SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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GIORGIO ARMANI CORP.,

Plaintiff, Index No. 651022/15

- against -

SL GREEN REALTY CORP., SL GREEN OPERATING PARTNERSHIP, L.P., MADISON/65 OWNER LLC, 75 DEVELOPMENT FEE LLC, 752 MADISON OWNER 2 LLC, and 752 MADISON OWNER 3 LLC.

Defendants.

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Hon Charles E. Ramos, J.S.C.

Plaintiff Giorgio Armani Corp. (Armani) commenced this action to prevent defendants SL Green Realty Corporation and SL Green Operating Partnership, L.P. (collectively, SL Green) from evicting it from its flagship retail space comprising a square plot of land located at the northwest corner of Madison Avenue and East 65th Street, which it has subleased since 1996.

In 2011, Armani negotiated and executed an extension of its sublease (Sublease) until 2025, with rent set at $3.5 million per annum (Sublease Extension). At that time, the fee interest underlying the subleased premises, in addition to three other buildings leased to other tenants (the site), was owned by the Weatherly family. The ground lease (Prime Lease) was held by David W. Frankel.[1]

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[1] Armani only occupies 752-760 Madison Avenue, a portion of the site subject to the Prime Lease.

Plaintiff's Allegations

In December 2011, Madison/765 Owner, LLC, an affiliate of SL Green, acquired the Prime Lease from Frankel, thereby assuming the position of sublessor (Sublandlord) to Armani's Sublease. In or about that time, SL Green embarked on a plan to consolidate ownership over the entire site so that it could eliminate the tenancies thereon and pursue an unencumbered luxury development project.

On June 20, 2014, Weatherly put its fee interest in the site on the market. The following day, Sublandlord SL Green initiated a rent re-set appraisal under the Prime Lease, seeking to adjust the rent due thereunder.

SL Green, as a tenant in common with three other affiliates, defendants 752 Development Fee LLC, 752 Madison Owner 2 LLC, and 752 Madison Owner 3 LLC (collectively, the New Owner), acquired the fee interest in the land from Weatherly for $282 million, on July 21, 2014.

By reason of the acquisition, in the rent re-set appraisal proceeding, SL Green, through its two affiliates, was effectively arbitrating against itself. At the conclusion of the proceeding, the appraisal resulted in a significant increase in the rent owed by the Sublandlord under the Prime Lease. In February 2015, the appraiser rendered a decision assessing the value of the entire site at $190 million, thereby resulting in an increase in the

Sublandlord's rent due under the Prime Lease to $13.3 million, per annum effective April 1, 2015.

On March 6, 2015, Sublandlord SL Green, served Armani with a notice.[2] In the notice, the Sublandlord advised Armani that the appraisal proceeding resulted in a site valuation which resulted in an increased new ground rent under the Prime Lease substantially in excess of the current ground and sublease rent. As the net revenues for each of the three buildings for 2014 was $3.9 million (Armani's rent was locked-in at $3.5 million for the years 2015-2025), the Sublandlord was facing a substantial deficiency which would result in its default of its rental obligations based upon its purported inability to pay the new ground rent. Although the Sublandlord possessed the valuable right to develop the site under the Prime Lease, it indicated to Armani that it would be voluntarily surrendering the Prime Lease, effectively terminating Armani's Sublease.

Armani alleges that SL Green colluded with its affiliates (defendants) to drive up the rent on the Prime Lease in the rent re-set appraisal. SL Green directed its tenant affiliate, the Sublandlord, to voluntarily default under its rent obligation under the Prime Lease in an effort to destroy the Sublease, in order to squeeze Armani out of its flagship retail space, or

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[2] The Sublease Extension does not contain a non-disturbance agreement vis-a-vis the fee owner.

force it to pay rent far in excess of the amount of rent set forth in the Sublease Extension.

In March 2015, Armani moved by way of order to show cause for a Yellowstone injunction enjoining defendants from taking any action to terminate the Sublease. On May 12, 2015, this Court granted a temporary restraining order (TRO) pending determination of the motion for preliminary injunction, and granted Armani leave to conduct expedited discovery. On June 24, 2015, this Court held a hearing and permitted the parties to proffer evidence and legal arguments pertaining to the amount to be paid for use and occupancy and the amount of the undertaking in the event the Court grants the preliminary injunction sought by Armani. The following memorandum decision pertains solely to the issue of the amount of use and occupancy and the undertaking, under CPLR 6312 (b).

