

<b>Kai Chan v Lipiner</b>
2018 NY Slip Op 31817(U)
July 30, 2018
Supreme Court, New York County
Docket Number: 650697/2015
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 39

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KAI CHAN,  
  
Plaintiff,

INDEX NO. 650697/2015

MOTION DATE 12/29/2017

- v -

MOTION SEQ. NO. 004

MARLENE LIPINER, THOR 174-176 BOWERY, LLC,  
  
Defendants.

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 403

were read on this application to/for DISMISSAL

HON. SALIANN SCARPULLA:

In this action, *inter alia*, for specific performance, defendants Thor 174-176 Bowery LLC (“Thor”) and Marlene Lipiner (“Lipiner”) move to dismiss and move for summary judgment dismissal of the third amended complaint, pursuant to CPLR 3211 (a)(7) and 3212. Plaintiff Kai Chui Chan (“Chan”) opposes and cross-moves for summary judgment in his favor, and in a separate motion, moves to dismiss Thor’s counterclaim. Additionally, third-party defendants move to dismiss Thor’s third-party complaint.

## **Background**

Lipiner was the owner of the building located at 174-176 Bowery (“Building”). Pursuant to a lease agreement dated March 2, 2000, Lipiner leased the Building to 176 Bowery, LLC, which lease term ended in September 2017 (“Lease”). Neither party disputes that, despite identifying Tenant as 176 Bowery, LLC, 176 Bowery, Inc. was the Tenant under the Lease.

176 Bowery, Inc. was incorporated in 2000 with Chan as 176 Bowery, Inc.’s sole owner. During the Lease, various corporate entities operated businesses from the commercial space, starting with Champ Restaurant and Kitchen Supply, Inc., followed by Champ Chairs & Tables, Inc (“Champ”). According to Champ’s 2009 and 2010 tax returns, Chan’s daughter, Elizabeth, was the sole owner of the company, despite Chan testifying that he jointly owned Champ with her. Champ occupied the Building pursuant to a sublease with 176 Bowery, Inc. from September 2002 to August 2007 (“Champ Sublease”). In 2003, during the Champ Sublease, New York State involuntarily dissolved 176 Bowery, Inc. for failing to pay its franchise taxes. Despite the dissolution, 176 Bowery, Inc. continued making payments to Lipiner and filing taxes for the Building until 2007.

After the Champ Sublease expired in 2007, Champ continued to occupy the Building until Tomeli Inc. (“Tomeli”) replaced it in 2010. According to Tomeli’s 2010, 2011 and 2012 tax returns, Chan’s wife, Amera Hong, was the sole owner of the

company.<sup>1</sup> Although Tomeli occupied the Building, Tomeli never executed a sublease, nor did Lipiner ever execute a consent to assignment of the Lease to Tomeli.

In November 2014, Lipiner entered into a contract for sale of the Building with Thor (“Purchase Agreement”). On February 6, 2015, 176 Bowery, Inc. sent Lipiner a letter requesting that Lipiner comply with the Lease’s “Right of First Refusal,” pursuant to Article 31 of the Lease. Article 31 provides

If at any time during the term of this lease, the Landlord wishes to sell the building of which the premises form a part, and shall receive and accept a bona fide offer from any person to purchase the demised premises, Landlord shall send Tenant a copy of the proposed Contract of Sale or offer (except for the name of the buyer), and notify Tenant of the intention of Landlord to accept same. Tenant shall have the right within thirty (30) days to accept in writing the terms of the said contract or offer, and within thirty (30) days thereafter, to purchase the demised premises in its own name for the gross purchase price and on the same terms specified in the said contract or offer. If Tenant shall not so elect within the said period, Tenant shall be deemed to have either waived its right of first refusal or deemed not to exercise such right, and in any event, Landlord may then sell the demised premises to the buyer provided the said sale is on the same terms and conditions and for the price set forth in the said contract sent to Tenant. This right of first refusal shall not apply to any purported sale or transfer by the Landlord to his/her immediate family.

Lipiner subsequently provided “176 Bowery, Inc / 176 Bowery, LLC” with notice of the proposed terms of the Purchase Agreement. In response, counsel for Chan requested a “revised” Right of First Refusal, in which Chan or his wholly owned legal entity would be considered the replacement Master Tenant, pursuant to Article 32 and Article 33. On February 25, 2015, Lipiner rejected any “revised” Right of First Refusal.

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<sup>1</sup> Chan, however, testified that he jointly owned Tomeli with Amara Hong.

Chan, nevertheless, attempted to exercise the Right of First Refusal in his individual capacity and tendered a deposit of \$510,000.00.

Article 32 of the Lease, titled "Sublease to Principals," provides that "Landlord shall allow the Master Tenant to sublease to the two existing principals of Master Tenant: Penny Cheung (aka Ping Cheung) or Jimmy Chan (aka Kai C. Chan) within the original purpose of the lease under any legal entity which they own 100% of. All terms and provisions of the lease shall remain in full force and effect as to any sublease." Chan has not produced a sublease for the Building naming him nor any wholly-owned entity a subtenant.<sup>2</sup>

Article 33 of the Lease, titled "Recognition of Sub-Lessee", provides:

In the event either of the principals, Ping Cheung or Jimmy Chan wants to terminate its sublease, surrender its part of the premises and or dissolve or cause Master Tenant to go out of business and discontinue its corporate activities, then, in that event, Landlord agrees to continue to recognize the remaining sub-lessee, either Ping Cheung or Jimmy Chan, or their wholly owned legal entity, as the replacement Master Tenant under the master lease. The name of the sublessee shall be incorporated into the master lease by reference hereto.

Chan commenced this lawsuit in March 2015 seeking specific performance of the Right of First Refusal and his right to purchase the Building. Meanwhile, Lipiner and Thor negotiated their disputes related to the Purchase Agreement and entered into a

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<sup>2</sup> The Lease arose from a previously surrendered lease, in which Ping Cheung was the principal of the tenant. Ping Cheung is a non-party to the action, and Chan does not contend that Ping Cheung owns an interest in either Champ or Tomeli.

settlement agreement, dated April 15, 2015 (“Lipiner Settlement”).<sup>3</sup> Lipiner and Thor closed the sale on the same day, and Lipiner conveyed the deed for the Building to Thor despite the earlier Notice of Pendency filed by Chan. At one point, the action was litigated in federal court, where the parties stipulated, *inter alia*, that Thor would not commence any action to evict Chan, and Chan would personally comply with the obligations as Tenant pursuant to the Lease.

The action was then remanded back to this court. On May 10, 2017, I issued a decision and order partially granting Chan leave to file a third amended complaint. In the operative complaint, Chan seeks (1) a declaratory judgment that he is the replacement Master Tenant possessing the Right of First Refusal pursuant to the Lease; (2) a declaratory judgment that he properly exercised the Right of First Refusal pursuant to the Lease; (3) a declaratory judgment that he is entitled to purchase the Building on the same terms and conditions as Thor based on the Lipiner Settlement; (4) specific performance of his Right of First Refusal to purchase the Building; and (5) tortious interference with contract against Thor.

On July 20, 2017, Thor filed its answer to the third amended complaint and asserted a counterclaim against Chan seeking a declaratory judgment that (1) Thor is entitled to eject and evict Chan from the Building and (2) that Chan must pay fair market value for use and occupancy of the Building after the Lease expires. Additionally, Thor

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<sup>3</sup> In exchange for one million-dollars, Thor released its claims against Lipiner for the alleged breach of the Purchase Agreement’s representations and agreed to indemnify Lipiner with respect to this action.

filed a third-party complaint against Amera Hong, Elizabeth Chan, Tommy Doe, and other persons in the Building (collectively, “Chan Family”) for a declaratory judgment that Thor is entitled to eject and evict the Chan Family from the Building.

Defendants now move for summary judgment dismissal of Chan’s third amended complaint, and Chan opposes and cross-moves for summary judgment in his favor. Chan also moves to dismiss Thor’s counterclaim, and the Chan Family separately moves to dismiss Thor’s third-party complaint.

### **Discussion**

A party moving for summary judgment is required to make a *prima facie* showing that it is entitled to judgment as a matter of law, by providing sufficient evidence to eliminate any material issues of fact from the case. *Winegrad v New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985); *Grob v Kings Realty Assoc.*, 4 A.D.3d 394, 395 (2d Dep’t 2004). The party opposing must then demonstrate the existence of a factual issue requiring a trial of the action. *Zuckerman v City of New York*, 49 N.Y.2d 557, 562 (1980).

Defendants argue that Chan may not exercise the Right of First Refusal because, pursuant to Article 33 of the Lease, he did not qualify as a “replacement Master Tenant” when 176 Bowery, Inc. dissolved in 2003. Resolution of whether Chan is the holder of the Right of First Refusal depends, in the first instance, on whether the Lease terminated upon the dissolution of 176 Bowery, Inc. in 2003. If the Lease terminated after the dissolution of 176 Bowery, Inc., then the ensuing occupants of the Building (including Chan) were merely month to month tenants, and the Right of First Refusal expired with

the Lease. If, however, the dissolution of 176 Bowery, Inc. did not terminate the Lease, then the Right of First Refusal may have passed to Chan, individually, as a successor or assignee of 176 Bowery Inc.

The Lease does not expressly indicate whether it terminates upon the dissolution of 176 Bowery, Inc. as the corporate tenant. *See* Article 9 of the Lease (enumerating events of default that terminate the Lease, none of which address dissolution). Neither does Article 33 of the Lease make the parties' intention clear, because that provision solely contemplates dissolution in the context of a sublease with Ping Cheung or Jimmy Chan (or their wholly owned legal entity). No sublease has been produced, thus this Article of the Lease is not directly applicable. *See* Article 33 of the Lease ("In the event either . . . Ping Cheung or Jimmy Chan wants to . . . dissolve or cause Master Tenant to go out of business and discontinue its corporate activities, then, in that event, Landlord agrees to continue to recognize the remaining sub-lessee, either Ping Cheung or Jimmy Chan, or their wholly owned legal entity, as the replacement Master Tenant under the master lease.").

