136 E. 64th St., L.P. v 136 E. 64th St. Corp.

2013 NY Slip Op 33124(U)

December 11, 2013

Supreme Court, New York County

Docket Number: 651098/2013

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN J.S.C. *Justice* **PART** _____

Index Number : 651098/2013
136 EAST 64TH STREET
vs.
136 EAST 64TH STREET
SEQUENCE NUMBER : 003
REARGUMENT/RECONSIDERATION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____
Answering Affidavits — Exhibits _____ **No(s).** _____
Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

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

Dated: 12/11/13

CK
CYNTHIA S. KERN J.S.C. , J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

----------x

136 EAST 64TH STREET, L.P.,

Plaintiff,

Index No.651098/2013

-against-

DECISION/ORDER

136 EAST 64TH STREET CORPORATION and THE NEW YORK CITY LANDMARKS PRESERVATION COMMISSION,

Defendants.

----------x

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits and Cross Motion.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff commenced the instant action seeking a permanent injunction directing defendant to consent to plaintiff's request for the installation of new awnings/signs for two of plaintiff's commercial tenants. It now moves for an order granting reargument of its prior motion for summary judgment, which this court granted in part and denied in part by decision/order dated September 18, 2013. For the reasons set forth below, plaintiff's motion for reargument is granted. However, upon reargument, the court finds that there still remains a material issue of fact precluding summary judgment.

The relevant facts are as follows. Defendant 136 East 64th Street Corporation (the

"Corporation" or "defendant") is the owner of a building located at 136 East 64th Street, New York, New York (the "Building"). The Building consists of residential space for the Cooperative's shareholder and a commercial space on the ground floor consisting of eleven stores (the "Commercial Space"). On or about December 20, 1984, plaintiff entered into an Amended and Restated Agreement of Lease to rent out the entire Commercial Space from defendant for a 75-year term (the "Lease"). The Lease, among other things, sets the conditions under which plaintiff can make changes to the exterior of the Building. Specifically, paragraph 5 of the Lease provides that:

> Lessee shall make no exterior changes to the store fronts or other details affecting the facade of the Building without the consent of the Lessor which consent shall not be unreasonably withheld or delayed by Lessor. Lessor agrees to promptly execute any application or other document or instrument required or deemed desirable by Lessee in connection with obtaining any permit, authorization or other necessary or desirable order or ruling from governmental authorities having jurisdiction whenever such action is necessary or desirable, provided, however, that Lessee agrees to reimburse Lessor for any reasonable cost or expense incurred by Lessor in connection therewith.

Additionally, paragraph 34 provides:

> Notwithstanding anything to the contrary contained in this Lease, neither Lessee nor any assignee or sublessee of Lessee shall, without the prior written consent of the Lessor (i) make, cause or permit or suffer to be made, any change or alteration in the exterior walls fo the demised premises or make any sue of such exterior walls (except for the installation of a new storefront, signs or awnings in keeping with the character of the building as a first class apartment house and security gates); or (ii) make any application of any kind to any governmental authority for or pertaining to any structural change in the exterior walls of the demised premises. The consent of Lessor to any of the foregoing will not be unreasonably withheld or delayed.

In March of 2010, defendant Landmarks Preservation Commission ("LPC"), the agency responsible for identifying and designating the city's landmarks in the city's historic districts, expanded the Upper East Side Historic District ("UESHD") to include the Building. As a

building in a designated historic district, the Building must get LPC approval for any proposed changes to the exterior of the Building, including new awnings or storefronts in the Commercial Space. Additionally, pursuant to the LPC regulations, any application to the LPC for approval must bear the property owner's signature.

This action involves two of plaintiff's commercial tenants, A&A Discounts and Stay Connected, Inc. ("Stay Connected"), who wish to make changes to their storefronts. Specifically, on or about September 27, 2012, plaintiff submitted a plan for the A&A Discounts replacement awning to the Corporation. Around this same time, on or about November 27, 2012, plaintiff submitted another plan to defendant to install a sign/awning on the Verizon Store storefront, which was opened by Stay Connected in the Commercial Space after the LPC expanded the UESHD to include the Building. In regards to both plans, plaintiff requested the Corporation's consent to the plans and its signature on the necessary applications to LPC and the Department of Buildings ("DOB").

By letter dated February 8, 2013, the Corporation denied both requests (the "Denial Letter"). The Corporation's Denial Letter asserted that its refusal to consent to the proposed changes was based on "extensive research regarding the possible preferences of the New York City Landmarks Preservation Commission in relation to the plans that have been submitted," and that it was the Corporation's Board Members' view "that [the proposed] awnings would very probably not be acceptable to the Commission." More specifically, the Corporation noted that "in order to be consistent with the views of the commission regarding the historic architectural character of the building, the Corporation has determined not to provide its consent under the Lease." Plaintiff brings the instant action to challenge this denial.

CPLR § 2211 provides that a motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." In its prior decision, this court denied the portion of plaintiff's motion seeking summary judgment on its breach of contract claim on the ground that a material issue of fact existed as to whether the Corporation's refusal to consent was reasonably based on legitimate objective business concerns. In coming to that determination, the court relied on the standard set forth in *Wize Eyes of Syosset, Inc. v. Turnkpike Corp.*, 66 A.D.3d 884 (2nd Dept 2009), wherein the Second Department held that when a commercial lease provides that the landlord will not unreasonably withhold consent to proposed signage, the landlord may "properly consider whether the proposed signage would detract from the overall appearance of the property or whether it could lead to a decrease in the property's rental values" as those are legitimate objective business considerations. The court found *Wize Eyes* applicable to the instant action on the ground that Paragraph 5 of Lease explicitly provides that the Corporation's "consent shall not be unreasonably withheld or delayed" for any proposed "exterior changes to the store fronts or other details affecting the facade of the Building." Plaintiff now moves to reargue this portion of its prior motion on the ground that this court overlooked Paragraph 34 of the Lease, which specifically governs sign and awning proposals and sets a standard separate and apart from the reasonableness standard in Paragraph 5.

The court grants plaintiffs' motion for reargument with respect to the portion of plaintiff's prior motion seeking summary judgment on its breach of contract claim on the ground that it overlooked the applicability of Paragraph 34 in its prior analysis. However, upon

reargument, the court finds that a material issue of fact still remains precluding summary judgment. Pursuant to Paragraph 34 of the Lease, plaintiff or its sublessees are not restricted from installing "a new storefront, signs or awnings in keeping with the character of the Building as a first class apartment house." Thus, reading this paragraph in conjunction with Paragraph 5 of the Lease, it is clear that the Cooperative may only refuse its consent, i.e. its refusal would be deemed reasonable, to a new storefront, sign or awning when it is not "in keeping with the character of the Building as a first class apartment house." Accordingly, the issue to be determined in this action is whether the proposed signs/awnings herein at issue are "in keeping with the character of the Building as first class apartment house." As this is a factual determination and the record before this court contains conflicting affidavits attesting to whether the proposed signs/awnings meet this standard, the determination must be left to the trier of fact precluding summary judgment.

To the extent plaintiff argues that the proposed signs/awnings are "in keeping with the character of the Building as a first class apartment house" as a matter of law as they are merely "replacement" signs/awnings and as such they must be acceptable as the prior signs were already approved, .such contention is without merit. Contrary to plaintiff's assertion, nowhere in the Lease is a determination made that when plaintiff entered into the Lease with the Cooperation the awnings that were in place at the time were deemed to meet this standard. Moreover, even assuming, *aguendo*, that such determination was made, the idea of what is deemed "first class" is not necessarily a stagnant standard and can evolve with time.

Based on the foregoing, plaintiff's motion for reargument is granted and, upon reargument, the portion of its prior motion seeking summary judgment on its breach of contract

claim is denied as there remains a material issue of fact in dispute. This constitutes the decision and order of the court.

Date: 12/11/13

Enter: _____

J.S.C.

CYNTHIA S. KERN
J.S.C.