CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: COMMERCIAL PART 52

525 NOSTRAND LLC,

Petitioner ,

-against-

WAZI ULLAH and JANNATUL KAWSER,

Respondent.

Index No. 064807/2015

DECISION and ORDER

Date(s) of Trial/Hearing:

June 19, 2015, July 21, 2015, August 4, 2015, August 31, 2015, September 9, 2015, October 5, 2015, October 6, 2015, October 7, 2015 and October 13, 2015.

This is a commercial holdover summary proceeding. On April 7, 2015, the Petitioner had served the notice of petition and petition to recover possession of the premises known as 525 Nostrand Avenue, Commercial Store, Brooklyn, New York 11218.

In or about April 23, 2015, WAZI ULLAH, by his attorney, Dipo Akinola, P.C., served and filed an answer which contained various affirmative defenses in this matter.

The verified answer denied service of a termination notice; it also alleged that the notice of petition and petition were not served on the Respondent. The only notice that the Respondent allegedly received was notice from the Court. The Respondent alleged the right to a traverse hearing. The answer asserts that the petition fails to state a cause of action (first affirmative defense); the Respondents have an option to extend the terms of the lease for an additional five years and the Respondent, in writing, extended the subject lease for an additional five years (second affirmative defense); the court lacked subject matter jurisdiction over the petition based on the lack of an adequate description of the subject premises sought to be recovered (third affirmative defense); the petition failed to plead the Multiple Dwelling Registration Number for this building (fourth affirmative

defense); the petition is defective and fails to comply with the applicable laws, therefore requiring dismissal of the action (fifth affirmative defense); the Petitioner is barred by the doctrine of laches, estoppel and/or equitable estoppel, from the commencement of this proceeding (sixth affirmative defense); and the Petitioner's conduct constitutes waiver which is a complete bar to this proceeding (seventh affirmative defense). For these above claims, the Respondent asserted that the proceeding should be dismissed as a matter of fact and law.

The petition was noticed to be heard on April 23, 2015 at 10 o'clock a.m. in Commercial Part 52. On that day, the case was adjourned to June 17, 2015. The undersigned judge ordered a traverse hearing and if required, a trial, on June 17, 2015 at 10 o'clock a.m. The Respondent was required to pay use and occupancy in the sum of $3,150.00 for May and June 2015 by the fifth day of each month and on default in payment, pursuant to RPAPL §745(2)(C)(i), the Court would enter a judgment of possession and a monetary judgment thereunder.

On June 17, 2015, the case was adjourned to June 19, 2015 for traverse and trial to be referred to the undersigned.

On June 19, 2015, after a court conference, the traverse defense was waived and the case was scheduled to proceed to trial on July 21,2015 at 2:30 p.m.

On July 21, 2015, the case was adjourned to August 4, 2015 for trial.

On August 4, 2015, the case was adjourned to August 31, 2015 and then again to September 7, 2015 for a continued trial. The court ordered use and occupancy to be paid *pendente lite* until a final determination by this Court.

On September 7, 2015, the Court was informed that use and occupancy was not paid as ordered and as a condition to the continuance of the trial and in an effort to bring the Respondent in compliance with the court order, payment was required to be made by September 9, 2015 by hand delivery.

The case was then adjourned for a continued trial to October 5, 2015, October 6, 2015 and October 7, 2015.

Subsequently, the case was adjourned to October 13, 2015 for a continued trial and for summation.

TRIAL HISTORY

On June 19, 2015, after a conference and traverse was waived, the case proceeded to trial.

For the record, the trial proceeded on the following dates: June 19, 2015, July 21, 2015, August 4, 2015, August 31, 2015, September 9, 2015, October 5, 2015, October 6, 2015, October 7, 2015 and October 13, 2015.

The Petitioner called **SEAN SINNREICH** of Woodmere, New York as the first witness in its *case-in-chief*. He testified that he was a manager of this mixed-use building that contains three residential apartments and one commercial store. The store is occupied by the Respondent restaurant and is used for business purposes only. Notwithstanding the fact that the building contained three apartments, the witness testified that it was not a multiple dwelling. The witness further testified that the restaurant specialized in "Indian cuisine."

The Petitioner admitted into evidence, Petitioner's Exhibit "1", a certified copy of the deed of ownership, which shows that on October 3, 2014, Right On Nostrand Avenue LLC transferred all rights, title and interests in the premises known as 525, 527 and 529 Nostrand Avenue, Brooklyn, New York (Block 1867, Lots 12, 13 and 14) to 525 NOSTRAND LLC for valuable consideration. The purchase price for the subject premises was $2,925,00.00 and it was an on-length transaction. The deed showed that filing fees and real estate transfer taxes were paid to the City of New York and the State of New York.

Additionally, the Petitioner admitted Petitioner's Exhibit "2", a lease agreement between the Promenade Development LLC, as landlord, and the Respondents, WAZI ULLAH and JANNATUL KAWSER, as tenants, that commenced on March 15, 2010 and terminated on March 30, 2015. Notwithstanding questions on *voir dire*, the document was admitted into evidence.

Additionally, the Petitioner admitted Petitioner's Exhibit "3," an estoppel certificate which contained material terms at the closing. The estoppel certificate stated that the former landlord and the Respondent had a lease that commenced on March 15, 2010 and terminated on March 30, 2015 at a monthly rent of $3,646.52. The document also represented that the landlord had a security deposit of $9,000.00 in conformity with the lease and the Respondent was current in monthly rent payments. The witness stated that he recognized the

Respondent's signature on the document, namely WAZI ULLAH, based on receipt of business checks with his signature and the estoppel certificate. He further testified that WAZI ULLAH signed checks in front of him, and he was familiar with his signature.

The witness further testified that the estoppel certificate was given to him by the seller of the property, Jeremy Feit. He also indicated that the estoppel certificate was in a file that was given to him along with other original documents at the closing on October 3, 2010. Of relevance to this case, the witness further testified that as of the date of the estoppel certificate, no written option to renew or to extend the lease was ever received by the former owner or by himself. The witness also referred the Court to the second page of the estoppel certificate which provides that the assignment and assumption of the lease were assumed by the Petitioner.

He further stated that on October 3, 2014, a written notice had been sent to the Respondents about the change in ownership of the building. The Petitioner testified that the notice was signed by Bennat Berger, a member of Right On Nostrand Avenue LLC, giving the tenants notice that effective October 3, 2014 there was a change in ownership and provided the tenants with a new address to mail the monthly rent. The witness testified that this notice was given to all tenants in the building by hand (personal) delivery and was also posted in the lobby of the demised property. A copy of the notice was admitted into evidence as Petitioner's Exhibit "4".

The Petitioner subsequently admitted Petitioner's Exhibit "5," a rent ledger, with no objection after *voir dire*. The witness testified that he prepared the document on June 11, 2015 by printing it from his computer and it reflected the monthly rent of this tenant as $3,646.52. The witness also testified that there was an additional amount of $1,823.26 due which he called the "holdover rent"; $114.87 which reflected the Respondent's share of the real estate property tax and $85.90 for the Respondents proportionate share of insurance reimbursement. The total amount that was due and owing including the rent for the month of June was $14,830.92.

After this first date of trial, Petitioner's Exhibits "1" through "5" were admitted into evidence.

On July 21, 2015, **SEAN SINNREICH** continued his testimony on behalf of the Petitioner. Notwithstanding additional questions regarding Petitioner's Exhibit "3," the document was still admitted into evidence.

Additionally, on this trial date, Petitioner's Exhibit "6," assignment and assumption of leases, rent and security deposits and Petitioner's Exhibit "6A," also an assignment and assumption of leases and security deposits were admitted into evidence.

The first assignment was dated October 3, 2014, assigned all leases in existence and all of the security deposits between Right On Nostrand Avenue LLC and 525 NOSTRAND LLC (Petitioner's Exhibit "6").

Additionally, on March 10, 2014, a similar assignment and assumption of leases, rent and security deposits were signed. The witness testified that although he was aware of the lease option, the Respondent must give written notice of the option. He points to paragraph 28 which describes the method that must be used to extend the lease. He asserted that despite the fact that the lease does not explicitly state a time period to exercise the extension, it nonetheless requires the lease extension to be exercised before the lease ended. He relies on paragraph 26, which states that the tenant needed to exercise the extension before the lease terminated by its terms.

The witness believed that the lease ended by its terms since neither he or the prior owner received any written notice from the tenant of their exercise of the option. The witness knew the lease and relied on Article 26 and 28 of the lease agreement. The witness further testified that the lease option had to be sent by certified mail and in this instance, no mail, either by regular mail or by certified mail was ever received by the Petitioner.

The witness reiterated that Petitioner's Exhibit "4," the written notice, was posted in the public hallways, sent by regular mail and was put under all the tenant's door. Therefore, the Respondent had notice of the proper place to send the monthly rent and the lease extension.

The witness further testified that in November 2014, he received a telephone call from the tenant herself about the rent in or about November 1, 2014. He believed that since he got the rent, the tenants knew where to send the extension request.

On further examination of the witness, he stated that the superintendent placed the written notice on the door of all the tenants about the transfer in ownership and address for rent payments.

After this testimony, the case was adjourned to August 4, 2015 for a continued trial on the merits.

On August 4, 2015, the Respondent's attorney moved for a directed verdict, specifically alleging that the Petitioner failed to sustain a *prima facie* case on the grounds that the Respondent exercised the option to extend the lease for another five years and the lack of any evidence of any notice to the tenants of the change in ownership.

After oral argument, the motion for a directed verdict was denied.

The Respondent then went forward with their *case-in-chief.* The Respondent called JANNATUL KAWSER one of the named Respondents in the proceeding. She testified that she has been in occupancy of the premises for about six years. She and her husband signed the lease agreement with the former landlord.

Prior to her taking occupancy of the property, it was a meat market from at least 2010 to 2013 and was not in good condition. There was plenty of garbage and other trash in the property; it looked like a junk yard. Many people in the neighborhood used to dump all kinds of things on the property. The property required substantial rehabilitation.

She testified that the construction began with changing all the beams on the floors. They did a complete gut rehabilitation. They also did a complete renovation of the backyard, the basement and the bathrooms. She stated that she retained an architect, and floor plans were prepared for the job.

She acknowledged that she assumed all responsibility for the property since she took it in "as is" condition as prescribed in Articles 5 and 6 of the lease. She also acknowledged that she was responsible for the repairs to the property.

After she and her husband retained the architect and the construction company to perform the renovations, the renovations started between January 2010 and March 2010. It took about seven to eight months for the work to be completed. Respondent's Exhibit "A," although produced, was not admitted into evidence. The Respondent stated that the cost of the work was $35,917.00 and included plumbing and electrical

work, and cleaning of the entire property. Respondent's Exhibits "A," "B" and "C", although marked, were not admitted into evidence.

The witness changed her renovation costs and clean up to $250,000.00. She further testified that she signed the lease about March 2010 before the renovations were completed which effectively changed the premises from a meat market into an Indian restaurant. She claims that she continues to operate the restaurant there today.

When she first opened the restaurant it was a buffet style restaurant and it opened for lunch and dinner. She stated that they started losing in the business, and she believed it was because of the type of décor at the property and the food delivery system. She then changed the entire décor and the name of the restaurant. The name of the restaurant was Ulah Restaurant, and it was changed to Bombay Canay. The changes in the restaurant took place about a year and a half after the initial renovation, and was finalized in 2011. She was confident in the location; she said it was a good community and their location was very close to the subway.

On the next trial date, September 2, 2015, JANNATUL KAWSER, testified that Petitioner's Exhibit "2" was their lease and she was aware that the lease would end and wanted to extend the terms for an additional five years. She stated that she verbally told the prior landlord and also the Petitioner's agent that she wanted to extend the lease.

She also stated that she submitted that request to the Petitioner, in writing, and proffered Respondent's Exhibit "D," a letter dated September 10, 2014, in which the tenants extended the terms of the lease. She affirmed that her signature is on the bottom of the letter and her husband's signature is above hers. They mailed the document to the P.O. Box that was stated in the lease. She stated that she put Respondent's Exhibit "D" in an envelope, purchased the stamps, put the stamps on the envelope and put it into the mail to her old landlord. The old landlord's address was BCB Properties Management in Manhattan and although she exercised the extension before that time, when she was notified of the change in ownership, she got a bank check and the landlord picked that up from her on September 8, 2015.

