Is a "Lease" a Lease, or Something Else?

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One would typically assume that an agreement labeled as a "lease," and designating the parties as "landlord" and "tenant," was in fact a lease and not some other type of agreement. Such an assumption may not be wise. As the Appellate Division, First Department recently instructed in *Women's Interart Center v. New York City Economic Development Corp.*,[1] a "lease" may or may not be a lease, depending on the agreement's terms.

In *Women's Interart*, the court was faced with the question of whether a document purporting to be a "net lease" was in fact a lease—thereby providing the "tenant" with standing under Article 7 of the Real Property Actions and Proceedings Law (RPAPL) to evict a subtenant in the subject buildings—or was a management agreement, which accorded no such rights. In reversing the Supreme Court, the Appellate Division, after examining the pertinent terms of the agreement, held that the agreement was in fact a lease.

The pertinent facts were as follows: Women's Interart Center Inc. (WIC) was a not-for-profit cultural organization which, since 1971, was involved in theatrical productions and the support of visual artists, writers and small theatrical companies. In 1971, WIC began to lease from the City of New York certain space located at 549 W. 52nd St. as a theater and art gallery. In 1996, however, the building had deteriorated, and WIC could no longer present public programming there. Thus, on Jan. 25, 1996, WIC leased from the city, on a month-to-month basis, part of the second floor in the building located at 500 W. 52nd St. to be used as a theater and WIC's sole venue for public programming.[2]

On or about April 15, 1999, the city entered into an agreement with the Clinton Housing Development Fund Corp. (CHDFC), which they called a "net lease," covering multiple buildings, including 549 W. 52nd St. (which WIC leased from the city) and 500 W. 52nd St. (in which WIC leased part of the second floor from the city). The term of the net lease was "month to month" and the rent to be paid to the city for the entire term was $1.00 and "such other amounts as shall be due and payable to [the City] hereunder." The commencement date of the net lease for 500 W. 52nd St. and 549 W. 52nd St. was May 1, 2006 and April 1, 2007, respectively.[3]

Notably, the net lease specifically provided that "[t]he sole and exclusive relationship of [the City] and [CHDFC] shall be that of landlord and tenant" and that "[CHDFC] is not and shall not be deemed an agent of [the City] by virtue of this net lease." The net lease further stated that "CHDFC shall operate and manage the premises."[4]

On March 31, 2006, the city sent WIC a letter regarding 500 W. 52nd St. advising that "effective May 1, 2006, [CHDFC] will assume management of the property that you currently lease from [the City]" and instructed WIC to send rent payments to CHDFC. On March 29, 2007, the city sent WIC a similar letter for the period April 1, 2007 onward.[5]

In August and September 2007, CHDFC notified WIC that it was terminating WIC's tenancies at 500 W. 52nd St. and 549 W. 52nd St. and, when WIC failed to vacate, commenced summary holdover proceedings in Civil Court, New York County, with respect to both buildings. WIC then commenced an action in Supreme Court, New York County, seeking a declaratory judgment and a permanent injunction. The Supreme Court thereafter removed the landlord-tenant petitions from the Civil Court and consolidated them with the Supreme Court action.[6]

The Supreme Court

Following discovery, CHDFC moved for summary judgment dismissing WIC's complaint and remanding the landlord-tenant proceedings to Civil Court. Among other things, CHDFC maintained that by virtue of the net lease from the city to CHDFC, it was entitled to terminate WIC's tenancies and evict WIC from its premises in both buildings.

Supreme Court, New York County (Justice Karen Smith) denied CHDFC's motion, and instead granted WIC partial summary judgment declaring that WIC was entitled to a declaratory judgment that CHDFC lacked authority to terminate WIC's tenancies, because the net lease was a management agreement, not a lease. Specifically, the Supreme Court found that, because the agreement was a management agreement, CHDFC did not have standing under RPAPL Section 721 to maintain an eviction proceeding against WIC.[7]

In support of its holding, the Supreme Court relied on several provisions of the agreement which the court found "revealed" that the agreement was intended to be a management agreement. Among other things, the Supreme Court noted that Section 3.6 of the net lease limited CHDFC's ability to make any improvements or alterations to any of the properties "without the prior written consent" of the city, and Section 3.9 required CHDFC to notify the city "immediately upon the occurrence of any incident in the Premises that may result in a claim against Lessee and/or Lessor." The Supreme Court found that these provisions, in addition to other provisions in the net lease which retained to the city "the right to access the premises, books, records, accounts and statements," are "typical of a property management agreement, not a net lease."[8]

The Supreme Court also ob-served that the letters CHDFC sent notifying WIC to send rent payments to CHDFC stated that CHDFC was assuming "management" of the properties and "no mention [was] made of any changes pertaining to

payment or failure to make payment of rent, nor [did] the letter provide any indicia of a change in the [City's] proprietary interest in the subject premises." Thus, the Supreme Court concluded that the subject agreement was a management agreement and not a lease because it did not transfer "absolute control and possession" of the subject properties to CHDFC.[9]

The Appellate Division

The Appellate Division, First Department, in a unanimous opinion signed by Justice Dianne T. Renwick, reversed and held that the agreement was, in fact, a lease between the city and CHDFC. The Appellate Division thus vacated the grant of partial summary judgment to WIC, and instead declared that CHDFC had standing pursuant to RPAPL 721(10) to commence eviction proceedings against WIC.

At the outset, the Appellate Division agreed with the Supreme Court that "the mere fact that the agreement is referred to as a 'net lease' does not transform it into one" and that "[t]o determine whether the underlying agreement is a net lease or a contract for management services, its contents must be examined in order to see what interest the parties intended to pass." Citing to well-established Court of Appeals precedent, including the 1960 decision in *Feder v. Caliguira*,[10] the Appellate Division stated that:

the critical question in determining the existence of a lease establishing a landlord-tenant relationship is whether exclusive control of the premises has passed to the tenant.[11]

The Appellate Division further stated that if "control has passed" a landlord-tenant relationship has been established, even if the use is (as was found by the Supreme Court) "restricted by limitations or reservations."[12]

The Appellate Division found that the terms of the agreement demonstrated that CHDFC had "exclusive control and possession of the leased premises." Specifically, the court found:

Like a typical commercial net lease, the agreement imposes the responsibility for all expenses arising from the property, including the costs of repairs of every nature, utilities and insurance, upon the tenant. CHDFC also bears the cost of expenses of leasing a portion of the premises to residential and commercial tenants. In addition, CHDFC agreed to indemnify and defend the City for any damages or injury that occurred to any property or person because of its use of the leased premises. Finally, CHDFC was granted sole authority to maintain legal actions against month-to-month tenants, like WIC, for the collection of rents and evictions.[13]

The Appellate Division further observed that although the city did reserve itself certain rights regarding the premises, these reservations were not, as Supreme Court found, revealing of a management agreement, but were instead "completely in line with the type of reservations that are permitted in a lease."[14] Such reservations which the Appellate Division found to be consistent with a lease were the city's right to inspect the premises, the right to examine and audit the books and records, and the right to cure a default in CHDFC's obligations that "creates a risk of immediate harm to persons or property."[15]

The Appellate Division also noted that a "management agreement" is defined under General Obligations Law Section 5 -903 "merely as a service contract" and that such agreements do not "delegate such an extensive dominion and control over the premises, as delegated [by the "net lease] here."[16]

The Appellate Division therefore concluded that:

according to the type of functions CHDFC is required to provide under the agreement and the limited qualitative restrictions placed on its authority, we find that the total nature of the agreement reflects that the parties entered into a lease agreement rather than a contract for management services.

Conclusion

Thus, just because an agreement is labeled as a "lease," and states that the parties' relationship is one of "landlord and tenant," one cannot necessarily assume that the agreement is truly is lease, which would provide the parties with various statutory and other legal and equitable rights given to landlords and tenants. Rather, as the Appellate Division made clear, one must examine the specific rights and obligations that the agreement confers to determine the "critical" question of whether "exclusive control and possession" has been passed to the named "tenant." As such, the question of whether a "lease" is a truly a lease depends on a careful examination of the agreement's terms.

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Endnotes:

1. 97 A.D.3d 17, 944 N.Y.S.2d 137 (1st Dept. 2012).

2. 97 A.D.3d at 18.

3. 2010 WL 3384705 at p. 2 (Sup. Ct. N.Y. Co. 2010).

4. 97 A.D.3d at 20.

5. Id.

6. Id.

7. 2010 WL 3384705 at p. 4.

8. Id. at p. 3

9. Id. at p. 4.

10. 8 N.Y.2d 400, 208 N.Y.S.2d 970 (1960).

11. 97 A.D.3d at 21.

12. Id.

13. Id at 21-22 (internal citations omitted).

14. Id. at 22.

15. Id.

16. Id.