Discussion

The parties' dispute at this stage centers on the appropriate amount of interim use and occupancy, and whether Armani should be required to post an undertaking in addition to paying interim use and occupancy.

The purpose of a Yellowstone injunction is permit a tenant confronted by the threat of termination of its commercial leasehold to obtain a stay tolling the landlord's termination thereof while the propriety of the underlying default is

litigated (*Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assocs.*, 93 NY2d 508 [1999]).

In granting a Yellowstone injunction, a court may impose reasonable conditions upon the tenant, including requiring the tenant to post an undertaking in an amount rationally related to the quantum of damages that the landlord would sustain if the tenant is later determined not to have been entitled to the injunction (CPLR 6312; *61 West 62nd Owners Corp. v Harkness Apartment Owners Corp.*, 173 AD2d 372 [1st Dept 1982]).

In addition, the landlord may recover "reasonable compensation" for the use and occupancy of the premises for the period the tenant is in possession (Real Property law § 220; *Metropolitan Transp. Authority v 2 Broadway LLC*, 279 AD2d 315 [1st Dept 2001]).

The reasonable value of use and occupancy due from a holdover tenant is the fair market value of the premises after the expiration of the lease (*Mushlam, Inc. v Nazor*, 80 AD3d 471 [1st Dept 2011]). Fair market value may be established by appraisal testimony based on comparable rentals or by reference to the rental history of the premises itself (*Cooper v Schube*, 101 AD2d 737 [1984]; *Mushlam, Inc. v Nazor*, 80 AD3d 471 [1st Dept 2011]; *2641 Concourse Co. v City Univ. of NY*, 137 Misc 2d 802, 805 [Ct Claims 1987], *affirmed* 147 AD2d 379 [1st Dept 1989]; *Beacway Operating Corp. v Concert Arts Socy.*, 123 Misc 2d 452

[Civ Ct, NY County 1984]). The rent reserved under the lease, while not necessarily conclusive, is probative as to the reasonable value of use and occupancy (*43rd Street Deli, Inc.*, 107 AD3d 501; *Mushlam*, 80 AD3d at 472).

An award of interim use and occupancy should not be excessive, and is without prejudice. Thus, if wrongly assessed, a tenant may be provided with a refund or rent credit (*East 4th Street Garage, Inc. v Estate of Berkowitz*, 265 AD2d 249 [1st Dept 1999]). The landlord has the burden of proving reasonable value of use and occupancy (*Beacway Operating Corp.*, 123 Misc 2d at 453).

Privity of contract is not essential to an award of use and occupancy, which is based on the theory of quantum meruit (*Getty Props. Corp. v Getty Petroleum Mktg. Inc.*, 106 AD3d 429, 420 [1st Dept 2013).

Armani's Position

Armani maintains that it should only be required to pay the current Sublease rent, $3.5 million per annum, as a use and occupancy charge and that no additional bond requirement be imposed. Armani argues that defendants will not actually be harmed by an injunction while this action is pending, and are presently earning more short-term rental income from the premises than they would be if they had already evicted Armani.

Armani points out that the New Owner's primary objective is

to evict all of the subtenants, demolish the three buildings, and redevelop the site as soon as possible. Consequently, Armani reasonably argues, that the New Owner would likely keep the property vacant while awaiting regulatory approval in connection with the development rather than rent it on a short-term lease.

Armani submits expert testimony as to the marketability of the site for a one to two year tenancy while the New Owner prepares for major re-development at the site. Armani cites to four recent examples of other sophisticated New York landlords holding prime retail locations vacant while making necessary preparations for major re-development projects (Kurland Aff., ¶¶ 5-6, Exhibits B-D annexed thereto). Armani emphasizes that SL Green itself has employed this strategy, having held the retail space located at 42nd Street and Vanderbilt Avenue vacant while it awaited approval for its One Vanderbilt project (Kurland, ¶ 6).

Armani submits the expert affidavit of Gerald Pietroforte, who testifies that the market rental value for premium retail space on Madison Avenue between East 59th Street and East 72nd Street is $360 per square foot, which annualizes to $5,917,680 for 16,438 sq. ft. of retail space.

To arrive at this figure, Armani's expert calculated the blended rent per square foot (the total rent due under the lease divided by the total square footage of the leased premises) of

three retail locations with spaces greater than 10,000 sq. ft.: Crate and Barrel located at 650 Madison Avenue ($329.84 per sq. ft.), Bottega Veneta located at 740 Madison Avenue ($333.33 per sq. ft.), and Ralph Lauren located at 867 Madison Avenue ($536.15 per sq. ft.)[3] (Pietroforte Aff., ¶¶ 6-7, Exhibit B annexed thereto).

Armani argues that this rental value assumes that the New Owner would be able sign a premium, high-end tenant for a short-term lease, which is unlikely given its redevelopment plans. Because a premium tenant would likely be uninterested in a short term tenancy, preferring instead long-term leases with options to renew, the market of prospective tenants for a one to two year lease would likely consist only of pop-up stores. Armani's expert opines that the rents typically paid on short-term, pop-up leases are generally much lower than the rents commanded on more traditional, long-term leases (Kurland, ¶ 8).

Consequently, Armani argues that a "pop-up discount" of as much as eighty-one percent should be applied, and thus, the true market rent for a one to two year tenancy would be as low as $68 per square foot, which annualizes to $1,117,784, an amount far lower than the current Sublease rent of $3.5 million (Kurland

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[3] These figures are listed in the aggregate or "blended" amount, which is equal to the total rent due under the lease divided by the total square footage of the leased premises (Pietroforte Aff., ¶ 7).

Aff., ¶ 8; Pietroforte Aff. ¶ 14).

Defendants' Position

In opposition, defendants assert that Armani should be required to pay to the New Owner use and occupancy based on the current fair market value of the premises that Armani is occupying, commencing as of April 1, 2015. Defendants submit appraisal testimony from Jeffrey Roseman to establish fair market value.

Defendants also reject the contention that Armani is entitled to a "pop-up discount" as if the New Owner were only interested in a short-term lease for the duration of the preliminary injunction period. According to defendants, damages are to be measured by the reasonable value to the party using and occupying the space.

Defendants' expert calculates fair market rent in the amount of $837,916.67 per month, $10,055,000.04 per annum, based upon nine comparables. The comparable rentals that defendants' expert cites include Breitling, located at 575 Madison Avenue ($559.69 per sq. ft.), Coach, located at 595 Madison Avenue ($780.93 per sq. ft.), Aaron Basha, located at 673 Madison Avenue ($900 per sq. ft.), Morgenthal Frederics, located at 680 Madison Avenue ($2500 per sq. ft.), Qela, located at 680 Madison Avenue ($1,017.66 per sq. ft.), Hermes located at 691 Madison Avenue ($601.85 per sq. ft.), Jimmy Choo, located at 699 Madison Avenue

($800 per sq. ft.), and Elie Saab, located at 860 Madison Avenue ($1,000 per sq. ft.)[4] (Exhibit B, annexed to the Roseman Aff.).

In addition, defendants rely largely upon *Omabuild Corp. v Copacabana Nightclub, Inc.* (7/21/94 NYLJ 23 [col 1]), where the Court rejected the tenant's request to apply a discount to the fair market value due to the short term nature of its holdover and alleged adverse conditions existing in the premises because there was no proof in the record that the landlord intended to find a short term tenant. Moreover, the Court found evidence that the holdover tenant was acting in bad faith.

Here, in contrast, Armani's holding over has not interfered with defendants' ability to re-let the premises to a long term tenant as defendants concede that they do not intend to sign a long term tenant, but rather pursue redevelopment of the entire site. Thus, defendants' expert submissions on comparable, long-term rentals are not relevant. Moreover, there is no authority for basing the fair market value upon the rent that may be charged in the future once the hypothetical redevelopment of the entire site is complete, as opined by defendants' expert, Roseman (*see* Roseman Aff., ¶¶ 20-22).

Although some discount to the FMV is appropriate given that, at most, defendants could only re-let the premises to a short-

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[4] These figures are listed in the aggregate.

term tenant while pursuing their redevelopment plans,[5] the eighty-one percent "pop-up" discount, as advocated by Armani, appears unreasonable. Defendants failed to submit any evidence as to short-term comparables.

Accordingly, having reviewed the rent reserved under the Sublease, the parties' opposing expert submissions, including testimony of commercial real estate brokers, real estate market experts and advisers pertaining to asking rents and actual rents along the Madison Avenue corridor at issue, this Court concludes that the rent reserved under the Sublease, of $3.5 million, to be the appropriate fair market rent as use and occupancy of the premises, without prejudice to adjustment upon trial.

As for the amount of the undertaking, it must not be based upon speculation, and be rationally related to the damages the non-movant might suffer if the court later determines that the relief to which the undertaking relates should not have been granted (*Visual Equities v Sotheby's Inc.*, 199 AD2d 59 [1st Dept 1993]; *Access Medical Group, P.C. v Straus Family Capital Group, LLC*, 44 AD3d 975 [2d Dept 2007]).

Defendants request that the Court order an undertaking in the amount of $96,152,925. They submit the sworn testimony of experts who state that the injunction will interrupt the New

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[5] Defendants' expert opines that it will take, at most, eleven to twenty-three months to obtain Landmark Preservation Committee and DOB approvals for the redevelopment.

Owner's development of a luxury condominium or boutique hotel project, causing defendants to incur in lost profits, and missing the market damages (Von Ancken Aff.). Defendants' expert opines that the New Owner will suffer a loss of $83 million if it is forced to "miss" the current historically-high market for sales of new residential condominium units because it was wrongly delayed by Armani's holdover tenancy.

Defendants fail to submit persuasive authority for the proposition that the risk to a developer for "missing the market," or the delayed opportunity to develop property are quantifiable and recoverable as damages against a bond. Rather, courts consistently refuse to fix undertakings to cover such damages because they are speculative and impossible to quantify (*see e.g. Maestro W. Chelsea SPE LLC v Pradera Realty Inc.*, 38 Misc 3d 522, 536 [Sup Ct, NY County 2012]; *see also Peyton v PWV Acquisition LLC*, 35 Misc 3d 1207[A], *5 [Sup Ct, NY County], *affirmed* 101 AD3d 446 [1st Dept 2012]; *Visual Equities Inc.*, 199 AD2d 59; *Blueberries Gourmet, Inc. v Aris Realty Corp.*, 255 AD2d 348, 350-51 [2d Dept 1998]).

Here, the New Owner has to evict all of the subtenants, demolish the three buildings located on the site, obtain and finalize regulatory approval from various city agencies (including the Landmarks Preservation Committee) and financing prior to pursuing the redevelopment project. Thus, redevelopment

of the site is, at most theoretical and in its infancy.

Therefore, the amount of the undertaking that defendants request for missing the market and lost opportunity damages, $83 million, is excessive and speculative and does not stem from provable and actual future losses.

In addition, defendants argue that the bond should protect the New Owner for the attorneys' fees likely to be incurred in defeating the motion for a preliminary injunction, because Armani's right to injunctive relief is the primary object of this action. Attorneys' fees incurred in a successful effort to vacate a restraining order may be recoverable damages (*see Shu Yiu Louie v David & Chiu Place Rest.*, 261 AD2d 150, 152 [1st Dept 1999]). Further, counsel fees for the entire proceeding may be recoverable where the plaintiff's right to injunctive relief is the primary object of and inseparable from the merits of the action (*Republic of Croatia v Trustee of Northampton 1987 Settlement*, 232 AD2d 216 [1st Dept 1996]).

Therefore, as the New Owner's potential liability stemming from an unwarranted injunction is the use and occupancy of the premises, which Armani is paying in any event, the Court fixes the amount of the undertaking at $750,000 for attorneys' fees and expenses.

Settle Order on notice.

Dated: August 5, 2015 ENTER: J.S.C.

CHARLES E. RAMOS