SCAN

INDEX
NO. 015884-00

SUPREME COURT - STATE OF NEW YORK
IAS TERM, PART 28 NASSAU COUNTY

PRESENT:
HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: 10-18-00
Submission Date: 11-8-00
Motion Sequence No.: 001,002/MOT D

CRAFTMASTERS CONSTRUCTION CORP.,
Plaintiff,

- against -

RML REALTY, LLC and
SOUTHAMPTON BRICK & TILE, INC., and
RYAN TOSCANO,
Defendants.

PLAINTIFF'S ATTORNEY
Marci S. Zinn, Esq.
Jaspan, Schlesinger & Hoffman, LLP
300 Garden City Plaza
Garden City, New York 11530-3324

DEFENDANT'S ATTORNEY
(for RML Realty, LLC, Michael A. Sirignano and George Tsunis, Esqs.)
Rivkin, Radler & Kremer, LLP
EAB Plaza
Uniondale, New York 11556

(for Southampton)
John J. Munzel, Esq.
548 Roanoke Avenue
Riverhead, New York 11901

(for Ryan Toscano)
Richard A. Kraslow, P.C.
425 Broad Hollow Road
Melville, New York 11747

Upon the following papers read on Plaintiff's motion seeking a preliminary injunction:

Plaintiff's Order to Show Cause (#001);
Affidavit of Marci S. Zinn, Esq., and supporting papers;
Plaintiff's Order to Show Cause (#002);
Affidavit of Marci S. Zinn, Esq.;

Affidavit of Kenneth Plamer and supporting papers;
Plaintiff's Memorandum of Law;
Affidavit of Richard M. Linchitz, M.D. in Opposition;
Affidavit of Ryan Toscano;
Affidavit of Leonard M. Ridini, Jr., Esq.;
Defendant's Memorandum of Law;
Reply Affidavit of Kenneth Palmer and supporting papers;

Motion by Plaintiff Craftmasters Construction Corp., for an order pursuant to CPLR 6301 enjoining the Defendants RML Realty, LLC, Southampton Brick and Tile, Inc., and Ryan Toscano from proceeding with a lease of approximately 7800 square feet of space, one of three commercial units in the premises 125 Long Island Expressway in Jericho, New York is **denied.**

The instant action arises out of a restrictive covenant in a ten year commercial lease between Plaintiff, a tenant, and Defendant RML Realty, LLC ("RML"), the landlord, dated November 7, 1997. Paragraph 60, entitled "prohibition" reads as follows:

> Provided tenant is not in default of any provision of this lease, Landlord agrees not to lease any portion of the Building to another tenant in the business of retail or wholesale of (sic) Kitchens or bathrooms.

Paragraph 59 of the same lease provided that the landlord would give the Plaintiff the right of first refusal with respect to a second space then occupied by Cutco Industries. Such premises are now occupied by Defendant Toscano, an employee of Southampton Brick and Tile, Inc., which has another business location and does not lease or intend

to occupy the space in question. On March 23, 2000, the landlord wrote to Plaintiff and offered it the space which by that time had been vacated by Cutco. By letter dated March 24, 2000, Plaintiff wrote back and advised the landlord that it was not interested in the space previously occupied by Cutco. In August, 2000, the landlord leased the space to Toscano. Plaintiff, relying on the restrictive covenant and the right of refusal, seeks to enjoin the Defendants from proceeding with the lease.

The landlord, RML, argues that it complied with the terms of paragraph 59 concerning the right of first refusal, that Plaintiff can not rely on the restrictive covenant because it was in default with respect to various monetary provisions of the lease and that, in any event, the restrictive covenant does not bar the lease to Toscano. The court agrees that the landlord clearly offered the space to Plaintiff first and that Plaintiff declined to exercise its option to lease it. The court disagrees with the landlord that Plaintiff was in default but need not actually reach that question since the court concludes that the Toscano lease is not barred by the restrictive covenant in the landlord's lease with Plaintiff.

To prevail on an application for preliminary injunctive relief, the moving party must demonstrate (1) a likelihood of success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) that a balancing of the equities favors the movant. See, W.T. Grant Co. v. Srogi, 52 N.Y. 2d 496, 438 N.Y.S. 2d 761 (1981). See also, Zanghi v. State of New York, 204 A.D. 2d 313, 611 N.Y.S. 2d 263 (2nd Dept.

