

<b>R.A. Real Estate, Inc. v Tower W. Assoc., LP</b>
2007 NY Slip Op 32398(U)
July 31, 2007
Supreme Court, New York County
Docket Number: 0601520/2005
Judge: Walter Tolub
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

**WALTER B. TOLUB**

PRESENT: \_\_\_\_\_  
*Justice*

PART 15

Index Number : 601520/2005

INDEX NO. \_\_\_\_\_

R.A. REAL ESTATE

MOTION DATE \_\_\_\_\_

vs

TOWER WEST ASSOCIATES

MOTION SEQ. NO. \_\_\_\_\_

Sequence Number : 001

MOTION CAL. NO. \_\_\_\_\_

OTHER RELIEFS \_\_\_\_\_

this motion to/for \_\_\_\_\_

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

**IS DECIDED**

**IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION**

**FILED**  
PAGES NUMBERED \_\_\_\_\_  
AUG 01 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: 7/31/07

**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: PART 15

-----X  
R.A. REAL ESTATE, INC.,

Plaintiff,

-against-

Index No. 601520/05

TOWER WEST ASSOCIATES, LP,

Defendant.

-----X  
TOLUB, J.:

This is an action for breach of a lease between plaintiff R.A. Real Estate, Inc., as tenant, and defendant Tower West Associates, LP, as landlord, relating to the commercial premises described as the street level store and basement located at 741-753 Columbus Avenue, New York, New York (the Premises). Plaintiff alleges that defendant unreasonably withheld its consent for sublease of the Premises, in breach of the lease, and seeks lost rent and revenue from defendant.

Plaintiff now moves, pursuant to CPLR 602, for an order removing the summary proceeding entitled Tower West Assocs., L.P. v R. A. Real Estate, Inc., et al., L&T Index No. 601520/2005 (the Summary Proceeding) commenced in the Civil Court of the City of New York, County of New York, and consolidating it with the instant action.

Defendant cross-moves for summary judgment dismissing plaintiff's first, second and third causes of action, and for the costs and expenses, including attorneys' fees, incurred by

**FILED**  
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NEW YORK  
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defendant in this action.

For the reasons set forth below, plaintiff's motion is denied, and defendant's cross motion for summary judgment is granted.

#### **FACTS**

Defendant is the owner and landlord of the Premises. Plaintiff is the tenant of the Premises, pursuant to a rental agreement made September 3, 1992 between plaintiff and defendant (the Lease). The Lease commenced on December 1, 1992, and ends on August 31, 2013.

The Premises is subdivided into three spaces. Plaintiff subleased a portion of the Premises to Rite Aid of New York, Inc. (Rite Aid), pursuant to a sublease agreement and a Tri-Party agreement (the Tri-Party Agreement) dated March 31, 1995 (collectively, the Rite Aid Sublease).

Plaintiff also subleased a portion of the Premises to Wing Lee and Sau Chun Lam Lee d/b/a U-Like Chinese Restaurant (U-Like) pursuant to a sublease dated February 28, 1994 (the U-Like Sublease). Although the U-Like Sublease expired on February 28, 2004, U-Like continues in possession of the U-Like Premises as a month-to-month subtenant.

The third portion of the premises is currently vacant (the Vacant Premises), and is the subject of this action.

Pursuant to paragraph 41 of the Lease, plaintiff agreed

[4]  
to pay to defendant minimum annual rent for the Premises in the amount of \$380,000.00, payable in monthly installments of \$31,666.67 (the Minimum Rent), for the period commencing on October 1, 2005 and ending on September 30, 2008.

Pursuant to the Rite Aid Sublease, the parties agreed that, without waiving or releasing plaintiff from its obligations to defendant, Rite Aid would be permitted to pay directly to defendant the minimum annual rent for the Rite Aid Premises in the amount of \$301,777.00, payable in equal monthly installments of \$25,648.08 (the Rite Aid Rent), for the same period. The parties also agreed that Rite Aid would pay the amount of real estate tax escalation charges for the Rite Aid Premises (the Real Estate Taxes) directly to defendant. Under the terms of the Rite Aid Sublease, plaintiff is liable to defendant for payment of the Rite Aid Rent in the event that Rite Aid fails to make timely payments.

In addition, U-Like is permitted to pay rent directly to defendant in the amount of \$4,666.00 per month (the U-Like Rent). The Rite Aid Rent and the U-Like Rent are credited against the Minimum Rent. However, under the terms of the Lease and the Rite Aid Sublease, plaintiff is responsible for payment of an amount equal to the difference between the Minimum Rent and the amount of rent paid by Rite Aid and U-Like (the Base Rent Differential).

Pursuant to the Lease, plaintiff may only sublease the Premises with defendant's consent, provided that it complies with the requirements set forth in the Lease. Specifically, Article 57 (A) (ii) of the Lease provides that:

Notwithstanding anything to the contrary contained in Article 11 hereof, provided that Tenant is not in default under any of the terms, covenants and conditions of this Lease:

\* \* \*

(ii) Tenant may sublet the Demised Premises, either with respect to the Demised Premises as a whole or with respect to all and not part of the Supermarket Premises or with respect to all or part of the Other Premises, subject, however, to clause (d) of this subsection (ii), only upon compliance with and subject to all of the following terms and conditions:

(a) Tenant shall notify Landlord, in writing, of any such proposed sublet not less than thirty (30) days prior to the date on which Tenant proposes to sublet the Demised Premises, which notice shall expressly state whether the sublease is intended to be applicable to the Supermarket Premises, the Other Premises or the Demised Premises;

(b) Tenant shall obtain prior written consent of Landlord to such proposed sublease, which consent shall not be unreasonably withheld or unduly delayed by Landlord;

\* \* \*

(h) The sublessee shall use and occupy the Demised Premises, the Supermarket Premises or the Other Premises, as the case may be, only for the purposes set forth in this Lease, and for no other purpose.

Lease, Article 57 (A) (ii) (Aff. of Stephen Salup, Exh B). Pursuant to Article 40 (D) of the Lease, the Other Premises is comprised of the U-Like Premises and the Vacant Premises.

Article 58 (A) of the Lease describes the permitted uses of the Premises:

[Defendant] shall use and occupy the Other Premises [as defined in the Lease] as and for an expansion of the Supermarket Premises, and for the same use provided for therein, or for a florist store, a hardware store or a dry cleaning establishment for drop-off of clothes only (to be dry cleaned off-premises) or such other lawful purpose as [defendant] shall approve, such approval not be unreasonably withheld or unduly delayed.

Id., Article 58 (A).

Pursuant to Article 66 of the Lease, plaintiff waived any claim to money damages as a result of defendant's allegedly unreasonable refusal to consent to a subtenant:

[Plaintiff] hereby waives any claim against [defendant] for money damages which [plaintiff] may have based upon any assertion that [defendant] has unreasonably withheld or delayed any consent. [Plaintiff] agrees that its sole remedy shall be an action or proceeding to enforce such provisions or for specific performance or injunctive relief to compel such consent to be given. The successful party in any such action or proceeding shall be reimbursed by the other party for the reasonable costs and expenses, including attorney's fees, incurred in connection therewith.

Id., Article 66.

Plaintiff alleges that, in December 2003, it presented

Dunkin Donuts as a viable subtenant for the Vacant Premises and for the U-Like Premises (Amended Complaint, ¶ 24). Plaintiff further alleges that, on March 1, 2005, it tendered a proposed sublease between plaintiff and Langsam and Bruerer Custom Upholsterers Corp. (Langsam) (id., ¶ 12). Plaintiff contends that defendant unreasonably withheld its consent to both proposed subleases (id., ¶¶ 15, 25).

Defendant alleges that plaintiff failed to abide by the terms of the Lease with respect to proposing a subtenant for the Vacant Premises. According to defendant, on March 1, 2005, Edward L. Shendell, Director for Red Apple Real Estate, Inc., delivered to Jane Krieger, President of Grenadier Realty Corp., the managing agent for the Premises, a proposed sublease between plaintiff and Langsam for the Vacant Space for a term commencing on March 1, 2005 and ending on August 13, 2013 (the Langsam Sublease), in contravention of Article 57 (A) (ii) (a) of the Lease, which requires that plaintiff notify defendant of a proposed sublease 30 days prior to the date plaintiff proposes to sublet.

Defendant further alleges that the use clause in the Langsam Sublease indicates that the Vacant Premises would be used as an upholstering shop, which violates applicable zoning for the Premises. Consequently, by letter dated March 4, 2005, Stephen Salup, defendant's vice president, informed plaintiff that

"[i]nitially, and in response to your request for consent to the sublease, please be advised that the use clause of the [Sublease] is not consistent with the use clause of the [Lease] and, therefore, the assignment and subletting is not in compliance with the assignment and subletting provisions of the lease" (Salup Aff., Exh H). Accordingly, defendant refused to consent to the proposed Langsam Sublease.

On April 28, 2005, plaintiff commenced this action by filing and serving a summons and complaint seeking a declaratory judgment, under the first cause of action, that plaintiff is entitled to sublease the Vacant Premises to Langsam. In addition, in the second cause of action, plaintiff seeks a money judgment in the amount of \$55,029.00, for alleged lost revenue arising out of defendant's failure to consent to the proposed Dunkin Donuts sublease. In the third cause of action, plaintiff seeks a money judgment in the amount of \$350,245.00, for alleged lost revenue arising out of defendant's failure to consent to the Langsam Sublease.

On March 2, 2006, plaintiff amended the complaint, and defendant served an amended answer. In its answer, defendant counterclaimed for the legal fees and disbursements incurred by defendant to review the Sublease and documentation relating to Langsam pursuant to Article 57 (G) of the Lease, and for costs and disbursements, including attorney's fees, incurred by

defendant in this action pursuant to Article 66 of the Lease.

Discovery in this action has been completed. On October 13, 2006, plaintiff filed a Note of Issue and Certificate of Readiness.

With respect to the Summary Proceeding, notwithstanding its obligation to pay the Real Estate Taxes and the Base Rent Differential, plaintiff has failed to pay to defendant Real Estate Taxes in the amount of \$22,508.52 and the Base Rent Differential in the amount of \$30,929.03 (collectively, the Rent Arrears) for the period commencing January 18, 2001 and ending September 30, 2006.

Consequently, on November 7, 2006, defendant served upon plaintiff a rent demand dated November 3, 2006 (the Rent Demand) demanding that, on or before November 3, 2006, plaintiff pay to defendant the Rent Arrears. Plaintiff refused to pay the Rent Arrears. Upon the expiration of the Rent Demand, defendant commenced a non-payment proceeding by filing and serving plaintiff, U-Like and Rite-Aid with a Notice of Petition and Petition, seeking possession of the Premises, as well as a money judgment for the Rent Arrears.

On December 18, 2006, issue was joined in the Summary Proceeding, via service of an answer by plaintiff. Rite Aid answered on January 16, 2007. U-Like failed to appear in the proceeding, and defaulted.

On January 10, 2007, in Civil Court, plaintiff served a motion to dismiss the Summary Proceeding, on the ground that this action constitutes a prior action pending for the same relief as the Summary Proceeding, or to stay the Summary Proceeding pending a determination by this court of the Consolidation Motion. That motion is currently sub judice.

### DISCUSSION

#### Plaintiff's Motion for Consolidation

Plaintiff's motion for removal of the Summary Proceeding, and consolidation with this action, is denied.

CPLR 602 (a) provides that "[w]hen actions involving a common question of law or fact are pending before a court, the court, upon motion, may order ... the actions consolidated." Furthermore, CPLR 602 (b) authorizes the Supreme Court to remove an action or proceeding pending in another court for consolidation with the Supreme Court action. Plaintiff asserts that consolidation of this action, which has not yet reached the trial calendar, with the Summary Proceeding, which is an expedited special proceeding, would result in the efficient and expeditious resolution of these disputes. However, there are no common questions of law or fact between the two cases which plaintiff seeks to consolidate.

The Summary Proceeding is a simple nonpayment proceeding brought as a result of plaintiff's failure to pay rent

and additional rent for the Premises. The only issue before the court in the Summary Proceeding is defendant's right to recover the Rent Arrears. In contrast, the instant action presents different and much more complex issues than those raised in the Summary Proceeding, i.e., whether defendant unreasonably withheld consent to the request to sublease a portion of the Premises to Langsam. The only overlapping fact is the parties' landlord-tenant relationship pursuant to the terms of the Lease. Therefore, there are no common issues of law or fact that merit consolidation.

Moreover, the evidence necessary to prove the causes of action in this case is completely different than the evidence required to prove the cause of action for rent in the Summary Proceeding. In the Summary Proceeding, defendant is only required to prove on its prima facie case that it is the owner and landlord of the Premises, that plaintiff is the tenant, and that monies are owed under the Lease. In contrast, this action will involve complex issues, the possible testimony of experts, and an in-depth examination of the codes, rules and regulations applicable to the permissible use of the Vacant Premises, and the viability of Langsam as a proposed subtenant. Thus, defendant's claim in the Summary Proceeding bears no relation to the complex issues raised in plaintiff's complaint in the instant action. Indeed, defendant has not put its claim for rent before this

court via a counterclaim.

Furthermore, it is well-settled that "the Civil Court is the preferred forum for landlord-tenant disputes, and a summary proceeding should be removed only where the Civil Court is unable to afford the parties complete relief" (Spain v 325 West 83<sup>rd</sup> Owners Corp., 302 AD2d 587, 587 [2d Dept 2003]; Scheff v 230 East 73<sup>rd</sup> Owners Corp., 203 AD2d 151, 152 [1<sup>st</sup> Dept 1994] [there is "a strong rule against staying a summary proceeding, or removing it, such as for purposes of a consolidation or joint trial with some proceeding in the supreme court'" ] [citation omitted]; see also Post v 120 East End Ave. Corp., 62 NY2d 19, 28 [1984] ["Civil Court has jurisdiction of landlord tenant disputes," and where "it can decide the dispute ... it is desirable that it do so"]; Waterside Plaza, LLC v Yasinskaya, 306 AD2d 138, 139 [1<sup>st</sup> Dept 2003] ["Civil Court is the preferred forum for resolution of disputes over the possession of leasehold premises"]).

Plaintiff has not presented any compelling reason to ignore this black letter rule. Although plaintiff contends that its claims in this action could result in a set-off of the Rent Arrears, nothing contained in the Lease conditions the payment of rent or the Real Estate Taxes upon plaintiff's ability to sublet the Premises. Indeed, Article 41 of the Lease provides that the rent due for the Premises accrues on a monthly basis, and is owed

by plaintiff regardless of whether it has subleased the Premises:

All Rent shall be paid to [defendant] on the due date, without notice or demand, and without abatement, offset, reduction, deduction, defense or counterclaim, except as may be expressly set forth herein.

Thus, Article 41 (c) expressly precludes any set-off, and plaintiff's claim for damages is separate and distinct from defendant's claim for rent in the Summary Proceeding.

Accordingly, plaintiff's motion for consolidation is denied.

**Defendant's Cross Motion for Summary Judgment**

Defendant cross-moves for summary judgment dismissing plaintiff's first, second and third causes of action, and for an order granting it the costs and expenses, including attorneys' fees, that it has incurred in this action. Defendant's cross motion for summary judgment is granted, because there are no issues of fact that merit a trial in this action.

Plaintiff's first cause of action seeks a declaration that "the Plaintiff can sublease the Premises to [Langsam], and the Defendant shall consent to such sublease" (Amended Complaint ¶ 21). Article 57 (A) (ii) (h) of the Lease requires that the sublessee use and occupy the Vacant Premises only for the purposes set forth in the Lease, and for no other purpose. Article 58, the use clause of the Lease, limits the use of the Vacant Premises to "a florist store, a hardware store or a dry

cleaning establishment for drop-off of clothes only (to be dry cleaned off-premises) or such other lawful purpose as Landlord shall approve" (emphasis added).

Defendant's refusal to consent to the proposed Langsam Sublease was not unreasonable as a matter of law. Defendant presents evidence that plaintiff's proposed use for the Vacant Premises does not comply with applicable zoning laws. Under these circumstances, defendant's refusal to consent to an illegal use for the Premises was appropriate.

The use clause of the proposed Langsam Sublease provides that Langsam shall use and occupy the Vacant Premises as a "First-class custom upholstery shop." Pursuant to Zoning Resolution 32-17 (B) (see Salup Aff., Exh F), an upholstering shop dealing directly with consumers is a Use Group 8, and is permitted only in Zones C2, C3, C6 and C8. The Vacant Premises, however, is located in a C1-9 zone (see id., Exh G). Moreover, pursuant to Zoning Resolution 32-00, only Use Groups 1 through 6 are permitted in C1 districts (see id., Exh F). Accordingly, the proposed use for the Vacant Premises violates the Zoning Regulations and Articles 57 (A) (ii) (h) and 58 (A) (ii) of the Lease.

When a commercial lease provides that the landlord will not unreasonably withhold consent to a sublease, the landlord may refuse to consent to a proposed subtenant based on the legality

of the proposed use (see Mann Theatres Corp. of Cal. v Mid-Island Shopping Plaza Co., 94 AD2d 466 [2d Dept 1983], affd 62 NY2d 930 [1984]). Thus, it was not unreasonable as a matter of law for defendant to withhold consent to the proposed Langsam Sublease based on the legality of use (see Commack Roller Rink, Inc. v Commack Arena Marketing, Inc., 154 AD2d 327 [2d Dept 1989] [landlord did not improperly withhold consent to sublease where lease provided that facility must be used as roller rink, and evidence indicated that prospective sublessee's roller skating rink operation in another city was actually a "bar/dance-concert hall"]). Accordingly, the first cause of action must be dismissed.

Plaintiff's second and third causes of action, seeking money damages based on defendant's alleged unreasonable withholding of consent to the Langsam Sublease and the Dunkin Donuts sublease, must also be dismissed.

Where, as here, a contract is unambiguous and the intention of the parties can be determined from the four corners of the agreement, its interpretation presents a question of law for the court without resort to extrinsic evidence (Namad v Salomon Inc., 74 NY2d 751 [1989]; Mallad Constr. Corp. v County Fed. Sav. & Loan Assn., 32 NY2d 285 [1973]; Hay Group Inv. Holding B.V. v Saatchi & Saatchi Co. PLC, 223 AD2d 458 [1<sup>st</sup> Dept 1996]).

Pursuant to the clear and unambiguous provisions of Article 66 of the Lease, plaintiff waived "any claim against [defendant] for money damages which [plaintiff] may have based upon any assertion that [defendant] has unreasonably withheld or delayed any consent" in violation of any provision of the Lease. Plaintiff also agreed "that its sole remedy shall be an action or proceeding to enforce such provisions or for specific performance or injunctive relief to compel such consent to be given."

Thus, in light of the unambiguous Lease between plaintiff and defendant pursuant to which plaintiff agreed that it would not be entitled to money damages for defendant's refusal to grant consent, the second and third causes of action for money damages must be dismissed.

In response to the summary judgment motion, plaintiff fails to raise any triable issues of fact. Plaintiff's entire argument is based on two collateral agreements to the Lease - an alleged "Revenue Sharing Agreement" between plaintiff and defendant, and the Tri-Party Agreement, entered into by plaintiff, defendant and Rite Aid. Plaintiff's essential argument is that these two agreements demonstrate that the central purpose of the Lease was to permit plaintiff to sublease the Premises for the benefit of both plaintiff and defendant, i.e, in order to generate revenues to be split with defendant. Consequently, plaintiff argues, having agreed to share the

profits, defendant was charged with a special duty to not frustrate the purpose of the Lease by interfering with plaintiff's ability to sublease the Premises.

Plaintiff cannot, however, rely on either of these two agreements. First, plaintiff fails to demonstrate that defendant ever executed the Revenue Sharing Agreement. Indeed, the copy of the Revenue Sharing Agreement that plaintiff attaches to its papers does not bear the signature of any party, including that of plaintiff (see Aff. of Louis Palermo, Exh. B). The statute of frauds precludes this court from enforcing an unsigned document against defendant (see General Obligations Law § 5-701). Consequently, the Revenue Sharing Agreement has no force and effect, and defendant cannot be bound by its terms.

Moreover, contrary to plaintiff's assertions, the Tri-Party Agreement does not support its contention that it entered into the Lease in order to sublet the Premises for the benefit of both the landlord and the tenant. Contemporaneously with the execution of the Rite Aid Sublease, plaintiff, defendant and Rite Aid executed the Tri-Party Agreement. The Tri-Party Agreement relates only to the Rite Aid Premises, as described on Exhibit "A" annexed thereto, and not to the Vacant Premises, which is the subject of this action (see id., Exh C). Thus, the Tri-Party Agreement clearly cannot, as plaintiff argues, modify the Lease as related to any proposed subleases for the Vacant Premises.

Moreover, plaintiff's argument is completely contradicted by Article 63 of the Lease, which contains an integration clause providing that it constitutes the entire agreement between the parties:

This Lease ... sets forth all the covenants, promises, assurances, agreements, representations, conditions, warranties, statements and understandings (collectively, the "Representations") between Landlord and Tenant concerning the Demised Premises, and there are no Representations, either oral or written, between Landlord and Tenant other than those contained in the Lease.

Lease, Section 63 (A).

According to the parol evidence rule, the terms of an integrated written contract cannot be altered, varied or added to by evidence of a prior or contemporaneous written or oral agreement (Braten v Bankers Trust Co., 60 NY2d 155 [1983]; Rong Rong Jiang v Tan, 11 AD3d 373 [1<sup>st</sup> Dept 2004]). Indeed, an integration clause makes the written document itself the "exclusive evidence of the parties' intent," and renders extrinsic agreements unenforceable as a matter of law (Unisys Corp. v Hercules Inc., 224 AD2d 365, 368 [1<sup>st</sup> Dept 1996], appeal withdrawn 89 NY2d 1031 [1997]). Accordingly, in view of the integration clause contained in Lease, plaintiff is precluded from claiming that the Revenue Sharing Agreement and the Tri-Party Agreement modified the clear and unambiguous terms of the Lease (see Jarecki v Shung Moo Louie, 95 NY2d 665 [2001] [citing

integration clause to prevent extrinsic evidence from altering contract terms]; Longo v Butler Equities II, L.P., 278 AD2d 97 [1<sup>st</sup> Dept 2000] [rejecting plaintiff's claim that he had received prior representations that contradicted the express written terms of the limited partnership agreement]).

Defendant's motion for summary judgment on its first and second counterclaims for costs and disbursements, including reasonable attorney's fees incurred by defendant to defend this action, is also granted.

Article 57 (G) of the Lease provides that plaintiff "shall reimburse [defendant] on demand for any reasonable costs (including, without limitation, all reasonable legal fees and disbursements, as well as the costs of making investigations as to the acceptability of the proposed assignee or subtenant) which may be incurred by [defendant] in connection with a request by [plaintiff] that [defendant] consent to any proposed assignment or sublease." By letter dated June 21, 2005, defendant, by Grenadier Realty Corp., its managing agent, demanded payment from plaintiff of the costs incurred in connection with plaintiff's request that defendant consent to the Langsam Sublease. To date, plaintiff has refused to pay those costs.

In addition, Article 66 of the Lease provides that "the successful party in an action for specific performance or injunctive relief shall be reimbursed by the other party for the

reasonable costs and expenses, including attorney's fees, incurred in connection therewith."

The "successful party" in an action or proceeding is the party that wins on the central issues litigated in the case (see Peachy v Rosenzweig, 215 AD2d 301 [1<sup>st</sup> Dept 1995]; see e.g. Excelsior 57<sup>th</sup> Corp. v Winters, 227 AD2d 146 [1<sup>st</sup> Dept 1996] [landlord was "prevailing party" and was thus entitled to attorneys' fees pursuant to the lease]; Guazzoni v McNamara, 188 Misc 2d 598 [App Term, 1<sup>st</sup> Dept 2001] [landlord substantially prevailed on central issues litigated, and was entitled to an award of attorneys' fees]).

Plaintiff commenced this action based on defendant's allegedly unreasonable withholding of consent to the Langsam Sublease. Thus, the central issue raised by plaintiff was whether defendant unreasonably withheld consent to the Sublease. Because this court has granted defendant's cross motion for summary judgment and determined that defendant's refusal to consent to the proposed Langsam Sublease was not unreasonable as a matter of law, defendant is clearly the "successful party" in this action. As such, defendant is entitled to be reimbursed by plaintiff for the legal fees, costs and expenses incurred as a result of this action. However, summary judgment is granted as to liability only, and the issue of the amount of costs to which defendant is entitled will be referred to a Special Referee to

hear and report.

The court has considered the remaining claims, and finds them to be without merit.

Accordingly, it is

ORDERED that plaintiff's motion for consolidation is denied; and it is further

ORDERED that defendant's cross motion for summary judgment on the complaint is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that defendant's cross motion for summary judgment on its first and second counterclaims for its costs and expenses, including attorneys' fees, incurred in this action is granted as to liability only; and it is further

ORDERED that the issue of the amount of costs and expenses, including attorneys' fees, incurred by defendant in this action is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that this motion is held in abeyance pending

receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for the party seeking the reference or, absent such party, counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet<sup>1</sup>, upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date.

Dated: 7/31/07

ENTER:

**FILED**  
AUG 01 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

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

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<sup>1</sup> Copies are available in Room 119 at 60 Centre Street, and on the Court's website.