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

PRESENT: HON. JENNIFER G. SCHECTER **PART** 54

Justice

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ROSE GROUP PARK AVENUE LLC,

Plaintiff,

- v -

THIRD CHURCH CHRIST, SCIENTIST, OF NEW YORK CITY,

Defendant.

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INDEX NO. 651390/2019

DECISION AFTER TRIAL

Background

Third Church, Christ, Scientist of New York (Landlord or the Church) and Rose Group Park Avenue LLC (Tenant or Rose Group) are parties to a lease governing property located at 583 Park Avenue in Manhattan (Dkt. 618 [the Lease]). The Lease was executed in January 2006 and was amended in September 2006 (Dkt. 619 [the First Amendment]) and March 2007 (Dkt. 620). This action was commenced over a decade later in 2019 and concerns various disputes over the meaning of the Lease, including the parties' rights to use the property, in which Landlord operates a church and Tenant hosts events. Summary judgment was denied in December 2021 (Dkt. 520), and the Appellate Division affirmed in June 2022 (206 AD3d 546 [1st Dept 2022]). After a bench trial (*see* Dkts. 1015-1022), the parties filed post-trial briefs (Dkts. 1025, 1026).

Dora Redman, the Church's Clerk, was originally opposed to the Lease and voted against it. She believes the terms of the Lease to be in tension with her vision of how a tenant should be operating in the Church and thus wants to terminate the Lease. Despite her incredulous denials, there is ample credible evidence that her desire to find a different tenant is a major impetus of the disputes the Church has raised in this action (Dkts. 676-682; *see* Dkt. 1019 at 175-86). Landlord, however, is bound by the terms of the Lease that it executed, which the Appellate Division previously found was akin to a triple net lease (93 AD3d 1, 3 [1st Dept 2012]).

Purportedly relying on the terms of the Lease, Landlord served multiple notices to cure that were stayed by Yellowstone injunctions. Due to the serial and baseless nature of the notices, the court eventually had to prospectively enjoin their service. Nonetheless, significant intervention was still required when Landlord continued to complain about desk drawers and inconveniently-placed furniture. Indeed, Landlord attempted to raise further issues while this decision was sub judice. None of the issues Landlord raised provides a basis to terminate the Lease.

DECISION AFTER TRIAL

That conclusion does not come close to resolving the parties' disputes. The court must issue declaratory judgments about how and when the parties can use portions of the property and make final determinations about their net financial liabilities. This is a mixed bag. For instance, while Tenant is correct about all but one of the parties' use disputes and that Landlord's audit claims are ultimately without merit, Landlord is correct that Tenant has wrongly claimed that its on-site contractor was really a vendor rather than an affiliate within the meaning of the Lease and thus has been underpaying Landlord. While further submissions will be required before a definitive net judgment amount can be entered, notwithstanding the Lease's prevailing party clause, the court finds that neither Landlord nor Tenant is the prevailing party; thus, each will bear its own fees and costs.

Analysis

In light of the inherent tension between the parties' religious and secular uses of the property (the Church, for example, knew that despite its religious objection to alcohol, the Tenant would be hosting events where alcohol is served), in their Lease, they endeavored to clearly delineate how each would use the property. In determining the parties' rights and responsibilities, the Lease governs and is the best evidence of their intent (*see Ellington v EMI Music, Inc.*, 24 NY3d 239, 244-45 [2014]). Where there is only one reasonable interpretation, the Lease's plain meaning must control (*id.; see Madison Ave. Leasehold, LLC v Madison Bentley Assocs. LLC*, 8 NY3d 59, 66 [2006]), and interpretations of the Lease's unambiguous terms that have no textual basis must be rejected.

Gala is Rose Group's Affiliate

Gala-Productions LLC (Gala), which provides on-site audio-visual services for events at the premises, is Tenant's affiliate within the meaning of the Lease.

The amount of rent Tenant owes under the Lease depends, in part, on its Gross Sales (Dkt. 618 at 12). Gross Sales is defined to include amounts earned by "TENANT affiliates in, at, from or arising out of the use of the Premises" (*id.* at 14). The Lease does not define affiliates. In fact, the word "affiliate" does not appear in the body of any other provision of the Lease. It does, however, appear in the heading of Article 41, titled "Affiliate Transfers" (*see id.* at 81). Section 41.1 provides:

> Notwithstanding anything contained in this Lease to the contrary, the parties agree that a merger, reorganization or consolidation of TENANT shall not be deemed an assignment of this Lease provided that same is done for a bona fide business purpose and not merely to accomplish a transfer of this Lease. Any partner or member of TENANT shall have the right to transfer its interest (all or part), through death or otherwise, **to any family member of such partner or member**. However, a change in control of TENANT **outside of the Rose family** shall be considered an assignment of this Lease and shall require LANDLORD's consent, in accordance with the provisions of Article 22 of this Lease (*id.* [emphasis added]).

Gala's sole member, Alexandra Lind-Rose, is a family member of Tenant's principal. She is married to Tenant's owner, Louis Rose. On its own, that would not be dispositive. Of course, the court does not presume that a husband inherently has control of his wife's company. Accusing Landlord of operating under that assumption rings hollow under the circumstances. There is just no believable evidence whatsoever suggesting that Ms. Lind-Rose actually had any meaningful involvement in the business from its inception (it does not help that Gala tried to manufacture evidence of her purported involvement after the fact by giving her a Gala email address only after her deposition [Dkt. 1018 at 601-02]). The evidence established that Ms. Lind-Rose has nothing of substance to do with Gala and to the extent that she has had any role, the court is convinced that her activities were performed just for purposes of this litigation. Her testimony to the contrary was not credible. She claims to have had the idea for Gala but had no meaningful understanding about or involvement with the business. Landlord points out that "although she may have subjectively believed that established A-V vendors were too expensive, she did not know what their profit margins were, did not conduct any investigation into profitability, did not even have a business plan, and knew nothing about Gala's initial startup expenditures" and that "her story defies credulity" (Dkt. 1025 at 12). Based on her demeanor and testimony, the court agrees. It is further clear that Mr. Rose has a beneficial interest in Gala's profits.

Most significant to analysis of this issue, though, is the convincing evidence that Mr. Rose controlled Gala. The court was not persuaded by Tenant's witnesses' testimony to the contrary. The credible testimony at trial proved that Mr. Rose calls the shots for Gala. Though Mr. Rose credibly testified about many of the other issues at trial, based on his demeanor and the manner in which he answered questions on this topic, the court did not find his testimony believable.[1] Other witnesses convincingly testified that Mr. Rose directed Gala and its employees. The credible evidence established that Mr. Rose was involved with and controlled Gala's operations at the premises more so than he would have had the ability to do with respect to an unrelated third party. This is inconsistent with Gala simply being an arms' length vendor and is consistent with Gala being a family-owned business that he controlled and from which he benefitted. Tenant's lack of credibility on this issue reinforces the founded inference that an original impetus for Gala was to provide customers with audio-visual services at its on-premises events without having to remit any portion of those revenues to Landlord in contravention of the Lease.

While the Lease does not define affiliate and thus the term is ambiguous (206 AD3d at 547), § 41.1 is the best evidence of what the parties intended and Gala, as a closely held company owned by a family member and controlled by Tenant's owner, is exactly the type of affiliate that the parties contracted could not be used to reduce Tenant's Gross Sales for the purpose of decreasing the amount of rent owed to Landlord. The parties' supplemental

[1] This was true of many of the witnesses, who provided a mix of credible and incredible testimony. The court will not reject the entirety of such witnesses' testimony but rather will accept only those portions that are credible.

submissions will need to address how much Tenant owes Landlord as a result of this ruling.[2]

SES Service Charges Properly Excluded but are Subject to Landlord's Annual Audit Right

The amount of Tenant's Gross Sales affects the amount of rent owed to Landlord. In the original Lease, the parties agreed to exclude certain items from Gross Sales (Dkt. 618 at 15-16). "Service charges were only excluded from Gross Sales if the charges were paid directly by Rose Group to employees" (Dkt. 950 at 7). In the First Amendment, the parties agreed to amend "the definition of excludable service charges precisely because the staffing of employees for Rose Group events was through an affiliated staffing agency, Special Event Staffing ("SES")" (*id.*; *see* Dkt. 619 at 4-5 [excluding "monies representing, tips, gratuities and service charges paid by a customer that are directly paid by TENANT to employees or to a staffing agency, **which may be affiliated with TENANT, but only to the extent such monies are paid to or for the benefit of such agency's employees relating to their performance of services at the Premises**" [emphasis added]). That SES was an affiliate of Tenant was not an impediment to deducting service charges so long as the money was used to pay costs that otherwise would have had to be paid by Tenant had it handled the staffing itself. This makes sense. Just as Tenant could not use Gala to artificially decrease its revenue, Landlord could not artificially increase Gross Sales by including charges incurred to reimburse staff. Landlord questions, however, whether that is what the SES service charges were really for and whether it was provided with sufficient backup to verify the nature of these charges.

The credible evidence established that the SES service charges are properly excluded from Gross Sales under the First Amendment. For "many years, Rose Group excluded these amounts from Gross Sales and disclosed those amounts to Landlord monthly, according to the parties' established pattern of practice for such reporting. For years, Landlord raised no objection. Again, Landlord knew exactly how Rose Group was applying the service charges when the parties entered into the First Amendment, and so it knew that Rose Group was entitled to exclude those charges under the plain language of the amended Lease" (Dkt. 950 at 8). The court credits Louise Wilson's testimony that "all funds paid by Rose Group to SES are used to pay SES employees for services provided at the Premises" (Dkt. 951 at 5). The court was unpersuaded by any of Landlord's purported evidence to the contrary or its argument that it lacked sufficient evidence to properly audit the service charges, including Kaufman's unpersuasive testimony on this issue. On the contrary, the court is persuaded by Tenant's arguments, which are supported by credible evidence (*see* Dkt. 1026 at 11-13). Moreover, the audit materials provided by Tenant were consistent with what was always provided until the commencement of this action.

The court, however, is unpersuaded by Tenant's contention that, going forward, Landlord cannot request SES payroll records to ensure that future service charges are really being paid to SES employees. The Lease provides that, once per year, Landlord, "shall have the right to cause a **complete audit** to be made of Gross Sales by TENANT **and of all books**

[2] The checks introduced at trial were not considered and played no role in this decision (*see* Dkt. 1025 at 13-14).

and records pertaining thereto, including but not limited to those specified in Section E, and TENANT will make all of TENANT's books and records available" (Dkt. 618 at 19 [emphasis added]). While the Lease does not provide that records of Tenant's affiliates must be made available, this provision was drafted prior to the First Amendment, which for the first time made SES records relevant to Gross Sales. It would defeat the purpose of granting Landlord a complete audit of Gross Sales if it was unable to vet the veracity of a major component of them.

Of course, if SES was truly an unrelated third-party then the court might have concluded that the parties never contemplated forcing Tenant to obtain and produce its records. However, given the evidence at trial about the ways in which Tenant's affiliated companies operate, it is clear that Tenant has the practical ability to produce SES records that contain information material to Landlord's audit rights. To be sure, the court finds no fault in Tenant not having previously produced this information given the ambiguity in this Lease; there is no basis to revisit prior audits given the one-year lookback clause in the Lease (Dkt. 618 at 16-21; *see* 198 AD3d 506, 507 [1st Dept 2021]); and, as discussed, there is no credible evidence suggesting the service charges were not legitimate. However, that does not mean Landlord is not entitled to these records in the future now that the court has determined that they are within the scope of the audit clause. This will permit Landlord to confirm the continued legitimacy of the service charges.[3]

Landlord has not proven that SES service charges were improperly excluded from Gross Sales. Thus, Tenant is entitled to reimbursement of the $1,169,530 payment it made in protest pursuant to the Lease (*see* Dkt. 618 at 21).

