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

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SMG AUTOMOTIVE HOLDINGS LLC,

Plaintiff, Decision and order

- against - Index No. 527468/2022

AAF REAL ESTATE, LLC,

Defendant, February 28, 2023

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PRESENT: HON. LEON RUCHELSMAN Motion Seq. #1

The plaintiff has moved seeking an injunction preventing the defendant from evicting SMG or entering into any contract to sell or transfer the property. The defendant opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments, this court now makes the following determination.

On October 2, 2012 the sublessor Kings Automotive Holdings LLC entered into a lease with the defendant concerning property located at 2318 Flatbush Avenue in Kings County. That lease afforded the sublessor the option to purchase the property in the ninth year of the lease. On February 7, 2017 the plaintiff entered into a sublease with the sublessor and asserts that pursuant to that sublease the plaintiff purchased the sublessors assets and an assignment of the purchase option. Indeed, SMG exercised the purchase option which was rejected by the defendant on the grounds the plaintiff did not have the right to exercise that option. The plaintiff has now moved seeking to enjoin the defendant from evicting the plaintiff or from selling the

property without first allowing the plaintiff to exercise the option.

Conclusions of Law

In relevant part, CPLR §6301 allows the court to issue a preliminary injunction "in any action...where the plaintiff has demanded and would be entitled to a judgment restraining defendant from the commission or the continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff" (id).

It is well established that "the party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of the injunction and a balance of the equities in its favor" (Nobu Next Door, LLC v. Fine Arts Housing, Inc., 4 NY3d 839, 800 NYS2d 48 [2005], see also, Alexandru v. Pappas, 68 AD3d 690, 890 NYS2d 593 [2d Dept., 2009]). The Second Department has noted that "the remedy of granting a preliminary injunction is a drastic one which should be used sparingly" (Town of Smithtown v. Carlson, 204 AD2d 537, 614 NYS2d 18 [2d Dept., 1994]). Thus, the Second Department has been clear that the party seeking the drastic remedy of a preliminary injunction has the burden of proving each of the above noted elements "by clear and convincing evidence" (Liotta v. Mattone, 71 AD3d 741, 900 NYS2d 62 [2d Dept., 2010]).

Considering the first prong, establishing a likelihood of success on the merits, the plaintiff must prima facie establish a reasonable probability of success (Barbes Restaurant Inc., v. Seuzer 218 LLC, 140 AD3d 430, 33 NYS3d 43 [2d Dept., 2016]). In this case the defendant argues no injunction is possible because the plaintiff was never an assignee of the purchase option. Paragraph 11 of the lease between Kings and the defendant stated that the tenant Kings could not sublease any portion of the lease or the entire lease "without the prior written consent of Owner" (see, Agreement of Lease, ¶ 11, dated October 2, 2012 [NYSCEF Doc. No. 15]). On February 1, 2017 the landlord executed a Consent and Waiver of Lien. That document states that the landlord "waives any claim against or lien upon the books, records, inventory, equipment and other property of Sublessee and any proceeds therefrom, located at or installed or to be installed in the aforesaid Premises in which Santander Bank, N.A. together its successors and assigns (the 'Lender') now or hereafter holds a security interest" (see, Landlord's Consent and Waiver of Lien [NYSCEF Doc. No. 17]). The sublessee is listed as the plaintiff, namely SMG Automotive Holdings LLC. The defendant confirms, concerning that document, that "although it is not an explicit consent, the document signed by the Landlord was exchanged for valuable consideration, so AAF never denied the effectiveness of the Sublease" (see, Memorandum of Law in

Opposition, page 4 [NYSCEF Doc. No. 37]). Nevertheless, concerning the purchase option, the defendant maintains such option could not be assigned without the express written approval of the landlord. In the companion case, *SMG Holdings LLC et al v. AAF Real Estate LLC et al.*, Index Number 510650/2020 the defendant argues that "AAF approved the sublease agreement between Kings and SMG but nothing more than that. AAF never approved any assignment of any option or other right provided for in the Prime lease or the Sublease" (Affirmation in Support, ¶ 13 [NYSCEF Doc. No. 93]). In the companion case the defendant explains that "by approving a Sublease, AAF permitted the transfer of use and occupancy, which was only a portion of Kings' interest in the lease. SMG never received the whole of the tenant's interest, nor could it in the absence of AAF's explicit written consent. The language of the Lease barred Kings from assigning any of its interest under the lease without AAF's explicit written approval. SMG's purported position that it had the right to exercise the purchase option is without merit because Kings was precluded from assigning the right unless AAF agreed (which it never did)" (id at ¶ 14). The inconsistency of these arguments is apparent. First, the landlord acknowledges that Kings could not assign any of its interests without the landlord's express written approval yet admits that it approved the sublease, albeit only regarding use and occupancy, without

any written approval. The defendant repeatedly argues the assignment of the purchase option was invalid (see, Memorandum of Law, page 7: "that purported 'assignment' was never approved in writing by the Landlord. Therefore that 'Assignment' is no more than a worthless piece of paper"; page 8: "there is no getting around that fact unless and until the landlord gave its written consent no assignment could be effective. Landlord never gave such written consent. Therefore SMG never can establish standing to enforce AAF's promise which was made to Kings and Kings exclusively"; page 9: "this matter is directly controlled by the explicit language of Paragraph 11 of the October 2, 2012 Lease in which Kings covenants that it will not assign any of its rights under the Lease, without the Landlord's written consent").

However, the landlord treated SMG as an assignee and accepted rent paid by SMG since 2017. To be sure, the defendant admits that it treated SMG as an assignee only concerning use and occupancy and not regarding the purchase option. The defendant does not meaningfully address the fact it fully accepted rent and treated SMG as a tenant in all respects. Indeed, a careful review of paragraph 11 of the lease reveals that it does not carve out any special exception regarding the purchase option or any other provision. Paragraph 11 states that the tenant shall "not assign mortgage or encumber this agreement nor underlet, or suffer or permit the demised premises or any part thereof to be

used by others, without the prior written consent of Owner in each instance" (id). The paragraph, on its face, requires written consent from the owner for any sublease of the premises or any part of the premises. The landlord's argument that it can partially waive certain aspects of the provision but not others does not withstand analysis.

It is well settled that a party may waive any contract provision that is to its benefit (see, Tucek v. Hoffman, 161 AD2d 588, 555 NYS2d 167 [2d Dept., 1990]). Moreover, such waiver may even be implied (Central Park Electronics Inc., v. Hyundai Electronics America, 1996 WL 537660 [S.D.N.Y. 1996]). It is true that the acceptance of rent will not waive a lease provision prohibiting assignment without consent if the lease contains a provision providing that acceptance of rent with knowledge of a violation will not effect a waiver (see, Jefpaul Garage Corporation v. Presbyterian Hospital in City of New York, 61 NY2d 442, 474 NYS2d 458 [1984]). However, absent such a provision the court in Jefpaul explained that "our decision applied the settled principle that acceptance of rent by a landlord from a tenant with knowledge of the tenant's violation of the terms of the lease normally results in a waiver of the violation...The logic underlying this rule is plain enough: the option rests with the landlord to recognize the violation and terminate the tenancy. If he chooses to ignore it and accepts rent with knowledge of the

tenant's violation then the acceptance evidences his waiver and an election to continue the relationship. Although the intent to waive is usually a question of fact, knowing acceptance of rent without any effort to terminate justifies an inference that the landlord has elected to hold the tenant to the lease. The primary reason for the rule is the inconsistency of the landlord's positions. As one old English case put it, the landlord should not be permitted "to treat a man as a tenant, and then treat him as a trespasser"" (id).

In this case no such provision exists, thus the acceptance of rent acted as a total waiver of all the benefits of the lease notwithstanding written consent for any assignments. This waiver included the right to exercise the purchase option.

In any event there are surely questions of fact in this regard. Thus, even if issues of fact exist, the court can still conclude the moving party has demonstrated a likelihood of success on the merits (see, Ruiz v. Meloney, 26 AD3d 485, 810 NYS2d 216 [2d Dept., 2006]). Indeed, "the mere existence of an issue of fact will not itself be grounds for the denial of the motion" (Arcamone-Makinano v. Britton Property Inc., 83 AD3d 623, 920 NYS2d 362 [2d Dept., 2011]). This is especially true where the denial of an injunction would disturb the status quo and render the continuation of the lawsuit ineffectual (Masjid Usman, Inc., v. Beech 140, LLC, 68 AD3d 942, 892 NYS2d 430 [2d Dept.,

2009]). Thus, the moving party is not required to present "conclusive proof" of its entitlement to an injunction and "the mere fact that there indeed may be questions of fact for trial does not preclude a court from exercising its discretion in granting an injunction" (Ying Fung Moy v. Hohi Umeki, 10 AD3d 604, 781 NYS2d 684 [2d Dept., 2004]). Of course, issues of fact will necessarily prevent the issuance of any injunction only where the factual issues "subvert[s] the plaintiff's likelihood of success on the merits in this case to such a degree that it cannot be said that the plaintiff established a clear right to relief" (County of Westchester v. United Water New Rochelle, 32 AD3d 979, 822 NYS2d 287 [2d Dept., 2006]).

As noted, there are surely questions of fact whether the plaintiff may exercise the purchase option. Further, the plaintiff has demonstrated irreparable harm if the injunction is not granted as well as a balance of the equities. Consequently, the motion seeking an injunction is granted.

So ordered.

ENTER:

DATED: February 28, 2023
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC