STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

CHONG WANG, AS OWNER AND LEGAL REPRESENTATIVES OF ART DECOR CO., INC., A NEW YORK CORPORATION

Plaintiff,

-against-

CROSSGATES MALL GENERAL COMPANY NEWCO, LLC and JAMES MOTTO

Defendants.

DECISION and ORDER
INDEX NO. 4405-12

ACTION #1

CROSSGATES MALL GENERAL COMPANY NEWCO, LLC,

Petitioner,

-against-

ART DECOR CO., INC.,

Respondent.

INDEX NO. 4701-12
RJI 01-12-107853

ACTION #2

Supreme Court Albany County All Purpose Term, September 19, 2012
Assigned to Justice Joseph C. Teresi

APPEARANCES:
Young, Sommer, Ward, Ritzenburg, Baker & Moore, LLC
Attn: J. Michael Naughton, Esq.
Attorneys for Petitioner
5 Palisades Drive
Albany, New York 12205-6433

Law Offices of Ning Ye, Esq.
Attn: Ning Ye, Esq.
Attorney for Respondent
36-26A Union Street, #3-F
Flushing, New York 11354

TERESI, J.:

Petitioner, upon revoking Respondent's License Agreement[1] to use Space No L110[2] in its shopping center, commenced this RPAPL §713 eviction proceeding (the Action #2 caption above). Respondent answered, had previously commenced a separate action against Petitioner[3] and has submitted four motions. Because Petitioner demonstrated, as a matter of law, its entitlement to possession of Space No L110, Petitioner is granted a judgment of eviction. Respondent, however, failed to establish its entitlement to any of the relief it seeks.

Petitioner first demonstrated that the License Agreement constitutes a license not a lease.

"Whether a given agreement is a lease or a license depends upon the parties' intentions." (Mirasola v Advanced Capital Group, Inc., 73 AD3d 875, 876 [2d Dept 2010]). Neither the name of the instrument nor its designation of the parties is determinative. (Miller v City of New York, 15 NY2d 34, 38 [1964]; Feder v Caliguira, 8 NY2d 400, 404 [1960]; Linro Equip. Corp. v Westage Tower Assoc., 233 AD2d 824 [3d Dept 1996]). Rather, "[t]he central distinguishing characteristic of a lease is the surrender of absolute possession and control of property to another party for an agreed-upon rental." (Matter of Dodgertown Homeowners Ass'n, Inc., 235 AD2d

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[1] "License Agreement" will hereinafter refer to the parties' contract titled "License Agreement" and dated January 4, 2012.

[2] "Space No L110" constitutes 24,000 square feet of retail space located in the shopping center commonly known as Crossgates Mall.

[3] Upon Petitioner's motion for consolidation, Respondent's motion to dismiss on the ground that another action is pending and in an exercise of discretion, Action #1 and Action #2 are consolidated for all purposes pursuant to CPLR §602(a). (O'Connor v Demarest, 74 AD3d 1522, 1523 [3d Dept 2010]). The consolidated action shall retain the index number and caption of Action #1. All monetary issues between these parties, set forth in the various pleadings, shall be litigated in the consolidated action.

538, 539 [2d Dept 1997]). Whereas "[a] license gives no interest in land. It confers only the nonexclusive, revocable right to enter the land of the licensor to perform an act." (Mirasola v Advanced Capital Group, Inc., supra at 876).

Here, Petitioner established the parties' unequivocal intent to create a license, not a lease, for Space No L110. First, although not determinative, the parties called their agreement a "License Agreement" and designated themselves as licensor and licensee. It specifically states that "[Respondent] recognizes and agrees that the [Petitioner] is granting [Respondent] a revocable license only; not a leasehold interest or other estate in real property." Respondent further acknowledged that it was not granted "exclusive possession of Space No L110.]" Instead, the terms of the License Agreement granted Respondent only the ability to "occupy and use" Space No L110. Moreover, even this right was severely limited. Petitioner retained the right to "relocate [Respondent from Space No L110] to another space/premise at the Shopping Center, regardless of size, at any time during the term of this License on 24 hours advance written notice." In addition, Petitioner retained the right, "in their sole discretion, [to] revoke this License at any time during the term of this License for any reason, or no reason, upon giving 48 hours advance written notice." These terms are not typical of a standard commercial lease. (Miller v City of New York, supra). In light of the above, no issue of fact about the parties' intent is raised by the License Agreement's requirement that Respondent pay its own utilities or its once incorrectly referring to Respondent as "Tenant." Rather, the License Agreement's terms demonstrate, as a matter of law, the parties' intent to enter into a license. (Karp v Federated Dept. Stores, Inc., 301 AD2d 574 [2d Dept 2003]; Linro Equip. Corp. v Westage Tower Assoc., supra).

