Soho Hotel Owner LLC v CRI 11 Howard St. LLC
2026 NY Slip Op 30331(U)
January 23, 2026
Supreme Court, New York County
Docket Number: Index No. 650424/2025
Judge: Paul A. Goetz
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. PAUL A. GOETZ** **PART** **47**

Justice

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SOHO HOTEL OWNER LLC

Plaintiff,

- v -

CRI 11 HOWARD STREET LLC,

Defendant.

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INDEX NO. 650424/2025

MOTION DATE 05/09/2025

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 39, 40, 41, 42, 43, 44, 45

were read on this motion to/for DISMISS.

In this commercial real estate action, defendant-landlord moves pursuant to CPLR §§ 3211(a)(4) and (7) to dismiss plaintiff-tenant's complaint.

BACKGROUND

On April 14, 2016, the parties entered into a lease agreement by which plaintiff leased from defendant the premises at 11 Howard Street, New York, NY 10013, where plaintiff operated a hotel (NYSCEF Doc No 3). In order to protect its ability to reap the benefits of the extensive improvements it planned to perform on the premises at its own cost, plaintiff negotiated a right of first offer (ROFO) in the event that defendant opted to sell the property (NYSCEF Doc No 22 ¶¶ 21-23). The ROFO provides: "If Landlord desires, at its option, to initiate a Property Sale to a third party purchaser[,] Landlord must first provide written notice to Tenant of its intent to cause a ROFO Sale"; upon receipt of such notice, plaintiff could "elect to purchase the Property from Landlord at the ROFO Property Valuation" (NYSCEF Doc No 3, Exhibit L §§ [a]-[b]).

Plaintiff alleges that in "the first week of October 2023," representatives of defendant—Commerz Real AG (Commerz), one of defendant's parent companies—"attended a trade fair in Germany focused on commercial real estate investments in the United States" (NYSCEF Doc No 22 ¶ 29). There, Commerz representatives "met with a group of commercial real estate industry businesspeople"—representatives of Staycity, an Ireland-based company with hotels across Europe—"who [allegedly] desired to buy the Premises" (*id.*).[1]

"On October 18, 2023, Landlord sent to Tenant a Non-Payment Notice" which "advised that Tenant is currently in default under the Lease based on Tenant's failure to pay" real estate taxes, rent, and insurance cost reimbursements (*id.* ¶ 38; NYSCEF Doc No 8 [the first nonpayment notice]). The notice advised: "If Tenant fails to pay to Landlord [the amounts owed] within five (5) Business Days after Tenant has received this Notice, Landlord may serve a written fifteen (15) day notice of cancellation of this Lease upon Tenant, and upon the expiration of said fifteen (15) days, the Lease and the Term shall end and expire" (NYSCEF Doc No 8).

Two days later, defendant arranged for Staycity representatives to tour the premises in November of 2023 (NYSCEF Doc No 22 ¶¶ 30-31). Representatives of Staycity visited the premises as scheduled, but "at no point before the November 2023 site visit did Landlord ever deliver to Tenant, in writing or otherwise, a notice of its desire to sell the Premises" (*id.*).

"On August 6, 2024, Landlord sent to Tenant a second Non-Payment Notice," though plaintiff alleges that it had made partial payments of rent based on the first nonpayment notice (*id.* ¶¶ 40-41; NYSCEF Doc No 9 [the second nonpayment notice]). The notice again advised that defendant may serve a 15-day notice of cancellation upon plaintiff's failure to pay the

[1] The complaint does not name Commerz or Staycity specifically, however, defendant identifies these as the entities to which the complaint refers (NYSCEF Doc Nos 40 [memorandum of law]; 41 [affirmation of Sven Nötling, head of hospitality at Commerz]; 42 [affirmation of Tom Walsh, CEO and founder of Staycity]) and plaintiff does not dispute that these are the correct entities.

amounts due within 5 days (NYSCEF Doc No 9). On the same day, defendant sent plaintiff a default notice based on the *first* nonpayment notice (NYSCEF Doc No 22 ¶¶ 43-44; NYSCEF Doc No 10 [the default notice]). The default notice advised that "Tenant has not paid the amounts referenced in [] the October 2023 Non-Payment Notice within the stated five (5) Business Days cure period" and therefore "Landlord's rights and remedies set forth in [] the Lease are in full force and effect, including" Sections 18 and 19, providing for defendant's remedies in the event of default (NYSCEF Doc No 10).

On January 6, 2025, defendant "sen[t] Tenant a Fifteen Day Notice of Cancellation" which "made reference to both the First Notice and the Second Notice but not the [default] Notice and purported to exercise Landlord's right to cancel the Lease" within 15 days (NYSCEF Doc No 22 ¶ 47; NYSCEF Doc No [the cancellation notice]).

Plaintiff asserts causes of action for: (1) breach of contract, seeking specific performance requiring defendant to convey the premises to plaintiff under the ROFO terms; (2) breach of contract, seeking damages; (3) breach of the implied covenant of good faith and fair dealing; and (4) a declaratory judgment that plaintiff never received proper notices of nonpayment, default, and cancellation.

Affirmations in Support of the Landlord's Motion

Sven Nötling, head of hospitality at Commerz, states: "At no point has Defendant desired to initiate a sale of the Property to a third party"; rather, at the trade fair in Germany, Commerz "was interested in finding a potential *lessee* for the Property that could replace Tenant as the operator of the Property's hotel" (NYSCEF Doc No 41 ¶¶ 3, 5 [emphasis provided]). Nötling asserts that "[t]o that end, [he] spoke at Expo Real with a company called Staycity about

potentially leasing the Property," but "[f]ollowing [their] visit, Commerz Real had no further communications with Staycity about becoming a replacement operator" (*id.* ¶¶ 6-7).

Tom Walsh, CEO and founder of Staycity, asserts that he "attended the Expo Real Conference in Munich, Germany," where "representatives from Commerz Real also asked if Staycity could imagine leasing and replacing the existing operator of the 11 Howard Hotel"; "Staycity never discussed with Commerz Real the possibility of Staycity purchasing" the premises (NYSCEF Doc No 42 ¶¶ 2-3). He affirms that "[a]fter visiting the hotel, Staycity decided to not pursue the opportunity and had no further discussions with Commerz Real about the property" (*id.* ¶ 4).

DISCUSSION

When determining if a complaint may be dismissed for failing to state a cause of action pursuant to CPLR § 3211(a)(7), "the complaint must be liberally construed, the allegations therein taken as true, and all reasonable inferences must be resolved in plaintiff's favor" (*Gorelik v Mount Sinai Hosp. Ctr.*, 19 AD3d 319, 319 [1st Dept 2006]). The motion "must be denied if from the pleading's four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*id.* [internal quotations omitted]). However, "factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently or clearly contradicted by documentary evidence are not entitled to such consideration" (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003]).

i. Breach of Contract (first and second causes of action)

Defendant argues that plaintiff failed to allege a breach of the ROFO provision because, as indicated in the affirmations of Nötling and Walsh, "Defendant never actually initiated a sale of the property to a third party"; it only discussed the possibility of *leasing* the property to

Staycity (NYSCEF Doc No 40, p. 10). Defendant further avers that "[i]t does not matter whether, at some point, Defendant 'desired' to sell the property," as it never took any action to do so (*id.*). Plaintiff opposes, arguing that "[i]t does matter very much" whether defendant "desired" to sell the property, as "[t]hat is the governing contract provision" (NYSCEF Doc No 44, p. 5). Plaintiff emphasizes that under the ROFO provision, defendant was obligated to notify plaintiff as soon as it contemplated selling the property (*id.*, p. 4 ["The bargained-for ROFO trigger threshold is low and not limited to situations where Defendant initiates a sale"]). Plaintiff also argues that Nötling and Walsh's affirmations "are precisely the types of affirmations that do not constitute documentary evidence and do not provide any basis for dismissal" (*id.* p. 7).

At the outset, the right of first offer at issue is materially the same as a right of first refusal, as it is "a preemptive right [] to bind the party who desires to sell *not to sell* without first giving the other party the opportunity to purchase the property at the price specified" (*LIN Broadcasting Corp. v Metromedia, Inc.*, 74 NY2d 54, 60 [1989] [emphasis in original]). "Unlike an option -- in essence, an offer which by contract is to be kept open -- a right of first refusal [or ROFO] does not, at the time it is given, include an operative offer" (*id.* [citations omitted]).

The ROFO provision is unartfully drafted in that defendant's notice obligation is triggered not upon defendant taking any objective action to sell or attempt to sell the property, but upon defendant having the subjective "desire" to initiate a sale. "Because the phrase 'desires to [initiate a Property Sale]' is not defined in the [lease] agreement, the lack of clarity makes it susceptible to" multiple interpretations (*Lippman v Despatch Indus.*, 8 AD3d 1051, 1052 [4th Dept 2004] [internal quotation marks omitted]). Plaintiff asserts that defendant desired to sell the premises as of the first week of October 2023, when its representative attended the trade fair, whereas defendant asserts that it never desired to sell the premises.

The Nötling and Walsh affirmations are probative of defendant's alleged desire to sell the property. As plaintiff notes, these affirmations do not constitute "documentary evidence [to] conclusively establish a defense to the asserted claims as a matter of law" (*Lowenstern v Sherman Sq. Realty Corp.*, 143 AD3d 562, 562 [1st Dept 2016]). However, defendant's notice of motion reflects that the affirmations are submitted pursuant to CPLR § 3211(a)(7), rather than CPLR § 3211(a)(1) (NYSCEF Doc No 39), and "affidavits may be considered on a motion pursuant to CPLR 3211(a)(7) to dismiss a complaint, although they will not warrant dismissal [] unless they establish conclusively that the plaintiff has no [] cause of action" (*Margarita v Mountain Time Health, LLC*, 2020 NY Slip Op 04089, *2 [2nd Dept 2025] [internal quotation marks and citations omitted]). "Where, as here, evidentiary material is submitted and considered on a motion pursuant to CPLR 3211 (a) (7), [] the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and the motion should not be granted unless the movant can show that a material fact as claimed by the plaintiff is not a fact at all and unless it can be said that no significant dispute exists regarding it" (*Pacific W., Inc. v E & A Restoration, Inc.*, 178 AD3d 834, 835 [2nd Dept 2019]).

The Nötling and Walsh affirmations demonstrate "that a material fact as claimed by the plaintiff," i.e., the allegation that defendant desired to sell the premises, "is not a fact at all" (*id.*) since they both aver that defendant only ever expressed an interest in finding a potential lessee for the premises (NYSCEF Doc Nos 41, 42). Thus, the "factual allegations presumed to be true on a motion pursuant to CPLR 3211 [were] properly [] negated by [the] affidavits" (*Grandelli v City of New York*, 237 AD3d 534, 534-45 [1st Dept 2025], quoting *Wilhelmina Models, Inc. v Fleisher*, 19 AD3d 267, 269 [1st Dept 2005]). In opposition, plaintiff does not raise a "significant dispute" as to whether defendant was gauging interest in leasing the property rather than selling

it when it attended the trade fair (*B. Boman & Co., Inc. v Zionist Org. of Am.*, 2015 NY Slip Op 31809[U], *11 [SC NY Co 2015] [determining that landlord's seeking an appraisal of its property was not an expression of desire to sell sufficient to trigger a similar ROFO provision]). Instead, plaintiff merely asserts without support that "[t]he surreptitious-tour examinations are consistent with purchase negotiations, not leasing inquiries" (NYSCEF Doc No 44, p. 5).[2] Thus, plaintiff fails to establish that defendant breached the ROFO by "desir[ing]" to sell the premises.

