SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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101 H 216 LAFAYETTE, LLC, and AA 216 LAFAYETTE, LLC

Plaintiffs,

- against -

J&G FAMILY LIMITED PARTNERSHIP AND 218, LLC,

Defendant.

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Index No. 156538/17
Mot. Seq. 001

Decision and Order

HON. EILEEN BRANSTEN, J.:

In this declaratory judgment action, plaintiffs 101 H 216 Lafayette, LLC and AA 216 Lafayette, LLC move for partial summary judgment on the first, fifth, and sixth causes of action in their complaint. Defendants J&G Family Limited Partnership and 218, LLC oppose the motion and separately cross move for summary judgment dismissing plaintiffs' complaint.

BACKGROUND

Plaintiffs are the owners of the building located at 216 Lafayette Street, New York, New York (216 parcel). *See Chang Affid., Ex.* D (216 Deed). Defendant J&G Family Limited Partnership (J&G) is the owner of the adjoining building located at 218 Lafayette Street, New York, New York (218 parcel). *See Chang Affid. Ex B* at, ¶4. Defendant 218, LLC (218 Tenant) is a tenant at the 218 parcel. S*ee Chang Affid. Ex. C at* ¶5. 218 Tenant operates the Osteria Morini restaurant (the restaurant) at the 218 parcel. *See id.*

J&G leased space inside the 218 parcel to Altamarea Group, LLC (AG) pursuant to a lease dated January 6, 2010 (218 lease). S*ee Lauck Aff.*, ¶ 2. On April 29, 2010, AG assigned the

218 lease to 218 Tenant. *Id.* 218 Tenant decided to expand the restaurant from the 218 parcel to include the 216 parcel. *See id.*, ¶ 3. In connection with this expansion, 218 Tenant entered into a lease agreement dated February 25, 2011 (216 lease) with plaintiffs' predecessor in-interest Martha Schwartz (Schwartz) for certain ground floor, basement, and second floor space at the 216 parcel. *See Chang Aff. Ex. E* .

On June 30, 2011, as provided for in the 216 lease, Schwartz and J&G executed an easement agreement (the original easement) granting certain rights to 218 Tenant. *See Chang Aff.*, *Ex. F.* On September 14, 2012, the original easement was superseded by an amended and restated party wall easement agreement (the easement agreement). *See Chang Aff.*, Ex. G. (easement agreement). The easement agreement granted 218 Tenant the following easement (the easement):

1) the right to open a portion of the party wall between the 216 parcel and the 218 parcel to allow a pass-through;
2) a right of access for "ingress and egress by Tenant . . ."; and
3) a right to access a lavatory which was compliant with the Americans with Disabilities Act (easement agreement, ¶ 3).

On October 18, 2012, the easement agreement was filed with the Office of the City Register. *See id.*

In August 2013, 218 Tenant assigned the lease for the 216 parcel to its affiliate, OM 216, LLC (OM 216). *See* Lauck Aff., ¶6. Pursuant to the 216 lease, there was an option to terminate if the restaurant could not be expanded to the 216 parcel. *See Chang Aff.*, Ex. A at ¶14. In November 2015, OM 216 notified Schwartz of its election to vacate the 216 parcel effective

January 15, 2016. *See Chang Affid, exhibit H.* By letter dated January 14, 2016 OM 216 turned over possession of the 216 parcel to Schwartz. *See Chang Affid., Ex I.*

On June 5, 2017, plaintiffs purchased the 216 parcel from Schwartz (*see* Complaint, ¶ 39; 216 Deed). On June 20, 2017, plaintiffs commenced the instant action to determine the parties' rights regarding the easement. On August 21, 2017, J& G submitted an Answer, and on October 2, 2017 218 Tenant submitted an Answer.

Plaintiffs move, pursuant to CPLR 3212 for partial summary judgment on the first, fifth, and sixth causes of action in their complaint; for an order setting the matter down for a hearing on plaintiffs' monetary claims; and pursuant to CPLR 3212 and /or CPLR 3211 (b) dismissing defendants' affirmative defenses. Plaintiffs seek an order directing the entry of judgment for the plaintiffs and against defendants declaring the following:

1) the "[e]asement is invalid against the 216 [p]arcel and that the recording of the [] [e]asement over the 216 [p]arcel shall be immediately withdrawn[,]" and "[p]laintiff[s] hold[] legal tittle to the 216 parcel free and clear of the [] [e]asement . . ." *See Comp. ¶¶ 44-45*;
2) "J&G had no use rights under the [] [e]asement and that to the extent 218 Tenant ever had any use rights under the [] [e]asement, such rights expired upon termination of the 216 [l]ease and that the recording of the [] [e]asement over the 216 [p]arcel shall be immediately withdrawn" *See id.*, ¶62;
3) "[p]laintiff[s] may immediately close the opening which adjoins the cellar of the 216 [p]arcel with the cellar of the 218 [p]arcel and remove and dispose of any installations made in the 216 [p]arcel, including the Corridor" *See id.*, ¶ 66.

