

To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

FILED AND ENTERED  
ON June 12, 2009  
WESTCHESTER  
COUNTY CLERK

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER  
COMMERCIAL DIVISION**

**Present: HON. ALAN D. SCHEINKMAN,  
Justice.**

-----X  
MONTEFIORE MEDICAL CENTER,

Plaintiff,

Index No. 05535/08

-against-

Motion Seq. # 001  
Motion Date: June 12, 2009

CREST PLAZA LLC,

Defendant.

**DECISION, ORDER  
AND JUDGMENT**

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Scheinkman, J:

In this dispute between tenant and landlord over parking spaces, the landlord, Defendant Crest Plaza LLC (“Defendant,” “Landlord,” or “Crest Plaza”) had originally moved, pursuant to CPLR 3211(a)(1), (7), to dismiss the Complaint of the tenant, Plaintiff Montefiore Medical Center (“Plaintiff,” “Tenant,” or “Montefiore”). The motion was originally fully submitted on December 19, 2008. Upon review of the papers, the Court, in a Decision and Order, entered February 5, 2009, determined that, even if the Landlord was entirely correct in its contentions, dismissal would not be an appropriate remedy as the Tenant’s First Cause of Action seeks a declaratory judgment and, hence, the Court is obligated to determine the rights of the parties, even if those rights are found to be other than what Tenant claims them to be. The Court determined that the motion to dismiss should be treated as a motion for summary judgment and afforded the parties the opportunity to submit supplemental affidavits and memoranda of law. Landlord has submitted a supplemental affirmation and affidavit; Tenant has submitted a supplemental affidavit and a memorandum of law; Landlord has submitted a reply affirmation and affidavit. Additionally, as will be detailed further herein, upon review of the supplementary assertions of the parties, the Court determined to afford Plaintiff the opportunity to cure an evidentiary defect in its submission and to afford the parties the opportunity to submit any further arguments with respect to the legal effect to be accorded the evidence requested by the Court. Those submissions have also been received and considered.

**RELEVANT BACKGROUND**

Plaintiff’s complaint contains four causes of action. The First Cause of Action seeks a declaratory judgment determining that: (a) Landlord has a duty to provide Tenant with parking spaces pursuant to the lease agreement; and (b) Tenant’s use of the parking spaces is exclusive of any right that has been enjoyed by third parties, *i.e.*, other tenants and their

employees, guests and patrons. The Second Cause of Action is for an injunction; the Third Cause of Action is for breach of lease, arising from a failure to provide the use of the parking spaces; and the Fourth Cause of Action is for breach of the covenant of quiet use and enjoyment.

A. *The Lease*

Crest Plaza and Montefiore entered into a written Lease, made as of April 2004, under which Montefiore rented from Crest Plaza the street level portion of premises located at 19 Parsons Place, also known as 434-440 White Plains Road, in Eastchester, New York (Affirmation of John M. Dillon, Esq., dated November 17, 2008 [“Dillon First Aff.”], Ex. B, the “Lease”).<sup>1</sup> The premises was apparently formerly occupied by a automobile business (“Ultimate Auto”) and was to be used by Montefiore as a “first class medical facility” and as general and administrative offices (Lease at Rider p. 4)<sup>2</sup>. To accomplish this, significant renovations were required, with the Tenant obligated to perform a “high quality, upscale installation” of, among other things, a new HVAC system, new electrical services, flooring, alarm systems and storefronts and windows (*id.* at Rider pp. 11-12). The Landlord was required to make any necessary repairs and replacements to the exterior walls, the outside sidewalks, the demising walls, concrete walls and ceilings, the roof, and to the portions of sewage, plumbing, electric and mechanical systems outside the demised premises (*id.* at Rider pp. 13-14).

The Lease is for a term of 10 years, though the Tenant has both an option to terminate the Lease and an option to extend it. The Tenant may terminate the Lease beginning after November 30, 2008, though termination requires nine months advance notice and is conditioned upon Tenant’s payment of \$149,250 to Landlord (representing the value of a rent concession and the amount paid by the Landlord in brokerage commission) (Lease at Rider at p. 3). On the other hand, the Lease gives the Tenant the option to extend the Lease for successive five-year periods, with the Tenant to give the Landlord 6 months advance notice of its election to exercise each extension (*id.* at Rider at pp. 3-4).

The Rider to the Lease, in a section dealing with the Use of the premises, contains a paragraph dealing with the Tenant’s right to parking:

Tenant shall have the right, at no charge, to the use of parking spaces in the Parking Area together with rights of access, maneuvering and other rights in the Parking Area. Tenant shall be

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<sup>1</sup>While the Lease is supplied through an affirmation of counsel, the Lease so furnished is represented by counsel to be the Lease annexed to the Complaint (see Dillon First Aff. at 2 n1). In any event, an identical document is supplied by defense counsel (see Affirmation of Jacqueline C. Gerrald, Esq., dated December 12, 2008 [“Gerrald First Aff.”] at ¶ 5 and Ex. C ).

<sup>2</sup>The Verified Complaint asserts that the premises are used as an ambulatory care facility providing primary and specialty care services, including pediatrics, as well as diagnostic services and treatment (Dillon First Aff., Ex. A [“Complaint”] at ¶ 7).

permitted to extend the rights granted to it in the Parking Area to its physicians and employees, any approved assignee, subtenant or other transferee and its invitees. The actual number of parking spaces which shall be made available to Tenant and their location may vary as a result of compliance with applicable legal requirements and engineering or parking industry standards (Lease, Rider § 58[5] at p. 21).

The term “Parking Area” is defined as the “parking lot owned by Landlord on the corner of Parsons Place and White Plains Road” (Lease, Rider, § 56[4] at p.18). The Lease also gives the Tenant the right to “install and maintain sign(s)” in the Parking Area, provided that the signs comply with all applicable legal requirements and the Tenant pays all permit fees and other expenses associated with installing and maintaining the signs. The signs were regarded as sufficiently important as to warrant a provision authorizing the Tenant to cancel the Lease on written notice to Landlord if the Town of Eastchester or other governmental authority having jurisdiction does not issue a permit or other approval to the Tenant for signs either in the demised premises or in the Parking Area (*id*).

The Lease made it the Tenant’s responsibility to seek all governmental approvals for the work contemplated by the parties, including approvals of any Planning or Zoning Boards. However, the Landlord was to cooperate with Tenant and sign all documents and other materials required to enable Tenant to obtain a building permit and appropriate “sign-offs” (Lease, Rider § 48[1][2][a] at p. 12).

*B. The Present Parking Dispute*

Montefiore’s Verified Complaint (verified by counsel pursuant to CPLR 3020[d]) asserts that Montefiore has an exclusive right to parking spaces. Plaintiff alleges that the Zoning Ordinance of the Town of Eastchester requires a minimum number of parking spaces be allocated to Plaintiff’s medical and services staff as well as to patients (Dillon First Aff., Ex. A, “Complaint”, ¶18). The parking spaces claimed by Montefiore are located in a parking lot directly across Crest Avenue from the demised premises (Complaint, ¶¶2, 12). While a reading of the Complaint alone leaves it unclear whether the parking lot referred to in the Verified Complaint (defined as a lot directly across Crest Avenue) is the same as the parking lot referred to in the Lease (defined as a parking lot owned by Landlord on the corner of Parsons Place and White Plains Road), Defendant’s Verified Answer does not deny the allegation in the Verified Complaint as to the location of the Parking Area (Gerrald First Aff., Ex. B). Thus, it is agreed that the Parking Area referred into the Lease is the parking lot directly across Crest Avenue from the demised premises.

For the proposition that the Tenant is entitled to exclusive use of the parking spaces, Tenant relies on both the language in the Lease and upon an affidavit submitted by Landlord to the Zoning Board of Appeals of the Town of Eastchester, sworn to January 3, 2005 (the “Curreri Zoning Board Aff.”), which was annexed to the Complaint. John J. Curreri is the sole member of Crest Plaza and submitted the affidavit to the Zoning Board in support of Montefiore’s application for “a variance for off site parking” (Curreri Zoning Board Aff., Ex. C to Dillon First Aff., at ¶1). In the portion of the affidavit quoted in the Complaint (Complaint at ¶ 11), Curreri told the Zoning Board:

At the November 9, 2004 Town of Eastchester Zoning Board of Appeals meeting, an issue was raised regarding contractual parking rights to which the current tenants may be entitled. Alfred A. Delicata, Esq., appearing on my behalf, made representations to the Board, that none of the current tenants have parking rights in the Crest Avenue lot in connection with their leases. That statement was based upon my review of the leases currently in effect for the subject premises and in contemplation of that issue being raised by the Board (Curreri Zoning Board Aff. at ¶ 2).

In a portion of the affidavit not quoted in the Complaint, Curreri continued:

However, since the Board desires a more formal statement of the current parking availability for Montefiore Medical Center, please allow this affidavit to confirm that none of the current tenants at the above referenced property have any contractual rights to utilize the parking facility in question. Once again, this statement is made based upon my review of the leases maintained in my office of which I have undertaken to review a second time and my personal knowledge of the leases and riders as I was personally involved in the negotiations of same (Curreri Zoning Board Aff. at ¶ 3).

According to Plaintiff, third parties, consisting of other tenants in the shopping center and their employees and patrons, have used Plaintiff's parking spaces, with the consent of Crest Plaza (Complaint at ¶¶ 12-14). Tenant asserts that this misuse has been open and notorious, that Landlord has refused to take an action to prevent it, and has frustrated Tenant's efforts to control the situation, as by painting over stripes that Plaintiff had installed (Complaint at ¶¶ 15-20). Tenant asserts that its physicians, employees, patients and other invitees have had to look for parking elsewhere, including the use of metered parking (*id.* at ¶ 23). This, according to Plaintiff, is a problem because physicians, rather than administering to patients, are outside looking for parking and patients are delayed in reaching their physicians because of the need to search for parking (*id.* at ¶¶ 24, 25). The Landlord's Verified Answer essentially denies the material allegations of the Complaint. The gist of the Landlord's position is that Tenant is not entitled, as a matter of law, to any exclusive parking and, therefore, Tenant's problems are not the Landlord's responsibility.

### **THE PARTIES' RESPECTIVE POSITIONS**

#### ***A. The Landlord's Principal Contentions on the Dismissal Motion***

In support of its original motion to dismiss, the Landlord argues that Paragraph 58(5) of the Lease gave the Tenant the right to use parking spaces in the parking area, but did not convey an exclusive right of use (Dillon First Aff. at ¶¶ 11-12). The Landlord contends that the unambiguous and clear terms of the Lease must govern and that Curreri's affidavit to the Zoning Board – in stating that no current tenants have parking rights – is silent as to Plaintiff's rights and does not reflect any statement by Landlord that Plaintiff's rights are exclusive (*id.* at ¶¶ 17, 19) The Landlord thus argues that the Verified Complaint should be dismissed for not stating a cause of action or as barred by documentary evidence as the Lease does not provide

for exclusive parking (*id.* at ¶ 2).<sup>3</sup>

*B. The Tenant's Principal Contentions on the Dismissal Motion*

In its original opposition to the motion, Plaintiff relies on an affirmation of counsel and a memorandum of law. Counsel alleges that, pursuant to Section 13(D) of the "Zoning Law", Plaintiff is entitled to all 27 parking spaces (Gerrald First Aff. at ¶ 7). However, counsel does not provide a copy of the referenced zoning legislation or provide any other documentation in support of her contention as to her client's entitlement under zoning law. Nor does she explain how she derived the number of 27 spaces, as the number of spaces is not referenced in the Verified Complaint.

Counsel also submits a photograph she took of a sign in the parking lot in question, though she does not identify when she took the photograph (Gerrald Aff. at ¶¶ 10-11, Ex. E). The sign essentially states that the lot is a private parking area for "Fox's and 434 Offices Only" and that offending vehicles will be towed (Gerrald Aff. at ¶ 10, Ex. E).

Plaintiff argues that the documentary evidence (the Lease and the Curreri Zoning Affidavit) constitute documentary evidence in support of its claim to exclusive parking rights or, at least, that evidence does not entirely negate its pleaded claims to exclusive parking (Def. Mem. in Opp. at 6). Plaintiff also asserts that it had properly set forth its claims in its Verified Complaint and, therefore, under the standards applicable to motions to dismiss under CPLR 3211(a), the Verified Complaint should withstand Defendant's motion (*id.* at 7-9).<sup>4</sup>

*C. The Landlord's Reply on the Dismissal Motion*

The Landlord's reply on the dismissal motion takes the form of a brief affirmation of counsel that simply reiterates the Landlord's prior arguments (Affirmation of John M. Dillon, Esq., dated December 18, 2008).

*D. The Landlord's Supplemental Submission*

In response to the Court's invitation to the parties to submit supplemental papers in connection with the summary judgment motion, the Landlord submits a supplemental affirmation from its counsel and a supplemental affidavit from its sole member, Curreri. Counsel's supplemental affirmation is brief and simply refers to, and restates, the arguments previously made (Affirmation of John M. Dillon, Esq., dated February 26, 2009).

Curreri's affidavit states that, at the time the Lease was negotiated, "the parties

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<sup>3</sup> The Landlord did not submit a memorandum of law and counsel improperly cites law in the submitted affirmation, which is really a "briefermentation" (see 22 NYCRR § 202.8[c]; *Matter of Taylor*, 265 App Div 858 [2d Dept 1942]). This places counsel in the unseemly position of attesting to the truth of the legal arguments "under penalties of perjury." This practice is not appropriate and counsel should desist from it in the future.

<sup>4</sup> These legal arguments are now academic in light of the Court's decision to effectively convert the dismissal motion to a motion for summary judgment.

and their counsel knew that my staff and I, as well as other tenants in the premises, used, and would continue to use, the same parking lot” and that nothing changed thereafter during Montefiore’s tenancy (Affidavit of John J. Curreri, sworn to February 26, 2009 [“Curreri Supp. Aff.”] at ¶ 5). Curreri avers that Montefiore, about six months after the Lease was signed and after work was completed on the premises, applied to the Town of Eastchester Zoning Board of Appeals for site and plan approval (*id.* at ¶ 6).<sup>5</sup> He acknowledges submitting the Curreri Zoning Affidavit, but explains that he did so in order to help Plaintiff obtain a final certificate of occupancy and, without the affidavit, Plaintiff would have had to spend more money and time to obtain a variance (Curreri Supp. Aff. at ¶¶ 7-8).

Curreri argues that, in his affidavit to the Zoning Board, he did not concede, confirm, or acknowledge that Montefiore’s access to the parking lot was exclusive (Curreri Supp. Aff. at ¶ 9). He states that Plaintiff always has had the right to use and access the parking lot and Defendant has not interfered with that access (*id.* at ¶ 10). Curreri acknowledges the sign which was photographed by Plaintiff’s counsel, but states that the sign is “old” and was located there prior to Plaintiff’s tenancy (*id.* at ¶ 11). Curreri asserts that Plaintiff never raised any questions or concerns about the sign and that the sign is merely a warning to the public and not to authorized users, such as Plaintiff (*id.*)

#### *E. The Tenant’s Supplemental Submission*

For its supplemental submission, Plaintiff tenders an affidavit from Raymond Miranti, its Director of Real Estate, and a memorandum of law in opposition to the granting of summary judgment.

Miranti asserts that he was advised by Plaintiff’s architect that, under the Town Zoning Code, there was insufficient on-site parking for Plaintiff’s use of the premises as medical offices (Affidavit of Raymond Miranti, sworn to April 4, 2009 [“Miranti Aff.”] at ¶ 5). Miranti does not identify whether this advice was given before or after the Lease was signed. Putting aside this bit of hearsay, Miranti goes on to state that, in a totally conclusory fashion, there was adequate parking in Defendant’s lot “located on the northerly side of the Building across Crest Avenue” and, therefore, “Plaintiff and Defendant agreed that Plaintiff would have use of as many spaces in Defendant’s parking lot as may be required to comply with legal

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<sup>5</sup>Curreri, in making this statement, cites Paragraph 10 of the Verified Complaint, thus seemingly agreeing with the allegation of that Paragraph, notwithstanding that the Landlord’s Verified Answer denies such allegation (Gerrald First Aff., Ex. D. at ¶ 1). Perhaps more importantly, while Paragraph 10 alleges that Plaintiff applied for site and plan approval, Plaintiff does not mention the timing and it strikes the Court as backwards for an application for site and plan approval to be made *after* the work was completed. Moreover, Curreri impliedly acknowledges that Montefiore’s application included a request for a zoning variance (see Curreri Supp. Aff. at ¶ 8) – such a request is typically made before, not after, construction, especially if a building permit is needed in order to lawfully commence construction. Indeed, the municipal materials recently submitted by Plaintiff indicate that Site Plan and Architectural Approval was granted on January 26, 2005, shortly after Plaintiff’s request for variances was granted on January 11, 2005 (see Letter from Jacqueline C. Gerrald, Esq., dated June 9, 2009, and the attachments thereto).

requirements including without limitation, the Town of Eastchester Zoning Code (*id.*). Miranti, however, does not state, by whom and when this alleged agreement was made; in particular, Miranti does not explicitly state whether this alleged agreement was made before or after the Lease was signed. However, he later suggests in his affidavit that this agreement was reached before the Lease was signed, as discussed below (see Miranti Aff. at ¶ 7).<sup>6</sup>

### 1. *The Zoning Board Minutes*

Miranti goes on to state that Plaintiff applied to the Town for an area variance that would permit the use of the across-the-street parking lot in order to obtain the approvals and permits necessary to allow the renovations to proceed and the premises to be occupied (Miranti Aff. at ¶ 7). He claims that both parties understood that all of the spaces in the parking lot would have to be made available to Plaintiff given the total floor area of the building (*id.*) He asserts that the Lease provision regarding parking was drafted to “maintain some flexibility” in the event that the parties’ “interpretation and understanding” of the zoning code turned out to be incorrect (*id.*) This, he states, is reflected in the language appearing in Paragraph 58(5) which provides that the “actual number of parking spaces which shall be made available to Tenant may vary as the result of compliance with applicable legal requirements and engineering or parking industry standards” (see Miranti Aff. at ¶ 7).

Miranti claims that Defendant “represented” to the Zoning Board that no tenant other than Plaintiff “has a right to park in its parking lot,” that Defendant represented that Defendant’s parking lot is “exclusively dedicated” to Plaintiff, and that the Zoning Board ultimately determined that Plaintiff was required to have use of all the parking spaces in Defendant’s parking lot (Miranti Aff. at ¶ 8). In support of the first of these assertions, Miranti relies on the Curreri Zoning Affidavit. In support of the second, he cites what he says is an excerpt from the transcript of a January 11, 2005 hearing before the Zoning Board and annexes what he purports is a copy of a partial transcript of the hearing.

That document records that the Chair recognized a “Mr. Dellacotta”<sup>7</sup> as having attended a prior meeting on behalf of the property owner (Miranti Aff., Ex. D at 83). The Chair states that, based on prior submissions, the Board recognized that there was no parking requirement for the Fox establishment, but noted that a board member, Mary Ann Michels, had questioned whether the owner of the off site parking lot had a contractual agreement to allow parking by others (*id.* at 75-77). The Chair recounted that at the last meeting, the Board had asked for “some information that any other tenants with respect to this property as a whole

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<sup>6</sup>The Court observes that the Lease contains a merger clause, pursuant to which it is stated that the Lease reflects and merges all of the prior understandings and agreements of the parties and that any executory agreement made thereafter is ineffective as to any modification or amendment unless set forth in writing and signed by the party to be charged (Lease, Pre-Printed Form, at § 20).

<sup>7</sup>While the transcript refers to Mr. “Dellacotta,” the Curreri Zoning Affidavit refers the same prior meeting as the Chair mentioned and acknowledged that Alfred A. Delicata, Esq. appeared on his behalf (Curreri Zoning Aff. at ¶ 2). Accordingly, the Court will assume that the reference to “Dellacotta” was the use of a phonetic name by the reporter and that the reference was to Alfred A. Delicata, Esq.

were not already entitled to use this lot, **because this lot, as we discussed very specifically at the last meeting, would be completed dedicated to this application, Montefiore Medical Center, and no other tenant ....**" (*id.* at 80-81) (emphasis added).

In response to this statement, Mr. Delicata stated, in the portion quoted by Miranti:

I'm happy to report that there are no other parties either in possession or out of possession who have any contractual right, any verbal right, there is no lease, whether in writing, orally or any other nature of any type of lease that encumbers any spots in that lot. **The lot in question is exclusively dedicated to the Montefiore application** and there is no other use, there's no other secrete [sic] person who has any type of contractual right to those parking spaces (*id.* at 84 [emphasis added]).

During its deliberations on Montefiore's variance request, the Board discussed the parking issue. In those discussions, the Chair remarked "[a]nd with respect to anybody that's current using this lot, which by the end of this passes this lot will become exclusively dedicated to the Montefiore Medical Center for the length of the lease" (*id.* at 90). According to the Chair, any persons presently using the lot would have access to a nearby municipal lot (*id.* at 90-91, 93).

In bringing the application to a vote, the Chair stated that the "building requires a total of twenty-seven parking spaces including two handicap accessible parking spaces [and] [t]he applicant has submitted a plan which provides all required parking (*id.* at 101). The Chair stated the resolution and its findings as follows:

- "[t]he primary issue before the Board with respect to this application is to allow this applicant to use a parking lot that is directly across the street from it rather than contiguous to its own property. Given that this parking lot has been in existence for many years, allowing this applicant to simply walk across the street to use it will in no way create an undesirable change in the character of the neighborhood ...."
- "[w]ithout the use of this parking lot across the street from this building, there is no other place where this applicant can propose parking which would meet the zoning requirements ...."
- The applicant "only seeks to use a parking lot directly across the street from the application rather than one that is contiguous with it, and, as such, because it is directly across the street, the Zoning Board finds that this requested variance is not in any way substantial ...."

- “the town determined through an independent parking study that sufficient parking does exist in the surrounding municipal lots for this area ....” (*id.* at 101-104).

More importantly, the transcript reflects that the Chair attached a condition to the granting of the variance:

the first condition is that this lot as it currently exists shall be exclusively dedicated to the use by this applicant, Montefiore Medical Center, for the entire duration of the lease and any renewals of the lease, and should for any reason this lot be able to be used by this applicant for any reason, that the applicant would be required to return to this Board for additional approval (*id.* at 106).

After the Chair proposed and then withdrew a second condition (relating to insurance coverage for the parking lot), the Chair returned to the exclusivity condition:

I’ll continue with the first condition and just ask Mr. Reda [the Deputy Town Attorney] that the condition as I laid out with respect to the dedication of the parking lot **for as long as this tenant is using that property and with respect to any future tenant**, it goes without saying but it’s often better to say it, that any future tenant that would occupy this property, **to the extent that this lot has now been dedicated to Montefiore Medical Center, did not continue for the use of the tenant**, if any. Obviously if there was any parking requirement with respect to that future use other than by Montefiore, that tenant would be required to come back to the Zoning Board because there would be a parking deficiency on their parking requirement. So, that’s may be not a terribly coherent way of saying that this lot – but I’m getting a lot of requests from different directions here and I’m trying to formalize them into English – **this lot will be forever dedicated to the use of Montefiore Medical Center**. To the extent that there are future tenants using this space, be it the same use or a different use, and this lot is not dedicated to that use, a future approval of this Board would be required (*id.* at 108-110 [emphasis added]).

Additionally, the Chair stated that if it turned out that the representations made in the affidavits submitted by the Landlord and the representations made by the Landlord’s counsel at the meeting proved to be incorrect, the approval would “fall” (*id.* at 110).

With this, the Board unanimously approved the variance application (*id.* at 112).

## 2. *Other Tenants With Parking Privileges*

Miranti annexes to his affidavit another affidavit from Curreri, this one sworn to

March 2009 (Miranti Aff., Ex. E [“Curreri March 2009 Aff.”]).<sup>8</sup> In it, Curreri states that, from 2004 to present, Landlord has had 11 tenants (excluding Montefiore); 9 are still tenants and, of those 9, 3 have made written leases. One of the leases grants the tenant (LMI Accounting) unassigned parking spaces in the Landlord’s lot “on the Northerly Side of the Premises, “with Curreri stating that the referenced lot is not the one involved in this case (Curreri March 2009 Aff. at ¶¶ 2, 5[a]). Two other tenants have leases that provide that the Landlord is responsible for maintenance of common areas, which is said to include “the parking lot area” (*id.* at ¶ 5[b]).

Miranti states that there is a question as to whether the lot referred to in the LMI Accounting lease is the same lot as involved in this litigation (Miranti Supp. Aff. at ¶ 22). Miranti also refers to the private parking sign photographed by Plaintiff’s counsel (*id.* at ¶¶ 17-18).

In an accompanying memorandum of law, Tenant re-states its prior arguments but adds a new one – Tenant contends that Landlord should be estopped from contesting the exclusive nature of Tenant’s parking rights given the position taken by the Landlord before the Zoning Board (Def. Supp. Mem. in Opp. at 6). Tenant also argues that there are questions of fact, asserting that the Lease is ambiguous, that other tenants may have parking rights, that the sign in the parking lot violates Plaintiff’s rights, and whether there is, in fact, another parking lot (*id.* at 8-10). Plaintiff asserts that it needs discovery on these issues (*id.* at 11).

#### F. *Landlord’s Supplemental Reply*

In response to Tenant’s supplemental opposition, Landlord submits a supplemental reply affirmation from its counsel (Affirmation of John M. Dillon, Esq., dated April 15, 2009 [“Dillon Supp. Reply Aff.”]). As to the Zoning Board minutes, defense counsel asserts that the transcript is inadmissible (and not entitled to consideration on this motion) because Miranti had no personal knowledge of the hearing before the Zoning Board (Dillon Supp. Reply Aff., at p. 2 n. 1). In any event, counsel argues that the Zoning Board was only looking for confirmation that no other tenant had any contractual rights to the parking lot (*id.* at ¶ 8). Counsel also urges that the Board did not dictate or require that the Landlord provide Tenant with exclusive use of the parking lot; it simply conditioned the variance on the representations made that no other tenant had any contractual rights to use of the lot (*id.* at 9). Counsel suggests that the phrase “completely dedicated to the Plaintiff’s application”<sup>9</sup> means only that no other tenant had any enforceable rights (*id.*). Defendant otherwise re-states its prior arguments, *i.e.*, the Lease is not ambiguous, the Lease does not grant exclusive rights of use to the parking lot, and there are no triable issues of fact (Dillon Supp. Reply Aff. at ¶¶ 10-14).

#### G. *The Further Submissions*

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<sup>8</sup>The purpose of this affidavit is unclear. It was not contained in the Landlord’s submissions on this motion and no where in the text of the affidavit does Curreri state the purpose for making the affidavit.

<sup>9</sup>This is apparently a reference to the Chair’s statement that, at the prior meeting, the Board had been discussing whether the subject parking lot “would be completed dedicated to this application, Montefiore Medical Center, and no other tenant ....” (Miranti Aff. Ex. D at 80-81).

Upon review of the parties' supplemental materials, it became apparent to the Court that Defendant's objection to the lack of an evidentiary foundation for consideration of the Zoning Board minutes was well taken. While the Court could have proceeded to decision without consideration of the minutes, it seemed obvious that doing so would have invited further motion practice and delay in the final resolution of the dispute. Moreover, the failure of Plaintiff to submit properly authenticated documents could have resulted in a manifest injustice. As will explained further, Plaintiff has a valid point regarding estoppel and to grant an undeserved judgment to Defendant because of a readily remedied technical failure to authenticate a governmental record would have been unjust.<sup>10</sup> Accordingly, the Court directed Plaintiff to submit a properly authenticated transcript of the zoning hearing and a properly authenticated Zoning Board resolution and afforded the parties an opportunity to comment on the legal effect to be given such documents.

Plaintiff, by letter from its counsel, dated June 9, 2009, has now submitted the governmental records, including, in particular, the portion of transcript of the January 11, 2005 Zoning Board of Appeals meeting dealing with Plaintiff's application for variances.<sup>11</sup> These records are accompanied by a certificate from the Eastchester Town Clerk that these documents are true and correct copies of the originals on file in the Eastchester Building Department Office.

The transcript is identical to the transcript previously submitted by Plaintiff and, therefore, no further elucidation on its content is required.

Also submitted is a memorandum from Margaret H. Uhle to the file, dated May 2, 2006, which states that on January 11, 2005, the Zoning Board granted area variances to permit renovations to the subject property. The memorandum states, in part, that an area variance was granted "to permit parking on a separate lot from the building it serves." It further states that the building requires 27 parking spaces (inclusive of two handicapped accessible spaces) and that while "the applicant has provided all required parking, it is provided on a lot separate (across the street from) the building it serves." The memorandum also states that the approval was granted subject to the following two conditions:

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<sup>10</sup>This, of course, is not to excuse Plaintiff's failure to submit properly authenticated documents in the first place. Defendant objects to the Court's allowance of a further opportunity to authenticate the documents. Had the Court not exercised its discretion to allow a further submission, it would doubtless have been a close call, on a motion to renew, as to whether Plaintiff should have submitted proper documents in the first place. But the Court could have avoided that question by determining the present motion without prejudice to renewal. Nevertheless, counsel, in responding to a motion for summary judgment, should be cognizant of the necessity of submitting admissible materials.

<sup>11</sup>While the transcript is only a partial transcript – the portion provided being that which relates to Plaintiff's application – and does not contain a certification from the stenographer that the transcript is accurate, Defendant does not contend that anything that could bear on this matter has been excluded or that the transcript does not accurately reflect the hearing on Plaintiff's application.

1. The referenced parking lot shall be exclusively dedicated to the proposed professional medical offices (Montefiore Medical Center) for the entire duration of the lease and any renewals of the lease. If for any reason in the future, any portion of the parking lot is proposed to be dedicated to any use other than professional office uses at 19 Parsons Place, approval by the Zoning Board of Appeals would be required.
2. At the request of the ZBA, the owner of the property submitted two Affidavits affirming that none of his current tenants have any contractual rights to use the parking spaces within the referenced lot. If this representation proves to be false, the ZBA's approval would be nullified.

The memorandum also states that the "full resolution and findings are contained in the minutes of the January 11, 2005 Zoning Board of Appeals meeting."

Plaintiff makes no further argument regarding the legal significance of these materials.

Defendant submits an affirmation from its counsel (Affirmation of John M. Dillon, Esq., dated June 12, 2009) in which Defendant objects to consideration of the transcripts of the Zoning Board hearings, asserting that Plaintiff did not establish a reasonable excuse for failing to tender such evidence in admissible form, citing several cases dealing with the failure to submit admissible evidence to defeat summary judgment in personal injury actions. However, these cases are not on point. Relevant here is the Court's authority, prior to the final submission of the motion, to permit the correction of technical defects in the interest of justice (see CPLR 2001; CPLR 2101[f]). On the merits of the controversy, defense counsel asserts that the issue before the Court is whether the Lease provides for "exclusive" use of the parking lot and that the zoning materials are not relevant on that issue.

### **THE SUMMARY JUDGMENT STANDARD**

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Failure to make that initial showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York University Med. Ctr.*, 64 NY2d 851, 643-644 [1985]; *St. Luke's-Roosevelt Hosp. v American Tr. Ins. Co.*, 274 AD2d 511 (2d Dept 2000); *Greenberg v Manlon Realty, Inc.*, 43 AD2d 968 [2d Dept 1974]). Once the moving party has made a *prima facie* showing of entitlement of summary judgment, the burden of production shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact or demonstrate an acceptable excuse for failing to do so (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Tillem v Cablevision Sys. Corp.*, 38 AD3d 878 [2d Dept 2007]).

The court's function on a motion for summary judgment is issue finding rather than issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223 [1978]). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8 [1960]; *Sillman v Twentieth Century Fox Film Corp.*, *supra*).

### **THE FIRST CAUSE OF ACTION (DECLARATORY JUDGMENT)**

In the First Cause of Action, Plaintiff seeks a two-pronged declaratory judgment: that “a) Defendant has a duty to provide Plaintiff with the parking spaces pursuant to the Lease Agreement and b) Plaintiff’s right in and to the use of the parking space is exclusive of any right which has been wrongfully enjoyed by the Third-Parties” (Complaint at ¶ 34; *see also* Wherefore Clause at 10). Defendant seeks summary judgment dismissing all of Montefiore’s Causes of Action, including the First Cause of Action.

#### **A. The Parties’ Rights Under the Lease**

“Construction of an unambiguous contract is a matter of law, and the intention may be gathered from the four corners of the instrument and should be enforced according to its terms” (*Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]; *Kass v Kass*, 91 NY2d 554, 566 [1998]; *Taussig v Clipper Group, L.P.*, 13 AD3d 166, 167 [1st Dept 2004], *lv denied* 4 NY3d 707 [2005]; *1550 Fifth Avenue Bay Shore, LLC v 1550 Fifth Avenue, LLC*, 297 AD2d 781, 783 [2002], *lv denied* 99 NY2d 505 [2003]). “[T]he aim is a practical interpretation of the expressions of the parties to the end that there be a ‘realization of [their] reasonable expectations’” (*Brown Bros. Elec. Contr., Inc. v Beam Constr. Corp.*, 41 NY2d 397, 400 [1977], quoting 1 Corbin, Contracts § 1). In examining a contract to find the parties’ intent as to a particular section, a court should read “the entirety of the agreement in the context of the parties’ relationship,” rather than isolating distinct provisions out of an entire agreement (*Matter of Riconda*, 90 NY2d 733, 738 [1997]). Thus, “[t]he rules of construction of contracts require [the court] to adopt an interpretation which gives meaning to every provision of a contract or, in the negative, no provision of a contract should be left without force and effect” (*Muzak Corp. v Hotel Taft Corp.*, 1 NY2d 42, 46 [1956]; *see also Excess Ins. Co. Ltd. v Factory Mut. Ins.*, 3 NY3d 577, 582 [2004] [a contract is to be interpreted so that no portion of the contract is rendered meaningless]; *Columbus Park Corp. v Department of Hous. Preserv. & Dev. of City of New York*, 80 NY2d 19, 31 [1992]; *Two Guys from Harrison-New York, Inc. v S.F.R. Realty Assoc.*, 63 NY2d 396, 403 [1984]). A contract is unambiguous if “on its face [it] is reasonably susceptible of only one meaning ....” (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 570 [2002]). Parol evidence cannot be used to create an ambiguity where the words of the parties’ agreement are otherwise clear and unambiguous (*Innophos, Inc. v Rhodia, S.A.*, 38 AD3d 368, 369 [1st Dept 2007], *affd* 10 NY3d 25 [2008]).

These principles have particular vitality when the written instrument to be interpreted is a lease. When the parties have set down their agreement in a clear, complete document, their writing should be enforced in accordance with its terms, a principle particularly

important in real estate transactions where commercial certainty is a major concern and the contract was negotiated between sophisticated, counseled business people negotiating at arm's length (*South Road Assoc., LLC v International Bus. Mach. Corp.*, 4 NY3d 272, 277 [2005]). It is important to read the document as a whole (*id.*). Extrinsic evidence cannot be used to create an ambiguity in a document which is complete and clear and unambiguous on its face (*Madison Avenue Leasehold, LLC v Madison Bentley Assoc. LLC*, 8 NY3d 59, 66 [2006]).

The Lease language in question is that contained in Rider Paragraph 58[5]. It states:

Tenant shall have the right, at no charge, to the use of parking spaces in the Parking Area together with rights of access, maneuvering and other rights in the Parking Area. Tenant shall be permitted to extend the rights granted to it in the Parking Area to its physicians and employees, any approved assignee, subtenant or other transferee and its invitees. The actual number of parking spaces which shall be made available to Tenant and their location may vary as a result of compliance with applicable legal requirements and engineering or parking industry standards.

There is nothing ambiguous about this language. It says plainly and forthrightly that Tenant and its employees and patients have the right to use the parking lot free of charge. There is no promise or commitment that any number of parking spaces be set aside for Tenant's benefit nor is there any promise or commitment that third parties will be precluded from using the lot. While Tenant places great importance on the last sentence, which provides that the number and location of spaces may vary depending on legal requirements and parking industry standards, the Court reads this sentence as simply indicating that the present number of spaces, and their location within the area, might be changed due to legal or industry requirements.

The Lease has a merger clause in which the parties agreed that all understandings and prior agreements are merged in the Lease which alone fully expresses the parties' agreement and that any executory agreement thereafter is ineffective to change, modify, or discharge the Lease unless put in writing and signed by the party to be charged (Lease at ¶ 20). New York courts strictly enforce such merger clauses (*see, e.g., Jarecki v Shung Moo Louie*, 95 NY2d 665, 669 [2001] ["the purpose of a merger clause is to require the full application of the parol evidence rule in order to bar the introduction of extrinsic evidence to alter, vary or contradict the terms of the writing"]; *Daiichi Seihan USA v Infinity USA, Inc.*, 214 AD2d 487, 488 [1st Dept 1995] ["Any attempt by defendant to alter the plain meaning of the contract by alleged oral modifications fails as a result of the contract's integration clause"]).

Evidence of prior negotiations that were not reduced to an executed written agreement are inadmissible for the purpose of varying or contradicting the terms of the License Agreement (*see, e.g., Bero Contr. & Dev. Corp. v Vierhile*, 19 AD3d 1160, 1161 [4th Dept 2005] [since language in agreement was clear and unambiguous and included a merger clause, parties could not introduce "parol evidence, including evidence of prior negotiations between the parties"] ). Such evidence similarly is inadmissible for the purpose of introducing

ambiguities into integrated agreements (see, e.g., *Corman v LaFountain*, 38 AD3d 706, 707 [2d Dept 2007] [“When an agreement is clear and complete on its face, it should be enforced according to its terms without looking to extrinsic evidence to create ambiguities”] ).

Hence, to the extent Plaintiff argues that the parties agreed, prior to the signing of the Lease, that Plaintiff would have exclusive parking rights in the adjacent lot, that evidence is inadmissible to vary the written terms.<sup>12</sup> Likewise, to the extent Plaintiff asserts that the agreement for exclusivity was made after the Lease was signed, Plaintiff’s argument fails as an impermissible effort to establish an oral modification of the terms of a signed real estate document.

For the reasons set forth, the Court concludes, as to the first branch of Plaintiff’s request for a declaratory judgment, Plaintiff is entitled to a declaration that it is entitled to the use of the parking spaces in the Parking Area across Crest Avenue from the demised premises in accordance with the Paragraph 58(5) of the Lease on a non-exclusive basis only. This does not end the controversy as the first branch of Plaintiff’s request for a declaratory judgment is specifically pegged to its rights under the Lease Agreement, while the second branch of its application is not limited to the terms of the Lease Agreement.

#### *B. Estoppel*

While not pleaded as a basis for its claims in its Complaint<sup>13</sup>, Plaintiff asserts, in its supplemental response to treating the motion to dismiss as a motion for summary judgment, that Defendant should be estopped from now asserting a position inconsistent with its statements to the Town Zoning Board. Defendant does not object to the consideration of this argument; rather, Defendant contends that the Zoning Board did not “dictate” or “require” Defendant to provide Plaintiff with exclusive parking rights. While asserting that the Board conditioned the approval on the representations (by Defendant) that no other tenant had contractual rights to the lot, Defendant acknowledges that the variances were granted on condition that the lot be “completely dedicated to the Plaintiff’s application” (Dillon Supp. Aff. at ¶ 9). Defendant suggests that the Board’s condition means that if it turns out that the lot was not completely dedicated to Plaintiff’s application, the variances are no longer valid and Plaintiff must seek new approvals from the Board (*id.*).

Justice Titone, before becoming an Associate Judge of the New York Court of Appeals, writing for the Appellate Division, Second Department, set forth the basis for judicial

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<sup>12</sup>Moreover, as noted, Miranti’s affidavit is not supported by any claim that he had personal knowledge of the supposed agreement nor does Miranti supply anything other than a conclusory allegation to the making such an agreement.

<sup>13</sup>Plaintiff’s Complaint referenced the Curreri Zoning Board Affidavit and asserted that, by that Affidavit, Defendant had acknowledged that Plaintiff had exclusive parking rights under the Lease (Complaint at ¶¶ 11-12). As set forth above, the Court concludes that Plaintiff may not use the Curreri Zoning Board Affidavit to vary the terms of the Lease. Further, there is nothing in the Curreri Zoning Board Affidavit that expressly or impliedly acknowledges that Plaintiff’s parking rights are exclusive or that Curreri viewed the Lease as preventing Defendant from granting parking rights to others in addition to Plaintiff.

estoppel as follows:

[T]he doctrine of estoppel against inconsistent positions precludes a party from “framing his \* \* \* pleadings in a manner inconsistent with a position taken in a prior proceeding” ... The doctrine rests upon the principle that a litigant “should not be permitted \* \* \* to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise” ... “The policies underlying preclusion of inconsistent positions are ‘general consideration[s] of the orderly administration of justice and regard for the dignity of judicial proceedings’ ... In short, “where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position” (*Environmental Concern, Inc. v Larchwood Constr. Corp.*, 101 AD2d 591, 593 [2d Dept 1984] [Titone, J] [citations omitted]; *Kasmarski v Terranova*, 115 AD2d 640, 641 [2d Dept 1985] [same]; *accord City of New York v College Point Sports Assn., Inc.*, 61 AD3d 33 [2d Dept 2009]; *Prudential Home Mtge. Co., Inc. v Neildan Constr. Corp.*, 209 AD2d 394 [2d Dept 1994]; *Matter of Schmerer v Kahn*, 137 AD2d 758 [2d Dept 1988]).

The principle against inconsistent positions is not limited to inconsistent positions taken in litigation. Thus, a party to litigation may not take a position contrary to a position taken by that party in an income tax return (*Mahoney-Buntzman v Buntzman*, 12 NY3d 415 [2009]). The principle also applies to the context presented here, an effort to assert in court a position which is inconsistent with a position taken in a prior administrative proceeding (*Mitchell v Washingtonville Cent. School Dist.*, 190 F3d 1, 6 [2d Cir 1999]; *Matter of Cablevision Sys. Corp. Shareholders Litig.*, 21 Misc 3d 419, 434 [Sup Ct Nassau County 2008]; *Matter of 67 Vestry Tenants Assn. v Raab*, 172 Misc 2d 214, 219 [Sup Ct NY County 1997]), at least where the administrative proceeding involved a hearing (see *Ferring v Merrill Lynch & Co., Inc.*, 244 AD2d 204 [1st Dept 1997]).

The principle of judicial estoppel applies where two elements are shown: first, the party against whom the estoppel is asserted must have argued an inconsistent position in a prior proceeding; and second, the prior inconsistent position must have been adopted by the tribunal in some manner (*Matter of 67 Vestry Tenants Assn.*, *supra*, 172 Misc 2d at 219; see *Kalikow 78/79 Co. v State*, 174 AD2d 7, 11 [1st Dept 1992], *lv dismissed* 79 NY2d 1040 [1992]).

In this case, it is clear that Defendant, through its attorney, argued to the Zoning Board that the parking lot in question was exclusively dedicated to the Montefiore application. While the record before this Court indicates that the application for zoning variances was made by Montefiore, not by Crest Plaza, it is clear that Crest Plaza had a vital interest in the success of the application – had the zoning variances not been granted, Montefiore would not have been able to proceed with the significant renovation of the premises. Moreover, Crest Plaza was bound by the Lease to cooperate with Montefiore’s application and sign all documents necessary in order to enable Montefiore to obtain a building permit and “sign-offs” (Lease, Rider at ¶ 48[1][2][a] at p.12). It appears that, as is the case in zoning matters generally, under the Zoning Law of the Town of Eastchester, a building permit may not be obtained until all necessary zoning variances have been obtained (see Town of Eastchester Zoning Law at §

5[B][1]), as amended September 21, 2004). Thus, by agreeing that it would sign all documents necessary in order to enable Montefiore to obtain a building permit, Crest Plaza thereby agreed to sign all documents necessary to enable Montefiore to obtain any required zoning variances.

It is plain, from the papers submitted, that the only way Montefiore could meet the Town's parking requirement was to utilize the parking lot across Crest Avenue from the premises. This, indeed, was the purpose of the variance application. Thus, Defendant was well aware – and supported – Montefiore's request to use the adjacent lot. The record also confirms that Defendant's attorney was present at the January 11, 2005 hearing when the Zoning Board voted to grant the variance on the express condition that the subject parking lot be dedicated to the use of Montefiore. It is clear that, when the Zoning Board granted the variance, it did so on the understanding (derived from affidavits submitted by Crest Plaza) that no other tenants then had any parking rights on the lot and that, before any future tenants could use the lot, the approval of the Zoning Board would be required (see *Miranti Aff.*, Ex. D at 109-110).

The memorandum from Margaret H. Uhle, dated May 2, 2006, recites that the Zoning Board conditioned its approval on lot being "exclusively dedicated" to the "proposed professional medical offices (Montefiore Medical Center)" for the entire duration of its lease and, if, in the future, any portion of the lot is proposed to be dedicated to any use other than "professional office uses at 19 Parson Place," approval by the Zoning Board of Appeals would be required. While the latter phraseology is somewhat ambiguous (as it refers to professional offices uses and not specifically to Montefiore or to professional medical offices), the memorandum makes clear that the full resolution and findings are set forth in the January 11, 2005 hearing minutes. Those minutes make clear that the Board required that if any use was to be made of the parking lot in the future by anyone other than Montefiore, Board approval was required.

The Zoning Board approval was granted in January 2005. There is no indication that Defendant ever objected to the condition attached to the resolution. Rather, it appears that, following the granting of the municipal approvals, Montefiore proceeded with substantial renovations to the building and thereby occupied it and paid the required rent to Crest Plaza.

Defendant's contention that, given the use of the parking lot by others, Montefiore's remedy is to return to the Zoning Board rings hollow. The suggestion that Defendant allowed Montefiore's occupancy to become illegal (by virtue of the lapsing of the variance by the occurrence of the purported condition subsequent) by allowing others to park in the lot is belied by the fact that Crest Plaza has accepted Montefiore's rent all these years. Moreover, it is clear from the language of both the May 2, 2006 Uhle memorandum and the January 11, 2005 hearing minutes that, *prior* to any use by persons other than Montefiore, an application to the Zoning Board was required. This put the burden on Defendant (not on Montefiore) to make an application before allowing any others to use the lot.

It seems readily obvious that, at the time of the zoning variance application, Crest Plaza was desirous of securing Montefiore's tenancy, even at the expense of limiting its ability to provide parking to future tenants. Having taken that position before the Zoning Board, and prevailing, Crest Plaza cannot evade the consequences of that position simply because, after it

put Montefiore in place, it desired to lease out other portions of the space to other tenants. Given the reliance by Montefiore and the Zoning Board on Crest Plaza's pledge to dedicate the parking lot to Montefiore exclusively, Crest Plaza may not be allowed to "play fast and loose" by reversing its course and retreating from its dedication of the parking lot to Montefiore's exclusive use, as represented to, and accepted by, the Zoning Board (see *Ford Motor Credit Co. v Colonial Funding Corp.*, 215 AD2d 435 [2d Dept 1995]).

Consequently, the Court concludes that Crest Plaza is not entitled to summary judgment dismissing that portion of Montefiore's First Cause of Action that seeks a declaration that "Plaintiff's right in and to the use of the parking space is exclusive of any right which has been wrongfully enjoyed by the Third-Parties" (Complaint at ¶ 34; see also Wherefore Clause at 10). While Montefiore has not moved for summary judgment, the Court may nevertheless search the record and grant summary judgment to a non-moving with respect to an issue that is the subject of the motion before the court (see, e.g., CPLR 3212[b]); *Goldstein v County of Suffolk*, 300 AD2d 441 [2d Dept 2002], *lv denied* 100 NY2d 509 [2003]). Because the First Cause of Action is the subject of Crest Plaza's motion, and the issue is resolvable on the basis of the documentary evidence in the form of the Zoning Board's records, the Court will grant summary judgment to Montefiore on the second prong of its First Cause of Action. However, Montefiore is not entitled to the broad declaration that it seeks. Since exclusivity of Montefiore's parking rights in the lot is entirely dependent upon the prior determination of the Zoning Board, and is not provided by Lease, the exclusivity may be revoked by the Zoning Board. Therefore, the Court will grant a declaratory judgment that Montefiore has the right, during its occupancy of the subject premises, to the exclusive use of the Parking Area, in accordance with the January 11, 2005 Zoning Board determination, subject to the provisions of the Lease and subject to further action by the Zoning Board.

### **SECOND CAUSE OF ACTION (INJUNCTIVE RELIEF)**

In the Second Cause of Action, Plaintiff seeks an injunction prohibiting Defendant from engaging in any acts depriving Plaintiff from using the parking spaces, including, but not limited to, the removal of obstruction of any designation of the parking spaces as reserved for Plaintiff (Complaint at ¶ 45). Because the Court has found that Plaintiff is entitled, pursuant to the January 11, 2005 Zoning Board resolution, to the exclusive use of the subject lot, the Court will grant the requested injunction, which shall be in effect until such time as the Zoning Board takes action to rescind Plaintiff's parking exclusivity.

### **THIRD AND FOURTH CAUSES OF ACTION (BREACH OF CONTRACT; BREACH OF COVENANT OF QUIET USE AND ENJOYMENT)**

In the Third Cause of Action, Plaintiff seeks damages of at least \$75,000 for breach of the Lease's provisions for parking (Complaint at ¶ 52). In the Fourth Cause of Action, Plaintiff seeks damages of at least \$75,000 for breach of the Lease's covenant of quiet

enjoyment, asserting that the use of parking spaces by third parties as deprived Plaintiff of the beneficial use of the premises (*id.* at ¶¶ 54-60). Defendant is entitled to summary judgment on these Causes of Action, given the Court's conclusion that the Lease does not provide exclusive parking rights to Plaintiff.

### CONCLUSION

The Court has considered the following papers on this motion:

- 1) Notice of Motion dated November 17, 2008; Affirmation of John M. Dillon, Esq., dated November 17, 2008, together with the exhibits annexed thereto, submitted with proof of service;
- 2) Affirmation of Jacqueline C. Gerrald, Esq., dated December 12, 2008, together with the exhibits annexed thereto;
- 3) Plaintiff's Memorandum of Law In Opposition to Motion to Dismiss, dated December 12, 2008;
- 4) Affirmation of John M. Dillon, Esq., dated December 18, 2008, submitted with proof of service;
- 5) Affirmation of John M. Dillon, Esq., dated February 26, 2009; Affidavit of John J. Curreri, sworn to February 26, 2009, together with the exhibit annexed thereto, submitted with proof of service;
- 6) Affidavit of Raymond Miranti, sworn to April 4, 2009, together with the exhibits annexed thereto, submitted with proof of service;
- 7) Plaintiff's Memorandum of Law In Opposition to Summary Judgment, dated April 7, 2009, submitted with proof of service;
- 8) Affirmation of John M. Dillon, Esq., dated April 15, 2009, submitted with proof of service;
- 9) Letter to Court of Jacqueline C. Gerrald, Esq., dated June 9, 2009, together with the enclosures contained therein;
- 10) Affirmation of John M. Dillon, Esq., dated June 12, 2009, submitted with proof of service.

Based upon the papers aforesaid, and for the reasons hereinabove stated, it is hereby

ORDERED that the motion by Defendant Crest Plaza LLC, made pursuant to CPLR 3211(a) (1), (7), to dismiss the Complaint of Plaintiff Montefiore Medical Center, and deemed to be a motion for summary judgment pursuant to this Court's order entered February 5, 2009, is granted in part and denied in part as set forth herein; and it is further

ORDERED that the motion by Defendant Crest Plaza, LLC for summary judgment with respect to the First Cause of Action of the Complaint of Plaintiff Montefiore Medical Center is denied; and it is further

ORDERED that Plaintiff Montefiore Medical Center is granted summary judgment with respect to its First Cause of Action to the extent set forth herein and not otherwise; and it is further

ORDERED, ADJUDGED AND DECREED that Plaintiff Montefiore Medical Center is entitled to a declaration, and the Court hereby declares, that Plaintiff Montefiore Medical Center is entitled to the use of the parking spaces in the Parking Area across Crest Avenue from the premises demised to said Plaintiff from Defendant Crest Plaza LLC pursuant to a written Lease made as of April 2004 in accordance with the Paragraph 58(5) of the Lease on a non-exclusive basis only; and it is further

ORDERED, ADJUDGED AND DECREED that Plaintiff Montefiore Medical Center is entitled to a declaration, and the Court hereby declares, that Plaintiff Montefiore Medical Center has the right, during its occupancy of the premises demised to said Plaintiff from Defendant Crest Plaza LLC pursuant to a written Lease made as of April 2004, to the exclusive use of the Parking Area across Crest Avenue from the said premises in accordance with the January 11, 2005 determination of the Zoning Board of Appeals of the Town of Eastchester, New York, subject to the provisions of the said Lease and subject to further action by the Zoning Board; and it is further

ORDERED that the motion by Defendant Crest Plaza, LLC for summary judgment with respect to the Second Cause of Action of the Complaint of Plaintiff Montefiore Medical Center is denied; and it is further

ORDERED that Plaintiff Montefiore Medical Center is granted summary judgment with respect to its Second Cause of Action to the extent set forth herein and not otherwise; and it is further

ORDERED, ADJUDGED AND DECREED that, unless and until the Zoning Board of Appeals of the Town of Eastchester rescinds, varies, or modifies its resolution of January 11, 2005, Defendant Crest Plaza LLC is hereby enjoined and restrained from engaging in any acts depriving Plaintiff Montefiore Medical Center from using the parking spaces located in the Parking Area across Crest Plaza from the premises demised to said Plaintiff from said Defendant, including, but not limited to, the removal of obstruction of any designation of the parking spaces as reserved for said Plaintiff; and it is further

ORDERED that the motion by Defendant Crest Plaza, LLC for summary judgment with respect to the Third and Fourth Causes of Action of the Complaint of Plaintiff Montefiore Medical Center is granted; and it is further

ORDERED, ADJUDGED and DECREED that the Third and Fourth Causes of Action set forth in the Complaint of Plaintiff Montefiore Medical Center are dismissed; and it is further

ORDERED that neither party is entitled to costs as against the other and that neither party is entitled to any other, further, or different relief than is set forth herein.

The foregoing constitutes the Decision, Order, and Judgment of this Court.

Dated: White Plains, New York  
June , 2009

E N T E R :

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Alan D. Scheinkman  
Justice of the Supreme Court

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