SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK
Present: HON. R A L P H P. F R A N C O, Justice

POA J,. ASSOCIATES

TRIAL/IAS, PART 11
NASSAU COUNTY

Petitioner (s),

INDEX No.: 7018-03
MOTION SEQ.1

-against-

MARJORIE S. GROCHOLA TRUST, ELIZABETH S. MILLER TRUST, ELIZABETH S. MILLER and MARJORIE S. GROCHOLA, as TRUSTEES UNDER A TRUST AGREEMENT DATED OCTOBER 29, 1975 KNOWN AS THE MARJORIE S. GROCHOLA TRUST, and ELIZABETH S. MILLER and MARJORIE S. GROCHOLA, as TRUSTEES UNDER A TRUST AGREEMENT DATED OCTOBER 29, 1975 KNOWN AS THE ELIZABETH S. MILLER TRUST

Respondent (s).

The following papers read on this motion:

Notice of Motion/ Order to Show Cause....._____
Answering Affidavits....._____
Replying Affidavits....._____

Application by plaintiff POA J. Associates, L.P., brought on by order to show cause, for an order pursuant to CPLR 6301 preliminarily enjoining defendants from interfering with plaintiff's exclusive right to use and occupy the premises located at 394-444 Hillside Avenue, East Williston, New York known as the Herricks Shopping Center (the "premises") and from commencing or prosecuting any proceeding to

dispossess, evict, terminate or invalidate the Ground Lease is determined as hereinafter provided.

Plaintiff is the tenant of the premises under a Ground Lease. Defendants are the current landlords of the premises. Specifically, defendant Elizabeth A. Miller and defendant Marjorie S. Grochola are the daughters of William W. Stoothoff and Edna Stouthoff and the trustees of the trusts/defendants.

By way of factual background, the original lease was executed in 1952 by and among William W. Stoothoff and Edna D. Stoothoff as the "landlords" and the Herrick Shopping Center, Inc. as "tenant".

On or about August 24, 1964, the original tenant Herrick Shopping Center, Inc. assigned the Ground Lease to Hillside-Herrick Corp. Thereafter, on or about December 31, 1986, plaintiff purchased the Ground Lease (now known as the Hillside-Herrick Shopping Center) from Hillside-Herrick Corp. for the sum of $2,600,000.00.

The First Lawsuit

Plaintiff contends that on or about December 5, 1996, Hillside Herrick Corp. exercised its option to renew the Ground Lease for an additional period of 15 years, thereby extending the term of the Ground Lease until December 31, 2003. The individual defendants, however, have no recollection of receiving said notice. This issue is the crux of the first action which plaintiff commenced on or about February 19, 2002. In this action, plaintiff seeks*inter alia*, a declaration that plaintiff duly exercised the second renewal option under the Ground Lease, thereby extending the term to December 31, 2018.

After issue was joined, plaintiff moved for partial summary judgment.

Thereafter, defendants served their opposition to the motion for partial summary judgment and simultaneously cross-moved to dismiss the complaint on the grounds of

mootness. Specifically, defendants' assert that their notice to terminate the lease on the basis of Grand Union's bankruptcy renders the dispute over the validity of the renewal option moot.

The Termination Notice

On or about April 22, 2003, defendants served a notice to terminate plaintiff's rights under the Ground Lease by invoking Article 22 of the Original Lease ("TerminationNotice"). The termination notice provides in relevant part that the Ground Lease is being terminated because Grand Union, a former subtenant of the plaintiff's at the premises, had filed a voluntary petition for bankruptcy on October 3, 2000.

Article 22 of the Original Lease provides that:

> If the major Tenant then in possession be adjudicated a bankrupt or in case the entire premises shall be deserted for a period of three (3) months or if such Tenant make an assignment for the benefit of creditors or take advantage of any insolvency act, or default in any of the terms, covenants and conditions at this lease, the Landlords at their option may terminate this lease on fifteen (15) days written notice forwarded to the Tenant by Registered Mail at its address herein above given or at any changed address which may be furnished to the Landlords and the Tenant will quit and surrender the demised premises on the date of such termination the Tenant shall, however, remain liable hereon.

In support of the within application, plaintiff argues, *inter alia*, that: a) the term "major tenant" is not defined in the Ground Lease and any ambiguity, therefore, should be resolved in its favor; b) the reference to "major tenant" refers to the tenant of the whole shopping center (*i.e.*, plaintiff); and c) Grand Union was not the "major tenant" of the premises as contemplated by Article 22 of the Ground Lease nor was it the tenant "then in possession" for purposes of the notice of termination. In sum, plaintiff submits that defendants' service of the termination notice was improper and the Ground Lease is in full force and effect.

In opposition to the application for injunctive relief, defendants assert that Grand Union was definitely the major tenant at the premises. Indeed, the word "major" is defined as "greater than others in importance or rank" (American Heritage College Dictionary (4th Ed. 2002) and Grand Union was clearly the most prominent tenant at the premises having the largest square footage. In other words, it was the anchor tenant in the shopping center.

To obtain a preliminary injunction, a movant must establish a likelihood of success on the merits, irreparable inquiry in the absence of an injunction, and a balancing of equities in the movant's favor. (*Aetna Insurance Co. v Capasso*, 75 NY2d 860 (1990); *Doe v Axelrod*, 73 NY2d 748, 750 (1988)). The propriety of granting or denying a preliminary injunction lies with the sound discretion of the court. (*Merscorp, Inc. v Romaine*, 295 AD2d 431 [2nd Dept 2002]; *Nelson, LP v Jannace*, 248 AD2d 448; [2nd Dept. 1998]).

Further, preliminary injunctive relief is a drastic remedy which will not be granted "unless a clear right thereto is established under the law and the undisputed facts upon the moving papers, and the burden of showing an undisputed rights rests upon the movant." *(William M. Blake Agency, Inc. v Leon* , 283 AD2d 423 [2 nd Dept 2001]

quoting *First Natl. Bank v Highland Hardwoods*, 98 AD2d 924; *see Peterson v Corbin*, 275 AD2d 35, 36; [2nd Dept. 2000]).

It is a fundamental principle of contract interpretation that agreements are construed in accord with parties' intent (*see Slatt v Slatt* , 64 NY2d 966, 967, *rearg denied* 65 NY2d 785 [1985]. In fact, "the best evidence of what parties to a written agreement intend is what they say in their writing" (*Slamow v Del Col*, 79 NY2d 1016, 1018 [1992]). Hence, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms (*see e.g. R/S Assoc. v New York Job Dev. Auth.*, 98 NY2d 29, 32, *rearg denied* 98 NY2d 693 [2002]; *W.W.W. Assoc. V Giancontieri*, 77 NY2d 157, 162 [1990]).

Extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to decide (*see W.W.W. Asoc. v Giancontieri, supra* at 162; *Greenfield v Philles Records, Inc.,* 98 NY2d 562). 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" (*Breed v Insurance Co. of N. Am.* , 46 NY2d 351, 355 [1978], *rearg denied* 46 NY2d 940 [1979]). Hence, if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity (*see e.g. Teichman v Community Hosp. Of W. Suffolk* , 87 NY2d 514, 520 [1996]; *First Natl. Stores v Yellowstone Shopping Ctr.*, 21 NY2d 630, 638, *rearg denied* 22 NY2d 827 [1968]).

The pivotal issue in this case is whether Grand Union is the "major tenant" as contemplated by Article 22. We conclude that the term "major tenant" is ambiguous and is susceptible to differing interpretations. Specifically, both parties have submitted

affidavits from experts supporting their respective opinions. Under the circumstances extant, extrinsic evidence is admissible to determine the intent of the parties *(cf Greenfeld v Philles Records*, 98 NY2d 562, 569).

In view of the foregoing, it is conceivable that plaintiff may suffer irreparable harm if it was evicted from the premises and lost its rights under the Ground Lease. In this regard, the specter of harm here is not so remote or speculative. (*See, Borey v National Union Fire Ins. Co.*, 934 F2d 30 [2d Cir. 1991]).

Further, plaintiff has established that the equities tip in its favor. Between the time of Grand Union's bankruptcy filing and plaintiff's receipt of the termination notice, plaintiff has paid all of the rent due on the premises and defendants have accepted such payments. In addition, plaintiff has timely and duly paid all of its obligations under the Ground Lease, including payment of real estate taxes and base rent in a sum in excess of $6,300,000.00. As long as plaintiff continues to make the aforesaid payments, defendants cannot establish any prejudice to their rights if a stay is granted.

Based upon the foregoing and in order to preserve the *status quo*, it is within this court's discretion to grant the preliminary injunction to the extent that defendants are enjoined from commencing or prosecuting any proceeding to dispossess or evict plaintiff from the premises or to terminate the Ground Lease. Notwithstanding the foregoing, plaintiff may not execute any new leases with prospective tenants at this juncture as defendants have raised an issue regarding plaintiff's "deliberate" failure to rent vacant stores resulting in an erosion of tenants and depreciating the value of the reversion. Or more aptly stated, defendants have alleged that POA J. will not suffer a forfeiture because virtually all of plaintiff's property has been amortized.

Pursuant to CPLR 6312(b), plaintiff is required to post an undertaking which would "reimburse the defendant(s) for damages sustained if it [were] later finally

determined that the preliminary injunction was erroneously granted" (*Schwartz v Gruber*, 261 AD2d 526 *quoting Margolies v Encounter, Inc.*, 42 NY2d 475, 477). The fixing of the amount of an undertaking rests within the sound discretion of the court, and will not be distributed absent an improvident exercise of discretion (*Lelekakis v Kamamis* 303AD2d 380, [2nd Dept 2003]; *Blueberries Gourmet, Inc. v Aris Realty Corp.*, 255 AD2d 348, 350 [2nd Dept. 1998].

In the instant case, this court finds that plaintiff should be required to post an undertaking in the amount of $25,000.00.

A Preliminary Conference (See: 22 NYCRR 202.12) shall be held at the Preliminary Conference Part, located on the lower level of the Supreme Court on **September 24, 2003, at 2:30 P.M.** This directive, with respect to the date of the Conference, is subject to the right of the Clerk to fix an alternate date should scheduling require. **Counsel for the plaintiff shall serve a copy of this Order on all parties. A copy of the Order, with Affidavits of Service, shall be served on the Preliminary Conference Clerk within 10 days of today's date.**

This constitutes the order and judgment of this court.

Dated: September 4, 2003

7018.1

Hon. Ralph P. Franco, J. S. C.

ENTERED

SEP 10 2003

NASSAU COUNTY
COUNTY CLERK'S OFFICE