

**SUPREME COURT - STATE OF NEW YORK  
IAS TERM PART 16 NASSAU COUNTY**

**PRESENT:**

**HONORABLE LEONARD B. AUSTIN**

Justice

**STIPULATED FACTS**

**Submission Date: 9-5-06**

\_\_\_\_\_  
**EFL BAKING CORP.,** x

Plaintiff,

- against -

**COUNSEL FOR PLAINTIFF  
Wenig, Saltiel & Green, LLP  
26 Court Street - Suite 502  
Brooklyn, New York 11242**

**LOWY FAMILY IRREVOCABLE TRUST,  
MEYER LOWY a/k/a MICHAEL LOWY,  
and KATY LOWY,**

Defendants.

\_\_\_\_\_  
x

**COUNSEL FOR DEFENDANT  
Jonathan A. Stein, P.C.  
132 Spruce Street  
Cedarhurst, New York 11516**

**ORDER**

The following papers were read on a submission pursuant to stipulated facts:

- Stipulated Set of Facts and Exhibits A - E;
- Transcript of Deposition of Levi Kramer;
- Defendants' Demand for Expert Disclosure;
- Plaintiff's Memorandum of Law;
- Defendants' Memorandum of Law.

This action was submitted to the Court on stipulated facts pursuant to CPLR

3222.

BACKGROUND

By lease dated October 31, 2001, Plaintiff E.F.L. Baking Corp. ("EFL") leased the ground floor and basement storage area of the premises located at 1373 Coney Island Avenue, Brooklyn ("Premises") from Meyer Lowy a/k/a Michael Lowy and Katy Lowy (collectively "Lowy"). Although it is not clear from the papers, at some point, Lowy transferred all or some of their interest in the property to Defendant Lowy Family Irrevocable Trust ("Trust").

Portions of Paragraph 48 of the lease give rise to this action. The relevant portions of that paragraph state:

**"48. RENEWAL, OPTION, PURCHASE OPTION, RIGHT OF FIRST REFUSAL**

Tenant shall have an option to purchase the building housing the Demised Premises free and clear of all liens encumbrances and violations, free of leases extending beyond three years from the date of purchase and free of any option to renew, subject to the provisions of this paragraph. In the event Tenant herein wishes to exercise the option to purchase the premises at or before the expiration of the Lease term or any authorized extension thereof, Tenant shall notify Landlord of its exercise of the option to purchase specifying a proposed purchase price and terms. Landlord shall respond within thirty (30) days thereafter either agreeing to the proposed purchase price and terms or rejecting same. In the event Landlord rejects same, each party shall, within ten (10) days of Landlord's rejection of the proposed purchase price and terms, designate an MAI or SRI qualified appraiser who has been regularly engaged in the practice of appraising commercial real estate in the Flatbush section of Brooklyn for at least three (3) years prior to the expiration of the Lease. Thereafter, the appraisers shall have thirty (30) days to determine the purchase price based upon market value for sales of this type within a reasonable geographic radius and similar business locations. The higher of the two appraisals so obtained is hereinafter referred to as the "Higher Value" and the lower of such appraisal as the "Lower Value." If the Higher Value is not more than 110% of the Lower Value, the purchase price shall be the average of the Higher Value and the Lower Value. If the Higher Value is greater than 110% of the Lower Value, the two (2) appraisers shall appoint a third

appraiser. The third appraiser shall be appointed by the President of the Kings County Chapter of the Appraisal Institute if the two appraisers cannot agree upon the said appointment within ten (10) days after being charged to do so. Upon delivery of the third appraisal (the "Third Value"), the purchase price shall be : (a) the Lower Value if the Third Value is less than the Lower Value; (b) the Higher Value if the Third Value is greater than the Higher Value; (c) the average of the Third Value and the other Value that is closest to the Third Value if the Third Value falls within the Lower Value and the Higher Value; or (4) the Third Value, if the Lower Value and the Higher Value are equally close to the Third Value. Each party shall compensate the appraiser it selects, and if necessary shall share equally in the cost of the third appraiser. In the even the parties cannot agree to other terms same shall be submitted to arbitration in connection with the provisions hereof. If Tenant exercises this option it shall close no less than ten (10) days prior to the expiration of the Lease, except in the event of a defect in the title or due to delays or actions on the part of the parties other than the purchaser, time being of the essence. At Tenant's option, Landlord shall hold a mortgage in respect of some of the purchase price in lieu of cash at the closing, for a period not exceeding ten (10) years, accruing interest at the prime rate of interest charged by Citibank, N.A. or its successor, plus two (2) percent. Said mortgage shall not exceed sixty-five (65) percent of the purchase price of the property to be acquired. At Landlord's sole option, said mortgage shall be a balloon mortgage, i.e. payable at interest only during the term of the mortgage with the principal due in one lump sum upon the completion of the mortgage term, or a self-amortizing mortgage...

Tenant shall also have the right to exercise a right of first refusal with respect to leasing any other space at the premises not currently included in this lease which is in the same building wherein the demised premises are located, to the extent that Landlord is required to offer the same to Tenant at a rent and terms to be set by Landlord. In the event Tenant does not accept said rental and terms, Landlord is free to offer said space for rental to the general public, provided that the rent and terms are equal or greater to that rejected by Tenant. In the event Landlord opts to lower the rent and/or alter the terms of the lease for said space, Landlord shall again offer the same to Tenant herein. Landlord shall notify Tenant within five (5) days of its intention to lease said space, including the rental amount and terms of rental therefor. Tenant shall notify Landlord within three (3) days thereafter of its intention to exercise an option of first refusal to lease said space upon the rental amount and terms specified by Landlord."

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By letter dated April 20, 2004 sent by Jay Bohensky, Esq. on behalf of EFL to Lowy by regular mail and certified mail, return receipt requested, EFL advised Lowy that it was exercising its option to purchase the premises for the sum \$500,000 with Lowy taking back a purchase money mortgage for \$325,000 for a term of 30 years with interest at the rate of prime plus two percent. The closing was to be within 90 days of confirmation of the sales price.

In response to the April 20, 2004 letter, Jonathan A. Stein, Esq., on behalf of the Trust, sent a letter fo Bohensky advising him, "With respect to his desire to purchase the building, upon our review of the contract it is our opinion that we are not obligated to sell the property to you at this time."

When EFL leased the Premises, Jack Jaffa ("Jaffa") leased units 1A and 2A at the Premises. These are residential units. The lease on these units expired by its terms of July 1, 2003. By letter dated July 31, 2003, the lease with Jaffa was renewed for a three year term running from July 1, 2003 through June 30, 2006. Lowy and/or Trust renewed the Jaffa lease without notifying EFL or granting EFL the opportunity to lease the space on the same terms that the renewal was being offered to Jaffa.

EFL commenced this action seeking specific performance of the option and money damages resulting from Defendants renewing the lease for units 1A and 2A without complying with EFL's right of first refusal.

DISCUSSION

A. Specific Performance of the Option

A lease is a contract that is subject to the same rules of construction as is any other agreement. George Backer Mgt., Corp. v. Acme Quilting Co., Inc., 46 N.Y.2d 211 (1978); and 1009 Second Avenue Assoc. v. New York City Off Track Betting Corp., 248 A.D.2d 106 (1<sup>st</sup> Dept. 1998).

The intent of the parties is to be determined from the language of the lease. *Id.* Where the language of a lease is clear and unambiguous, the intent of the parties is to be determined from the language of the lease. Martin v. Glenzan Assoc., Inc., 75 A.D.2d 660 (3<sup>rd</sup> Dept. 1980), See also, P. J. Clarke's v. 919 Third Avenue Assoc., 178 A.D.2d 173 (1<sup>st</sup> Dept. 1991). The words of the lease should be interpreted using their plain meaning. Martin v. Glenzan Associates, Inc., *supra*. The court should refrain from interpreting the language of the lease in such a way as would distort its meaning or render any provisions of the lease meaningless. Poughkeepsie Savings Bank, FSB v. G.M.S.Y. Assoc., 238 A.D.2d 327 (2<sup>nd</sup> Dept. 1997).

An option is an agreement that confers upon the optionee the right to purchase property at a later date upon the payment of consideration. Singh v. Atakhanian, 31 A.D.3d 524 (2<sup>nd</sup> Dept. 2006).

An option must be exercised within the time and in the manner established by the option. The holder of the option must strictly adhere to the terms and conditions of the option. Raanan v. Tom's Triangle, Inc., 303 A.D.2d 668 (2<sup>nd</sup> Dept. 2003); and Mohring

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Enterprises, Inc. v. HSBC Bank USA, 291 A.D.2d 385 (2<sup>nd</sup> Dept. 2002) and D.A.D. Restaurant, Ltd. v. Anthony Operating Corp., 139 A.D.2d 485 (2<sup>nd</sup> Dept. 1988). The holder of the option must procedurally comply with the terms of the option by timely notifying the grantor of the option of its intent to exercise the option and by providing notice its intent in the manner prescribed by the option. *Id.* The holder of the option must also strictly comply with the substantive terms of the option. O'Rourke v. Carlton, 286 A.D.2d 427 (2<sup>nd</sup> Dept. 2001); and Bresnan v. Bresnan, 156 A.D.2d 532 (2<sup>nd</sup> Dept. 1989).

The lease undeniably provides EFL with an option to purchase the Premises. However, EFL did not exercise the option in accordance with its terms.

The option permitted EFL to finance a portion of the purchase price through a purchase money mortgage of ten years. EFT purported exercise provided for a purchase money mortgage of 30 years. Since EFL did not strictly comply with the substantive terms of the option, the Court cannot compel specific performance. See, O'Rourke v. Carlton, *supra*.

B. Damages - Violation of Right of First Refusal

A right of first refusal binds the party who seeks to lease the premises to not lease the premises without giving the other party the opportunity to lease the premises at the same rent and on the same terms. See, LIN Broadcasting Corp. v. Metromedia, Inc., 74 N.Y.2d 54 (1989). The right of first refusal is breached when the grantor fails to extend to the holder the opportunity to exercise the right. Cipriano v. Glen Cove Lodge

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#1458, B.P.O.E., 1 N.Y.3d 53 (2003). EFL's lease contained a right of first refusal.

Lowy breached this provision when it renewed Jaffa's lease without offering EFL the opportunity to lease the Jaffa premises on the same terms as were offered to Jaffa.

EFL can recover money damages for the breach of this lease provision by establishing the damages sustained were within the contemplation of the parties when they executed the lease and the damages flow from the breach. 730 Supermarket Corp. v. Byron Boyce Co., Inc., 172 A.D.2d 511 (2<sup>nd</sup> Dept. 1991).

Nothing in the Stipulated Facts or the materials provided to the Court contain a basis for the calculation of damages sustained as a result of the breach. Therefore, the matter must be set down for a hearing to determine the damages sustained by EFL, if any, resulting from the breach.

Accordingly, it is,

**ORDERED**, that the first cause of action seeking specific performance of EFL's option to purchase the premises is dismissed; and it is further,

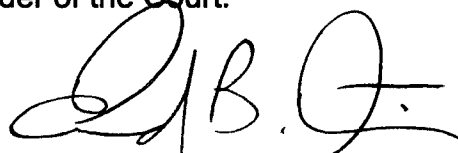
**ORDERED**, that Plaintiff is granted judgment on the issue of liability on the second cause of action and the matter is set down for a hearing before Special Referee Frank Schellace on December 6, 2006 at 9:30 a.m. to determine the amount of damages, if any, sustained by Plaintiff as a result of Defendants' failure to offer Plaintiff the right of first refusal; and it is further,

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**ORDERED**, that the County Clerk, Nassau County is directed to enter judgment in favor of Plaintiff and against Defendant in the amount of damages as found by the Special Referee together with interest from July 1, 2003 and costs and disbursements as taxed by the Clerk.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY  
October 31, 2006



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

**ENTERED**

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**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**