| **Residential Committee of the Bd. of Mgrs. of 200 Riverside Blvd. at Trump Place Condominium v DJT Holdings LLC** |
| --- |
| 2018 NY Slip Op 30946(U) |
| May 14, 2018 |
| Supreme Court, New York County |
| Docket Number: 650080/2018 |
| Judge: Eileen Bransten |
|  |
|  |

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

PRESENT: HON. EILEEN BRANSTEN PART 3
*Justice*

X

RESIDENTIAL COMMITTEE OF THE BOARD OF MANAGERS OF 200 RIVERSIDE BOULEVARD AT TRUMP PLACE CONDOMINIUM

Plaintiff,

- V -

DJT HOLDINGS LLC,

Defendant.

INDEX NO. 650080/2018

MOTION DATE 05/10/2018

MOTION SEQ. NO. 001

**DECISION AND ORDER**

X

The following e-filed documents, listed by NYSCEF document number 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80

were read on this application to/for Summary Judgment

**Upon the foregoing documents, it is**

**ORDERED** Plaintiff's Motion seeking a Declaratory Judgment that it is not obligated to continue to use the Identification "Trump" on the subject premises' façade is GRANTED for the reasons stated in the May 3, 2018 record and transcript (Nina Koss, OCR) at 6:4-25:2 and as follows:

The sole issue before this Court is whether the License Agreement, entered into between the parties, prevents Plaintiff from removing the Identification "Trump" from the façade of the building. Plaintiff also seeks dismissal of Defendant's counter claim for attorney's fees.

**[Continued on Next Page]**

## I. BACKGROUND

This action arises from a residential condominium building located at 200 Riverside Blvd., New York, New York ("the Building"). Pl. 19-a Statement ("Pl 19-a), ¶1. The Building consists of 377 residential units and four commercial units. *Id.* The building was constructed in or around 1998 and the words "Trump Place" were installed with large brass-finish characters in two locations on the Building's façade (the "Signage"). *Id.*, ¶2.

In 1998, the Condominium's Offering Plan dated September 18, 1998 was filed. *Levy Reply Affid.*, ¶24; see also, Exhibit "H". Amendments to the Plan were made in March and April 2000. See, *Levy Reply Affid.*, ¶24; see also, Exhibit "I".

On or about March 31, 2000 Donald J. Trump and the Condominium Board ("Board") entered into a License Agreement. *Id.*, ¶3. Provided for in the license agreement, is the nonexclusive, nontransferable right for the Building to use the Identification "Trump" on its façade. See, Ex. A to Levy Affid., §1(a).

In early 2017, the Board, in response to certain unit owners' concerns, discussed the possibility of removing and/or altering the Signage so that it would no longer include the name "Trump." Pl 19-a, ¶7. In February 2017, the Board conducted a straw poll among the residential unit owners regarding the continued use of the Signage. Of the 253-unit owners who responded, sixty-three percent responded in favor of removal of the Signage from the facade of the Building. Levy Affid. ¶ 8; see also, Pl. Memo in Support at 4.

On or about March 29, 2017, the Board received a letter from Defendant's chief legal officer, Alan Garten. Pl. 19-a, ¶ 8 (the "Threatening Letter"). The Threatening Letter stated that removal of the Identifications from the Building "would constitute a flagrant and material breach of the License Agreement." *Id.* ¶ 9; Levy Affid. ¶ 7 and Ex. B.

**[Continued on Next Page]**

In view of this "Threatening Letter", Plaintiff obtained written consent from the Board of Managers in Lieu of a Meeting authorizing the commencement of this suit for the limited purpose of seeking a Declaratory Judgment that the License Agreement does not require the Building use the Signage. *See* Exhibit C and D to Levy Affid.

## II. APPLICABLE LAW

It is well understood that summary judgment as a remedy is drastic and that remedy should only be granted if the moving party has met the burden of sufficiently establishing the absence of any material issues of fact, therefore, requiring judgment as a matter of law. *Vega v. Restani Contr. Corp.*, 18 N.Y.3d 499,503 (2012) (citing *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986)). Despite the sufficiency of the opposing papers, "the failure to make such a showing requires denial of the motion." *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985).

If, on the other hand, the showing has been made, the burden shifts to the opposing party to the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980)

In a case involving the interpretation of a contract, the Court should grant summary judgment "where the terms of the contract are clear and unambiguous." *JPMorgan Chase Bank, N.A. v. Controladora Comercial Mexicana S.A.B. De C.V.*, 29 Misc.3d 1227(A) (N.Y. Sup. Ct. 2010) (Bransten, J.).

**[Continued on Next Page]**

Determining "whether or not a writing is ambiguous is a question of law to be resolved by the courts." *W.W.W. Assocs. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990); *JPMorgan Chase Bank, N.A.*, 29 Misc.3d 1227(A) ("Contract interpretation is a question of law, appropriate for resolution on summary judgment"). A "contract is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion." *Regal Realty Servs., LLC v. 2590 Frisby, LLC*, 62 A.D.3d 498, 501 (1st Dept. 2009). A party may not vary the terms of an unambiguous writing by offering "what was really intended but unstated or misstated...." *Gladstein v. Martorella*, 71 A.D.3d 427, 429 (1st Dept. 2010) citing *W.W.W. Assocs.*, 77 N.Y.2d at 162.

## III. ANALYSIS

Defendant opposes this motion, arguing the License Agreement language reads in its favor. It also argues both that Plaintiff lacks standing and, even if standing is present, the issue before the Court is not ripe for adjudication.

### *A. Standing*

First, the Court will address the issue of standing as a threshold matter. Defendant argues Plaintiff lacks standing to commence this action because a full meeting of the Board was not conducted as required by the Building's ByLaws and because the Residential Committee may not "take any action whatsoever with respect to the Common Areas". *Def. Memo in Opp* at 15-18.

**[Continued on Next Page]**

As for the scope of the Residential Committee's instant law suit, the Court does not find the question being asked of it "affects the common areas". Certainly, the answer to the question can lead to steps which may affect the common area, but that is not at issue at this moment. Moreover, By-Laws §2.16 states that the Board "may by resolution create such other committees as they shall deem appropriate and such committees shall consist of at least 2 members of the Board and each shall have such powers and authority as the Board of Managers…shall vest therein". Defendant does not argue the Board's ability to delegate its power is somehow limited. Indeed, here, as evidenced by the resolution passed by the Board, the Board vested the authority to commence this action to the Residential Committee. See, Ex. C and D to Levy Affid. Accordingly, the Residential Committee was properly authorized to commence this limited action.

Defendant's argument that a full Board meeting was not conducted pursuant to the By-Laws and the non-residential committee members have been excluded from the managerial process, therefore preventing commencement of this suit, is also rejected.

The Board is to be comprised of 7 individuals, 5 representatives from the residential units and 2 representatives from the non-residential or commercial units. See, *Ceraso Reply Affid.*, ¶3; see also, Exhibit "I" to *Levy Reply Affid.* at 1. Defendant takes issue with the fact that only 5 Board members – all representatives from the residential units – permit this lawsuit to commence, seemingly to the exclusion of the non-commercial units. However, as Plaintiff has established, which Defendant does not refute, there are no representatives from the commercial units currently on the Board. For the past several years, the commercial units never voted and elected such persons. See, *Levy Affid.*, ¶4; see also, *Ceraso Reply Affid.*, ¶5 ("For the past several years, no owners of non-residential units have identified themselves to the Trump

**[Continued on Next Page]**

Company as members of the Non-Residential Committee"). Therefore, Plaintiff argues, no exclusion of non-residential committee members was even possible because no such members existed at any relevant time. Pl. Memo in Reply at 3.

When there is a vacancy on the non-residential committee, the commercial owners do not *ipso facto* become Board members; the vacancy "shall be filled by a majority vote". See, By-Laws, §2.4. Additionally, having failed to elect members to the Board, commercial unit owners do not by default become Board members. Management is only vested in the Board. *Id*, §2.1(a). Indeed, Defendant does not even attempt to identify the individuals believed to belong to the Board, on behalf of the non-residential units, who were allegedly excluded in discussions concerning the commencement of this suit.

Regardless of vacancies in the non-residential committee, the Board may act only if there is a "quorum" which is defined as a "majority" of Board members. *Id*, §2.11(a). With 5 (out of a possible 7) existing Board members in attendance, there is a quorum and therefore the Board's actions are valid. *See*, Fletcher cyclopedia of the Law of Corporations, §421 ("The general rule is well settled that the power of a board of directors is not suspended by vacancies on the board unless number is reduced below the quorum."). Seemingly, the only requirement for non-residential committee participation is where the Board "purports to authorize action adversely affecting any non-residential unit" and "in such an event, the vote for such action shall be voidable at the option of the **non-residential committee**..." *Id*, §2.11(a) (emphasis added).

The Court agrees with Plaintiff insomuch as this lawsuit does not "adversely affect" the non-residential units so the above cited limitation is inapplicable. That is, again, Plaintiff's relief sought is limited to a declaration that the License Agreement does not mandate use of the identifications on the Building. Even if the Court did consider the Residential Committee's

**[Continued on Next Page]**

commencement of this action to "adversely affect" the non-residential units, it is up to the non-residential units to object, not Defendant. Conceivably, the decision to remove the identifications could "adversely affect" the non-residential units- however, that is not the issue squarely put before the Court today.

Therefore, the Court finds Plaintiff properly has standing to commence this action.

*B. Does a Justiciable Controversy Exist?*

Next, Defendant argues there is not a justiciable controversy and, therefore, the Court would merely be issuing an advisory opinion if it decided the instant motion. The Court rejects Defendant's argument and finds a justiciable controversy does exist which can be decided by the court.

In an attempt to use the Threatening Letter as both a shield and a sword, Defendant argues that although it threatened Plaintiff not to "take any steps" to remove the identifications from the building, because Plaintiff did not "take any steps" to remove the identifications from the building, the matter is not ripe for adjudication. Put another way, Defendant complains Plaintiff has not taken the very steps Defendant threatened and coerced it not to take.

To the contrary, however, it is Defendant's threatening letter which aids the court in finding a justiciable controversy does exist. That is, Defendant's letter specifically cites the License Agreement and asserts Plaintiff's removal of the identifications on the Building would be a violation of the Agreement, namely Section 1(b). As such, the question now before this Court is does the License Agreement oblige Plaintiff to use the identifications on the Building? If yes, Plaintiff will not be permitted to remove the identifications. If no, Plaintiff will endeavor

**[Continued on Next Page]**

to remove the identifications. The Court can and is prepared to interpret the License Agreement to resolve the heart of the dispute.

Cases are ripe for adjudication when a court's determination will resolve the dispute. *Klostermam v. Cuomo*, 61 N.Y.2d 525, 538 (1st Dept 2005) (The "primary purpose of declaratory judgments is to adjudicate the parties' rights before a "wrong" actually occurs in the hope that later litigation will be unnecessary"). To determine ripeness, the critical issue is whether the Court's decision will depend entirely on a "future event…beyond the control of the parties and may never occur" or will have a "practical effect of influence" on the parties. *40-56 Tenth Ave LLC v. 450 W. 14th St. Corp.*, 22 A.D.3d 416, 417 (1st Dept 2005)

In *40-56 Tenth Ave.*, the trial court dismissed plaintiff's case as "premature" when a plaintiff, who was considering building out his premises to market to potential restauranteurs, sought confirmation that such use would comply with an easement granted by the Defendant. The First Department reversed the trial court, however, finding a justiciable issue to exist even though plaintiff did not yet have a tenant and therefore might ultimately let the premises to a non-restauranteur. The Appellate Division found if it resolved the dispute concerning the meaning of the easement, then plaintiff would presumably act in accordance with the law. *40-56 Tenth Ave LLC at 417.*

In those cases, courts do not search for any future event that might invalidate the action as non-justiciable; it is sufficient that a party's conduct is highly likely to hinge on the court's decision: "Where the future event is an act contemplated by one of the parties, it is assumed that the parties will act in accordance with the law and thus the court's determination will have the immediate and practical effect of influencing their conduct." *Id*, at 417.

**[Continued on Next Page]**

Despite this, Defendant argues the Board must first notice and call a meeting, then vote in favor by a majority, and then and only then, will the issue be ripe for adjudication. Defendant's argument misses the mark. Again, the issue before the Court is limited to contract interpretation notwithstanding what the ultimate required voting results yield. See, *Fossella v. Dinkins*, 66 NY2d 162 (1985) (The Court of Appeals held an action justiciable wherein petitioners sought to enjoin the Board of Elections from presenting votes with a proposed referendum on the grounds it was unconstitutional notwithstanding the fact that voters might ultimately reject the referendum.)

Here, the Court finds, like in *Fossella*, its decision will have an immediate impact on whether a vote indeed is conducted and – as such – a justiciable controversy is before the Court.

*C. Rights and Obligations under the License Agreement*

Having found Plaintiff has standing to commence this lawsuit, and the issue of interpretation of the License Agreement to be justiciable, the Court now turns to the specific question as to whether the License Agreement obligates Plaintiff to use the Identification "Trump" on the Building.

Relying on the plain terms of the very brief, 4-page (including the signature page) License Agreement, §1(a), Plaintiff argues there are no obligations or requirements for the Building to carry the name "Trump" on it in perpetuity. §1(a) of the License Agreement states:

> Licensor, for One ($1.00) Dollar and other good and valuable consideration, receipt of which is hereby acknowledged, hereby **grants** to Licensee a nonexclusive, non-assignable, nontransferable **right**, without the right to grant sublicenses, to use the Identifications, on a royalty free basis, solely for the purpose of identifying the Building at its above-mentioned location and in advertising, promotional and publicity materials solely with respect

**[Continued on Next Page]**

> to the promotion of the Building and its residential condominium units, subject, however, to all of the terms, covenants and provisions of this Agreement. Ex. A to Levy Affid., ¶ 1(a) (emphasis added).