She also testified that she purchased the stamps at Atlantic and Nostrand but did not send the letter by certified mail but by regular mail. She was adamant that the purpose of sending the letter was to extend the lease for another five years and wanted another five years after that.

She also stated that prior to writing and sending out the lease extension letter she had a conversation with the prior landlord about the lease extension. She said she spoke to Alicia and Mrs. Kendra and she was assured that there would be no problem with the extension and they would extend the lease.

She was told to pay $3,150.00 in the future. The first conversation that she had regarding the lease with the owner was between September and October 2014. She testified that she had this discussion with the old landlord as well as the new landlord at their first meeting in which she gave two month's rent. She stated that even the new owner, after discussion with her, agreed to give her a new lease. Both her and her husband knew about the lease; they spoke with him at the store.

The witness continued to assert that they changed the name of the restaurant from Ulah Restaurant to Bombay Canay; the work was done in March 2010; and then by 2011, everything was changed and made new again.

After the initial investment, the business was not good so they did a new renovation and the new renovation which commenced 2010, she spent $250,000.00 for the construction. This renovation that costs the sum of $250,000.00 was done in 2010 and involved new construction, including electrical and plumbing work. She stated that she made this investment because she had an additional five years left on the lease.

The witness indicated that she did not understand all the language in the lease. She talked about her background in terms of education; she had graduated from college. She indicated that seven other people worked in the restaurant, as did she. She employed three families and a few single individuals. Her income was derived from the restaurant; she stated "there is no other source of income because presently her husband is ill and the restaurant is their only source of income."

On cross-examination, the witness testified she served the notice by regular mail and no proof of mailing, she acknowledging that there was no proof that the landlord had ever received the letter.

The witness testified that she did not understand the requirements under the lease terms, Article 28 and 26 of the lease, to extend the lease or that the notice be sent out by registered or certified mail. She stated that she did not understand the mailing requirements that the notice be sent out by registered mail, return receipt. There were no additional documents submitted to prove compliance with the lease. The notice was sent to the address of the landlord in the lease; Attn: Accounting Office.

On the next day of trial, October 5, 2015, the Petitioner continued with his cross-examination. The witness repeated and reiterated her claims about the mailing. The witness continued to state that she had no knowledge of the mailing address for the new owner, notwithstanding testimony to the contrary that all tenants in the building were notified by hand delivery under the door, affixed to the door and also by regular mail.

She also stated that she did not pay her monthly rent by mail because the manager had always picked up the rent from the store, and collection of the rent had never been an issue with prior management nor with this landlord.

She testified that the renovations cost in excess of $250,000.00; she claimed that she had checks to prove the payments for the renovations but she did not have the checks available in court because they were with her architect. In addition to the above sum, she also testified that it cost her $16,900.00 to change the décor from the buffet style to the restaurant bar style.

During the time that she has occupied the property, there have been water leaks from the hood in the kitchen and in the bathroom and had informed the manager about these leaks. In addition, there were broken tiles in the property on the floor and walls. She testified that she did the renovations in 2012 and at that time the water was still leaking into the kitchen area and the floors were broken up. The improvements that she concluded in 2012 involve the replacement of the electrical system, the replacement of floor tiles, and new lighting. In addition, they installed a new counter and changed the chairs and tables throughout the restaurant. There were no improvements that have been conducted within the year prior to the date of the trial. The witness also stated that at another time there were broken floor tiles and broken ceiling tiles and she had to sheetrock to cover the leaks in or about November or December of 2014.

On redirect, the witness further testified that her rent was not $3,646.52 as proffered by the Petitioner, but was $3,150.00. The witness denied having seen Petitioner's Exhibit "6", a copy of the assignment and assumption of lease, rent and security deposit. She also denied ever seeing Petitioner's Exhibit "4," the notice to the tenants of the change in ownership of the property, dated October 3, 2014. There was no further relevant testimony from this witness and the case was adjourned to October 6 for a continued trial.

On October 6, 2015, the Respondent called **OLABANJI AWOSIKA** as a witness in their *case-in-chief.* The witness is a licensed architect and obtained his license in 1991.

The witness testified that he was retained by the Respondents about five years ago to convert the commercial space to a restaurant and he submitted plans to the Department of Buildings on their behalf. His described the property as an abandoned vacant commercial space in bad condition.

He had to measure the entire property, draft plans, and design the restaurant. Additionally, he had to draft plans of the equipment location; additionally, he was required to design and plan the installation of the commercial kitchen equipment. Additionally, he was responsible for the plans for the HVAC system, including the ventilation system. He charged and collected $10,000.00 for his work. The application was for a Type 2 alteration that did not require the issuance of a new certificate of occupancy, but a letter of no objection or conformity. The Respondent admitted into evidence Respondent's Exhibits "E-1" through "E-4," the architectural plans for the subject premises. Additionally, the Respondent admitted into evidence Respondent's Exhibit "F," the seal and signature of the architect and then Respondent's Exhibit "E-1", a specific site plan, the location of the doors and windows, plumbing and gas systems, and new light fixtures.

The witness further testified about the different architectural plans, Respondent's Exhibits "E-1" through "E-4" contained one of three changes to the plumbing and gas risers and was a cross-section of the building. Respondent's Exhibits "E-2", an amendment to the plumbing and gas risers. The architect then went through the respective floor plans starting with the cellar; the cellar was for storage for the commercial store; the first floor including the front entrance door, the seating arrangements, the commercial kitchen, new interior and

exterior doors, countertop space, ventilation, HVAC and a roof system. It was the whole building except the apartments above. The plans also contained a handicap detailed bathroom.

During the completion of the application, the architect is required to provide an estimated cost of the restoration of the property. He acknowledged that the costs are purely speculative, because it depends on the construction company and other factors, he estimated that the costs for this renovation around $128,000.00 excluding the equipment.

On cross-examination, the most significant testimony by the architect was that the plans were not a final job, and he could not confirm whether the job had ever been signed-off by the DOB. In addition, he was uncertain about whether or not any of the permits on the job were amended and/or updated. He testified that the sign-off is ultimately the responsibility of the contractor and not the architect.

The Respondent next called **WAZI ULLAH**, one of the Respondents in this proceeding.

The witness testified that he is one of the named Respondents and a commercial tenant in the demised premises. He wanted to open an Indian restaurant in 2010 and he went to this property for inspection. He said that the conditions were filthy. The tiles were missing from the floor and the walls, and it had formerly been a meat shop.

He retained an architect, and the architect submitted plans to construct the restaurant. He had to renovate the entire property. He testified that they had to replace all the beams and the girders. He worked with the architect as well as the contractor.

The general contractor was named Hoque. Hoque hired the subcontractors including plumbers and electricians and he coordinated the job at the subject property. Respondent's Exhibit "C" was admitted into evidence which is the contract prepared by Hoque. The contractor performed the services stated in Respondent's Exhibit "C" in 2010 and 2011. The contractor started the work in about March or April of 2010 and completed the work at the end of 2011.

The restaurant was opened in November 2011, and was a buffet. They were only charging $5.00 for the buffet. Since the buffet was not profitable, he and his wife changed the restaurant to a la carte and the name was changed to Bombay Canay. This second make over took about a month and a half to complete.

On the following day of October 7, 2016, **WAZI ULLAH** continued this testimony. He testified that the following sums had been paid for construction: $35,917.00 paid in or about May 22, 2010 and an additional $15,770.00 was paid on an unspecified date, an additional $6,000.00 was paid on another unspecified date. Those costs included the construction, plumbing and electric and the installation of a filter or a feeder. Three people worked on the job.

He was responsible for getting the contractors and he referred to him as Mr. Jerry. He gutted the place in about March or April 2010, and started right way. Subsequently, in or about May 22, 2010, the plumbing and the filter were installed in the property. Shortly after that, unfortunately, the business sustained damages in Hurricane Sandy and additional work was required in the restaurant. He stated that all his records, contracts, receipts, and other papers were lost due to water damage from the storm. He said that during Hurricane Sandy, one of the water pipes erupted and he had to pump out all the water. The same water pipe broke again. He testified that he lost all his money for the work that had been recently done prior to that time. He also made more improvements, including the installation of a new countertop, new tiles on the floor and made repairs to the roof. At the same time, he purchased new furniture for the restaurant, such as new chairs and new sofas.

The witness also testified that the ceiling required repairs due to water leaks. In addition to the above, the witness testified that the restaurant required painting and plaster-work throughout. The restaurant required electrical work and new lighting fixtures in 2014. It cost between $8,000.00 to $10,000.00.

The witness stated that their goal was to improve the store so that they could increase the number of customers. **WAZI ULLAH** also stated that the reason that he and his wife invested so much in the space was because he knew that he had another ten years remaining on the lease. He stated that Respondent's "D" was their notice to the landlord of their intentions to renew the lease.

Petitioner waived cross-examination and therefore, no redirect and no re-cross. At the conclusion of this witness' testimony, the Respondent rested on its *case-in-chief.*

In rebuttal, the Petitioner called **ALLISON CORREA**. She testified that she was the property manager for Right On Nostrand Avenue LLC for nearly thirteen years and managed four other properties, 525 and 529 Nostrand Avenue and two other properties. She was primarily responsible for rent collection and managed all the commercial landlord-tenant cases.

As a property manager, at one point in time, their office was on-site and she interacted with all the tenants. She testified that the main office was at 27 Union Square West in Manhattan and then 551 Nostrand Avenue and then 53 Street. There offices were at 551 Nostrand Avenue and they began their operations there in 2003 and they remained at this site until November 2013, when they moved their offices to Union Square. They notified all of the tenants along with their rent bill and sent them a change of address notice. She stated most of the tenants made rent payments to the office.

The witness acknowledged that they had relocated their office to 515 Madison Avenue in November 2013. When shown Respondent's Exhibit "D," the lease extension, she stated that she had never seen it before that day in court. She immediately noticed the address and stated that her office was not located at that address; they had moved to the Union Square address by the date of the letter. She had never seen the letter and their office had not received it.

Furthermore, she testified that contrary to the tenants' testimony, neither Respondent had any verbal conversation with her about extending the lease; they had never even discussed the lease extension with her. As she stated, they came to the office to pay their rent and they always hand-delivered the rent but there was never any conversation about the extension. The witness, when shown Petitioner's Exhibit "3," the estoppel, stated that this type of document is prepared when they sell property. It was prepared by Greg Box. Apparently, the couple contacted the management office when they received the document and required an explanation before they would sign the estoppel certificate. She stated that it was Mr. WAZI that required the explanation of the

estoppel certificate prior to closing. She stated that at that time, their rent was paid, and thereafter, they never had any further discussions about the lease.

During her testimony, the Petitioner admitted into evidence Petitioner's Exhibit "7," a rent ledger to substantiate the rent that is due and owing by the Respondents.

On cross-examination, the witness testified on November 1, 2013, the rent statement was given to the tenants and Kendra Fedlis, from their office, picked up the rent from the tenants. She never collected the rent herself. Then later, when they relocated, the tenants came to their office to deliver the rent. At one point, there was some discussion the new owner and how was rent to be collected, but she told him that the new owner and the tenants would work that out among themselves.

Although she was aware that the tenants had an option to extend their lease, she said that they probably discussed that with the old owners but definitely not with the new owners. She further testified that their rent is $3,646.52, but that the tenants paid less than the monthly rent, and she just decided to "let it go".

She testified that she did not handle the mail for the office, and that the mail, once sorted, was received by the office manager, and she was never told of any receipt of any notice to extend the lease terms.

On redirect, she was quite firm that when the Respondent asked if she was going to renew the lease, she told him that it was not within her power to extend the lease.

On re-cross, she stated only the general manager or the director of the office had authority to discuss the lease extension with the Respondents; he never discussed it with her, and she had no knowledge about the renewal.