Petitioner next demonstrated that it duly revoked the License Agreement. Pursuant to the terms of the License Agreement set forth above, Petitioner retained the right to revoke it on 48 hours written notice. The notice could be delivered to any of Respondent's employees located at Space No L110 and if "no employees [were] present at [Space No L110] at the time notice is attempted to be given, then notice shall be mailed, via regular mail... to [Respondent's] address set forth in this License." Notice was complete "in the case of hand delivery on the day so delivered or if by mail, then the date so mailed." In accord with such terms, Petitioner submitted proof that it properly served its written revocation notice on July 25, 2012 by both delivery and mail. Because such revocation was not "effective until July 31, 2012" more than the required 48 hour notice was given, and the License Agreement was properly revoked.

After revocation, Petitioner duly served an RPAPL §713 ten day Notice to Quit in accord with RPAPL §735. It first established that, on August 10, 2012, Petitioner hand delivered a written "Notice to Quit" letter to an employee of Respondent at Space No L110. Such letter gave the requisite ten day notice by demanding Respondent vacate Space No L110 on or before August 21, 2011. The Notice to Quit was then mailed on August 11, 2012. It was sent "via First Class Mail and Certified Mail Return Receipt Requested" to Respondent at Space No L110, the address set forth on the License Agreement and a third address proffered as Respondent's address in Action #1's caption. Upon such allegations and proof, Petitioner demonstrated that its Notice to Quit was served in accord with RPAPL §§713 and 735.

Based upon the foregoing, Petitioner demonstrated its entitlement to possession of Space No L110 as a matter of law.

In opposition to Plaintiff's prima facie showing, Respondent proffered no admissible

proof that requires a hearing. Conspicuously absent from any of Respondent's numerous submissions is an affidavit made by one of its owners, managers or employees. Without such proof, no non-hearsay admissible facts have been proffered to rebut Petitioner's showing. To the extent that Respondent relies upon the statement of its "3rd party realtor," because it was not sworn it is inadmissible and of no probative value. (Bright ex rel. Bright v. McGowan, 63 AD3d 1239 [3d Dept. 2009][rev'd on other grounds], Slavenburg Corp. v. Opus Apparel, Inc., 53 NY2d 799 [1981]; Autiello v. Cummins, 66 AD3d 1072 [3d Dept. 2009]). Similarly, Respondent's attorney's assertions are not based upon "personal knowledge of the operative facts [rendering them of no]... probative value." (2 North Street Corp. v. Getty Saugerties Corp., 68 AD3d 1392 [3d Dept. 2009]; Groboski v. Godfroy, 74 AD3d 1524 [3d Dept. 2010]; Zuckerman v. City of New York, 49 NY2d 557 [1980]).

Respondent's Answer[4] too, fails to effectively refute Plaintiff's allegations or raise an issue of fact that requires a hearing. First, although the Petition is verified the Answer is not. This CPLR §3020(a) defect permitted Petitioner, upon notice, to treat it as a nullity. (CPLR §3022). Even accepting the Answer's validity, it still failed to set forth any evidentiary facts because it is signed only by Respondent's attorney. Additionally, because those portions of the Answer responding to Petitioner's service allegations "constitute improper denials, they may be deemed admissions." (Gilberg v Lennon, 193 AD2d 646 [2d Dept 1993]; CPLR §3018[a]). Specifically, Respondent's answering allegations do not "deny" the paragraphs of the Petition that allege service. Rather, the Answer states: "Opposed for improper formation of the allegation

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[4] The Answer is denominated "Defendant's Opposition to Show Cause Order Motion for Dismissal of Plaintiff's Petition" and is dated August 29, 2012.

and for lack of evidence..."; "Please double check Article 16. The Service is invalid, hence void."; "Irrelevant for violation of Article 16."; "Opposed..."; "Invalid and Irrelevant for violation of Article 16."; and "Opposed as Irrelevant for violation of Article 16." These statements are unclear, ambiguous and fail to set forth a sufficient CPLR §3018(a) denial, rendering the petition's service assertions admitted. Moreover, these answering paragraphs at most assert a violation of License Agreement paragraph 16, but do not refute or deny any of Petitioner's actual service allegations. As such, Respondent's bare claims do not constitute the requisite "detailed and specific contradiction of the allegations in the process server's [or Petitioner's representatives'] affidavit[s] sufficient to create a question of fact warranting a hearing." (Christiana Bank & Trust Co. v Eichler, 94 AD3d 1170, 1171 [3d Dept 2012], quoting U.S. Bank Natl. Assn. v. Vanvliet, 24 AD3d 906 [3d Dept 2005]; Bankers Trust Co. of Cal. v Tsoukas, 303 AD2d 343 [2d Dept 2003]; Kurlander v Willie, 45 AD3d 1006 [3d Dept 2007]; Owens v Freeman, 65 AD3d 731 [3d Dept 2009]). Because no issue of fact was raised, no hearing is necessary and Petitioner is entitled to possession of Space No L110.

Accordingly, Petitioner is granted a judgement and warrant of eviction.

Turning to Respondent's four motions, it failed to demonstrate its entitlement to any of the relief it seeks. Respondent filed two motions[5] without an accompanying notice of motion. As such, both are defective and denied because "[t]he failure to give requisite notice of motion deprives the court of jurisdiction to entertain the motion." (Burstin v. Public Service Mut. Ins. Co., 98 A.D.2d 928, 928 [3d Dept. 1983]; Bianco v. Ligreci, 298 AD2d 482 [2d Dept. 2002]).

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[5] The title of the first motion was "Respondent's Urgent Motion for Evidentiary Hearing" and the second was "Defendant's Motion for the Honorable Court to Take Judicial Notice on Certain Commonplaces."

Similarly, Respondent's "Consent Motion for Oral Argument" is jurisdictionally flawed because it provided only two days notice, insufficient as a standard motion or as a cross-motion. (CPLR §§2214 and 2215). Lastly, Respondent's Order to Show Cause[6] seeking a declaration finding Petitioner in contempt and granting a preliminary injunction is wholly unavailing. Relative to contempt, Respondent submitted no "lawful order of the court" allegedly violated. (Town of Copake v. 13 Lackawanna Properties, LLC, 73 AD3d 1308 [3d Dept. 2010], quoting Matter of Department of Envtl. Protection of City of N.Y. v. Department of Envtl. Conservation of State of N.Y., 70 NY2d 233 [1987][internal quotation marks omitted]). Nor, on its preliminary injunction motion, did Respondent make any showing of its "probability of success on the merits, danger of irreparable injury in the absence of an injunction [or] a balance of equities in its favor." (Green Harbour Homeowners' Ass'n, Inc. v. Ermiger, 67 AD3d 1116, 1117 [3d Dept. 2009], quoting Nobu Next Door, LLC v. Fine Arts Housing, Inc., 4 NY3d 839 [2005]; Melvin v. Union College, 195 AD2d 447 [2d Dept.]; CPLR §§6301 and 6312).

Accordingly, Respondent's motions are denied in their entirety.

This Decision and Order is being returned to the attorneys for Petitioner. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute

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[6] To the extent the Order to Show Cause sought a stay of Action #2, because Action #1 and #2 are now consolidated this portion of Respondent's motion is denied as moot.

entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York
October 12, 2012

Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Order to Show Cause, dated August 21, 2012; Order to Show Cause (corrected), dated August 22, 2012; Notice of Petition, dated August 21, 2012; Petition, dated August 21, 2012, with attached Exhibits A-F; Affidavit of Joseph Castaldo, dated August 16, 2012, with attached Exhibits 1-2; Affidavit of J. Michael Naughton, dated August 21, 2012, with attached Exhibits A-D; Corrected Affidavit of J. Michael Naughton, dated August 22, 2012, with attached Exhibits A-D.
2. Defendant's Opposition to Show Cause Order Motion for Dismissal of Plaintiff's Petition, dated August 29, 2012, with attached Exhibits A-D.
3. Notice of Consent Motion for Oral Argument, dated September 17, 2012; Consent Motion for Oral Argument, dated September 17, 2012; Affidavit of Ning Ye, dated September 13, 2012, with attached Exhibits A-G.
4. Affidavit of Ning Ye, dated September 20, 2012; Affidavit of Ning Ye, dated September 20, 2012.
5. Respondent's Urgent Motion for Evidentiary Hearing, dated September 26, 2012; Affidavit Statement of Haiyan Speiser, dated September 26, 2012, with attached unnumbered exhibits.
6. Defendant's Motion for the Honorable Court to Take Judicial Notice on Certain Commonplaces, dated September 27, 2012.
7. Affidavit of Joseph Castaldo, dated September 19, 2012; Affidavit of James Motto, dated September 19, 2012, with attached Exhibits 1-7; Affidavit of J. Michael Naughton, dated September 19, 2012, with attached Exhibits A-C.
8. Copy of Order to Show Cause, dated September 16, 2012 (as modified September 19, 2012); Petition for Respondent to Show Cause, dated September 13, 2012; Affidavit of Ning Ye, dated September 13, 2012 (unsigned).
9. Affidavit of J. Michael Naughton, dated September 25, 2012, with attached Exhibits 1-4.