

<b>Foscarini Inc. v Greenestreet Leasehold Partnership</b>
2019 NY Slip Op 30307(U)
February 12, 2019
Supreme Court, New York County
Docket Number: 653840/2015
Judge: Saliann Scarpulla
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION

-----X  
FOSCARINI INC.

Plaintiff,

- v -

THE GREENESTREET LEASEHOLD PARTNERSHIP,

Defendant.

INDEX NO. 653840/2015

MOTION DATE 10/25/2018

MOTION SEQ. NO. 003

**DECISION AND ORDER**

-----X  
HON. SALIANN SCARPULLA:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 110, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 143

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, it is

In this action arising out of a dispute over Plaintiff Foscarini Inc.'s ("Foscarini") rights under a commercial lease, defendant The Greenestreet Leasehold Partnership ("Greenestreet") moves for partial summary judgment on its counterclaims and for dismissal of the complaint's first and second causes of action.

**Background**

Foscarini, a lighting and design corporation, leased the ground floor unit of 15-17 Green Street, New York, New York (the "Premises") from Greenestreet pursuant to a written lease agreement and rider (collectively, the "Lease"), which was effective from January 16, 2011 ("Commencement Date") for a five-year term ("Initial Term").

Lease ¶67(A) provides Foscarini with the option to renew the Lease (“Renewal Option”) for an additional five-year term (“Extended Term”). Although the Extended Term would be governed by almost all the same terms and conditions as in the Lease, the annual rental rate for the Extended Term is subject to change: the rent would be ninety-five percent “of the fair and reasonable annual market rental rate for the [] Premises in the condition as of the Commencement Date . . .” for the first year of the Extended Term and would increase by three percent each year for the remainder of the Extended Term. *Id.*

To properly exercise the Renewal Option, Foscarini was required to be “in strict compliance” with the terms and conditions set forth in ¶67(A). Notably, Foscarini was to provide Greenestreet with “[w]ritten notice of such election . . . not sooner than twelve (12) months and not later than six (6) months prior to the [Termination Date] of the [Initial Term]. Time shall be of the essence in connection with the exercise of [the Renewal Option] hereunder.” ¶67(A)(i) (the written notice is referred to as “Renewal Notice” and the time to provide such notice is referred to as “Renewal Period”).<sup>1</sup>

The Lease also provides procedures for determining the fair and reasonable annual market rental rate (“Renewal Rent”); if the parties are unable to agree on the Renewal Rent “by the start of the last five (5) months of the Initial Term, then . . . [it] shall be determined” by the appraisal procedures set forth in ¶67(A)(v). ¶67(A)(ii)(b).

---

<sup>1</sup> ¶64 requires that “[a]ny notice. . . be in writing . . . [and] sent by (i) Fedex or other reputable overnight courier (ii) registered or certified mail, return receipt requested; or (iii) personal delivery.” Foscarini is required to send notices to “The Greenestreet Leasehold Partnership, 15-17 Greene Street, New York, New York 10013, Attn: Ms. Barbara Simon” with a copy sent to “Hartman & Craven LLP, 488 Madison Avenue, New York, NY 10022, Attn: Stephen W. O’Connell.” *Id.*

Foscarini delivered a letter dated January 1, 2015 (“January Letter”) to Barbara Simon (“Simon”), a Greenestreet shareholder, which states in pertinent part:

Please be advised that Foscarini Inc would like to enter into discussions as soon as possible starting in January 2, 2015 regarding renewing our lease as per the agreements set forth in the existing lease [sic]. I am available for discussions anytime from January and would like to resolve such matters as quickly as possible based on the terms outlined in that lease.

In a February 27, 2015 email (“February Email”) to Simon, Foscarini states that it would like to resolve a few matters, including that it would like to

[u]nderstand where we stand on beginning our discussions on a new lease, we are as already stated interested in remaining in the space and would like to manage the situation ASAP. We do not want to be left in a situation where we are not able to manage our business need [sic] in a suitable time frame and I look forward to the program and process.