Landlord not Entitled to Construction Expenses Related to the Roof and Façade

There is no basis for Landlord to seek repayment for the roof work from Tenant. That work was Landlord's financial responsibility under the Lease (Dkt. 618 at 26-27). While the work was originally to be performed by Tenant, Landlord was required to reimburse it (*see id.*). Tenant did not do the work since Landlord refused to commit to paying interest as required by the Lease (*see id.*; *see also* Dkt. 950 at 37-38). Landlord footing the bill is consistent with the Lease.

Nor is there a basis for Landlord to seek apportionment of "the equitable allocation of the cost of the repair" of the façade since that must be done in accordance with the dispute resolution process in section 37.1B of the Lease (Dkt. 618 at 78-79). The judgment entered in this action will direct the parties to follow this process.

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[3] SES records were not explored in a more fulsome manner during fact discovery because Landlord failed to serve a subpoena until shortly before trial. During discovery, Landlord did not seek a ruling that SES records are within Tenant's possession, custody or control since Tenant has the practical ability to obtain them. That strategic litigation decision will not prejudice Landlord's substantive rights under the Lease in the future. The trial record indicates that production of such records is not burdensome and revelations of any future audit will be an issue for another day.

Tenant Not Entitled to Damages Allegedly Caused by Scaffolding

Tenant is not entitled to consequential damages due to the length of time there was scaffolding at the premises. At most, Tenant demonstrated that Landlord's negligence in overseeing the work resulted in the scaffolding staying up much longer than anticipated. However, there is no credible evidence that this was done in bad faith to harm Tenant's business (*see* 206 AD3d at 547). Thus, Tenant is not entitled to consequential damages for the loss of business caused by the scaffolding. In any event, for the avoidance of doubt, the court was unpersuaded that Tenant proved such losses.

Use of the Premises: Tenant has no Right to Any Wednesday Nights but Otherwise Prevails

The parties have many disputes about when and how Tenant may operate in the building. Article 35.1 of the Lease provides that Landlord "shall continue to use and occupy the Premises for the conduct of church services and other church related activities as herein set forth, subject to the relocation of certain Church or Church related rooms and offices and to the exclusive use by TENANT of certain portions of the Premises, all as more particularly set forth herein" (Dkt. 618 at 69-70). Article 35.1 then delineates "such Church services and other related activities" with specificity (*see id.* at 70-71). Articles 35.2 through 35.5 provide further specificity about the parties' use of the premises (*see id.* at 71-73).

This case is not the first time that the scope of Tenant's usage rights under the Lease has been litigated. Rather, in a case where the Appellate Division upheld the State Liquor Authority's denial of Tenant's application for a liquor license, the court made extensive findings that are relevant to the parties' disputes, which are worth recounting.

The Appellate Division explained that "in January 2006, the Church, facing major budget deficits, entered into an agreement with tenant Rose Group, a commercial caterer, for a 20-year lease on the premises with two five-year renewal options"; that "the lease provides for an annual rent of $250,000 in the first year escalating to $519,732.00 in the last year," with the Church receiving "10% of gross sales of Rose Group's business where gross sales exceed the annual rent" and that "under the terms of the triple net lease, Rose Group also pays the property taxes and charges for utilities and services" and pursuant to which "Rose Group as tenant 'shall use and occupy the [p]remises solely as a high end, first class catering facility and for banquets, special events and meetings, all of which may include the preparation and service of food and alcoholic and non-alcoholic beverages'" (93 AD3d at 3-4). The court noted that "Rose Group has spent millions of dollars installing catering facilities throughout the Church" and "that the Church did not own any catering facilities until Rose Group installed them" but that "none of these catering facilities were installed for the Church's use" (*id.* at 7). Rather, "the public event space/auditorium is used as ballroom or banquet hall only by Rose Group; otherwise it is set up for Church use as a sanctuary" and "the lease makes it clear that Rose Group's renovation and upgrading work which includes the installation of kitchen equipment and of the VIP suite was 'to accommodate [Rose Group's] catering business'" (*id.*).

The court further observed that "notwithstanding Rose Group's declarations that the Church owns the facilities 'now and in perpetuity,' there is no provision in the lease that reflects current or future Church ownership of the catering facilities" and "indeed, the lease, to the contrary, states that upon expiration or termination of the lease, Rose Group shall remove all of its property'" (*id.*). Importantly, the court explained that "the most visible component of the facilities, the banquet hall/ballroom, the arcade and the balcony become a sanctuary when used by the Church"; that "the church pews have been removed from this area"; and that "following any Rose Group event, tables and chairs and setting stations must be removed and stored" and "plastic folding chairs are then arranged for use by the congregation" (*id.* at 8).

The court further emphasized that "this Cinderella-style transformation does not end at the stroke of midnight; even when the catered event is over, the building's predominant character does not revert to that of a place of worship as it was prior to the execution of the lease with Rose Group" (*id.* at 11). Rather, "pursuant to the lease, Rose Group removed all the church pews for the duration of the 20–year lease and for the periods of renewal and "following each event, Rose Group is required only to set up plastic folding chairs for the congregants" (*id.*). "Hence, depending on the time of day, there may either be plastic folding chairs set up for the congregation in the sanctuary/ballroom, or Rose Group employees may be setting up tables and chairs for a catered event later in the evening" (*id.*)

Furthermore, "Rose Group, under the terms of the lease, has been permitted to install curtains to conceal the church's organ pipes. It is also permitted to conceal any religious messages inside the sanctuary. Moreover, a visitor wandering into the church would be greeted not by a church custodian, but by a doorman hired by the Rose Group. On the lower level, Rose Group's kitchen staff works on the preparation of food and beverages for hours prior to the scheduled event" (*id.*).

"On the exterior of the building, the lease has permitted Rose Group to 'install a sign above the center doorway of the center front of the [b]uilding identifying it as '583 Park Avenue" where previously signs and lettering on the front pillars and over the main door identified the building as the Third Church of Christ Scientist" (*id.*). "The lease further allows Rose Group to 'remove or cover ... the existing signs on the building facade and replace or cover them with blank ("faux") windows" and to 'install ... a blank piece of limestone or limestone veneer over the engraved lettering over the front pillars'" and "although Rose Group is obligated to install two electronic signs on the corners of the building, one on 63rd Street, which will indicate the existence of a Sunday school and church, those signs, controlled from an office on the premises will be switched off 'when [Rose Group] is using the [p]remises for a third-party function or [even] marketing the premises'" (*id.*). "Hence, whether the building is being used incidentally for a catered event or not, **its character can no longer be described as predominantly that of a place of worship. On the contrary, the provisions of the lease have permitted the building to be so altered that little remains as evidence of its use as a place of worship**" (*id.* at 12 [emphasis added]; *see also id.* ["The square footage used exclusively by the Church encompasses a 4th floor area reserved for Church offices and classes, and a corner of the basement, now

reserved for Sunday school and a nursery ... In this case...there is no daily worship, only twice-weekly services with two extra services on Christmas Eve and Thanksgiving"]).

In sum, the court held that "far from being a subordinate use of Church property, Rose Group events take priority over Church events" since "church activities are strictly limited by the lease" and that "the Church's use is limited to specific designated times (*id.*). "Thus, **the Church's use is subordinate to Rose Group's use according to the plain language of the lease** which reflects simply that Rose Group has established a catering business in a building it has leased from the Church" (*id.* at 13 [emphasis added]).

Landlord completely ignores these supported findings, pretending that the Appellate Division never opined on the meaning of the Lease and the nature of Tenant's occupancy. Redman still seems to believe, despite the Appellate Division's determination to the contrary, that Tenant is merely operating in a building that is primarily used as a church and that the essential character of the building as a church should predominate. Not so. Indeed, the credible evidence at trial was perfectly consistent with the Appellate Division's conclusions.

In deciding the particulars, the specific explicit terms of the Lease govern the parties' usage rights. The court rejects the parties' contentions about their ability to use the premises during times that are inconsistent with Article 35 of the Lease. So, for instance, while the Lease permits Landlord's use on Thanksgiving and Christmas Eve (Dkt. 618 at 70), it does not permit services on Good Friday. Nor does the Lease permit Tenant to host events on 17 Wednesday evenings per year. While the Church agreed to permit Tenant to do so in certain years, this was not a perpetual agreement and Tenant's testimony of a broad 2014 oral agreement was incredible (Mr. Rose's testimony was not believable and the parties' correspondence related to Wednesday evenings undermined it). The credible evidence demonstrates that this was a yearly agreement, not a Lease modification, and that the Landlord is in no way obligated to renew it (*see* Dkts. 990-992, 1013). Tenant's reliance on the parties' course of performance is misplaced as expressly limited permission in certain years does not suddenly entitle it to permission extending for the duration of the Lease. That was not the bargain that these parties struck. While Landlord benefitted from the additional revenue generated and thus was not harmed by the extra events that were held, going forward Tenant is not entitled to hold events on Wednesday evenings absent Landlord's consent.

Aside from this issue, the court agrees with Tenant regarding the remaining disputed usage and "other issues" addressed in its brief and Mr. Rose's affidavit (*see* Dkt. 1026 at 20-25; *see also* Dkt. 950 at 15-16). Tenant's positions regarding use of the roof (*see* Dkt. 950 at 23-24), "minor non-structural changes" (*see id.* at 24-25), the way Tenant handles the setup for services (*see id.* at 25-27), the Reading Room (*see id.* at 27-30), the signage (*see id.* at 30-32), access to the A/V equipment (*see id.* at 32-33), room rentals (*see id.* at 35), and use of the fourth floor areas (*see id.* at 35-36) are consistent with the specific applicable provisions of the Lease, the parties' course of conduct, and the prior findings of the Appellate Division, and are supported by the credible testimony and evidence provided by Tenant. All of Landlord's notices to cure based on these issues and the other baseless

alleged breaches (*see id.* at 43-48) are rejected and declaratory judgments and permanent injunctions will be issued accordingly (*see* Dkt. 1026 at 9-11).

The court has considered Landlord's other arguments, including those it failed to address in its post-trial brief (e.g., its argument that additional rent is owed by virtue of how Tenant was operating during the pandemic) and finds them unavailing. Landlord is not entitled to any additional relief based on the issues raised in this action that is not expressly granted in this decision.

In the end, Landlord's serial complaints, including picayune ones regarding desk drawers and closet doors, are baseless. Aside from the 17-Wednesdays issue, the ways in which Tenant is operating in the building is consistent with the Lease. Unless the parties agree otherwise, Tenant's leasehold will continue. Defendant must accept that reality. Its attempts through litigation to get out of the Lease are unavailing. **Landlord is cautioned that fee shifting under the Lease will be ordered if court intervention is required due to further baseless complaints. Enough is enough.**

Prevailing Party Fees are Not Warranted

The court does not find that either party is entitled to prevailing party fees under Article 38 of the Lease given "the mixed results of this case" (*Blue Sage Capital, L.P. v Alfa Laval U.S. Holding, Inc.*, 168 AD3d 645, 646 [1st Dept 2019]; *see* Dkt. 618 at 80). While Tenant prevailed on more issues than Landlord, the issues on which Landlord prevailed are significant. Thus, neither party is awarded fees (*Free People of PA LLC v Delshah 60 Ninth, LLC*, 169 AD3d 622, 623 [1st Dept 2019]; *see Pearl Capital Bus. Funding, LLC v Berkovitch*, 211 AD3d 485, 486 [1st Dept 2022]).

Conclusion

Further submissions are required on (1) the parties' net financial liabilities, (2) the proposed declaratory judgments and (3) the permanent injunctions.

Accordingly, it is ORDERED that the parties shall promptly meet and confer to see if they can agree on the form of a proposed judgment based on the rulings in this decision and, if not, by November 29, 2023, they shall e-file and email the court proposed judgments, with a redline, along with a joint letter addressing their disagreements, which shall not exceed 8 pages and which shall be evenly split.

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DATE: 10/25/2023 **JENNIFER G. SCHECTER, JSC**

Check One: [X] **Case Disposed** [ ] **Non-Final Disposition**