SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: TOLUB PART 15

Justice

Comprehensive Hlth Development School

-v-

Seward Park Housing Corp

INDEX NO. 601264/08

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

[redacted]

IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
OCT 29 2008
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 10/28/08

WALTER B. TOLUB J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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COMPREHENSIVE KIDS DEVELOPMENT SCHOOL,

Plaintiff,

-against-

SEWARD PARK HOUSING CORP.,

Defendant.

----------x

Index No. 601864/08
Mtn Seq.001

WALTER B. TOLUB, J.:

This is a motion by the Plaintiff for an order enjoining the Defendant from leasing two commercial units during the pendency of this action (CPLR 6311). Defendant cross-moves to dismiss the action.

Facts

The facts in this matter are largely undisputed. Plaintiff Comprehensive Kids Development School ("CKD") operates a day care center. As of December 1, 2006, Plaintiff entered into a 10 year written lease ("First Lease") and Rider with Defendant Seward Park Housing Corp. ("Seward Park") for commercial space located at 383 Grand Street New York, NY ("Leased Premises").

Thereafter, Plaintiff informed Defendant that it wanted to lease additional space to be used in conjunction with the Leased Premises. The parties entered into negotiations for additional space from Defendant known as stores numbered "3" and "5" located at 200 East Broadway ("Additional Space"). During the April 24,

2007 Seward Park Board of Directors (the "Board") meeting, the Board approved in principal the leasing of the Additional Space to Plaintiff. The Board referred the matter to its attorney to negotiate the terms and conditions and to prepare a written lease.

The attorneys for the parties agreed that the Additional Space was to be leased on substantially the same terms as the First Lease. The parties discussed that the Additional Space would be leased for $24.00 per square foot for the first year with increases of 5% per year. These terms were agreed upon through various emails between the parties' attorneys. The first substantive email was sent by Defendant's attorney on August 3, 2007. The email stated, in relevant part, that the Defendant contemplated amending the current lease to add "#3 and #5 East Broadway," "Starting at $24 sq ft for approximately 2300 sq ft" and a "%5[sic] annual increase for new space, no taxes." On November 30, 2007, Plaintiff's attorney replied that the information stated in Defendant's email was correct and to please send him a copy of the draft of the amendment.

Additionally, in November 2007, Plaintiff prepared an application for a building permit with the Department of Buildings ("DOB") to make alterations to the Additional Space. Such an application required the signature of a Coop officer. The Defendant's managing agent presented the application to the

dependent on whether the proponent of either of the respective motions has made a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact" (Wolff v New York City Trans. Auth., 21 AD3d 956 [2d Dept 2005], quoting Winegrad v New York University Med. Ctr., 64 NY2d 851, 853 [1985] [internal quotes omitted]. A party is entitled to summary judgment if the sum total of the undisputed facts establish the elements of a claim or a defense as a matter of law. This means that none of the material elements of the claim or defense are in dispute (Barr, Atlman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing 2006] §37:180).

Statute of Frauds

General Obligations Law 5-703(2) provides that "[a] contract for the leasing for a longer period than one year, or for the sale, of any real property, or an interest therein, is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged, or by his lawful agent thereunto authorized by writing" (GBL 5-703[2]). Here, the parties agree that there is no written lease that was entered into between the parties for the Additional Space. Therefore the court must look to the written exchanges between the parties to see if a binding agreement has been made out.

Absent a formal contract, writings made in contemplation of a lease will only be binding when all of the essential terms and conditions of an agreement have been set forth in writing (Brause v. Goldman, 10 AD2d 328 [1st Dept 1960]). The writing does not have to be formal but must exhibit a full manifestation of mutual assent, and a complete meeting of the minds (Id.). Essential terms are those terms customarily encountered in transactions of this nature (Spier v. Southgate Owners Corp., 39 AD3d 277 [1st Dept 2007]).

Here, the correspondence between the parties attorneys do not exhibit a manifestation of mutual assent to all essential terms and conditions of the Proposed Lease, and as such there is no meeting of the minds as required for a binding agreement. Specifically, the parties did not agree to a specific square footage for the Additional Space, there was no commencement date for the Proposed Lease, there was no indication as to whether Plaintiff would have renewal options, there is no indication of a methodology to compute the rent increases during the lease term and there was no transfer of a security deposit let alone a set amount for such a deposit. It follows that the emails and correspondence between the parties do not contain all of the essential terms and conditions of an agreement to lease property.

Plaintiff argues that the Statute of Frauds does not apply because the execution of the DOB application form is

(1)"unequivocally referable" to the Proposed Lease; (2) Defendant's signing off on the application constitutes part-performance; and (3) that Plaintiff relied on the DOB application to its detriment.

Plaintiff asserts that the a party loses its protection under the Statue of Frauds when it induces or permits another party to do acts pursuant to and in reliance upon an agreement (GBL 5-703[4]; Wolly v. Stewart, 222 NY 347 [1918]).

In the instant matter, Plaintiff never took possession of the Additional Space, did not actually perform any alterations and did not pay a security deposit. Here, Plaintiff received Defendant's endorsement of renovation plans. Plaintiff's arguments for reliance and part performance fall short because the parties merely took preliminary steps in their negotiations. Preliminary steps alone do not constitute part-performance or adequate grounds for reliance (Rosenwald v. Goldfein, 3 AD2d 206 [1st Dept 1957]).

It follows that Plaintiff's motion must be and is denied and that Defendant's cross-motion, now viewed as a motion for summary judgment, is granted as a matter of law.

Accordingly, it is

ORDERED that Plaintiff's motion is denied; and it is further

ORDERED that Defendant's cross-motion, now a motion for summary judgment, dismissing the Complaint is granted and the Complaint is dismissed; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 10/23/08

HON. WALTER B. TOLUB, J.S.C.