White Knight of Flatbush LLC v Deacons of the Dutch Congregation of Flatbush
2015 NY Slip Op 32854(U)
August 14, 2015
Supreme Court, Kings County
Docket Number: 508807/14
Judge: Martin M. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
Commercial Part 10

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WHITE KNIGHT OF FLATBUSH LLC,

Plaintiff(s) Index no. 508807/14

-against- DECISION/ORDER

DEACONS OF THE DUTCH CONGREGATION OF FLATBUSH A/K/A THE REFORMED PROTESTANT DUTCH CHURCH OF THE TOWN OF FLATBUSH, STERLING GROUP ASSET MANAGEMENT, LLC, MICHAEL CHERA and ANGELO MONACO,

Defendant(s)

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Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion by Sterling Group Asset Management, LLC (Sterling), Chera and Monaco to dismiss, the motion by the Deacon of the Dutch Congregation of Flatbush (the Church) to dismiss, and the cross motion of White Knight of Flatbush LLC (White Knight) to file and serve a Third Amended Verified Complaint

PAPERS	NUMBERED
(Motion Seq. #2 Sterling Defendant's motion to dismiss)	
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	
Replying Affidavits	
Memorandum of Law	2, 3, 4, & 5
(Motion Seq. #3 & #5 Church's motion to dismiss)	
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(Motion Seq. #4 & #6: White Knight's motion to amend)	
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(Note: Motion Seq. #3 & #4 were superceded by Motion Seq. #5 & #6, although papers submitted in connection with the initial motions were adopted on the subsequent motions.)

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Plaintiff brings this action for, inter alia, specific performance of a contract involving real property located at 898-908 Flatbush Avenue, Brooklyn, New York. The property is owned by the defendant Church.

The purported contract, dated April 4, 2014, between plaintiff and the Church is designated an "Agreement of Lease". The contract interposes White Knight as a purported leasee between the Church and the existing triple net leasee, denoted in the appraisal report as a "sandwich lease" in which White Knight can be thought of as the meat or jelly and the Church and existing triple net leasee as the slices of bread.

Importantly, the contract includes an option to purchase the property upon termination or expiration of the existing triple net lease and sub-leases. The option price, without taking account of reductions and credits, is $5,500,000.00.

Defendant Sterling is purportedly affiliated with the existing triple net leasee, a non-party Allied Property Group. Allied's lease runs to 2019 with an option to extend it until 2028. Sterling entered an alleged agreement to purchase to the property for $8,500,000.00 dated August 14, 2014.

Plaintiff commenced the action with the filing of a summons and complaint alleging four causes of action including, inter alia, specific performance. Shortly thereafter plaintiff filed an Order to Show Cause seeking to compel the Church to submit its contract, and *only* its contract, to the Attorney General for approval.

The White Knight agreement provides (Article 36) for submission for to the Attorney General "which approval shall approve the terms of this Lease including and specifically to be stated in the AG Approval the right of the Tenant to purchase the Premises pursuant to the Option. The AG Approval shall state that no further approval of the Attorney General of New York (the "AG") shall be required with respect to the sale and purchase of the Premises pursuant to a sale resulting from the Tenant exercising the Option." It is worth noting that the Attorney General is not a party to the contract and neither party could compel the Attorney General to approve the contract or fashion its approval to suit the parties. Be that as it may, failure to obtain the Attorney General's approval in this form within one year allows White Knight to terminate the agreement.

Plaintiff filed an Amended Complaint alleging five causes of action. A week later plaintiff filed the Second Amended Complaint that alleged eleven causes of action, which now including claims of tortious interference with contract and injurious falsehood against Sterling, Chera and Monaco (the Sterling defendants).

Plaintiff's motion to compel the Church to submit only the purposed White Knight

contract to the Attorney General for approval appeared on the court's calendar. At that time, the court was compelled to point out that pursuant to Religious Corporation Law (RCL) Sec. 2-b(d-1) and RCL Sec. 12(5-c) the Dutch Reform Church was exempt from obtaining approval from the Attorney General and that even were the Attorney General to mistakenly approve the purposed contract, RCL Sec. 12(5-c) requires the consent of the trustees of the Classis of the church in order to obtain approval from the court.

Religious Corporation Law Sec. 12 has existed essentially in it's current form for over one hundred years and its antecedents date back to 1784. The Church predates those antecedents, and indeed the founding of the United States; the Church is the oldest church on all of Long Island, having opened on December 15, 1654. (Brooklyn Daily Eagle, December 1, 2009; December 1, 2011).

It is worth noting that the proposed contract was drafted by White Knight. On some level, White Knight was aware of the requirements of RCL 12. It failed, however, to take account of the exceptions in the statute. This error infects this entire matter.

The contract prepared by White Knight does not become effective until it is approved by the Attorney General (Article 36.01). The provision is very specific to the Attorney General approval and does not contain saving, broad language, as, for example Article 14.17(I) of the Sterling agreement which provides for "...the Supreme Court Approval and any and all approvals required to consummate the transaction..." It is highly questionable whether the Attorney General's office would even review a matter that is outside the mandates of its statutory authority.

Since White Knight drafted this contract it is charged with providing that it comply with the statutory procedure required to review and approve the contract. White Knight can not object to this court insisting that the parties proceed in compliance with New York law. Another, perhaps better, option would have been to declare the contract void ab initio for failure to provide for the approvals required by law.

Plaintiff withdrew its application to have its purposed contract submitted to the attorney general. The Church subsequently submitted both contracts to the Classis and the Classis did not approve the White Knight agreement but approved the Sterling contract.

Turning to the motions before the court, the Church and the Sterling defendants have moved to dismiss the Second Amended Complaint. White Knight has moved for leave to file and serve a Third Amended Complaint. Turning first to the motions to dismiss.

> "On a pre-answer motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction and the plaintiff's allegations are accepted as true and accorded the benefit of every possible favorable inference" (Granada Condominium III Assn. v. Palomino, 78 A.D.3d 996, 996, 913 N.Y.S.2d 668; see

> Leon v. Martinez, 84 N.Y.2d 83, 87, 614 N.Y.S.2d 972, 638 N.E.2d 511). A motion pursuant to CPLR 3211(a)(1) to dismiss a complaint on the ground that a defense is founded on documentary evidence "may be appropriately granted only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858, 774 N.E.2d 1190; see Rodolico v. Rubin & Licatesi, P.C., 114 A.D.3d 923, 924–925, 981 N.Y.S.2d 144). (Attias v. Costiera, --- N.Y.S.2d ----, 2014 WL 4627774, 2014 N.Y. Slip Op. 06163 [2d Dept., 2014]).

"In considering a motion to dismiss pursuant to CPLR 3211(a)(7), the court should...determine only whether the facts as alleged fit within any cognizable legal theory'" (Simos v. Vic–Armen Realty, LLC, 92 A.D.3d 760, 761, 938 N.Y.S.2d 609, quoting Leon v. Martinez, 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511; see Sinensky v. Rokowsky, 22 A.D.3d 563, 564, 802 N.Y.S.2d 491). (Black v. New York City Housing Authority, 120 A.D.3d 731, 991 N.Y.S.2d 337, 2014 N.Y. Slip Op. 05936 [2d Dept. 2014]).

At the outset of this court's analysis it must be noted that because plaintiff seeks specific performance of a contract regarding the rental of real property for more than five years and its ultimate sale, the court is compelled to review the terms of the purposed contract to determine if the transaction is fair and reasonable. (RCL 12 and NFPL 511(d)).

Plaintiff triggered this review by bringing the order to show cause to compel submission of the purposed contract to the Attorney General, effectively seeking specific performance of Article 36 of the "Agreement of Lease". Moreover, the first five causes of action, the ones alleged against the Church are all entirely dependent on the contract being valid and enforceable and the other causes of action are only slightly less dependent on the validity of the contract.

"[A] court may not direct specific performance of a contract for the sale of real property by a religious corporation, as here, without first determining that the proposed sale complies with Religious Corporation Law § 12 and Not-for Profit Corporation Law § 511(citations omitted)." (Scher v. Yeshivath Makowa Corp., 20 A.D.3d 470, 799 N.Y.S.2d 106, 2005 N.Y. Slip Op. 05899 [2d Dept., 2005]).

> "Although a court of equity may decree specific performance of an executory contract for the sale of the real property of a religious corporation (Muck v. Hitchcock, 149 App.Div. 323, 328-329, 134 N.Y.S. 271, supra; Sun Assets Corp. v. English Evangelical Lutheran Church of Ascension of Borough Park, Brooklyn, supra, 19 Misc.2d p. 192, 185 N.Y.S.2d 695; Bounding Home Corp. v. Chapin Home for Aged and Infirm, 19 Misc.2d 653, 191 N.Y.S.2d 722; Congregation Beth Elohim v. Central Presbyterian Church, supra, 10 Abb.Prac. p. 490), it must first determine, in accordance with subdivision (d) of section 511 of the Not-For-Profit Corporation Law, that the terms and consideration of the

> transaction are fair and reasonable and that the purposes of the corporation or interests of its members will be promoted by the sale (cf. Associate Presbyterian Congregation of Hebron v. Hanna, 113 App.Div. 12, 14, 98 N.Y.S. 1082). The purpose of this requirement is to protect the members of the religious corporation, the real parties in interest, from loss through unwise bargains and from perversion of the use of the property (Bowen v. Trustees of Irish Presbyterian Congregation in City of New York, 6 Bosw. 245; Muck v. Hitchcock, 212 N.Y. 283, 287, 106 N.E. 75, supra; Congregation Beth Elohim v. Central Presbyterian Church, supra, 10 Abb.Prac. pp. 488-489; Madison Ave. Baptist Church v. Baptist Church in Oliver Street, 1 Abb.Prac. (N.S.) 214, 224; Reformed Protestant Dutch Church in Garden Street v. Mott, 7 Paige Ch. 77, 83-84)." (Church of God of Prospect Plaza v. Fourth Church of Christ, Scientist, of Brooklyn, 76 A.D.2d 712, 431 N.Y.S.2d 834 [2d Dept. 1980]; aff'd, 54 N.Y.2d 742, 426 N.E.2d 480, 442 N.Y.S.2d 986 [1981].) (Emphasis added.)

Thus, if the contract is not one that could be approved by the court then cause of action for specific performance and the related causes of action must be dismissed.

Turning to the proposed contract between the Church and White Knight. This court spent a substantial amount of time reading and analyzing the thirty three page, single spaced agreement. The transaction is complicated with a variety of moving parts and the contract is a dense and convoluted document, seeded with hidden definition, or, alternatively, lacking definitions to terms that require them. Whether this came about through haste, inadvertence and poor drafting or is an intentional and deliberate effort to make the agreement opaque and subject to interpretation is beyond the scope of this decision. In any case, this contract is deeply flawed.

The transaction can be broken down into two parts, the lease and the option. The lease however is more in the nature of a property management agreement which interjects White Knight between the Church and Allied, the current triple net leasee. The appraisal calls the arrangement a "sandwich lease".

Purportedly, the transaction was structured as a lease to avoid the alleged Attorney General's disdain at approving option contracts with religious corporations. White Knight freely admits that the transaction was structure to obscure its true purpose from the Attorney General. The fact that White Knight would proceed in this fashion and that they would admit this to this court shows a certain lawlessness that is disturbing and problematic. Nor should the irony of this be lost; to avoid disapproval by the Attorney General the transaction was transformed from a simple option contract to highly complicated "sandwich lease" and option, when, in fact, Attorney General approval was not required.

White Knight gains no current possessory interest in the real estate under the Agreement of Lease. The agreement does not call for regular payments of rent. Instead, it contains a single payment denoted as the "base rent payment" of $800,000.00. Of that sum, $600,000.00 was to

be placed in escrow for payment of outstanding real estate taxes, in the event the "Space Tenant" failed to bring them current within one year. (Allegedly, the back taxes were brought up to date by the current triple net leasee in early April of 2014; the contract was signed by the treasurer of the Church on April 4 and by White Knight on April 18.)

In the event the existing triple net leasee exercises its option to renew the triple net lease, the Church would be entitled to the "Excess Rent" defined as 25% of the increased rent, in excess of $40,000.00 per year. The appraisal, submitted in connection with the motion asserts that under current market conditions "the property's potential gross income at market levels is $462,000.00". At that rate, the Church would receive over $110,000.00 a year for the nine years of the extension, while White Knight would receive over a $330,000.00 a year.

While White Knight is certainly entitled to compensation for the use by the Church of the initial $800,000.00 during this period, as well as management fees, a third of a million dollars a year is approximately ten times the fair value for this, given current interest rates and the fact that the property has a single, large commercial tenant that is a public traded corporation. Also, to the extent the Church receives any "Excess Rent", White Knight receives a credit against the option price.

The option is exercisable "[u]pon the termination of the Space Lease and any subleases of the Space Tenant...or expiration of the Space Lease..." It is significance to this court that termination of the existing triple net lease was contemplated by White Knight and, in fact, precedes "expiration" in the option provision. The stated option price is $5,500,000.00 subject to some substantial reductions, some of which are a good deal less obvious than others. The initial payment of $800,000.00 (the Lump Sum Base Rent Payment) is credited against the option price, as is any "Excess Rent" paid to the Church.

A significant reduction is included deep in Article 4, entitled IMPOSITIONS. Section 4.02 provides, in full: "In the event at the time of any Excess Rent is payable to the Landlord there remains an outstanding balance of unreimbursed (I) Tenant's Excess Tax Payments, (ii) Tenant Required Tax Payment (as defined below)[*a definition that this court could not find within the contract*], (iii) Tenant Litigation Expenses or (iv) Tenant AG Expenses (as herein defined [$25,000.00]), Landlord agrees that Tenant may use the Excess Rent due Landlord pay to Tenant any amount of said unreimbursed payments and expenses until said payment and expenses are paid in full. Hereinafter the payments referred to in (I)-(iv) in the preceding sentence shall be collectively referred to as the "Reimbursable Expenses". "Any outstanding Reimbursable Expenses outstanding (sic) at the time Tenant shall purchase the Property pursuant to the Option (as defined herein) shall be credited against the Purchase Price (as defined herein)."

In plain language, to the extent White Knight pays any taxes on the real property they can deduct it from the "Excess Rent". The failure to define "Tenant Required Tax Payments" creates an open issue as to whether White Knight is entitled to recoup sums that are the obligation of and are actually paid by Allied. This can be a considerable sum ranging from nearly $700,000.00

(under the unextended term) to over $2,200,000.00 (for the extended term), assuming no increase in current rates and assessments).

It is also worth noting that as provisions in section 4.02 and 4.03 provide for plaintiff to be responsible for the litigation expenses incurred in connection with enforcement of the "Space Lease", so one can only speculate as to what is contemplated by "(iii) Tenant Litigation Expenses" in Section 4.02, which does not appear to be otherwise defined in the agreement.

There are several intangibles factors that must be considered in connection with this agreement. It can not be overlooked that the contract is not a "one shot" deal but involves White Knight and the Church in a fairly long relationship, one White Knight might call a landlord-tenant relationship, since it denotes the contract an "Agreement of Lease". For all appearance, White Knight is a sophisticated investor that is not averse to litigation. On the other hand, the Church has expressed a serious disdain for litigation and retracted a very substantial offer to resolve the matter with White Knight because White Knight commenced this action.

As noted, ambiguities in the Agreement of Lease will almost certainly requires future litigation to interpret it. The probability of substantial litigation expenses must be deducted from the value of to the Church of the Agreement of Lease.

Nor can it be overlooked that the Option is exercisable "[u]pon the termination of the Space Lease and any subleases of the Space Tenant". Thus, the Agreement of Lease would give White Knight a very substantial interest in effecting the termination of the lease and subleases which undoubtedly will result in a degree of unpleasantness, if not hostility, between the Church and its neighbors, the subleasees. The probable damage to the Church's reputation among its neighbors, the quintessential loss of good will, would have to be calculated into value of the Agreement of Lease.

With all this in mind, the court turns to the valuation issue. The Church has submitted an appraisal in connection with the motion. While this appraisal was purportedly prepared for the Church, the complaint alleges that White Knight paid for it (as well as for the Church's legal fees in connection with the contract).

The appraisal is an impressive, professional looking product, some fifty pages long with addendums of nearly half that length. It finds that the value of the property, as of April 14, 2014, is $7,623,000.00, unencumbered by the ground lease. The appraisal finds the property with the existing ground lease has a value of $3,930,000.00. The methodology behind this very substantial reduction, nearly double the difference from the gross current rent and the gross market rent, is not set forth. The appraisal does not attempt to calculate the value of the property in four years or thirteen years.

It is noted that defendant Sterling has made an offer to presently pay $8,500,000.00 for the property. Paragraph 2(b) of the Contract Modification Agreement between the Church and

Sterling expressly provides for a counter offer from White Knight in excess of $8,600.000.00, which White Knight declined to make.

White Knight has sought to prevent the Church from disclosing this offer to the Attorney General and the Classis and undoubtedly would object to this court taking note of the competing offer as any measure of the value of the property. White Knight completely fails to recognize that the failure to disclose such material information borders on fraudulent conduct, if, in fact, it does not cross that line.

The competing offer is material and relevant to evaluating the White Knight contract. The court, however, takes note that the value of the property to Sterling, an affiliate of the current triple net leasee, is higher than it would be to any unrelated, third party. Sterling's offer is in line with the present appraised value, given the premium that the property would have to the current triple net leasee. Sterling's offer received little consideration in this court's review of the White Knight, which rises or falls on its own weight.

A final factor that must be taken into account is the Agreement of Lease itself. Plainly put, the contract is overly complex, deliberately obscured and confused. This court spent an inordinate amount of time reviewing the provisions of the agreement, yet there are large sections that received only cursory review because they appeared to be fairly standard provisions. So much of this agreement fails to meet standard expectations that this court has no confidence that all of the unpleasant surprises have been discovered.

As just one example, the option does not simply expire if White Knight fails to timely exercise it. Under Section 32.02 the Church must give White Knight written notice that it failed to exercise the option and White Knight has thirty days to exercise the option after receipt of the "Reminder Notice" (emphasis added). The court would call this provision unusual if not extraordinary. The Church's failure to take proper action could result in an option that continues long after the lease expires.

With all this in mind, the court turns to valuing the White Knight contract to the Church. Under the best of circumstances, the Church receives $800,000.00 upon approval of the contract, forgoes $160,000.00 in rent over the next four years, and receives the full balance of $4,700,000.00 in four years.

As the above discussion should make clear, it is extremely difficult to fully outline the worst case analysis, except to say the Church would receive substantially less. It would receive approximately $100,000.00 of the increase in the rent over the nine years extension, but the $900,000.00 it received would be credited to plaintiff upon exercise of the option. It would forgo approximately $3,000,000.00 of the increased rent.

To the extent that taxes are paid, even by the current net leasee, plaintiff may be entitled to a credit against the option price. The appraisal shows taxes as of 2014 to be $173,149.00, so

at current rates over four years taxes total nearly $700,000.00 and over the thirteen years they total over $2,200,000.00. This is a sufficient sum to motivate plaintiff to litigate the issue. Given the complexity and ambiguities of the contract, plaintiff may be entitled to further credits against the purchase price.

Under this worst case scenario, with a reduction for "Excess Rent" and for "Tenant Required Tax Payment", of the $5,500,000.00 the Church would receive $800,000.00 at the outset and $1,600,000.00 from White Knight upon exercise of the option, $900,000.00 from the triple net lessee over the period from 2019 to 2018, and $2,200,000.00 in taxes, paid by the triple net lessee gets credited against the purchase price. The Church nets $3,300,000.00 and potentially less.

Ordinarily, the monetary consideration is the overriding factor, if not the only factor in determining whether a contract involving the transfer of an interest in real estate is fair and reasonable under the Religious Corporation Law. In this case, it is only one of many factors. The contract is deeply flawed with many ambiguities and open issues. It disproportionately exposes the Church to a wide variety of risks and fails to provide compensation for those risks.

Overall, the Agreement of Lease provides the Church with less than real value for the interests in real property that it transfers and does not compensate the Church for the risks it undertakes. It exposes the Church to substantial future litigation expenses and a serious loss of good will. This court that is finds that the Agreement of Lease is neither fair or reasonable.

All this is to say that no reasonable court giving this matter due deliberation would approve this Agreement of Lease as fair and reasonable to the Church except through incompetence, inadvertence or inattention to detail. Thus, the Agreement of Lease can never become a fully enforceable contract.

Finally, the Court notes that the Classis did not approve the White Knight contract. As previously noted, RCL Sec. 12(5-c) requires the written approval of the Classis to be submitted to the court in connection with any application for approval. To the extent White Knight objects to the contract being submitted to the Classis, the court finds the contract void as against public policy for failure to provide for approvals of the Classis or this court as required by statutory law.

For the foregoing reasons, the Church's motion to dismiss the First, Second, Third, Fourth and Fifth causes of action in the Second Amended Complaint is granted.

Turning to the motion by the Sterling defendants to dismiss the Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh causes of action; these causes of action fall into two groups with the even numbered causes claiming tortious interference with contract and the odd numbered causes claiming injurious falsehood, with two causes of action alleged separately against each of the three Sterling defendants.

Turning first to the claims for tortious interference with contract, "[t]he elements of a cause of action to recover damages for tortious interference with a contract are the existence of a valid contract with a third party, the defendant's knowledge of that contract, the defendant's intentional and improper procuring of a breach, and damages (see White Plains Coat & Apron Co., Inc. v. Cintas Corp., 8 N.Y.3d 422, 426, 835 N.Y.S.2d 530, 867 N.E.2d 381; New York Merchants Protective Co., Inc. v. Rodriguez, 41 A.D.3d 565, 566, 837 N.Y.S.2d 341)." (Rose v. Different Twist Pretzel, Inc., 123 A.D.3d 897, 999 N.Y.S.2d 438, 2014 N.Y. Slip Op. 08819 [2d Dept. 2014]). It is worth noting that some courts have substituted the term "without justification for the term "improper" in connection with the third element of the cause of action. (Nancy Miller v Margaret Theodore-Tassy, 92 A.D.3d 650, 938 N.Y.S.2d 172, 276 Ed. Law Rep. 382, 2012 N.Y. Slip Op. 00940 [2d Dept. 2012]; Lama Holding Company et al. v Smith Barney Inc. et al., 88 N.Y.2d 413, at 425, 668 N.E.2d 1370, 646 N.Y.S.2d 76 [1996]).

A number of decisions indicate that plaintiff must allege that "but for" defendant's conduct the contract would not have been breached. (See, for example: Ferrandino & Son, Inc., Appellant v Wheaton Builders, Inc., 82 A.D.3d 1035, 920 N.Y.S.2d 123, 2011 N.Y. Slip Op. 02346 [2d Dept, 2011]; 68 Burns New Holding, Inc. v Burns Street Owners Corp. et al., 18 A.D.3d 857, 796 N.Y.S.2d 677, 2005 N.Y. Slip Op. 04406 [2d Dept, 2005]; Washington Avenue Associates, Inc. v Euclid Equipment, Inc., et al., Defendants, and MIF Realty L.P., 229 A.D.2d 486, 645 N.Y.S.2d 511 [2d Dept, 1996]).

Plaintiff has not and can not satisfy this causation element for the causes of action for tortious interference with contract. Even assuming the Sterling defendants actions "dissuad[ed] the Church from taking steps needed to obtain Attorney General approval" this was not a meaningful breach of the contract because the Attorney General's approval is entirely irrelevant under the circumstances of this case. It was the approval of the Classis and this court's approval that were necessary to render the contract fully enforceable and, as noted at length above, that approval is not forthcoming.

Moreover, the Sterling/Allied defendants are obviously fully justified in seeking to fend off White Knight's attempt to "sandwich" itself into the existing Landlord-Tenant relationship between Allied and the Church.

For the foregoing reasons, the motion to dismiss the Sixth, Eighth and Tenth causes of action for intentional interference with contract must be granted.

Turning to the Seventh, Ninth and Eleventh causes of action for injurious falsehood. "To establish a claim for injurious falsehood, a plaintiff must demonstrate that a defendant maliciously made false statements with the intent to harm the plaintiff, or recklessly and without regard to their consequences, and that a reasonably prudent person would have or should have anticipated that damage to the plaintiff would result (see Gilliam v. Richard M. Greenspan, P.C., 17 A.D.3d 634, 635, 793 N.Y.S.2d 526)." (North State Autobahn, Inc., et al. v. Progressive Insurance Group Company, 102 A.D.3d 5, 953 N.Y.S.2d 96, 2012 N.Y. Slip Op. 06932 [2d

Dept. 2012]; Carrara, et al. v. Kelly, 74 A.D.3d 719, 902 N.Y.S.2d 619, 2010 N.Y. Slip Op. 04724 [2d Dept. 2010]).

The allegations regarding this cause of action are that each of the Sterling defendants made representations to the Church that they were not affiliated with the current triple net lessee, Allied, and that this representation was false. There are allegations that Allied caused the Church difficulties, presumably by failing to pay the real estate taxes.

There is no allegation in the complaint that had the Church been aware of the relationship it would not have dealt with the Sterling defendants. (The proposed Third Amended Complaint, dealt with below, includes an allegation that "The Church told White Knight that it would not deal with Chera." At this juncture, the court has not granted leave to serve a Third Amended Complaint, so this allegation is not properly before the court. In any case, the amendment falls short of curing the defect, as it does not allege the Church would not have dealt with entities with connections to Chera.)

The complaint affirmative alleges that upon White Knight making the Church aware of Chera's interest in Sterling, the Church was entirely unmoved by the information. This shows that the alleged falsehood was not material or relevant to the Church's considerations.

Thus, even assuming the truth of the allegations, the complaint fails to allege that the alleged misrepresentation resulted in a detriment to the plaintiff. The failure to allege that had the Church known the true state of facts it would not have had dealings with Monaco and Sterling is fatal to the Seventh, Ninth and Eleventh causes of action.

For the foregoing reasons, the Seventh, Ninth and Eleventh causes of action must be dismissed.

Lastly, turning to White Knight's motion for leave to file and serve a Third Amended Complaint, CPLR 3025 provides that "Leave shall be freely given upon such terms as may be just..." In past years, the only consideration on the motion was the timing of the motion and the prejudice to the non-moving parties. A more recent trend permits the court to review the merits of the proposed amended pleading.

The Second Department weighed in on the issue in Lucido, etc., v Mancuso (49 A.D.3d 220, 851 N.Y.S.2d 238, 2008 N.Y. Slip Op. 00952 [2d Dept. 2008]). In Lucido the court held "In the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit." (Id.)

With this in mind the court turns to the proposed Third Amended Complaint. The bulk of the proposed amendments involve characterizations or recharacterizations, conclusions and opinions, and assorted other comments that have no place in a legal pleading. One need not look

long for such an improper inclusion; the first proposed amendment reads, in full:

"2. Once a contracting party has signed a contract to sell a property, there is only one proper response to a third-party offer: 'sorry, I'm already committed.' This principle applies to churches no lest than to the rest of us. Once the Church entered into a contract with White Knight, its obligation was to take steps to get that contract, and only that contract approved. Any other course of action is a breach. Seeking hierarchical approval of a different transaction is most definitely a breach of the church's obligation-so makes not a farthing of difference what the hierarchy's decision is, because placing the other proposed transaction before the hierarchy was prohibited."

Counsel apparently overlooks the provision of CPLR 3014 that "Every pleading shall consist of plain and concise statements in consecutively numbered paragraphs. Each paragraph shall contain, as far as practicable, a single allegation." The reference is to allegations of fact. For the most part, the other proposed changes do not add any factual allegations that are not otherwise included in the prior complaint.

Allegations that reiterate specific provisions contained in the Agreement of Lease, which was previously submitted in full to the court, do nothing to advance the matter. There are only a few new factual allegations contained in the proposed Third Amendment Complaint and one new theory of liability.

As previously noted there is a new allegation regarding Chera that "The Church told White Knight that it would not deal with Chera." As noted above, this allegation is insufficient to allege causation for that cause of action.

Another additional allegation that plaintiff seeks to add paragraph 28 to the proposed complaint, it reads, in full:

"28. At no time during the negotiations of the White Knight Contract or thereafter and continuing until after White Knight commenced this action, did the Church ever disclose that it was 'an incorporated Reformed Church in connection with the General Synod of the Reformed Church in America,' within the meaning of the Religious Corporation Law [Sec.] 12[5-c]. Churches covered by [Sec.] 12[5-c] need not obtain Attorney General approval. However, the court may not approve an application by such a church unless the church's Classis has given written consent to the transaction. To the contrary: the Church affirmatively represented in [Sec.] 16.04(a) that it was fully empowered to enter into the White Knight Contract. Thus, the Church breached the White Knight Contract at the moment of execution."

The allegation is risible. It is directly contradicted by the contract plaintiff seeks to enforce. The cover page for the Agreement of Lease provides in bold type, at lease sixteen point, that the agreement is between the Deacons of the Dutch Congregation of Flatbush A/K/A The Reformed Protestant Dutch Church of the Town of Flatbush and White Knight of Flatbush LLC.

The signature page is equally clear as to the Church's identity.

As previously noted, the contract was prepared by White Knight. It was their failure to use due diligence that resulted in a contract that failed to meet the mandates of the Religious Corporation Law. The attempt to shift responsibility for this only serves to highlight, once again, aspects of plaintiff's character that make a long term relationship between White Knight and the Church under the Agreement of Lease highly problematic and unreasonable.

Finally, plaintiff seeks to add a cause of action that because the Classis has a financial interest in the transaction, submission of the contract to the Classis for approval violates plaintiff's due process rights under the Fourteenth Amendment of the U.S. Constitution.

The case cited by plaintiff (in the proposed Third Amended Complaint) Tumey v. Ohio, (273 U. S. 510, 47 S. Ct. 437, 71 L. Ed. 749, 50 A. L. R. 1243 [1926]) is neither on point nor convincing. Tumey involved a judicial officer who received direct compensation from the fines assessed against defendants that were convicted before that officer. The defendant in Tumey faced jailing until the fine was paid.

The United States Supreme court held that such a direct financial incentive for a judicial officer violated a criminal defendant's due process rights. Tumey has been rarely cited in the eighty-nine years since it was decided. White Knight seeks to equate the business judgment of the elders of the court with a determination of a judicial officer as to a criminal defendant's guilt. (Westlaw showed seven cases, none of which were apropos to the circumstances of this case).

Section 12 of the Religious Corporation Law has been in effect essentially in its current for over one hundred years. For an excellent review of the history of Section 12 of the Religious Corporation Law and its antecedents dating from the seventh session of the New York State Legislature in 1784 see: Wolkoff v Church of St. Rita, (32 Misc.2d 464, 505 N.Y.S.2d 327 [Sup Ct, Richmond Co., 1986] aff'd, 133 A.D.2d 267 [1987]).

The court in Wolkoff showed how the legislative intent in 1784 was to set forth a statutory regime that require the elders of the various churches to act as guardians of the local churches in order to prevent unsound and unwise decision by the local churches. The legislature has maintained and augmented this system over the ensuing centuries.

White Knight is charged with notice of established New York law and the Agreement of Lease was not fully enforceable until in received court approval. The statutory scheme requiring the contract to be approved by the Classis does not violate plaintiff's due process rights.

Finally, it should be noted that while the approval of the Classis would be necessary to obtain the court's approval, the lack of approval of the White Knight contract by the Classis played no part in this court's analysis that resulted in the court's disapproval of the contract. Thus, even if submission to the Classis violates plaintiff's due process rights, plaintiff suffered

no damage as a result.

The proposed amendments, changes and additions in the proposed Third Amended Complaint are palpably insufficient or patently devoid of merit. Plaintiff's motion to file and serve the proposed Third Amended Complaint is denied in all respects.

For the foregoing reasons, the motions by the Church and by Sterling defendants to dismiss the action are granted. The summons and complaint are hereby dismissed and the notice of pendency is vacated and canceled.

The motion by White Knight for leave to serve and file a Third Amended Complaint is denied.

Submit order canceling notice of pendency.

Dated: August 14, 2015

Hon. Martin M. Solomon
J.S.C.