Emphasizing the words "right" and "grant", plaintiff argues those terms permit the use of the identifications but do not create an obligation to do so. As for the word "grant", Plaintiff argues it means to "permit as a right, privilege or favor". *Pl. Memo in Support* at 8. Plaintiff argues it is not a command nor does it give rise to an obligation to use that which is granted. *Id.* Suffice to say, Plaintiff argues absent an obligation to continue use of the name "Trump", it should be free to cease use of the identification.[1]

Opposing, Defendant relies upon the second "*Whereas*" clause contained within the Leasing Agreement which states:

> "Since approximately March 25, 1999, Licensee has used the Identifications substantially in accordance with the terms and conditions of this Agreement, and Licensor and Licensee now desire to set forth, in writing, the terms and conditions for Licensee's continued use of the Identifications to identify the Building".
> *See*, Levy Affid., Ex. A at 1; see also *Def. Memo in Opp* at 19.

Defendant argues that the "w*hereas*" clause was intended to memorialize that the Building would be named Trump Place **unless a proper vote is conducted in favor of amending the Declaration to change it**. *Def. Memo in Opp* at 19 (emphasis added). Drawing this Court's attention to the Condominium's governance documents (Declaration and By-Laws) which refer to the building as "200 Riverside Boulevard at Trump Place", Defendant argues that

[1] The Court recognizes there may be certain prerequisites which must first occur before such a proposed removal could occur, including obtaining requisite vote approval. The Court was not asked to, nor is it, commenting on the requirements that Plaintiff must meet in order to seek removal of the "Trump" identification.

**[Continued on Next Page]**

is to be the name, forever more, **unless and until a proper amendment is made to the governance documents**[2]. *Id. (emphasis added)*

As a preliminary matter, the Court disagrees with Defendant's interpretation of the second *whereas* clause. The Court declines to accept Defendant's assertion that the parties are required to "continue" the use of the Identification ("Trump") in perpetuity. Rather, the Court finds the proper interpretation for the second *whereas* clause is simply that the parties intended to continue use of the identifications as they had been since 1999, without an express intention to continue use of the Identification forever.

Moreover, and more significantly, even within its arguments, Defendant readily acknowledges there is a mechanism available to Plaintiff to remove the name "Trump". This concession is fatal to Defendant's objection.

Indeed, Defendant concedes the very issue at the heart of this action as it currently stands. That is, Plaintiff has asked the Court to declare the License Agreement does not obligate it to continue to use the Trump name on the Building. The crux of Defendant's objections is not that Plaintiff cannot change the name, but rather that it has failed to take the required steps in accordance with the By-Laws and Declaration (which essentially operates as the Proprietary Lease).[3]

Evidencing the critical concession, Defendant writes:

> "Needless to say, the consideration that flowed to the Sponsor and to Mr. Trump was not the recited $1, but rather the assurance, as memorialized in the Declaration, the Building would be named Trump Place **unless 66 2/3% of ALL unit owners (in number and percentage interest) votes to amend the Declaration to change**

[2] The Court notes neither the governance documents nor the initial Offering Plan makes mention of the License Agreement.
[3] The Court declines to comment on the sufficiency of Plaintiff's compliance with the By-Laws and Declaration as that issue is not currently before it.

**[Continued on Next Page]**

> **it".** *Def. Memo in Opp* at 6; see also, Def. Counsel Rosen Affirm., Ex. 1, at §10.1(a) (the Declaration i.e. the Proprietary Lease);
>
> "The purpose and objective of the License Agreement, which describes the 'continued use of the Identifications to identify the Building,' was to memorialize that the Building would be named Trump Place **unless and until** 66 2/3% of all unit owners (in number and percentage interest) **voted to amend the Declaration to change it.**". *Def. Memo in Opp* at 19; and
>
> "The plain language of the License Agreement, Declaration, and Bylaws collectively establish that the Condominium is mandated to use the Identifications in the name of the Building **unless a supermajority vote of all unit owners determine otherwise**". *Lesal Assocs. v Board of Managers of Downing Court Condominium*, 309 A.D.2d 594 (1st Dep't 2003)." *Def. Memo in Opp* at 20.

Alternatively, Defendant argues the License Agreement requires prior consent before any change in use – including the non-use – of the Identifications in the name of the building. *Id* at 20. In support of this argument, Defendant looks to ¶6 of the License Agreement which states, in relevant part:

> "Licensor shall have the absolute right of prior approval of any and all uses of the identifications by Licensee. Licensee shall submit all such proposed uses to Licensor in writing…". *Levy Affid.*, Exhibit A, ¶6

The Court rejects Defendant's interpretation of this provision as it simply does not say what Defendant contends it does. There is no indication there was an expectation or meeting of the minds between the parties that the Licensor possessed prior consent rights for the *non-use* of the identifications. In fact, a plain reading of the License Agreement states only the affirmative **use** of the identifications required consent. As in, if there is a request to use the identification elsewhere in the building or, perhaps, in a different font, etc.

**[Continued on Next Page]**

"[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms[.]". The First Department "appl[ies] this rule with even greater force" when, as here, the contract in question is a "commercial contract[] negotiated at arm's length by sophisticated, counseled businesspeople[.]" *Ashwood Capital, Inc. v. OTG Mgmt, Inc.*, 99 A.D.3d 1, 7 (1st Dep't 2012). Therefore, the Court is not persuaded by Defendant's argument that, pursuant to ¶6 of the License Agreement, Licensor specifically retained the "unfettered prior consent right" concerning the **non-use** of the identifications. That simply is not what the document says and "provisions in a contract are not ambiguous merely because the parties interpret them differently". *Mount Vernon Fire Ins. Co. v. Creative Hous.*, 88 NY2d 347, 352 (1996)

Therefore, the Court finds the License Agreement does not require Plaintiff to use the Identification "Trump" on the façade of the premises.

*D. Attorneys Fees*

Finally, Plaintiff seeks dismissal of Defendant's counterclaim for attorney's fees based on ¶7 of the License Agreement.

> ¶7 states: "Licensee hereby agrees to indemnify and hold free and harmless Licensor … from and against any and all actions … and the like, together with reasonable attorney's fees and expenses, which may be suffered, incurred or paid by Licensor arising from any use by Licensee of the Identifications or the commission by Licensee of any Breach.".

Defendant has failed to explain how this lawsuit mandates payment of attorney's fees on the part of Plaintiff and, similarly, fails to explain how Plaintiff breached the license agreement. Certainly, there can be no breach when Plaintiff has not yet done anything, but rather, has merely

**[Continued on Next Page]**

expressed its intentions to potentially do something – pending the Court's decision on the interpretation of the License Agreement.

The case cited and relied upon by Defendant – *Allerand, LLC v. 233 E. 18th Street Co.*, 19 AD3d 275 (1st Dept 2005) is distinguishable. There, the plaintiff lessor brought a declaratory judgment action but was also withholding rent during the proceeding, which violated the lease, entitling defendant landlord to attorney's fees. *Id* at 277 ("The salient circumstance in determining the applicability of the subject provisions is that the action was engendered by plaintiff lessees' breach of a basic obligation of the lease.").

Rather, more analogous to the case at the bar is *Cato Corp. v. Roaman*, 214 AD2d 383 (1st Dept 1995), relied on by plaintiff. There, the First Department held a tenant's suit did not trigger attorney's fees provision because tenant "live[d] up to its obligation under the lease during the pendency of this litigation". Indeed, there have been no arguments advanced by Defendant that Plaintiff has removed the identifications from the building and, arguably, breached the Agreement.

[Continued on Next Page]

As such, the Court does not find any of Defendant's arguments availing and its counter claim for attorney's fees is Dismissed. Plaintiff's motion for Summary Judgment is GRANTED as stated herein.[4]

This Constitutes the Order and Decision of the Court.

5/ 14 /2018
DATE

EILEEN BRANSTEN, J.S.C.

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| CHECK ONE: | X | CASE DISPOSED | | NON-FINAL DISPOSITION | | | |
| | X | GRANTED | | DENIED | | GRANTED IN PART | | OTHER |
| APPLICATION: | | SETTLE ORDER | | | | SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | | DO NOT POST | | | | FIDUCIARY APPOINTMENT | | REFERENCE |

[4] The Court must emphasize that it was only asked to decide a very specific issue – that is, whether the License Agreement prohibits Plaintiff from changing the name of the Building. The Court is not, nor was it asked to, commenting on the sufficiency of the steps taken by Plaintiff to satisfy any pre-requisites which may exist prior to it removing the "Trump" identification from the building.

As such, this Court is not providing any declarations that tomorrow Plaintiff may remove the "Trump" name from the building's façade without fear or threat of being sued for some other issue other than the interpretation of the License Agreement. *See*, Exhibit C to Levy Affid., "Written Consent of the Board of Managers in Lieu of a Meeting".