The Petitioner called **SEAN SINNREICH** again on their rebuttal case. He testified that the monthly rent for this commercial unit was $3,646.52 but that the court had ordered $3,150.00 as an interim rent pending the resolution of this proceeding.

Further, **SINNREICH** stated that the landlord would not have renewed the lease because of the below market rent. It would be highly prejudicial. The witness testified that the subject premises is about 800 square

feet and a comparable rent in that community is $5,200.00. The Petitioner's agent also states that the rent in one of their other comparable buildings is $3,600.00, not the $3,100.00 that the tenant was currently paying.

The witness also stated that the renewal is not valid since it is dated three months after the expiration of the lease. The witness also stated that in addition to the 800 square feet, the Respondent's have full access to the backyard and therefore, the rent should be much higher than $3,100.00.

The witness also had admitted into evidence, Petitioner's Exhibit "9," a series of photographs that he took one month ago. The pictures, according to the witness, demonstrate that no work has been done in this property since October 2014. The exterior photographs show no improvements. The photo of the rear shows that the rear is vacant and contains garbage and other debris. His observations, supported by the photographs, showed that even during normal business hours, one to two people are in the restaurant; otherwise, it is primarily empty. He stated that when he was present, "he saw a few people, but very, very few". The witness also denied receipt of Respondent's Exhibit "E" and said that he had never seen it before the court date.

On cross-examination, he admitted that he did not know the exact square footage of the property but estimated that it was about 800 square feet.

He confirmed that he had visited the old restaurant, and the old restaurant had been temporarily closed down. Notwithstanding the re-opening, he did not observe any new structure; there were no new permits obtained for any additional construction. He observed the same wall tiles and floor tiles. He said that he never spoke with the old owner about the lease since his office relied on the estoppel at closing to preclude this type of claim of a lease extension.

He also brought to the attention of the Court that the Respondents owed fourteen months in rent arrears.

He also stated that he is the manager of seven other buildings: four in Bushwick, two in Ridgewood and two in Williamsburg. Some of them have the same owners and some of them do not.

After redirect or re-cross, the Petitioner rested in its case-in-chief.

In summation, the Respondents argue that the lease is ambiguous and it fails to state the manner in which to rightfully exercise the option. The provision is a "little bit less ambiguous". The Respondent states that there was no extrinsic evidence that was submitted to help the court in making its determination.

The Respondent argues that the Respondents did not have the assistance of counsel and did not prepare their own option. The Respondent only signed it. Because the lease is ambiguous, it should be construed against the Petitioner since it was prepared by the Petitioner. Any lease ambiguity, according to the Respondent, is imputed to the Petitioner. The Respondent argues that in a similar decision before the court, that the ambiguity was imputed against the landlord and therefore, it allowed the tenant to exercise the option in the manner in which the tenant did exercise the option.

The Respondents also assert that the testimony of **ALLISON CORREA** corroborated the tenant's testimony, insomuch that she testified that she was asked verbally to extend their lease. The attorney also asserts that since English was not the Respondent's first language, they did not understand how to exercise the option and should be allowed to extend the lease.

The Respondents argue that this family relies on this restaurant to survive, and so in balancing the equities between parties, the equities should be balanced in favor of the Respondent as opposed to the Petitioner. He also argues that the testimony established that the Respondent discussed the lease option with the former landlord and with current manager of the building.

The Respondent further argues that the Petitioner failed to comply with paragraph 36 of the lease. There is no evidence that any notice was sent to the tenants providing notice of the new landlord and the new address as a condition precedent to the tenant complying with paragraph 28 of the lease to exercise the option to renew.

The attorney argues that the equities inure to the Respondents. The Respondents invested $250,000.00 in structural improvements and equipment and $10,000.00 in architectural fees to produce plans and drawings for the renovation of the property.

The attorney argues that no other tenants that have occupied this property, the Petitioner is a predatory landlord and their conduct here is unconscionable. He states that the tenants, on the other hand, have put a

lifetime of investment in the property, has good will and invested $250,000.00 in the property. Lastly, the Respondents are unsophisticated people who did not speak English as their first language and were unaware of their legal obligations of the manner in which to exercise the option to renew. There was no justification proffered by the landlord to not offer the tenant a lease.

