contract, the court may resolve the dispute as a matter of law. (*See Dilek v Rozenholc,* 2017 WL 4677628, *6 [Sup Ct, NY County Oct. 18, 2017] [granting summary judgment when the contract at issue was ambiguous but extrinsic evidence resolved the ambiguities and factual issues]; *cf. James v Jamie Towers Housing Co., Inc.*, 294 AD2d 268, 270 [1st Dept 2002] [holding that deposition testimony sufficed to resolve any ambiguity in the contract's language].)

On the other hand, when both the language of a contract and the extrinsic evidence are ambiguous, summary judgment is not warranted. (*Valley National Bank v Paige One, LLC*, 191 AD3d 622, 623 [1st Dept 2021] ["We find that the parties' resort to further extrinsic evidence does nothing to resolve the ambiguity or otherwise warrant summary judgment for either side].") For instance, summary judgment would not be appropriate when the credibility of extrinsic evidence is in dispute, or when the extrinsic evidence supports multiple reasonable interpretations of the contract. (*See Hartford Acc. & Indem. Co. v Wesolowski*, 33 NY2d 169 [1973].)

I. Whether the License Agreement is Ambiguous

In contending that the license agreement unambiguously withholds permission to replace the air conditioner, Riverside relies on the agreement's term providing that the licensee "shall maintain such air conditioning in accordance with all applicable legal requirements." (NYSCEF No. 100 at 1.) Riverside argues that this language clearly limits the licensee's conduct under the agreement to maintaining the unit—not to totally replace it. Stolzman, on the other hand, urges the court to read this provision as imposing an obligation on the licensee, not limiting the scope of the rights conferred by the agreement on the licensee.

Stolzman's interpretation of this language is reasonable. A contract typically confers a combination of rights and duties onto the signatory. The key task, then, is to distinguish one from the other. The text of the 2002 license agreement addresses the licensee's rights and duties in successive sentences. The agreement first confers a right on the licensee, providing that the licensee "*may* use the Space for an air-conditioning unit . . . serving the Apartment." (NYSCEF No. 100 [emphasis added].) The same sentence of the agreement also makes clear that limits exist on the scope of that right: It bars use of the roof space for any "other purpose." (NYSCEF No. 100 at 1.)

The agreement's next sentence provides that the licensee "*shall* maintain such Air Conditioning in accordance with all applicable legal requirements." (*Id.* [emphasis added].) This requirement—unlike the "for no other purpose" phrase in the preceding sentence of the agreement—does not limit the manner or extent of the licensee's use of the unit and the roof space. Instead, the requirement constitutes a distinct, affirmative obligation on the part of the licensee to keep the unit itself code-compliant.

On the other hand, this court does not agree with Stolzman that the agreement clearly and unambiguously permits replacement of the unit. The agreement does not, after all, mention replacement. Given the significant undertaking involved in removing a large and heavy air-conditioning unit from the roof of a building and installing a new unit onto the roof, that omission is potentially significant. To be sure, as Stolzman points out, the 2002 agreement refers to "*an* air conditioning unit," rather than, for instance, "*the* air conditioning unit." (*Id.* [emphasis added].) That choice of an indefinite article does at least suggest that the 2002 agreement contemplates the possibility of a new air-conditioning unit's being installed in the space at some point after the agreement's execution. At the same time, this court is not persuaded that this subtle difference in wording should *clearly* be read as having the significant effect on the scope of the agreement that Stolzman would ascribe to it.

In short, the text of the agreement may reasonably read as permitting only use of the existing air-conditioning unit, and also as permitting both use of that unit and its replacement with a new unit. The agreement is ambiguous.

II. Whether Extrinsic Evidence Resolves the License Agreement's Ambiguity as a Matter of Law

Because the language of the 2002 agreement does not unequivocally resolve the issue of replacement, this court must turn to extrinsic evidence to determine the parties' intent. (*See Theroux v Resnicow,* 187 AD3d 654, 654-655 [1st Dept 2020].) The parties have provided a number of documents illustrating the negotiation process that took place between Howkins and Riverside from 1991 to 2002, including several letters from Andrew Squire, Riverside's former counsel. Taken together, the 1991 agreement, Squire's letters, two draft agreements proposed by Squire in 1995, and minutes of a 2001 board meeting provide helpful context for the final 2002 agreement.

The 1991 agreement contained terms favorable to Howkins. (*See* NYSCEF No. 97.) It granted Howkins and his heirs, successors, and assigns a 10-year license to use the roof space in

exchange for a lump sum of $1,250. (*See id*. at 1-2.) As Riverside notes, this amounts to roughly $10 per month.[1] And the license would automatically renew at the same fee after 10 years, so long as the air-conditioning unit was not causing any structural damage to the building. (*See id.* at 2.)

Riverside soon made several attempts to invalidate the agreement. A letter from Squire dated December 13, 1994, declared the 1991 agreement "unenforceable and/or voidable." (NYSCEF No. 121 at 1.) In the same letter, Squire proposed a new agreement under which Howkins' monthly license fee would be increased retroactively to $100 per month, the license would be made nontransferable and limited to a one-year term (renewable at Riverside's reasonable discretion), and the license would become revocable by either party on 60 days written notice. (*See id.* at 2.) Howkins rejected this proposal.

In 1995 Squire continued to press for a revised agreement. A proposal attached to a letter from Squire dated September 27, 1995, would have granted the licensee "permission to operate and maintain *the* air conditioner *heretofore installed*." (NYSCEF No. 98 at 3 [emphasis added].) This proposal limited the term of the license to three years (renewable for further three-year periods at Riverside's reasonable discretion). (*See id.* at 3.) The September 1995 proposal also provided that the license would expire if Howkins transferred his co-operative shares or if the air-conditioning unit was moved or removed from the roof altogether. (*See id.* at 3.) In a further letter, dated November 30, 1995, Squire notes that the Riverside board was especially concerned about the possibility that Howkins's air-conditioning unit could interfere with potential construction of a roof deck. (*See* NYSCEF No. 99 at 2.)

The record reflects that in December 1995, Riverside sued Howkins in the Housing Part of the New York City Civil Court, seeking additional rent that Howkins assertedly owed for his use of the roof space. (*See* NYSCEF No. 95 at ¶ 12.) Howkins later countersued in Supreme Court, New York County, "alleging certain members of the Board had conducted a campaign of harassment to coerce him to accede to [Riverside's] demands." (*Id.*) The record does not, however, contain filings from these actions, nor how they were resolved.

The minutes from a September 2001 meeting of Riverside's board indicate that "[m]eetings with . . . Howkins had been convened for a third time." (NYSCEF No. 124 at 4.) At that meeting, the board determined that Howkins would be offered an amended license agreement, lasting for a renewable 10-year term, for which Howkins would pay approximately $80 a month, subject to increases matching percentage increases in building-wide maintenance fees. (*See id.*) This proposal also called for Howkins to agree to move the air-conditioning unit should Riverside decide to embark on construction on the roof, with moving expenses to be "shared 50/50 between the building and Mr. Howkins." (*Id.*)

The 2002 agreement between Howkins and Riverside, which controls today, contains some provisions more favorable to Riverside than the 1991 agreement, along the lines of Riverside's proposals from 1995 and 2001. The 2002 agreement raises the monthly license fee to

[1] Riverside has asserted that Howkins was serving as the president of Riverside's board at the time he and Riverside entered into the 1991 agreement.

a minimum of $85 a month, subject to further increases proportional to increases in the building-wide monthly maintenance charges. (*See* NYSCEF No. 100 at 1.) And the 2002 agreement provides that if Riverside builds a roof deck, it retains the right to move the air-conditioning unit (with moving expenses to be split between Riverside and the licensee). (*See id.* at 2.)

On the other hand, the 2002 agreement, unlike either the 1995 or 2001 proposals, contains no express durational limit. (*See generally* NYSCEF No. 100.) And unlike the 1995 proposals, the 2001 agreement does not permit either party to revoke the license, provide that the license would expire upon transfer of the shares or removal of the air-conditioning unit, or state that it is limited to the particular unit that Howkins had originally installed. (*See id.* at 1-2.)

The differences between the 1995 and 2001 proposals and the eventual 2002 license agreement as executed, particularly with respect to the scope and duration of the license, point in favor of Stolzman's reading of the 2002 agreement. This court is unpersuaded by Riverside's assertion that the 2002 agreement should be interpreted as reflecting the parties' intent to impose the limits of Squire's 1995 proposals on the licensee's use of the roof space—notwithstanding the absence of any contractual language evincing that intent or carrying it into operation.[2] Nor does this court agree that Stolzman's position on the scope of his license under the 2002 agreement is tantamount to asserting ownership over the roof space covered by the license, as Riverside suggests.

At the same time, this court is not persuaded that the extrinsic evidence presented on this motion establishes that Stolzman's reading of the 2002 license agreement is correct *as a matter of law*.

The record does not reflect, for example, what led Riverside to resort to litigation against Howkins in late 1995, rather than continuing to pursue negotiation; what led Howkins to countersue Riverside in 1998; what legal and evidentiary support Howkins and Riverside relied on in the actions between them; whether those actions were resolved by court orders or by settlement; or what the resolutions of the actions consisted of. In other words, it is unclear to this court whether the litigation between Howkins and Riverside strengthens, weakens, or leaves unaffected the inferences to be drawn from comparing the 1995 proposals and the 2002 agreement.

Moreover, the record does not indicate what brought the parties back to the negotiating table in late 2001; what the full terms were of the proposed agreement discussed in the September 2001 board meeting (and how those compared to the 1995 proposals); nor what happened between that meeting and the execution of the 2002 license agreement. At the very least, *something* brought about the removal from the final agreement of the 10-year license term

[2] Riverside also contends that by replacing the word "installation," which appeared in the 1991 agreement, with "use" in the 2002 agreement, the parties agreed that the licensee would be limited to use of the existing air-conditioning unit rather than installation of a new unit. (NYSCEF No. 97 at 1; NYSCEF No. 100 at 1.) This argument ignores that the 2002 license agreement refers to the licensee's use of *an* air-conditioning unit—not, as in 1991, installation of *the* air-conditioning unit.

that had been discussed at the September 2001 board meeting. What that something was, though, and whether Riverside received any concessions from Howkins in return, remains unclear.

In short, Stolzman has advanced a strong reading of the extrinsic evidence surrounding the 2002 license agreement. But accepting that reading now would still require this court to take a number of inferential leaps over gaps in the evidentiary record as it stands. It would be inappropriate for this court to do so at summary judgment.[3] That task must instead be left for a jury.

For the parties' benefit going forward, this court also notes that Stolzman has not, thus far, provided sufficient evidence to support his claim against Riverside for money damages.[4] (*See Wenger v Alidad*, 265 AD2d 322, 323 [2nd Dept 1999] [holding that because counterclaimant "failed to prove the damages that he allegedly sustained, he was not entitled to recover compensatory or punitive damages"].) Stolzman has alleged, for example, that he lost several prospective buyers for the apartment due to Riverside's refusal to allow replacement of the air-conditioning unit. (*See* NYSCEF No. 95 at ¶ 18.) But Stolzman has not provided evidence that losing these buyers caused him harm compensable in money damages (whether in the form of a showing that co-op apartment prices in the neighborhood have decreased in the past four years, or otherwise). This court does not hold that Stolzman *cannot* establish monetary harm. But, going forward, more evidence of that harm will be required before Stolzman can be entitled to recover money damages, even if he were to prevail on liability.

Accordingly, for the foregoing reasons it is

ORDERED that Stolzman's motion for summary judgment under CPLR 3212 is denied.

6/9/2022
DATE

HON. GERALD LEBOVITS
J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

[3] Stolzman also argues for the first time on this motion that Riverside breached the covenant of good faith and fair dealing implied in the 2002 agreement. But Stolzman did not plead this claim in his complaint; and given the absence of discovery on the claim, it would prejudice Riverside were this court to reach its merits. And the contentions underlying this claim substantially overlap in any event with those raised in support of Stolzman's previously dismissed tortious interference claim.

[4] Given this court's ruling on liability, it does not reach the issue of attorney fees.