In a May 12, 2015 email (“May Email”) to Simon, Foscarini states, in part, that “we have missed one another a few times and hope we can speak soon on the lease, permits, any other points and concerns.” Foscarini sent another email to Simon on June 25, 2015 (“June Email”) which states, *inter alia*:

Regarding Lease renewal, please forward the lease cost and plan. We can manage the 5 year arm option or even look at 10 if this adds any value . . . I have comps which are recent for our area, scope and so on which are nowhere near your figure per foot. Once we have your numbers we can begin the process of review and alignment. Please ASAP, I need to manage the process with you and options if we can get nowhere on the numbers since I have a team and business to run.

In an email dated July 13, 2015 (“July Email”) to Simon, Joel Simon, and Robert Cusumano (“Cusumano”), Greenestreet shareholders, Foscarini stated that it

need[s] to critically understand the rental agreement for the next terms of our lease. Per the agreement we were to alert you within 6 months which we have done several times. I now await a starting point in our negotiation for

rent for a second 5 years. We would also consider a 10 year lease as well. Please understand we need to be prepared for how we move with out working situation if for some reason we can not work out a clear and fair deal for the second term. I would need time to manage a new office and showroom so I am now approaching a more critical need for a renting figure.

By letter dated September 16, 2015 (“September Letter”), Foscarini notified Greenestreet that it appointed an appraiser to determine the Renewal Rent because, “pursuant to pursuant to Section 67A of the Lease, Foscarini timely and duly exercised its right to extend and renew the term . . . . Accordingly, the Lease shall be deemed renewed and the only issue for [the parties] to resolve is the amount of rent payable by [Foscarini] during the Extended Term.”

In a September 18, 2015 email, Cusumano responded to the September Letter, indicating that he “can express no opinion on the technical accuracy of [the] letter, or its consistency with the facts and the lease” but that he is waiting to hear back from Greenestreet’s shareholders on a renewal proposal.

In a September 21, 2015 email, Cusumano sent Foscarini proposed rent for a possible renewal term, not under the Renewal Option because “Foscarini has not actually renewed the lease. Renewal would have required a clear statement of intent to be bound by such renewal, no matter what price emerged from an arbitration. To my knowledge, Foscarini’s earlier communications did not in fact renew, but sought negotiations heading toward a possible renewal.”

Foscarini sent Greenestreet a letter dated October 16, 2015, notifying it that, because it failed to appoint an appraiser to determine the Renewal Rent in response to the September Letter, the Lease dictates that Foscarini’s appraiser will

determine the Renewal Rent. Counsel for Greenestreet responded by letter dated October 23, 2015 and rejected Foscarini's October 16<sup>th</sup> January Letter because Foscarini "never exercised its option to renew the Lease."

In November 2015, Foscarini commenced this action alleging two causes of action for: (1) a declaratory judgment that it properly exercised the Renewal Option and the Lease has been renewed for five years, beginning January 1, 2016; and (2) breach of lease based on Greenesetreet's failure to negotiate in good faith for the Renewal Rent and for its refusal to recognize that Foscarini renewed the Lease. Greenstreet filed an amended answer and asserted counterclaims for, *inter alia*: breach of contract (first counterclaim); holdover at fair market value (fourth counterclaim); and retention of the security deposit (fifth counterclaim). In August 2016, Foscarini vacated the Premises.

Greenestreet now moves for partial summary judgment, pursuant to CPLR 3212(e) on liability with respect to Greenestreet's first, fourth, and fifth counterclaims and dismissal of the first and second causes of action;<sup>2</sup> Greenestreet also requests a hearing on damages and that its remaining counterclaims be severed.

### **Discussion**

To prevail on a claim for breach of contract, a plaintiff must establish the "existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 (1st Dept 2010). Where, as here, "a written agreement . . . is

---

<sup>2</sup> Because Foscarini withdrew its first cause of action for a declaratory judgment, Greenestreet's motion with respect to this claim is denied as moot.

complete, clear and unambiguous on its fact[, it] must be enforced according the plain meaning of its terms.” *Beinstein v Navani*, 131 AD3d 401, 405 (1st Dept 2015) quoting *Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 (2002).

The parties agree that the Lease was binding on the parties and that Foscarini vacated the Premises on August 31, 2016. The parties disagree, however, as to which party complied with, and which party breached, the Lease. The complaint’s second cause of action for breach of Lease is based on Greenestreet’s alleged failures to recognize the Lease renewal, to comply with its obligations under the Lease to determine the Renewal Rent, and to negotiate in good faith regarding the Renewal Rent under the Renewal Option. In contrast, Greenestreet’s first counterclaim for breach of Lease is based on Foscarini’s alleged failure to vacate the Premises upon the expiration of the Initial Term, its failure to provide proper notice of intention to abandon the Premises, and for causing physical damage to the Premises.

In support of its motion, Greenestreet maintains that the Initial Term terminated on January 15, 2016; therefore, Foscarini was only able to provide Renewal Notice from January 16, 2015 through July 15, 2015. Greenestreet argues that Foscarini did not strictly comply with the Lease’s requirements, mainly because its purported written notice of its intent to renew the Lease was untimely and did not constitute a clear and unequivocal election to exercise the Renewal Option. Therefore, Foscarini argues, Greenestreet was under no obligation to offer Foscarini a renewal lease, and Foscarini was obligated to vacate the Premises at the end of the Initial Term.

The basis for virtually all relief sought by Greenestreet on this motion rests on its contention that Foscarini failed properly to exercise its rights to renew the Lease for an Extended Term. “An election to renew must be timely, definite, unequivocal and strictly in compliance with the lease term.” *Am. Realty Co. v 64 B Venture*, 176 AD2d 226, 227 (1st Dept 1991) (citation omitted); *see also Plaza Collectibles Corp. v Directors Guild of Am., Inc.*, 155 AD3d 512, 513 (1st Dept 2017). Thus, to properly renew the Lease for the Extended Term, Foscarini was required to provide Greenestreet with a clear, unequivocal written Renewal Notice within the Renewal Period (“not sooner than twelve (12) months and not later than six (6) months prior to” the Initial Term’s termination date). *See* ¶¶67(A)(i) & 64.

Although the first page of the Lease provides that the Initial Term ends on December 31, 2016, ¶40 of the Lease Rider contains the following conflicting provision:

The term of the Lease shall be five (5) years, commencing on January 16, 2011 . . . , and expiring on the last day of the sixtieth full calendar month of the term. If the Commencement Date is other than the first day of a calendar month, then Tenant shall pay a prorated amount of Rent for the partial first month and Month 1 in the chart below shall be deemed to be the first day of the first full calendar month following the Commencement Date.

Pursuant to ¶40, the Initial Term ends on January 31, 2016, the last day of the sixtieth full month following the partial month of January 2011. Despite this contradiction, ¶70 in the Lease Rider provides that where “any of the provisions of this Rider conflict or are otherwise inconsistent with any of the preceding printed provisions of the main body of the Lease . . . ***the provisions of this Rider shall prevail.***” (emphasis added). Therefore, per ¶40, the Initial Term ended on January 31, 2016 (“Termination Date”).



Accordingly, the Renewal Period during which Foscarini could provide Renewal Notice ran from January 31, 2015 (twelve months prior to the Termination Date) through July 31, 2015 (six months prior to the Termination Date). ¶67(A)(i).

As a matter of law, Greenestreet's January Letter was ineffective and did not constitute Renewal Notice because it was untimely sent before the Renewal Period commenced on January 31, 2015. *See Omansky v 160 Chambers St. Owners, Inc.*, 155 AD3d 460, 461 (1st Dept 2017); *315 W. 48th St. Realty Corp. v Maria's Mont Blanc Rest. Corp.*, 47 Misc 3d 65, 67 (App Term, 1st Dept 2015). Likewise, the February, May, June, and July Emails – which were sent by Foscarini to Greenestreet during the Renewal Period – failed strictly to comply with the Lease's written notice requirements set forth in ¶64 of the Lease. *See Plaza Collectibles Corp. v Directors Guild of Am., Inc.*, 155 AD3d 512, 513 (1st Dept 2017); *Am. Realty Co.*, 176 AD2d at 227.

The January Letter and the February, May, June, and July Emails were neither definite nor unequivocal because the language was conditioned upon the parties agreeing to a Renewal Rent acceptable to Foscarini. *See Joyous Holdings, Inc. v Volkswagen of Oneonta, Inc.*, 128 AD2d 1002, 1004 (3d Dept 1987) (tenant “deliberately conditioned its renewal upon the completion of structural repairs . . . [and] indicated that if an agreement concerning . . . repairs could not be reached, he would look for another location.”).

Because Foscarini's letters were conditional, equivocal and/or untimely, Greenestreet has established that Foscarini failed to renew the Lease pursuant to the Renewal Option. Greenestreet is therefore entitled to judgment dismissing Foscarini's

breach of contract claim based on Greenestreet's failure to recognize that Foscarini validly renewed the Lease.

Foscarini's breach of contract claim is also premised upon Greenestreet's purported failure to negotiate in good faith regarding the Renewal Rent under the Renewal Option and comply with its obligations to determine the Renewal Rent.

Although nothing in the Lease prevents the parties from agreeing on the Renewal Rent before Foscarini exercised the Renewal Option, the Lease does not require that the Renewal Rent be determined prior to Foscarini providing Renewal Notice. Rather, ¶67(A)(ii)(b) provides that parties have an additional month *after* the Renewal Period expires to agree upon the Renewal Rent; if Renewal Notice has already been provided and if the parties are unable to agree on the Renewal Rent by this time, then the parties must avail themselves of the appraisal procedures set forth in ¶67(A)(v) to determine the Renewal Rent. If the Renewal Option has not been exercised, then the parties are under no obligation to follow the ¶67(A)(v) appraisal procedures.

Because Foscarini never exercised its Renewal Option, Greenestreet has established that did not have any contractual obligation to seek to agree on the Renewal Rent or to avail itself of the ¶67(A)(v) appraisal procedures to determine the Renewal Rent. Greenestreet has thus also established that Foscarini's breach of contract claim based on the remaining allegations (regarding Greenestreet's failure to negotiate and comply with certain obligations to determine the Renewal Rent) should be dismissed as a matter of law.

Likewise, because Foscarini failed to exercise the Renewal Option, Greenestreet has met its burden of establishing under its first and fourth counterclaims that Foscarini breached the Lease<sup>3</sup> by failing to vacate at the end of the Initial Term and holding over through August 2016.

In opposition, Foscarini argues that it believed that it exercised the Renewal Option, and Greenestreet's failure to inform Foscarini that the January Letter was defective and its continuation of Renewal Rent negotiations constituted a waiver by Greenestreet of the formal requirements necessary to renew under the Renewal Option.

Because Foscarini never expressly and unequivocally notified Greenestreet of its intention to exercise the Renewal Option and, because Renewal Rent negotiations do not require that the Renewal Option already be exercised, any waiver analysis is irrelevant. To the extent that Foscarini relies on Greenestreet's internal communications to show waiver, Foscarini cannot claim reliance on internal discussions that were revealed during the course of litigation.

Moreover, Foscarini's contention that it believed that it exercised the Renewal Option are belied by the record submitted on this motion which shows that Foscarini was working with a real estate broker to find another location while engaging in Renewal Rent negotiations, that any expressed desire to stay in the Premises was contingent upon an agreeable Renewal Rent, and that it voluntarily vacated the Premises in August 2016.

---

<sup>3</sup> Lease ¶21 provides that "[u]pon the expiration or other termination of the term of this lease, Tenant shall quit and surrender to good order and condition, ordinary wear excepted, and Tenant shall remove all its property. Tenant's obligation to observe or perform this covenant shall survive the expiration or other termination of this lease . . . ."

Foscarini also argues that Greenestreet acted in bad faith by purportedly acknowledging that the Renewal Option was exercised by engaging in Renewal Rent negotiations and later changing its position that Foscarini never renewed the Lease. According to Foscarini, this change occurred because Greenestreet was considering selling the building and would get a higher price if the Premises were vacant.

Foscarini failed to raise a triable issue of fact that Greenestreet was acting in bad faith. Nothing in the record indicates that Greenestreet was acting in bad faith by intentionally misleading or preventing Foscarini from exercising the Renewal Option by considering alternate business scenarios. Instead, the fact that Greenestreet was looking for alternate business options and that Foscarini was looking for alternate rental spaces demonstrates that both parties independently believed that Foscarini never exercised the Renewal Option.

In accordance with the foregoing, Greenestreet's motion for partially summary judgment on liability is granted on its fourth counterclaim for holdover and for the portion of its first breach of contract counterclaim, based solely upon Greenestreet failing to vacate at the end of the Initial Term. A hearing before a special referee is required to determine the Premise's fair market rental rate for February 2016 through August 2016; if this rate exceeds the use and occupancy paid by Foscarini for those months, Greenestreet is entitled to holdover damages for the unpaid monthly portion.

Greenestreet fifth counterclaim alleges that it is entitled to retain the security deposit under the Lease because Foscarini caused physical damage to the Premises and defaulted under the Lease by failing to vacate. If Foscarini defaults

under the Lease, Greenestreet is entitled to retain the security deposit for the payment of any amount that Foscarini is in default and for any amount Greenestreet “may expend or may be required to expend by reason of [Foscarini’s] default . . . including but not limited to, any damages or deficiency in the re-letting of the demised premises . . . .” ¶31.

While Greenestreet may be entitled to retain the security deposit, this entitlement is dependent upon the amount of damages Foscarini ultimately owes to Greenestreet. Triable issues of fact exist as to the extent of physical damages Foscarini allegedly caused to the Premises, if any, and whether the fair market rental rate of the premises exceeds the use and occupancy paid by Foscarini for the months of February 2016 through August 2016. Therefore, Greenestreet’s motion for partial summary judgment on its fifth counterclaim is held in abeyance, and the issue of physical damages that Foscarini may have caused to the premises is also sent to the special referee to hear and report.

In accordance with the foregoing, it is

ORDERED that the branch defendant The Greenestreet Leasehold Partnership’s motion that seeks partial summary judgment dismissing plaintiff Foscarini Inc.’s first claim is denied as moot because plaintiff withdrew this claim; and it is further

ORDERED that the branch defendant’s motion that seeks partial summary judgment dismissing plaintiff’s second cause of action for breach of lease is granted and the second cause of action is severed and dismissed; and it is further

ORDERED that the branch defendant's motion that seeks partial summary judgment on the issue of liability on its first counterclaim for breach of lease is granted solely to the extent described above, with the amount of damages to be determined at a hearing before a Special Referee, and is otherwise denied; and it is further

ORDERED that the branch defendant's motion that seeks partial summary judgment on the issue of liability on its fourth counterclaim for holdover is granted, with the amount of damages to be determined at hearing before a Special Referee; and it is further

ORDERED that the branch defendant's motion that seeks partial summary judgment on the issue of liability on its fifth counterclaim for retention of the security deposit shall be determined after receipt of the Report of the Special Referee; and it is further

ORDERED that a hearing shall be conducted before a Special Referee on the issue of damages for the first, fourth and fifth counterclaims, including the issue of the reasonable fair market rental rate of the Premises. The Special Referee is to report to this Court with all convenient and deliberate speed, 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 these issues; and it is further

ORDERED that counsel for plaintiff shall, within 30 days from the date of this order, serve a copy of the order with notice of entry, together with a completed

Information Sheet, 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 SOR) for the earliest convenient date; and it is further

ORDERED that a final judgment shall be entered after a hearing to determine the amount of damages to be awarded to defendant; and it is further

ORDERED that the balance of defendant's counterclaims are severed and continued as against plaintiff; and it is further

ORDERED that counsel are directed to appear for a conference on March 13, 2019, at 2:15 PM.

This constitutes the decision and order of the Court.

<u>2/12/19</u>			
DATE		SALIANN SCARPULLA, J.S.C.	
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE