

<b>1265 Broadway LLC v Oakwood Worldwide (US) LP</b>
2023 NY Slip Op 30330(U)
January 26, 2023
Supreme Court, New York County
Docket Number: Index No. 652669/2021
Judge: Louis L. Nock
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. LOUIS L. NOCK PART 38M**

*Justice*

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1265 BROADWAY LLC,

Plaintiff,

- v -

OAKWOOD WORLDWIDE (US) LP and WORLDWIDE  
CORPORATE HOUSING, L.P.,

Defendants.

-----X

INDEX NO. 652669/2021

MOTION DATE 07/08/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 44, 45, 46, 47, 48, 49, 50, 51, and 52

were read on this motion for JUDGMENT - SUMMARY.

Upon the foregoing documents, so much of the motion as seeks partial summary judgment on the first cause of action for a declaration that the Sixth Amendment of the Lease (“Sixth Amendment”) between plaintiff 1265 Broadway LLC (“landlord”) and defendants Oakwood Worldwide (US) LP and Worldwide Corporate Housing, L.P. (collectively “tenant”) does not allow tenant to terminate the lease as of September 30, 2021, and that the Lease continues in effect is denied for the reasons set forth in the opposition papers (NYSCEF Doc. Nos. 44, 46-47, 49) and the exhibits attached thereto, in which the court concurs to the extent set forth below. The Sixth Amendment provides that the expiration date of the lease is extended from September 30, 2019, to September 30, 2024 (Sixth Amendment, NYSCEF Doc. No. 25, ¶ 1). The Sixth Amendment goes on to provide that if landlord converts the building to short-term rental use before September 30, 2019, one schedule of annual rent would apply (*id.*, ¶ 2[B][i]). However, if landlord failed to convert the building by September 30, 2019, or if landlord converted the building after that date, then a second schedule of annual rent would apply during

the time the building had not yet been converted, with the first schedule applying after conversion (*id.* ¶ 2[B][ii]). Finally, and most relevant to this action, the Sixth Amendment provides as follows: “**Termination.** This *Agreement* will terminate on September 30, 2021 if conversion is not complete” (*id.*, ¶ 3 [emphasis added]). The word “Agreement” appears only one other time in the Sixth Amendment, in the introductory recitation of the parties’ transaction history as part of the original “Agreement of Lease” which is subsumed into the defined term “Lease” (*id.*, ¶ A). In all other parts of the Sixth Amendment, the Sixth Amendment is referred to as the “Amendment” (*see id.*, ¶¶ 5-7). The word “Agreement” is not defined in the Sixth Amendment, nor in the original Lease. The parties claim that the text is unambiguous, but offering differing interpretations as to whether “Agreement” means merely the agreement of the parties regarding conversion of the building, or the entire Lease.

It is axiomatic that where the parties set down the unambiguous terms of their agreement in writing, the court has no power to vary that writing (*Vermont Teddy Bear Co., Inc. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]). The lease should be read as a whole, and no particular words or phrases should receive undue emphasis (*Bailey v Fish & Neave*, 8 NY3d 523, 528 [2007]). When doing so, a court should not read the contract in a way that renders any provision or clause meaningless (*Warner v Kaplan*, 71 AD3d 1, 5 [1st Dept 2009]). “Only where a contract term is ambiguous may parol evidence be considered to clarify the disputed portions of the parties’ agreement” (*Impala Partners v Borom*, 133 AD3d 498, 499 [1st Dept 2015]).

Here, neither party’s offered interpretations can be squared with the terms of the Sixth Amendment. Landlord’s preferred interpretation of the contract renders meaningless the use of “Agreement” in the termination provision, as the Sixth Amendment is elsewhere referred to as “Amendment.” Moreover, the termination provision is separate from the provisions regarding

landlord's conversion of the building. Conversely, tenant's preferred interpretation of the contract does not fit with the defined term "Lease," which is meant to encompass the original Lease and all amendments thereto. Because the term "Agreement" is not anywhere defined, the court finds it to be ambiguous, and will resort to parol evidence to resolve the ambiguity (*Impala Partners*, 133 AD3d at 499).

In their opposition papers, tenant submits an email thread of conversations between tenant's then Vice President of Field Operations – Americas, Fred Graham, and landlord's general counsel, Michael Kirkwood, regarding the terms of the Sixth Amendment. On January 3, 2019, Graham requested, on behalf of tenant, "an out clause if the conversion is not completed within 2 years of the renewal lease . . . [as] the conversion is a main piece for this long term agreement" (email dated January 3, 2019, NYSCEF Doc. No. 48). The next day, Kirkwood, on behalf of landlord responded and said "[w]e will give you a 2-year termination if the conversion is not complete" (email dated January 4, 2019, NYSCEF Doc. No. 48). Based on this email conversation, the court interprets the termination provision to provide that if landlord failed to convert the building to short-term rental use prior to September 30, 2021, that the Lease would terminate. Landlord argues that the court should not consider these communications evidence due to the merger clause present in the original Lease and incorporated by reference into the Sixth Amendment. However, a merger clause does not bar consideration of parol evidence where it is necessary to resolve an ambiguity (*Shionogi Inc. v Andrx Labs, LLC*, 187 AD3d 422 [1st Dept 2020] [stating that "extrinsic evidence might be admissible to resolve ambiguity" even where agreement contained a merger clause]). Landlord does not offer any further evidence in support of their preferred interpretation of the contract, and does not contest that its general

counsel stated that landlord would provide a two-year termination option for the entire lease. Accordingly, plaintiff is not entitled to a declaration that the lease remains in effect.

Further, the court notes that at oral argument, counsel for tenant requested that the court search the record pursuant to CPLR 3212(b) and grant it summary judgment dismissing the complaint (tr of proceedings dated August 3, 2021, NYSCEF Doc. No. 52 at 14), which request landlord offered no objection or opposition to. Upon a review of the record, the court finds that landlord has no right to relief under the Lease, as tenant did not breach the Lease by terminating it in accordance with the Sixth Amendment and landlord is not entitled to damages for anticipatory breach or to recovery its attorneys' fees, which are the subjects of landlord's three causes of action. Accordingly, the court awards summary judgment to defendant.

Finally, so much of the motion as seeks injunctive relief requiring tenant to continue paying the rent during the pendency of the action is dismissed as moot. Even were this aspect of the motion not moot, a preliminary injunction requires proof of, inter alia, a likelihood of success on the merits and irreparable harm (*Nobu Next Door, LLC v. Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]). As set forth above landlord is not likely to succeed on the merits. Further, plaintiff's injuries are adequately compensable by money damages (*Chiagkouris v 201 W. 16 Owners Corp.*, 150 A.D.3d 442 [1st Dept 2017]).

Accordingly, it is

ORDERED that plaintiff's motion seeking partial summary judgment and injunctive relief is denied; and it is further

ORDERED that the restraint issued by the court in its order dated July 9, 2021 (NYSCEF Doc. No. 33) is vacated, and any funds received by landlord representing rent after September 30, 2021, is to be reimbursed to tenant; and it is further

ORDERED that, upon a search of the record pursuant to CPLR 3212(b), the court grants summary judgment to tenant; and it is further

ADJUDGED and DECLARED that the Sixth Amendment to the parties' Lease gives tenant the right to terminate the lease as of September 30, 2021; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendants Oakwood Worldwide (US) LP and Worldwide Corporate Housing, L.P. dismissing the action against said defendants.

This constitutes the decision and order of the court.



<u>1/26/2023</u>				<u>LOUIS L. NOCK, J.S.C.</u>			
	<b>DATE</b>						
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE