

**2nd Ave. Showcase LTD v Ormonde Equities, LLC**

2012 NY Slip Op 33055(U)

December 20, 2012

Supreme Court, New York County

Docket Number: 110796/2011

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

2<sup>nd</sup> AVENUE SHOWCASE LTD.,  
Plaintiff,  
- v -  
ORMONDE EQUITIES, LLC,  
Defendant.

Index No.: 110796/11  
Motion Date: 6/12/12  
Motion Seq. No.: 003  
Motion Cal. No.: \_\_\_\_\_

The following papers, numbered 1 to 3 were read on this motion to dismiss.

Notice of Motion/Order to Show Cause - Affidavits - Exhibits  
Answering Affidavits - Exhibits  
Replying Affidavit - Exhibits

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).  
 Yes  
 No

PAPERS NUMBERED

1

Cross-Motion:  Yes

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Upon the foregoing papers,

Defendant moves to dismiss plaintiff's complaint based upon mootness and plaintiff cross-moves for summary judgment. For the reasons set forth below, the motion is granted only as to the third cause of action and is otherwise denied and the cross motion is granted.

Plaintiff is the commercial tenant of the ground floor store (the Premises) in a building (the Building) located at 2030 Broadway, New York, New York. Defendant is the owner of the Building. There is a commercial lease (the Lease) and Rider between defendant's predecessor and plaintiff dated October 9, 1987 with a First Addendum undated (the "Addendum"), as well as amendments dated February 28, 1991 and March 31, 1996.

Plaintiff's complaint alleges that it exercised its option under the Lease to extend its term for an additional five years

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

[\* 2]

and that defendant had not appointed an appraiser under the Rider's provision to ascertain the applicable rent. Plaintiff seeks a declaration of the parties' rights, an injunction and damages.

By order dated November 29, 2011 (the November 2011 Order), this court denied plaintiff's motion to stay a summary proceeding (the Civil Court Action) between the parties and to consolidate it with this action. Judge Andrea Masley dismissed the Civil Court Action by order dated March 12, 2012 (the Civil Court Order). In the Civil Court Order, she held that defendant had an "absolute right to extend the [L]ease ... [and that] the [L]ease was not terminated".

In its motion, defendant has presented the report of an appraiser setting forth the market value rent for the Premises and argues that it has, therefore, satisfied the appraisal provision of the Rider and that this action is moot. However, rather than moot the argument, the court finds that defendant's presentation establishes that plaintiff is entitled to the declaration that it seeks.

The Civil Court Order determined that the Lease, including the Addendum, was in full force and effect.

Paragraph 8 of the Addendum contains an appraisal provision (the Appraisal Provision):

The parties shall agree in writing on the rent to be paid during such extended term, if they are able to do so. If after thirty [30] days after notice of tenant's intention to exercise this option, the parties are still unable to agree on the rent to be paid, then Owner or its successor within ten [10] days thereafter shall in writing appoint an appraiser and the two appraisers then appointed shall determine the rent to be paid for the extended term. If, within ten [10] days, the two appraisers so appointed are unable to agree on such rent, they shall in writing immediately appoint a third appraiser and the majority of three appointed shall determine the rent. If the appraisers so appointed are unable to agree within the time

[\* 3]

aforesaid, and then fail or refuse to appoint a third appraiser ..., or if they appoint a third within that time, but a majority ... [refuse] or are unable to agree, then the parties within ten [10] days thereafter shall each in writing appoint a new appraiser and the two so elected shall appoint a new appraiser as aforesaid and the majority of the three so appointed shall determine the rent. This process of appointing and reappointing appraisers shall be continued within the time and in the manner aforesaid until either of the parties themselves or appraisers for them determine the rent. The appraisers then shall reduce to writing and deliver to each party a statement of the amount of rent fixed.

Generally, "when parties set down their agreement in a clear, complete document, their writing should ... be enforced according to its terms [and extrinsic evidence] is generally inadmissible to add or vary the writing" (W.W.W. Assoc. v Giancontieri, 77 NY2d 157, 162 [1990]). It is improper for the court to rewrite the parties' agreement and the best evidence of the parties' agreement is their written contract (Greenfield v Philles Records, Inc., 98 NY2d 562, 569 [2002]).

The Appraisal Provision sets forth the manner in which appraisers are to be appointed and the method by which such appraisers are to determine the renewal rent, in the event that within thirty days after plaintiff exercises its option, the parties have not reached a written agreement on the amount. Each party appoints an appraiser, who then appoint a third appraiser. If such appraisers cannot agree on the rent, then new appraisers are appointed.

Clearly the parties have not agreed on the rent amount, which is demonstrated by plaintiff's rejection of defendant's settlement offer in the form of an appraiser's market rental value report. Defendant admits that upon such rejection, it did not abide by the terms of the Appraisal Provision. Upon rejection of its settlement demand, defendant should have sent a

appraiser) to plaintiff. Of course, plaintiff is implicitly required to do the same. If the two appraisers are unable to agree, they must appoint a third appraiser. All three appraisers must agree on the market rent value, or the process begins anew, and is repeated until three appraisers agree on the market rental value.

Plaintiff is entitled to a declaration that defendant must send a notice of appointment of an appraiser, effective upon filing of proof of service (on either side's counsel) of a copy of this order with notice of entry. Plaintiff must also provide its own notice of the appointment of an appraiser to defendant.

Mootness "forbids courts [from passing] on academic, hypothetical, moot or otherwise abstract questions ... [but rather on cases] where the determination of the [case] and the interest of the parties is an immediate consequence of the judgment" (Matter of Hearst Corp. v Clyne, 50 NY2d 707, 713-714 [1980]; Coleman v Daines, 79 AD3d 554, 558 [1st Dept 2010]).

Defendant argues that by denying a stay of the Civil Court Action in the November 2011 Order, the court resolved plaintiff's declaratory judgment action. However, the denial of a stay of the Civil Court Action merely permitted an adjudication of the merits of the holdover proceeding that defendant commenced in that forum. The Civil Court Order resolved the question of whether the lease terminated only, and made no declaration as to the parties' rights under the Arbitration Provision. This court agrees however, that to the extent that the plaintiff sought to permanently enjoin defendant from taking any steps to terminate the Lease, such remedy has been rendered moot by this court's previous denial of a stay of the prosecution of the Civil Court hold-over proceeding.

This court now summarily declares that defendant must abide by the Arbitration Provision, i.e. paragraph 8 of the First

Addendum to the Lease, which sets forth a specific procedure for setting the renewal rent under the Lease.

Plaintiff sets forth no basis for its third cause of action, which seeks recovery of its attorneys' fees and other monetary damages from defendant under the Lease, and defendant's motion to dismiss is granted to that extent.

It is, therefore,

ORDERED that the branch of the motion of Ormonde Equities, LLC to dismiss the complaint is granted to the extent that the the third cause of action is dismissed; and it is further

ORDERED that the cross motion of plaintiff 2nd Avenue Showcase Ltd. for summary judgment on its an declaration and injunction with respect to the subject of the complaint's first and second causes of action is granted only to the extent of enforcing and compelling defendant to abide by paragraph 8 of the First Addendum dated February 28, 1991; and it is further

ADJUDGED and DECLARED that defendant Ormonde Equities, LLC has failed to comply with paragraph 8 of the First Addendum undated to the Lease and Rider to the Lease dated October 9, 1987; and it is further; and it is further

ADJUDGED AND ORDERED that effective upon the filing of proof of service of a copy of this Order with notice of entry, defendant shall abide by paragraph 8 of the Addendum undated.

This is the decision and order of the court.

Dated: December 20, 2012

ENTER:

11/21/12  
WANDA A. JONES J.S.C.