Because the Lease does not directly address whether it terminates on dissolution of 176 Bowery Inc., there is a question of fact as to what the parties intended upon dissolution. *See Goldman Sachs Group, Inc. v Almah LLC*, 85 A.D.3d 424, 426–27 (1st Dep't 2011) ("[a] contract is ambiguous if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings").



Moreover, if the parties intended the Lease and the Right of First Refusal to continue after 176 Bowery Inc. dissolved, then factual questions exist with respect to who could exercise the Right of First Refusal. Article 14 of the Lease provides that “Tenant shall not assign this lease without the prior written consent of the Landlord” and that “[n]o assignment or subletting or collection from an assignee or sub-Tenant or occupant shall be deemed an acceptance of the occupant, sub-Tenant or assignee as a tenant[.]” Thus, pursuant to Article 14, Chan could not assume the Lease after 176 Bowery Inc. dissolved without Lipliner’s prior written consent.

However, Chan and individuals/entities related to him (the Chan Family or entities wholly owned by Chan and/or the Chan Family) occupied the Building and Lipiner accepted payments from and interacted with him and these individuals/entities without dispute. Under these circumstances, a triable issue of fact exists as to whether Lipliner waived her right to require prior written consent to assignment of the Lease to Chan. *See Astoria Bedding, Mr. Sleeper Bedding Ctr. Inc. v Northside Partnership*, 239 A.D.2d 775, 776 (3d Dep’t 1997) (stating that courts disfavor “covenants seeking to limit the right to assign or sublet . . . [and that] they are construed with the utmost jealousy, and very easy modes have always been countenanced for defeating them”). Notably, if Chan is an assignee of the Lease, then Article 29 of the Lease provides that “[e]ach of the terms, covenants, and provisions of this lease shall be binding and shall inure to the

benefit of the parties and their respective successors and assigns, and legal representations.”<sup>4</sup>

Considering the foregoing issues of fact, I deny both parties’ respective motions for summary judgment. As for the motions to dismiss, resolution of whether Chan is entitled to specific performance will also resolve Thor’s counterclaim for ejection, making “determination [of Thor’s counterclaim] . . . merely advisory since it can have no immediate effect and may never resolve anything” *NY Pub. Interest Research Group, Inc. v Carey*, 42 N.Y.2d 527, 531 (1977). Therefore, I grant Chan’s motion to dismiss Thor’s counterclaim to the extent Thor seeks a declaratory judgment that “[it] is entitled to eject and evict Chan and all persons holding under his at the Building . . .” *See Efdex Elec. Contractors, Inc. v Melita*, 167 A.D.2d 501 (2d Dep’t 1990) (affirming dismissal of defendant’s counterclaim that was contingent on another party’s claim even if it was construed as a request for a declaratory judgment). I do not dismiss, however, that branch of Thor’s counterclaim in which it seeks a declaratory judgment for use and occupancy, as that determination would not be advisory.

I also grant the Chan Family’s motion to dismiss the third-party complaint. CPLR 1007 permits third-party practice only “against a person not a party who is or may be liable to that defendant for all or part of the plaintiff’s claim against that defendant[.]”

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<sup>4</sup> To the extent that defendants argue that recognition of Chan as the tenant would violate the statute of frauds, “[t]he presence of a tenant in possession that is paying rent gives rise to a presumption of an assignment sufficient to satisfy the statute of frauds.” *Gateway I Group, Inc. v Park Ave. Physicians, P.C.*, 62 A.D.3d 141, 147 (2d Dep’t 2009).

Here, Thor's third-party complaint seeks a declaratory judgment to eject and evict the Chan Family from the Building, which is improper under CPLR 1007. Additionally, I deny Thor's request to "realign" the Chan Family as additional counterclaim defendants as moot in light of the dismissal discussed above.

In accordance with the foregoing, it is

ORDERED that the motion by defendants Marlene Lipiner and Thor 174-176 Bowery LLC for summary judgment dismissing the third amended complaint is denied; and it is further

ORDERED that the cross-motion by plaintiff Kai Chui Chan for summary judgment on the third amended complaint is denied; and it is further

ORDERED that the motion by plaintiff Kai Chui Chan to dismiss defendant Thor 174-176 Bowery LLC's counterclaim is granted to the extent set forth in this decision, and the motion is otherwise denied; and it is further

ORDERED that the motion by third party defendants Amera Hong, Elizabeth Chan, Tommy Chan, and Daniel Connors V to dismiss Thor's third-party complaint is granted and the third-party complaint is dismissed in its entirety against said third party defendants.

This constitutes the decision and order of the Court.

7/30/18  
DATE

*Saliann Scarpulla*  
SALIANN SCARPULLA, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input checked="" type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED			<input type="checkbox"/>	GRANTED IN PART		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER		
	<input type="checkbox"/>	DO NOT POST			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE