

SHORT FORM ORDER

**E-FILE**

INDEX NO. 70613/2014

SUPREME COURT - STATE OF NEW YORK  
COMMERCIAL DIVISION IAS PART 48 - SUFFOLK COUNTY

PRESENT:

**HON. JERRY GARGUILO**  
**SUPREME COURT JUSTICE**

---

NORTH BAY MANAGEMENT INC.,

Plaintiff,

-against-

SYLPORT 47, LLC, DCSH INC., D/B/A  
BARBECUE BILL'S AND DOUGLAS CRESS,Defendants.  

---

ORIG. RETURN DATE: 3/4/15 FINAL SUBMISSION DATE: 3/25/14 MOTION SEQ#001 MOTION: MOTNDECD
---

**PLAINTIFF'S ATTORNEY:**SACCO & FILLAS, LLP  
31-19 NEWTOWN AVENUE  
ASTORIA, NY 11102  
718-746-3440**DEFENDANT'S ATTORNEY:***Attorneys for Sylport47*  
ESSEKS, HEFTER & ANGEL ESQS.  
RIVERHEAD, NY 11901  
631-369-1700**DEFENDANT'S ATTORNEY:***Attorneys for DCSH INC.*  
SOLOMON & HERRERA, PLLC  
2950 HEMPSTEAD TURNPIKE  
LEVITTOWN, NY 11756  
516-579-6200

The Court has considered the following in connection with its determination:

1. Defendant, Sylport 47, LLC's Order To Show Cause with supporting papers, inclusive of Exhibits A through G;
2. Plaintiff's Affirmation in Opposition with Affidavit of William Winkle; and
3. Defendant, Sylport 47, LLC's Reply Affidavit.

Defendant, Sylport 47, LLC, seeks an order granting it summary judgment pursuant to CPLR 3212 and dismissing the claims against it; an order directing the Suffolk County Clerk to cancel the Notice of Pendency filed against the subject property; and an order awarding it reasonable attorneys' fees.

Sylport 47, LLC ("Defendant") as Landlord of premises located at 47 Front Street, Greenport, New York, and described as Suffolk County Tax Map Number 1001-005 .00-0 4.00-019.00 (premises), entered into an agreement with North Bay Management, Inc. ("Plaintiff") to lease the subject premises for a ten-year term commencing on March 1, 2005, and ending on February 28, 2015. The lease granted Plaintiff-Tenant a "Right of First Refusal" to purchase the premises. Paragraph 68 of the lease states in pertinent part:

If, during the term of this Lease Agreement, the Landlord receives a bona fide offer from other than a member and/or Trust of the Landlord's family, which Landlord deems acceptable for the **sale of the leased premises**, the Landlord shall deliver, written notice to the Tenant setting forth the terms and purchase price. The Tenant may elect to purchase the leased premises at the price and on the same terms and conditions as described in said notice by giving prompt written notice to the Landlord, pursuant to paragraph "56" hereunder, within fifteen (15) days of the receipt of the notice sent by the Landlord to the Tenant.

Paragraph 68 (B) of the Rider to the Lease Agreement states:

Anything herein contained to the contrary notwithstanding, the rights set forth above, shall be void, however, if the Tenant is not in possession of the premises under this Lease Agreement at the time of the giving of such notice by the Landlord to the Tenant, or if the Tenant is in default under any of the terms of this Lease Agreement at such time and has not cured such default pursuant to this Lease Agreement.

According to Defendant, Sylport 47, LLC, Plaintiff cannot exercise its Right of First Refusal, or seek enforcement of Defendant's obligation to give Plaintiff notice of an offer Defendant deems acceptable, because the condition precedent to triggering the Right of Refusal has not occurred. Specifically, Defendant explains that no bona fide offer has been accepted by Defendant. Also, Defendant asserts that because Plaintiff was not in possession of the premises as it is sub-let same to Defendant DCSH, who operates a restaurant on the premises and because Plaintiff is in default on its rental payments, the Right of First Refusal is waived. Additionally, Defendant contends that in the absence of an acceptable offer, the obligation to deliver, written notice of an offer to purchase by a third party is negated.

According to Isaac Israel, a New York licensed associate real estate broker with Richmond Realty Corp., in October 2014 an exclusive listing agreement was entered into between Defendant and Richmond Realty Corp., through Mr. Israel as its representative to sell the premises. Mr. Israel avers that no acceptable offers to purchase the property was ever made to Defendant, and no memorandum of sale and contract to sell the premises were ever prepared.

Stanley Hagler, co-owner of Defendant, LLC, avers that no acceptable purchase offer has been received regarding the premises. Mr. Hagler also avers that Plaintiff is not in possession of the premises and is in default under the terms of the Lease Agreement for non-payment of rent in the arrears sum of One Hundred Ninety Seven Thousand Three Hundred Fifty Eight Dollars (\$197,358.00).

In opposition, Plaintiff, North Bay, asserts that upon information and belief, Defendant failed to provide Plaintiff with a notice of Right of First Refusal and as such, breached the Lease Agreement. Plaintiff claims that Defendant's application should be denied as premature, as no discovery has transpired. Plaintiff claims that Defendant made clear that it is unwilling to sell the premises to Plaintiff. Plaintiff does not refute that it's in default of its rental payments, it only disputes the sum of arrears due. On March 18, in an attempt to settle the dispute, the Court held a conference with counsel, and with Mr. Hagler in attendance. Mr. Hagler offered to sell the premises to Plaintiff at a price of \$1.5 million. Plaintiff was permitted two days to accept or reject the offer. No acceptance was received. Thereafter, Defendant entered into a lease agreement with a new tenant. As noted, the Lease Agreement between Plaintiff and Defendant expired on February 28, 2015.

A party moving for summary judgment has the burden of making a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence demonstrating the absence of any material fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY 2d 85 [1985]; *Zuckerman v City of New York*, 49 NY 2d 557 [1980]). Once a prima facie showing has been made by the movant, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial (*see, Zayas v Half Hollow Hills Cent. School Dist.*, 226 AD 2d 713 [2d Dep't 1996]). The key for the court on a motion for summary judgment is issue finding, not issue determination, and the court should not be in the business of determining issues of credibility on such a motion (*S. J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY 2d 338, 341 [1974]; *Cerniglia v Loza Rest. Corp.*, 98 AD 3d 933, 935 [2d Dep't 2012]).

It is a fundamental principle of contract law that agreements must be construed in

accordance with the intent of the parties, the best evidence of which is that which is expressed in their written agreement (*Schron v Troutman Sanders LLP*, 20 NY 3d 430[2013]; *Goldman v White Plains Center For Nursing Care, LLC*, 11 NY 3d 173 [2008]). When the terms of a contract are both clear and unambiguous, the intent of the parties must be found within the four corners of the contract (*Goldman v White Plains Center for Nursing Care LLC, supra*; see, *Greenfield v Philles Records, Inc.*, 98 NY 2d 562 [2002]).

A court may look to the purpose of the parties in making the contract, (*Greenfield v Philles Records Inc., supra*). However, a court may not by construction add or excise terms nor may it distort the meaning of the terms used and thereby make a new contract for the parties under the guise of interpreting the writing (*Bailey v Fish & Neave*, 8 NY 3d 523 [2007]; *Reiss v Financial Performance Corp.*, 97 NY 2d 195 [2001]; *Bazin v Walsam 240 Owners, LLC*, 72 AD 3d 190 [1st Dep't 2010]).

A Right of First Refusal does not give its holder the power to compel an unwilling owner to sell, rather it requires the owner, when it decides to sell, to offer the property first to the party holding the pre-emptive right so that it may be bought at the same terms as the third-party offer (see *LIN Broadcasting Corp. v. Metromedia, Inc.*, 74 NY2d 54; *New York Tile Wholesale Corp. v. Thomas Fatato Realty Corp.*, 13 AD3d 425). The Right of First Refusal is violated when the owner sells the property "without first offering the optionee the right to match the purchase offer" (*Rome Sav. Bank v. Husted and Son*, 171 AD2d 1048). For there to be a condition precedent to the Right of First Refusal, it must clearly appear from the lease that the parties intended the provision to operate as a condition precedent, and if there is any ambiguity the law does not favor a construction which creates a condition precedent (see *Kass v. Kass*, 235 AD2d 150; *Lui v. Park Ridge at Teryville Ass'n*, 196 AD2d 579, 582; 22 NY Jur 2d, Contracts Section 24). There is no ambiguity in the instant lease. The Right of First Refusal was and is a condition precedent. Plaintiff's alleged defaults need not be addressed as it remains uncontested that Defendant never received an acceptable offer.

Plaintiff's allegations of Defendant's intent to avoid a sale of the premises to Plaintiff are founded in suspicion and surmise. As such, same are insufficient to raise a triable issue of fact. The Affidavit of Mr. Winkle, based "upon information and belief," is without any probative value in the context of a summary judgment motion. See, *Noel v. L&M Holding Corp.*, 35 A.D.3d 681 (2nd Dept. 2006); *Anderson v. Livonia, Avon & Lakeville R.R. Corp.*, 300 A.D.2d 1134, 1135 4th Dept. 2002). A reading of the four corners of the contract, indicates a clear Right of First Refusal upon the trigger occurring, a bona fide offer made and deemed acceptable by the seller. Defendant has offered sufficient evidence demonstrating that no bona fide offer to purchase the premises was made.

Accordingly, the motion for summary judgment by Defendant, Sylport 47, LLC, is **GRANTED**, and the Complaint as against it is **DISMISSED**; and it is further

**ORDERED**, that the County Clerk of Suffolk County is directed, upon payment of proper fees, if any, to cancel and discharge a certain Notice of Pendency filed in the action on December 15, 2014, against property known as 47 Front St., Greenport, New York, Tax Map Number 1001-005.00-04.00-019.000, and said Clerk is hereby directed to enter upon the margin of the record of same a Notice of Cancellation referring to this Order; and it is further

**ORDERED**, that Defendant's application for an award of counsel fees is **DENIED**.

The foregoing constitutes the decision and **ORDER** of this Court.

**Dated: March 27, 2015**

  
**HON. JERRY GARGUILO, JSC**