Accordingly, the part of defendant's motion seeking to dismiss plaintiff's first and second causes of action for breach of contract will be granted.[3]

ii. Breach of the Covenant of Good Faith and Fair Dealing (third cause of action)

As defendant notes, "[t]he claim that defendant[] breached the implied covenant of good faith and fair dealing [must be] dismissed as duplicative of the breach of contract claim because both claims arise from the same facts" (*Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440, 443 [1st Dept 2009]). Plaintiff fails to address this argument in its opposition (NYSCEF Doc No 44, pp. 9-10). Accordingly, the part of defendant's motion seeking to dismiss plaintiff's third cause of action for breach of the implied covenant of good faith and fair dealing will be granted.

[2] Notably, the monthly base rent for the premises was set at $550,000; this would be a significant investment for a prospective lessee, and therefore it would not be unusual to tour the premises. As to the allegation that this tour was done "surreptitious[ly]," plaintiff does not explain how this reflects a desire to sell rather than lease the premises.
[3] In connection with its first cause of action, plaintiff seeks specific performance requiring defendant to convey the premises to plaintiff. Even if plaintiff established that defendant desired to sell the property, plaintiff would not be entitled to this relief because the ROFO merely prohibits defendant from selling the property without first giving plaintiff the opportunity to purchase it; it "does not compel an owner to sell [its] property" where the "deal was never consummated" (*Cestone v Brown*, 163 AD2d 563, 563-64 [2nd Dept 1990]; *Bloomer v Phillips*, 164 AD2d 52, 54-55 [3rd Dept 1990] [with a right of first refusal or ROFO, "the selling party is not required to . . . keep[] the offer open even after deciding against the sale[;] . . . the first refusal offer [] did not become an irrevocable option by operation of law"]).

iii. Declaratory Judgment (fourth cause of action)

Finally, plaintiff's fourth cause of action is for a declaratory judgment that plaintiff never received proper notices of nonpayment, default, and cancellation because "[t]he notices sent by Landlord to Tenant are strategic tools designed to influence, and interfere with, Tenant's ROFO" and "seek amounts allegedly incurred after Landlord first violated Tenant's ROFO rights" (NYSCEF Doc No 22 ¶¶ 96-97).

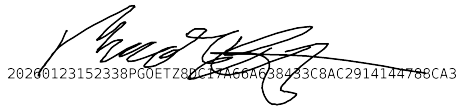
Defendant argues this cause of action must be dismissed pursuant to: (i) CPLR § 3211(a)(7) because "Plaintiff premises its request [] on its allegations that Defendant [] breached [the] ROFO," and "the ROFO was never triggered or breached"; and (ii) CPLR § 3211(a)(4) because "there is already a pending Housing Court proceeding concerning Plaintiff's conceded non-payment of rent and its failure to vacate the property post-termination" (NYSCEF Doc No 40, pp. 13-14). Plaintiff opposes on the grounds that: (i) "the validity of the notices is tied up inextricably with the ROFO scheme" and therefore "a resolution on the notices would be ineffective without a resolution on the ROFO issue here"; and (ii) since this action was commenced before the "Landlord-Tenant court action," it should retain priority (NYSCEF Doc No 44, pp. 10-11).

In light of the foregoing determination to dismiss plaintiff's other causes of action, and that "Civil Court is the strongly preferred forum for resolving such landlord-tenant disputes" (*Brecker v 295 Cent. Park W., Inc.*, 71 AD3d 564, 565 [1st Dept 2010]), the part of defendant's motion seeking to dismiss plaintiff's fourth cause of action for a declaratory judgment will be granted.

CONCLUSION

Based on the foregoing, it is

ORDERED that defendant's motion is granted, and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk; and the clerk shall enter judgment accordingly.



1/23/2026
DATE

PAUL A. GOETZ, J.S.C.

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