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, June 7, 2023

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PRESENT: HON. LEON RUCHELSMAN Motion Seq. #2

The defendant has moved pursuant to CPLR §3211 seeking to reargue a decision and order dated February 28, 2023. The plaintiff opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments, this court now makes the following determination.

As recorded in the prior order, 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 moved seeking to enjoin the defendant from evicting the plaintiff or from selling the property without first allowing the plaintiff

to exercise the option. The court granted that motion holding that the landlord accepted rent from the plaintiff thus could not thereafter argue the plaintiff was not a valid assignee with the available right to exercise the purchase option. The court rejected the defendant's argument the defendant had the right to waive the provision of the lease that required written consent to assign the lease but did not waive the provision concerning the express approval of the purchase option. The court then explained that the acceptance of rent with knowledge of a violation on the part of the tenant will not constitute a waiver of the violation if that fact is spelled out in the lease. However, if the lease is silent then the acceptance of rent will waive any violations. The court concluded that the lease did not contain any such non-waiver clause and that consequently the landlord's acceptance of rent constituted a waiver of the rules pertaining to the purchase option.

Upon reargument the defendant asserts that in fact the lease does contain a non-waiver clause. Paragraph 24 of the lease provides that "the receipt by Landlord of rent and/or additional rent with knowledge of the breach of any covenant of this lease shall not be deemed a waiver of such breach, and no provision of this lease shall be deemed to have been waived by Landlord or Tenant (as the case may be) unless such waiver be in writing signed by Landlord or Tenant (as the case may be)" (see,

Agreement of Lease, ¶24 [NYSCEF Doc. No. 15]).

However, that clause is not a basis upon which to assert the plaintiff has no ability to exercise the purchase option. That clause, and indeed the entire legal issue espoused in Jefpaul Garage Corporation v. Presbyterian Hospital in City of New York, 61 NY2d 442, 474 NYS2d 458 [1984] and mentioned by the court in the prior order, does not really pertain to this case. That case stands for the proposition that the acceptance of rent generally waives any lease violations. The reason is simple, if the landlord continues to accept rent then the landlord is obviously waiving any violations the tenant may have committed. A different rule governs where the lease expressly states that the acceptance of rent does not waive any violations.

In this case there are no violations. The only issue is whether the plaintiff is a valid assignee. The clause noted in the lease concerning the non-waiver of any violations by the acceptance of rent is inapplicable for this very reason. The court's extraneous references whether or not the acceptance of rent constitutes a waiver depending on any such language in the lease does not mean that such language in the lease in this case forecloses any waiver. Since there has been no violation of the lease and in fact there is no allegation of any lease violations, paragraph 24 is inapplicable. Indeed, the court's earlier discussion of the issue was to merely highlight that the

acceptance of rent generally waives any other contentions undermining the validity of the lease. That is all the more true where, as here, no actual violations are alleged. Thus, paragraph 24 is not a basis upon which to assert the landlord never waived any requirements associated with the purchase option provision. The acceptance of rent may have waived all such provisions.

Therefore, the motion seeking reargument is denied.

So ordered.

ENTER:

DATED: June 7, 2023
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC