SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

X

D.S. 53-16-F ASSOCIATES,

Plaintiff,

-against-

GROFF STUDIOS CORP.,

Defendant.

X

INDEX NO. 652789/15

DECISION & ORDER

OSTRAGER, J:

The parties to this bench trial stipulated to the submission of direct testimony by affidavit, with each party reserving the right to cross-examine the opposing party. The parties also stipulated to 29 undisputed facts and to the admission into evidence of 37 exhibits plus over 30 sets of Minutes of defendant's Board of Directors, all of which were received into evidence. The defendant, without objection, also proffered portions of the deposition testimony of Garry L. Cohen, the general partner of the plaintiff. Mr. Cohen is a Harvard MBA who, currently, or in the past, has been a principal in over a half dozen residential and commercial real estate investments.

Plaintiff is the current tenant of the lease to Store E, which includes certain ground floor space and part of the basement in the building located at 151 West 28th Street, New York, New York (hereinafter referred to as the "Tenant"). The defendant is a cooperative corporation that owns the premises at 151 West 28th Street (the "Building"), and is the landlord under the lease (hereinafter referred to as the "Landlord"). Store E is presently subleased by the Tenant to a wholesale flower distributer, Empire Cut Flower.

This 2015 case has a long history of claims and counterclaims, but the parties have resolved all claims and counterclaims except the Tenant's First Claim for a declaratory judgment that the Tenant and/or its subtenant has the right to use the elevator at the Building that descends to the basement and is now utilized as a passenger elevator by the residential tenants at the Building. Plaintiff in its Second Claim seeks money damages relating to the defendant's denial of its claimed right to use the northern elevator at the Building. Also pending is the Landlord's Third Counterclaim that "[i]n the event this Court determines that Plaintiff or its subtenants have any right to use the residential passenger elevators in the Building, Defendant is entitled to judgment declaring that such use is subject to Rules and Regulations adopted by Defendant pursuant to Art. 35 of the Lease for use of the elevators and adjacent common areas of the Building."

The cross-examination that was conducted in this one and one-half hour bench trial did not raise any credibility issues or contradict anything in the direct testimony offered by affidavit or the deposition of Mr. Cohen. Consequently, the decision of the Court is based exclusively upon the affidavits submitted by the parties, the deposition testimony of Garry L. Cohen, and the stipulated facts and exhibits. The plaintiff, of course, has the burden of proof on its claims, and the defendant on its counterclaim.

The stipulated facts are that the building at 151 West 28th Street was converted to cooperative ownership in or about 1978. At the time of the conversion, the Sponsor of the conversion retained, as tenant, 99 year leases to three retail stores on the ground floor, designated as Stores E, C, and W, corresponding to the East, Center and West commercial units. Each of the stores includes a ground level space with an entrance to the street and a portion of the cellar/basement below the store, and each store has a staircase between the ground level store

and the cellar/basement. The Building consists of two residential loft spaces on each of floors 2-9, and the three commercial stores on the ground floor. The sole entrance to the stores is from the sidewalk outside the Building, and there is no internal access from the stores to the ground floor lobby of the Building, except that Store E has access to the lobby via a corridor in the cellar/basement that leads to a fire staircase that runs past the first floor. Stores C and W may or may not be able to gain access to the fire staircase as there are partitions between the portions of the cellar/basement under those stores and the fire staircase, which Mr. Cohen observed prior to accepting the lease to Store E. Mr. Cohen testified by deposition that he believes there are doors in the partitions.

Plaintiff acquired the lease to Store E in January 2001 from a Mr. Arthur Soberman ("Soberman") pursuant to an agreement dated December 14, 2000. Soberman had acquired the lease from the Sponsor in 1982. At the time plaintiff acquired the lease to Store E in 2001, plaintiff had the opportunity to review Mr. Soberman's lease and amendments thereto and to conduct diligence by inspecting the premises and speaking with the lessees of Stores C and W.

At the time of the conversion to cooperative ownership, the Building was served by two elevators, one of which accessed all floors from the lobby through 9 as well as the cellar/basement, and the other of which accessed all floors except the cellar/basement. The elevator that accesses the cellar/basement originally required an operator to manually open and close its doors and to control it. The landing of the elevator that accesses the cellar/basement is in the corridor between the fire stairwell and the portion of the cellar/basement attached to Store E. The other elevator was and is a push-button, automatic elevator. The manual elevator was upgraded and converted to automatic operation in or about 2015. In addition to the two elevators within the Building, at the time of the conversion, exterior sidewalk elevators/lifts were located

immediately outside Stores E and W, providing access to the cellar/basement. The sidewalk elevators/lifts were removed in or about 1991, and the City of New York will not allow them to be reinstalled.

It is undisputed that neither the plaintiff nor its subtenant has either utilized the internal elevators or secured keys to the Building's front entrance. Plaintiff subleased Store E to Empire Cut Flowers, Inc. pursuant to a ten-year sublease in February 2001, which was extended for an additional ten years by an agreement dated December 15, 2010.

This dispute revolves entirely around paragraph 38 in the rider of the 1978 lease between the Landlord and the Sponsor, which provides in full:

> 38. The Tenant understands that the Landlord shall not be required to supply a superintendent or elevator operator to run the freight elevator in the demised premises. The Landlord grants permission to the Tenant to operate the freight elevator, at Tenant's own cost and expense, at those times Tenant needs to use said elevator, provided that Tenant procures insurance to indemnify Landlord against all claims and demands whatsoever for injury or injuries to person or persons and/or damaged property resulting from the operation of said elevator while being used by the Tenant. The Tenant shall deliver the policy or policies to the Landlord together with evidence satisfactory to the Landlord that the premiums thereon have been paid.

In connection with various other disputes between the parties, in or about early 2015 plaintiff asserted the right to use the northern elevator of the building pursuant to paragraph 38 of the original lease. The plaintiff also requested keys to the Building, which is otherwise unattended, and tendered the insurance that is a prerequisite to the use of whatever elevator is referred to in paragraph 38. There is at least arguable merit to defendant's claim that plaintiff knowingly and voluntarily waived any claim to use the northern elevator of the building because the plaintiff failed to assert any claim to the use of the northern elevator for nearly a decade. It

cannot be denied that at the time the plaintiff acquired the lease to Store E there were no elevators in the Building other than the two elevators in the lobby.

Plaintiff was manifestly not a party to the vestigial 1978 lease on which plaintiff rests its claim, and plaintiff's first assertion of the right to use the elevator came close to a decade after plaintiff secured the lease to Store E. And until approximately the time of the filing of this lawsuit in 2015 plaintiff took no steps to comply with the prerequisites to the enforcement of paragraph 38 of the lease. Nor did plaintiff have any difficulty subletting Store E in 2001 and securing a ten-year extension of that lease pursuant to an agreement which expressly stated that the subtenant had no right to use the elevator. Specifically, paragraph 6 of the 2010 extension states that:

> Lessee acknowledges that his rights are limited by the terms of the Over-Lease and further agrees he has no right to use any elevator, lobby, stairway, vault or basement area which is not part of the store premises for access or any other purpose.

In 1978 Store E had the use of an elevator/lift accessed via the sidewalk. It is counter-intuitive that the identical leases for Stores E, C, and W would confer on the lessees of each of those stores the right to enter the lobby of the Building and use an elevator in the lobby, inasmuch as there is no evidence that the one lobby elevator capable of descending to the basement would be of any meaningful use to Stores C and W; the only available record evidence indicates that there are partitions that interfere with access by those tenants to the elevator between the basement level landing of the northern elevator and the portions of the cellar/basement that is part of the leasehold of Stores C and W. It is equally counter-intuitive to believe that the 1978 intent of the leases was to confer the right of occupants of any store to gain access to floors 2-9 of the building, thereby potentially affording access to the 16 units on those floors.

In short, in the absence of testimony from individuals with percipient knowledge of the 1978 negotiations of the store leases, the Court gives the language of the lease the most logical interpretation consistent with both the circumstances that obtained in 1978 and the undisputed facts and exhibits. None of the testimony submitted by affidavit requires the Court to do otherwise, including the evidence submitted by Mr. Cohen that the northern lobby elevator was variously referred to as the service or freight elevator. It is significant, and it is undisputed, that plaintiff and its subtenant discussed increasing the subtenant's rent by $5,000 per month if the subtenant could use the northern elevator, which would result in a very substantial windfall to plaintiff over the course of a long-term lease. In sum, a preponderance of the evidence does not support plaintiff's claim. Since the defendant's counterclaim is conditioned upon a finding for the plaintiff, the Court need not address the merits of the counterclaim.

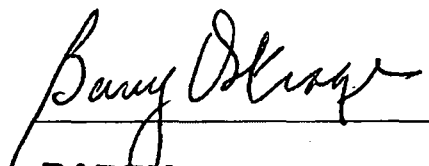
Accordingly, it is hereby

ORDERED, ADJUDGED AND DECLARED on plaintiff's First Claim that defendant has no right to use any elevator presently existing at the Building at 151 West 28th Street, New York, NY, and that plaintiff's Second Claim for damages is dismissed; and it is further

ORDERED that defendant's counterclaim is dismissed as moot.

The Clerk shall enter judgment accordingly without costs to either party.

Dated: January 18, 2018



J.S.C.

BARRY R. OSTRAGER
JSC