SHORT FORM ORDER **COPY** INDEX NO. 8599-2004

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXVII SUFFOLK COUNTY

PRESENT:
Honorable Ralph F. Costello

PINELAWN CEMETERY,

Plaintiff

-against-

COASTAL DISTRIBUTION, LLC, METROPOLITAN TRANSPORTATION AUTHORITY, THE LONG ISLAND RAILROAD COMPANY, and THE NEW YORK AND ATLANTIC RAILWAY,

Defendants

R/D 4-23-04
S/D 5-11-04
Motion No. 001-MD

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Upon the following papers numbered 1 to 51 read on this motion for preliminary injunction Order to Show Cause and supporting papers 1-19 ; Answering Affidavits and supporting papers 20-32; 33-40; 41-48 ; Reply Affidavits 49-51 ; it is,

ORDERED, that the motion of plaintiff Pinlawn Cemetery for a preliminary injunction is denied as follows.

The controversy concerns two adjoining parcels of land owned by plaintiff Pinelawn located in Farmingdale, New York, which are adjacent to lands used by Pinelawn as a cemetery. By two instruments dated August 30, 1904 and November 1, 1905,

respectively, Pinelawn agreed to "grant, devise and farm-let" the two parcels to defendant Long Island Rail Road Company ("LIRR") for a term of ninety-nine years, with an option to renew at the end of the term. Since that time, LIRR has operated the parcels for railroad-related purposes. It is alleged that the parcels encompass the only "wye," or Y-shaped track used to turn railroad cars and locomotives, east of Glendale.

By agreement executed in 1996, defendant New York & Atlantic Railway ("NY&A") took over all of LIRR's freight business and leased from LIRR the area in question, both to turn and store cars, and as a "transload" facility, that is, a location used transfer various commodities from rail to truck. NY&A in turn sublet the facility to defendant Coastal Distribution, LLC, for the latter purpose.

It appears that in 2003, Coastal began constructing a building at the site to "contain and protect" the transload operation. The building itself straddles the two subject parcels. Pinelawn has commenced an action to permanently enjoin the construction and operation of the facility and has interposed the instant motion for a preliminary injunction.

In support of the motion, several arguments are posited. Firstly, Pinelawn alleges that Coastal is constructing the building to sell heavy building materials and equipment; to process and sell stone aggregate; and to transfer debris and hazardous waste materials. Pinelawn argues that this usage violates the use restriction contained in the leases (i.e. farming), violates the Town Code of the Town of Babylon, and will have a negative impact upon its cemetery business and property.

Secondly, Pinelawn argues that the 1904 leases have expired and that only one of them, the November 1904 lease, has successfully been renewed. Pinelawn acknowledges that it executed a letter "agreement" dated October 17, 2003, by which it "concurs" with LIRR's exercise of its options to renew both leases. However, Pinelawn argues that the renewal did not occur "not less than three months prior to the expiration of the term granted" as provided therein, and therefore, the renewal of the August lease was not timely.

It is axiomatic that movant must establish three elements in order to demonstrate its entitlement to a preliminary injunction,

to wit, a likelihood of success on the merits of the action; irreparable harm to the movant absent the injunction; and a balancing of the equities in movant's favor (see, e.g. ***Aetna Insurance Co v Capasso***, 75 NY2d 860, 552 NYS2d 918 [1990]). Moreover, movant must show "a clear right to such relief under the law and the undisputed facts as set forth in the moving papers" (***Carman v Congregacion De Mita of New Nork, Inc.***, 269 AD2d 416, 416, 702 NYS2d 906 [2d Dept 2000]).

At bar, Pinelawn has failed, inter alia, to demonstrate a likelihood of success on the merits. Pinelawn's construction of the lease phrases "farm let" and "farm letten" as a restriction of LIRR's use of the site to agriculture is without merit. Rather, the caselaw supports defendants' counter-argument that the phrase "grant, devise and farm let" was the boiler plate language of the day meant to denote a lease of property for a term for any use as might be specified (see e.g. ***Atlantic Avenue Railroad Company v Johnson***, 134 NY 375 [1892][railroad]; ***Stewart v Long Island R. Co.***, 102 NY 601 [1886][railroad]; see also, ***Darby v Callaghan***, 16 NY 71 [1857]["the words 'demise lease and to farm let' are technical expression to constitute a lease"]; Blacks Law Dictionary, 6th ed. p606 ["*Farm let*. Technical words in a lease creating a term for years"]). Pinelawn has submitted no legal authority to the contrary.

Pinelawn's further argument concerning the untimeliness of LIRR's renewal of the August 1904 lease is also unpersuasive. The letter agreement containing Pinelawn's "concurrence" in the renewal refers unequivocally in a handwritten addendum to the August 1904 lease. If the doctrines of waiver or estoppel do not prevent Pinelawn from disavowing its consent, it is likely that equity would intervene to relieve LIRR of the consequences of an untimely notice to renew (see, e.g. ***Tritt v Huffman & Boyle Co.***, 121 AD2d 531, 503 NYS2d 842 [2d Dept 1986]).

As to Pinelawn's additional argument that the facility in question violates the Code of the Town of Babylon, it is probable that as the LIRR is a subsidiary of defendant Metropolitan Transportation Authority, municipal zoning authority over this site is superceded by the Public Authorities Law (see, Pub Auth Law §1266[8]).

Finally, Pinelawn's additional assertion that it will sustain damage to its property and business as a result of

Coastal's activities on the property is speculative at best. Hence, Pinelawn has failed to establish that it will be irreparably damaged if injunctive relief is not granted.

The motion is accordingly denied.

This matter is set down for a preliminary conference on the 31st day of August, 2004, at 9:30am, in the courthouse at 235 Griffing Avenue, Riverhead, Room 200. Pinelawn is directed to serve a copy of this order upon the calendar clerk of this court.

RALPH T. COSTELLO

Dated: August 6, 2004

J.S.C.

Clerk only: Non-final Disposition