Defendant 218 Tenant opposes plaintiffs' motion and cross moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' complaint as against it. Defendant J&G separately opposes plaintiffs' motion and cross moves for an order granting declaratory judgment interpreting the terms of the easement agreement in favor of J&G, and, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' complaint.

DISCUSSION

The standards for summary judgment are well settled.

> "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. Summary judgment is a drastic remedy, to be granted only where the moving party has tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action. The moving party's [f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, *regardless of the sufficiency of the opposing papers*" *See Vega v Restani Constr. Corp.*, 18 N.Y.3d 499, 503 (2012).

Plaintiffs argue that the easement was created solely for the use of an operation of a full-service restaurant on the 216 parcel in accordance with the terms of the 216 lease, and that when OM 216 elected to terminate the 216 lease, the purpose for which the easement was created ceased to exist, thereby extinguishing the easement. Plaintiffs also argue that 218 Tenant had no rights to the easement as a third-party beneficiary and J&G has no right to use the easement. Defendants contend that the claims against 218 Tenant should be dismissed as the easement has not been extinguished and 218 Tenant is a third-party beneficiary to the easement agreement.

"[E]xpress easements are defined by the intent, or object, of the parties". *See Lewis v Young*, 92 N.Y.2d 443, 449 (1998). If an "easement's language is not ambiguous, . . . it alone may be considered in determining the true intent of the parties to the grant, to the exclusion of

the circumstances surrounding the conveyance and the situation of the parties" *See Lawrence v 5 Harrison Assocs., Ltd.*, 295 A.D.2d 131, 132 (1st Dept 2002). "[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms". *See MHR Capital Partners LP v Presstek, Inc.*, 12 N.Y.3d 640, 645 (2009). "[T]he interpretation of an unambiguous contract is a question of law for the court, and the provisions of the contract delineating the rights of the parties prevail over the allegations set forth in the complaint" *See Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 A.D.2d 143, 150 (1st Dept 2001). "[C]ourts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include" *Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 N.Y.3d 470, 475 (2004). Thus, "courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing" *See id.*

The pertinent language from the easement agreement is as follows:

> "The [easement] . . . shall be used and maintained . . . by the Tenant Parties for a term expiring on the earlier of the date Tenant, its successors and assigns, vacate [216 parcel] and [218 parcel] or May 31, 2031 . . ." *See Chang Affid. Ex G at* ¶4.

The word "and" in "vacate [216 parcel] and [218 parcel] or May 31, 2031" demonstrates that the termination clause is only triggered upon 218 Tenant vacating both the 216 parcel and the 218 parcel. 218 Tenant has not vacated the 218 parcel, thus, the easement is still in effect. If J&G and Schwartz intended that the easement extinguish upon 218 Tenant vacating at least one of the parcels, the easement agreement should have been drafted as such (e.g. "a term expiring on the earlier of the date Tenant, its successors and assigns, vacate [216 parcel]" or "[218 parcel]") in the same way that the or is used in "***or*** May 31, 2031" *See id.*.

Plaintiffs' argument that "[i]t is therefore entirely consistent . . . that the 'Term' of the [e]asement expires when the Tenant vacates both spaces because the [e]asement requires that the 'Tenant' be the occupant of both spaces" is unavailing. *See Plaintiffs' Memorandum of Law in Further Support of Motion at 14*. If 218 Tenant is required to be the occupant of both spaces, then the easement agreement would state that termination is effective when "Tenant" vacates one property (i.e. [the 216 parcel or the 218 parcel). However, the termination provision explicitly states that the easement terminates when "Tenant", here 218 Tenant, "vacates [216 parcel] ***and*** [218 parcel]" (i.e. not just one property) "***or*** May 31, 2031". *See id.*, ¶3.

Plaintiffs' argument that the easement may be used only as long as both the 216 parcel and the 218 parcel solely operate as a restaurant and both leases are in effect is also unavailing as the easement agreement does not contain this limitation. "[A] condition precedent is an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises". *See MHR Capital Partners LP*, 12 N.Y.3d at 645. "[T]erms such as 'if,' 'unless' and 'until' constitute[] 'unmistakable language of condition' *See id.* As for a condition subsequent, it "[is] disfavored and [is] not found to exist unless the intention to create them is clearly expressed" *See Stratis v Doyle*, 176 A.D.2d 1096, 1098 (3rd Dept 1991); *see also Koshian v Kirchner*, 139 AD2d 942 (4th Dept 1988) ("reject[ing] [the] plaintiff's contention that the easement was extinguished by the failure of [the defendant] to pay an equal share of expenses incurred to maintain the easement [because] [t]he language of the [agreement] did not impose a condition subsequent but rather a collateral condition"). The easement agreement contains the following language, which is an unconditional grant of the easement:

> "[Schwartz], [her] successors and assigns do hereby grant, bargain, quitclaim and convey to [J&G Family] and Tenant, their successors and assigns, for the benefit of [218 parcel] and the exclusive use by Tenant, the right to . . the use and enjoyment of, over, upon, across and through the Access Easement for ingress and egress by . . . the 'Tenant Parties; [among other rights]." *See Chang Affid. Ex. G at ¶3*

Although the easement agreement refers to the existence of the 216 lease and the 218 lease, its validity is not dependent on the continued validity of both leases. The easement agreement merely states that, "[218 LLC] shall be permitted to use the Pass-Through and enter upon the premises of [the 216 parcel] and [the 218 parcel] pursuant to the terms of the Lease Agreement between [J&G] and [218 Tenant] . . . and the lease Agreement between [Schwartz] and [218 Tenant]". *See id.*, ¶ 5. It does not indicate a condition precedent or a condition subsequent regarding the 216 lease or the 218 lease. Moreover, the easement runs with the land, not the 216 lease. The easement agreement states, "[t]he covenants set forth herein shall run with the land and be binding upon and inure to the benefit of the [J&G and Schwartz] and their respective heirs, legal representatives, successors and assigns" *See id.*, ¶8. Moreover, the 216 lease states that it is "subject to a Party Wall Agreement to be mutually agreed upon by the parties" *See Chang Affid. Ex. E §67.*

The easement agreement also provides that the "[easement agreement] constitutes the entire understanding between the parties with respect to the properties affected by this [easement agreement] . . .", and it contains a severability provision, which states that any provisions found "to be illegal or unenforceable . . . shall be excised . . . and the remainder . . . shall continue into full force and effect *See Chang Affid. Ex. G.*, ¶ 7, 10. Furthermore, even if, assuming arguendo, the easement is ambiguous, "[a]ny ambiguities in an easement are to be construed in the manner most favorable to the grantee and its successors" *See Lawrence*, 295 A.D.2d at 131.

As to the third-party beneficiary arguments, 218 Tenant is a third-party beneficiary of the easement agreement. In New York, "an owner of neighboring land, for whose benefit a restrictive covenant is imposed by a grantor, may enforce the covenant as a third-party beneficiary despite the absence of any privity of estate between the grantor and the neighbor." *See Zamiarski v Kozial*, 18 A.D.2d 297, 299 (4th Dept 1963); *see also Lebensfeld v Bashkin*, 144 AD2d 542, 542–43 (2d Dept 1988) (holding that the "plaintiff . . . while not a signatory to the contract, could seek specific performance of the agreement as a third-party beneficiary since the contract was intended for the mutual benefit of himself and his wife, the plaintiff . . ."). The easement agreement states that the easement is "for the exclusive benefit of Tenant [218 Tenant]" *See Chang Affid. Ex G.*, ¶5. Therefore, 218 Tenant is a third-party beneficiary.

The court has considered the remaining arguments and finds them unavailing. Therefore, plaintiffs' motion is denied in its entirety, and the cross motions of J&G and 218 Tenant are granted.

CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiffs' motion is denied in its entirety; further

ORDERED that defendant 218, LLC's cross motion for summary judgment is granted; further

ORDERED that defendant J&G Family Limited Partnership's cross motion for summary judgment and for an order interpreting the easement in its favor is granted; further

ADJUDGED and DECLARED that the easement on the building located at 216 Lafayette Street, New York, New York and filed on October 18, 2012, with the Office of the City Register is interpreted in favor of J&G Family Limited Partnership as the easement is valid.

Dated: December 4, 2018 **ENTER:**

HON. EILEEN BRANSTEN
J.S.C.