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

**PRESENT:** **HON. VERNA L. SAUNDERS, JSC** **PART 36**
***Justice***

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BROAD STREET SUITES LLC,
Plaintiff,

- v -

EHRINPREIS & LEVINE, PLLC and ANDREW B. EHRINPREIS,
Defendants.

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**INDEX NO.** 652849/2021

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46

were read on this motion to/for **SUMMARY JUDGMENT**.

In this breach of contract action, defendants Ehrinpreis & Levine, PPLC ("E&L") and Andrew B. Ehrinpreis move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's causes of action for breach of contract and breach of a personal guaranty. Plaintiff cross-moves for summary judgment dismissing all causes of action against it, pursuant to CPLR 3212.

On August 26, 2019, E&L, a law firm, entered into an agreement ("agreement") with plaintiff for private office space in Suite 1444 ("unit"), on the 14th Floor of 30 Broad Street, New York New York ("the premises") (NYSCEF] Doc No. 8 ¶ 3, *Levine's affidavit*). The agreement commenced on September 1, 2019, and expired August 31, 2020 (NYSCEF Doc. No. 20, *agreement*). It entitled E&L to 24-hour access to the premises and unit; access to common spaces within the premises, including a kitchen facility, reception area, meeting rooms, as well as "sundry services" such as a receptionist, mail sorting, and a private telephone line (*id.* at 1, 9). E&L agreed to pay $1550.00 per month, plus a $3100.00 security deposit (*id.* at 1). With respect to extension or termination, the agreement provided in part:

> "Upon the expiration of the initial term, or any extension thereof, the term of this agreement herein granted shall be automatically extended for the same period of time as the initial term, upon the same terms and conditions as contained herein, unless either party gives notice to the other in writing to the contrary at least ninety (90) days prior to the end of the term" (*id.* at 2).

Defendants state that in summer of 2020, during the COVID-19 pandemic, tenants within the premises failed to follow COVID-related safety precautions. Defendants notified plaintiff via email on September 17, 2020, September 24, 2020, November 18, 2020, and December 1, 2020 regarding these concerns (NYSCEF Doc No. 33 ¶ 11, 13, 16-17, *defendants' statement of material facts*). Although plaintiff replied that action would be and had been taken, by October 2020, Levine informed Juda Srour, a principal of plaintiff, of E&L's intention to relocate

(NYSCEF Doc No. 7 at 6, *defendants' memorandum of law*). On December 1, 2020, E&L notified plaintiff that it would be vacating the unit by the end of the month (*id.* at 8-9). On December 7, 2020, Levine, a principal of E&L, requested the return of E&L's security deposit, but Srour refused (*id.* at 9). Thereafter, on December 30, 2020, E&L vacated the unit (*id.*).

Defendants now move for summary judgment on the grounds that the agreement was a lease not a license, thus requiring plaintiff to notify E&L regarding automatic lease renewals pursuant to General Obligations Law [GOL] § 5-905. GOL § 5-905 provides, in pertinent part, that an automatic lease provision is inoperative unless the lessor provides "written notice, served personally or by registered or certified mail, calling the attention of the tenant to the existence of such provision in the lease" at least fifteen days and not more than thirty days prior to the time specified in the lease for providing notice to quit the premises (*see* General Obligations Law § 5-905).

Plaintiff in opposition and in support of its cross-motion argues that it was not a landlord and defendants never developed a possessory interest in the premises. It contends that should this court find that the license is in fact a lease, E&L waived its right to receive renewal notices pursuant to the agreement and was entitled to keep the security deposit against the unpaid license fees.

It is well-established that summary judgment may be granted only when it is clear that no triable issue of fact exists. (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see also *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. (see *Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]; *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.,* 46 NY2d 1065,1067 [1979].) Failure to make such a *prima facie* showing requires a denial of the summary judgment motion, regardless of the sufficiency of the opposing papers. (see *Ayotte v Gervasio,* 81 NY2d 1062, 1063 [1993].)

Resolution of this case centers upon whether the agreement between plaintiff and defendants is a lease or license. "Whereas 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." (*Z. Justin Mgt. Co. v Metro Outdoor, LLC*, 137 AD3d 577, 578 [1st Dept 2016] [internal quotation marks and citation omitted].) "That a writing refers to itself as a license or lease is not determinative; rather, the true nature of the transaction must be gleaned from the rights and obligations set forth therein." (*Union Sq. Park Community Coalition, Inc. v New York City Dept. of Parks & Recreation*, 22 NY3d 648, 656 [2014].)

Defendants contend that the agreement created a distinction between exclusive access to the unit and non-exclusive access to common areas of the premises, and is therefore a lease, not a license. As a lease, plaintiff was obligated to provide notice pursuant to GOL § 5-905. Having failed to do so, at the expiration of its one-year term on August 31, 2020, the agreement became a month-to-month lease pursuant to Real Property Law 232- a (30 days' notice of termination

required in month-to-month tenancy). This in turn meant that defendant's December 1, 2020 notice to plaintiff that it would vacate the premises by the end of the month eliminated any further obligations that defendants had to plaintiff.

Plaintiff's opposition is predicated on its claim that the agreement is a license, and not a lease, due to the express language in the agreement denominating itself as a "Licensing Agreement." It points to co-working or work-sharing enterprises that allow licensors to revoke or relocate a licensee at will and cites to *Kemcy Intl. v Regus Mgt. Group, LLC,* 2011 NY Slip Op 34305 (Sup Ct, NY County 2011).

In *Kemcy,* plaintiff entered into an office service agreement, wherein it rented office space, parking and other services from defendant Regus. After accruing arears, Regus stopped providing business services and revoked Kemcy's access to the business center. Kemcy moved for a preliminary injunction and to enjoin Regus from effectuating a wrongful eviction because it argued that it was a tenant rather than a licensee. The court held that

> "the totality of the terms of the Agreement clearly demonstrate the intent to establish a license, not a lease, between the parties. The Agreement does include a defined period of time in which a client is provided with a space and the various agreed-upon services, but also indicates that the assigned office space is not necessarily permanent, and that Regus may enter the space at any time, thus showing that the client's right to the particular space is not exclusive" (*id.* at **9).

While the *Kemcy* decision analyzes clauses that are similar to the agreement at issue, it is not only distinguishable by the standard by which it was decided, but also the non-exclusive right to the room allocated to Kemcy. The agreement between Kemcy and Regus states in part,

> "'This agreement lists the accommodation(s) Regus has initially allocated for the Client's use. The Client will have a *non-exclusive* right to the rooms allocated to it. Occasionally Regus may need to allocate different accommodation(s), but these accommodation(s) will be of reasonably equivalent size and Regus will notify the Client with respect to such different accommodation(s) in advance'" (*id.*, at **7 [emphasis added]).

Here, while similar language is also used in the "Miscellaneous" portion of the agreement, the preamble and "Operating Covenant" all list the unit 1444 as exclusive to E&L. It appears that while the agreement contemplates relocation, the intent was to assign unit 1444 specifically to E&L, especially as it is reiterated in the floor plan annexed in the agreement's Schedule D.

Defendants cite to the recent case of *Solomon & Cramer LLP v Times Square Suites LLC,* 2021 NY Slip Op 31388[U] (Sup. Ct, NY County 2021). Not only is the contract at issue in *Solomon* identical to that of the instant case, but the same question, whether the agreement was a license or lease was before the court on a summary judgment motion. In *Solomon*, the court held that:

> "the agreement [is] a lease rather than a license. The agreement specifically provides *exclusive access to a specific unit* within the building and refers to plaintiff's ability to use a common area on a non-exclusive basis. That connotes a lease: plaintiff paid monthly rent for a designated office space, it had 24 hour, 7 days a week access to the unit and the agreement created a distinction between exclusive access to the unit and non-exclusive access to other areas. Unlike the shared co-working spaces alluded to by defendant in its cross-motion, this agreement does not detail a situation where plaintiff merely had access to 'general' office space at its convenience" (*id.* at ** 4-5 [emphasis added]).

The *Solomon* decision addresses the central issue, that of possession and control of the office space. The agreement here does not place restrictions on E&L's use or control of the space, such as who may enter, what services it offered, its operating hours, or who it may hire or fire. The agreement also contains provisions ordinarily found in commercial leases, such as those governing indemnification, repairs, insurance, security deposits, renewal provisions and a clause subordinating the agreement to the ground lease (*see Nextel of N.Y., Inc. v Time Mgt. Corp.,* 297 AD2d 282, 283 [2d Dept 2002]; *Tsabbar v Auld,* 276 AD2d 442, 442 [1st Dept 2000]; *Sun v New World Shopping Center NY, Inc.*, 2020 NY Slip Op 31974[U], **6 [Sup. Ct, Queens County 2020].) This, in addition to the *Solomon* court's analysis — that the agreement created a distinction between exclusive access to the unit and non-exclusive access to common areas — yields the conclusion that the agreement was a lease rather than a license. Therefore, even though "the contract speaks of a 'license' and avoids use of the word 'lease' it contains many provisions typical of a lease and confer[s] rights well beyond those of a licensee or holder of a mere temporary privilege." (*Miller v City of New York*, 15 NY2d 34, 37 [1964].)

Furthermore, the agreement was only terminable upon default or 90-days notice (*American Jewish Theatre, Inc.* 203 AD2d at 156 [a license must be revocable "at will" and "without cause"].) The subject agreement is not revocable "at will." The term "at will" does not appear at all in the agreement. Consequently, the agreement does not meet the "personal," "non-assignable," or "revocable at will" requirements of licenses. (see *Z. Justin Mgt. Co., Inc.,* 137 AD3d at 578; *cf Karp v Federated Dept. Stores*, 301 AD2d 574, 575 [2d Dept 2003] [holding that the agreement was a license rather than lease because defendant reserved the right to relocate or renovate the selling space, required plaintiff to operate its business only during defendant's business hours and merely afforded plaintiff the privilege of operating a department in its store, without exclusive possession and control].)

Because the court finds that the agreement was a lease, it also finds that plaintiff was entitled to receive notice pursuant to GOL § 5-905. In this case, it is uncontested that plaintiff failed to provide defendants with a written reminder of the agreement's automatic renewal. Such inaction renders the automatic renewal clause in this case unenforceable.

The court has considered both parties' arguments regarding COVID-19 safety precautions but need not address the issues in view of the foregoing. Accordingly, it is

**ORDERED** that defendants Ehrinpreis & Levine, PPLC and Andrew B. Ehrinpreis' motion for summary judgment (Mot. Seq. 001) is granted in its entirety and the complaint is

dismissed, with costs and disbursements as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment in favor of said defendants and against plaintiff in the amount of $3,100.00, plus interest from the date of this decision and order; and it is further

**ORDERED, ADJUDGED and DECLARED** that the lease at issue terminated on December 30, 2020; and it is further

**ORDERED** that plaintiff Broad Street Suites LLC's cross-motion for summary judgment is denied in its entirety; and it is further

**ORDERED** that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, on the defendant, as well as, the Clerk of the Court, who shall enter judgment accordingly; and it is further

**ORDERED** that service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

**August 22, 2022**

**HON. VERNA L. SAUNDERS, JSC**

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