SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. GEOFFREY J. O'CONNELL

Justice

TRIAL/IAS, PART 10
NASSAU COUNTY

SHOPWELL, INC., APQ SUPERMARKETS INC. and THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,

Plaintiff(s),

-against-

INDEX No. 3466/01
XXX

MOTION DATE: 4/30/02

CENTRE GREAT NECK LLC,

Defendant(s).

MOTION SEQ. No. 1

The following papers read on this motion:
Notice of Motion/Affirmation/Memorandum of Law/Exhibits A-M
Affirmations in Opposition/Exhibits A-J
Affidavit in Support/Plaintiff's Reply Memorandum of Law
Defendant's Memorandum of Law

Plaintiffs SHOPWELL, INC., APW SUPERMARKETS, INC. and THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC. seek an Order pursuant to CPLR § 3212 granting them summary judgment, declaring that plaintiff APW SUPERMARKETS' operation of a Waldbaums on Great Neck Road in Great Neck is not violative of the restrictive covenant in plaintiff SHOPWELL, INC.'s lease with defendant CENTRE GREAT NECK LLC. That motion is Granted.

The plaintiff SHOPWELL, INC., a subsidiary of the plaintiff THE GREAT ATLANTIC & PACIFIC TEA COMPANY ("A&P"), has operated a supermarket now known as the "Food Emporium Store" on Middle Neck Road in Great Neck since 1969. Its current lease with defendant CENTRE GREAT NECK LLC was amended in 1984 and expires on October 31, 2019. In 1986, another one of the plaintiff A&P's subsidiaries, plaintiff APW SUPERMARKETS, purchased a Waldbaums's supermarket which operated on

East Shore Road, less than one mile from the Food Emporium. That Waldbaums's was closed in 2000 and APW SUPERMARKETS purchased an existing lease and fixtures of an Edward's Supermarket near the intersection of Great Neck Road and Middle Neck Road, approximately one mile away from the plaintiff SHOPWELL's Food Emporium store.

On January 9, 2001, the defendant landlord sent the plaintiff A&P a warning that the opening of the Waldbaums's store on Great Neck Road would be violative of SHOPWELL's lease for the Food Emporium store. Specifically, paragraph 47 of the lease provides:

> During the term of this lease Tenant shall not directly or indirectly engage in any similar or competing business within a radius of one mile, except for any stores which may be presently in existence or as a result of acquisition or merger.

In addition to the base rent, a "percentage rent clause" affords the defendant landlord a percentage of sales at SHOPWELL's Food Emporium store above a specified amount. The restrictive covenant is designed to protect the defendant landlord's rights under the "percentage rent clause." The defendant landlord does not want competition close by as that clearly has the potential to diminish SHOPWELL Food Emporium's profits and, concomitantly, the defendant landlord's entitlement to a percentage rent.

On February 22, 2001, the defendant landlord sent a default notice to plaintiff A&P threatening to terminate SHOPWELL's lease for the Food Emporium store on account of the alleged lease violation caused by APW SUPERMARKETS' purchase of the Edwards store and operation of a Waldbaums's store there.

Plaintiffs commenced this action seeking declaratory relief. On March 3, 2001, the new Waldbaums's store opened on Great Neck Road. By Order dated May 17, 2001, this Court granted plaintiffs a Yellowstone injunction. See, *First Nat. Stores v Yellowstone S. Ctr.*, 21 NY2d 630 (1968). The issue to be decided now is whether the operation of the new Waldbaums's store violates paragraph 47 of SHOPWELL's lease.

The rules of construction of agreements in general apply to the interpretation of a lease. *George Backer Mgt v Acme Quilting*, 46 NY2d 211 (1978). The Court accordingly may not resort to extrinsic evidence where the parties' intent is clear from the language used in the lease. *W.W.W. Assocs v Giancontieri*, 77 NY2d 157 (1990). Whether or not a writing is ambiguous is a question of law for the court. *W.W.W. Assocs v Giancontieri*, *supra*, at p. 162. Of course, where there are conflicting credible interpretations of a lease and an ambiguity exists, triable issues of fact exist. *Blue Jeans U.S.A. Inc. v Basciano*, 286 AD2d 274 (1st Dept.2001). Nevertheless, on a motion for summary judgment, an ambiguity is to be resolved by the court

unless parol evidence is relied upon to shed light on the meaning of the words used. *Loctite VSI, Inc. v Chemfab New York, Inc.*, 268 AD2d 869 (3rd Dept. 2000); *Carvel Corp. v Rait*, 117 AD2d 485 (2nd Dept. 1986); *Mallad v County Fed. Sav. & Loan*, 32 NY2d 285 (1973). When interpreting a lease, the court must adopt an interpretation giving meaning to every provision. *Two Guys v S.F.R Realty Assoc.*, 63 NY2d 396, 403. The Court aims for a construction which gives fair meaning to the entire agreement taking care not to leave any provision without force or effect. *John E. Andrus Memorial Home v DeBuono*, 260 AD2d 635 lv. to app den. 93 NY2d 813 (1999).

Restrictive covenants must be strictly construed in the least restrictive manner against the party seeking their enforcement. *Blueberries Gourmet v Aris Realty Corp.*, ___ AD2d ___, 737 N.Y.S.2d 644 (2nd Dept. 2002); *Thrun v Stromberg*, 136 AD2d 543 (2nd Dept. 1988). Restrictive covenants in leases should be enforced according to the intent of the parties, which will be primarily determined from the lease. Ambiguities will generally be construed against the drafter, where there are two equally plausible interpretations of a restrictive covenant, the less restrictive interpretation will be adopted. 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. *Bear Mountain Books, Inc. v Woodbury Common Partners,* 232 AD2d 595, 596 (2nd Dept. 1996); app. den. 90 NY2d 808 (1997).

Here, the restrictive covenant does not state how the one mile limitation is to be measured, however, it does prohibit the Tenant from operating similar or competing businesses "within a radius of one mile."

Where parties to a contract have used a word that has a well defined and understood meaning it is presumed that they employed the word in the sense implied by that definition. The word 'radius' means a straight line drawn from the center to the circumference of a circle. "When applied to the limitation of space it means 'a circular limit defined by a radius of specified length.' Webster. Therefore when the parties to this contract used the words 'within a radius of' * * * as a limitation of the territory within which the defendant was prohibited from engaging in the specified business, they set apart a territory within a circle having all points equally distant in all directions from the premises . . . ." *Skolnick v Orth*, 84 Misc. 71 (1914); see also, *Silverman v Brody*, 65 NYS2d 803 (1946).

To interpret the restrictive covenant as urged by the plaintiffs, using driving distance, would render the word "radius" without its obvious meaning. Straight line measurement of one mile is clearly what was intended by the parties to the lease.

The lease also fails to specify from precisely what points the measurement is to be made. The defendant landlord's measurement between corner intersections supports its allegation that the plaintiffs are in violation of the lease, albeit by a mere 140 feet. However, the parties do not dispute that measuring from door to door, store to store, or even curb-cut to curb-cut, the distance between the two businesses exceeds the one mile limitation. The restrictive covenant refers to the Tenant and competing businesses. The restrictive covenant must be interpreted against the landlord urging its enforcement and there is no justification for extending the definition to that urged by the defendant landlord. The operation of the Waldbaums's does not violate SHOPWELL's lease.

In any event, assuming, *arguendo*, a violation of the lease's one mile restrictive covenant, the operation of the Waldbaums's supermarket by the plaintiff A&P through plaintiff APW SUPERMARKETS is not violative of the lease's restrictive covenant. The restrictive covenant applies to the Tenant and the Tenant is SHOPWELL, INC. "Tenant" is defined by the lease to include "heirs, distributees, executors, administrators, successors [and] assigns." Neither Waldbaum's, APW SUPERMARKETS or the A&P are an heir, distributee, executor, administrator, successor or assignee of the Tenant SHOPWELL. Plaintiffs SHOPWELL, A&P and APW SUPERMARKETS are all separate and distinct corporate entities existing under the laws of New York State. There is no evidence of fraud or other circumstances warranting the exercise of this Court's power to pierce the corporate veil or to treat parent and subsidiaries as a single corporate entity for present purposes. *Minister, Elders & Deacons of Reformed Protestant Dutch Church v 198 Broadway*, 59 NY2d 170 (1983).

In any event, the lease excludes existing supermarkets and Waldbaum's has been established where an existing supermarket, Edwards, was.

The plaintiffs' motion for summary judgment is granted and it is hereby declared that plaintiff APW SUPERMARKETS' operation of a Waldbaum's supermarket on Great Neck Road in Great Neck is not violative of SHOPWELL's lease with the defendant landlord CENTRE GREAT NECK LLC.

This Order shall constitute the judgment of this Court.

This proceeding is concluded.

Dated: May 28, 2002

ENTERED

MAY 30 2002

COUNTY OFFICE

HON. GEOFFREY J. O'CONNELL, J.S.C.