1994); and Amarant v. D'Antonio, 197 A.D. 2d 432, 602 N.Y.S. 2d 837 (1st Dept.1993). A preliminary injunction is a drastic remedy that will not be granted unless the movant can demonstrate a clear right to it under the law and upon undisputed facts. See, Anastasi v. Majopon Realty Corp., 181 A.D. 2d 706, 581 N.Y.S. 2d 223 (2nd Dept. 1992).

The law with respect to restrictive lease covenants was recently enunciated by the Second Department in Bear Mountain Books, Inc. v. Woodbury Common Partners, 232 A.D. 2d 595, 649 N.Y.S. 2d 167 (2nd Dept. 1996), wherein that Court held:

> The law favors the free and unobstructed use of realty (see, *Huggins v Castle Estates*, 36 NY2d 427; *Sunrise Plaza Assocs. v International Summit Equities Corp.*, 152 AD2d 561). Accordingly, covenants restricting the use of property are strictly construed against those seeking to enforce them (see, *Huggins v Castle Estates, supra; Sunrise Plaza Assocs. v. International Summit Equities Corp., supra)*. Restrictive covenants such as "use clauses" in leases should be enforced according to the intent of the parties, which will be primarily determined from the lease (see, *Sky Four Realty Co. v C.F.M. Enters.*, 128 AD2d 1011). While ambiguities will generally be construed against the drafter (see, *67 Wall Street Co. v. Franklin Natl. Bank*, 37 NY2d 245; *Sky Four Realty Co. v C.F.M. Enters., supra*), where there are two equally plausible interpretations of a restrictive covenant, the less restrictive interpretation will be adopted (see, *Sunrise Plaza Assocs. v International Summit Equities Corp., supra*). The burden of proof is on the party seeking to enforce the restrictive covenant and the existence and scope of the covenant must be established by clear and convincing evidence (see, *Greek Peak v Grodner*, 75 NY2d 981; *Huggins v Castle Estates, Inc., supra; Sunrise Plaza Assocs. v International Summit Equities Corp., supra*).

In addition, a restrictive covenant will not be interpreted beyond the clear and plain meaning of its terms. See, Thrun v. Stromberg 136 A.D. 2d 543, 523 N.Y.S. 2d 163 (2nd Dept. 1988).

In the case at bar, Toscano, in his opposing affidavit, represents under oath:

> I intend to open a business involving stone, ceramic, marble, masonry, limestone, and related products. These products are used for a wide variety of interior and exterior commercial and residential purposes.....I have absolutely no intention of opening a kitchen and bath business....I will not provide installation or contractor services.

The covenant in question, by its strict terms, prohibits the landlord from leasing space to anyone in the "business of retail or wholesale of Kitchens or bathrooms." While there may be some overlap in the products offered, Plaintiff and Toscano are clearly not in the same business. See, Cheng v. Brewran Village Hudson Associates, 180 AD2d 519, 580 N.Y.S. 2d 740 (1st Dept. 1992); and Arista Luncheonette, Inc. v. Harann Operating Corporation, 1 A.D. 2d 681, 147 N.Y.S. 2d 144 (2nd Dept. 1955).

For the foregoing reasons, the court concludes that Plaintiff has not established a likelihood of success on the merits. Accordingly, a preliminary injunction cannot lie. Therefore, it is,

ORDERED, that Plaintiff's application to enjoin Defendants from proceeding with their lease of the Cutco space is **denied;** and it is,

ORDERED, that the Order of October 20, 2000 granting a temporary restraining

order to Plaintiff against RML Realty, LLC, and Southampton Brick and Tile, Inc. is vacated and that application is likewise **denied;** and it is,

ORDERED, that counsel shall appear for a Preliminary Conference on December 15, 2000, at 9:15 a.m.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
November 14, 2000

Hon. LEONARD B. AUSTIN, J.S.C.

ENTERED
NOV 20 2000
KAREN V. MURPHY
COUNTY CLERK'S OFFICE NASSAU COUNTY