The Petitioner, in support of its case, indicated that the Respondent has not met the requirements of the decision and order of this Court in the matter of 149-05 Owner's Corp. v. Ira Phillips, D.D.S, et al.. He first stated that the failure to exercise the option was not inadvertent, and it was not a mistake. They simply sent it to the prior owner. The Petitioner asserts that the Respondent did not obtain the signature of the prior landlord or the new landlord as required by the lease to exercise the lease extension; certainly, there is no evidence produced to show that the lease extension was sent by certified mail. Notwithstanding this alleged inadvertent mistake, the Respondent sent the letter to the prior owner and did not send it properly. It was not sent by certified mail either way. There is no evidence that the prior owner approved this renewal or was aware of the lease renewal.

The Petitioner argues that the purported lease extension was sent to the old address and not to the new address. The Respondents had actual knowledge of the new office and the different address.

The Petitioner argues that the Respondent had knowledge that the property had been sold and there was a new owner. All of the tenants were notified orally by **ALLISON CORREA.** In addition, a written notice was delivered personally to the respective premises; annexed to the door and put under the door and also notified by regular mail.

The Petitioner asserts that the Respondent still is not paying the correct rental amount pursuant to the lease. The Petitioner states that there was never any agreement to reduce the monthly rent amount. It was the Court, the Petitioner argues, that ordered $3,150.00 as the monthly use and occupancy, *pendente lite*. The Petitioner argues that the Respondent does not have the ability to pay the rent; either the higher or the lower rent.

As to the claims of substantial improvements in the sum of $250,000.00, the Petitioner asserts that Respondent has not provided any documentary evidence to substantiate any payments for the work. The Petitioner argues that the Respondent has only produced self-serving documents and has failed to prove any payments for the work alleged due and owing.

Additionally, the Petitioner asserts that there was no work done in this property for at least a period of a year. If any work was done, it was done prior to the purported exercise of the option on September 14, 2014.

The Petitioner further asserts that Petitioner's Exhibit "9" depicts the lack of improvement in the property and evidence that the restaurant is not in good condition.

The Petitioner's attorney states that the Court should not consider the Respondent's claim that they could not speak English. It was their obligation to seek counsel to protect their lease and their failure to properly exercise the option is their fault.

The Petitioner argues that the balance of the equities are in their favor. The Petitioner, not the Respondent, would be highly prejudiced. The Respondent's rent is well below market value and based on the facts, they are losing money each month on the subject property.

The Petitioner further argues that the Respondent now owes in excess of $18,000.00; and has never paid the correct rent. The tenants simply cannot afford to maintain this business.

For all of the myriad reasons set forth above, the Petitioner states that the Respondent has not demonstrated compliance with the lease, and cannot prove any of the defenses alleged in the answer. Based on the facts and evidence presented by the Petitioner, the Petitioner claims that it has sustained its *prima facie* case and is entitled to a final judgment of possession and for $18,596.16 with the issuance of the warrant of eviction forthwith and no stay of the execution of the warrant.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

In this case, two competing commercial businesses claim rights to possession of a leasehold interest. A business can be defined as a commercial activity engaged in as a means of livelihood or profit, or an entity

which engages in such activities (InvestorWord.com). The location of a business is often the cornerstone of its success. More than half of all small businesses rely on the rental of commercial property for the sale, distribution, manufacturing and production of goods and/or the distribution of services. In those rentals, many commercial tenants invest substantial sums of money in renovations and thus, enter into long term leases to recover the investment made in the property over the course of the lease.

A lease is a contract, in essence, a form of agreement made by a landlord with a tenant for the use and occupation of real property (Rasch, NY Landlord and Tenant Section 1:1-1:2). Therefore, it is no surprise that the principals of contracts govern landlord and tenant commercial leases; both legal and equitable principles of contract law govern the lease agreement between parties.

In the case at bar, two principles of law are at work. General contract construction and the application of equitable relief to relieve a defaulting party of the terms of conditions of the lease agreement.

Often, the first question of concern is whether the underlying agreement is unequivocal and contains the necessary provisions to constitute a meeting of the minds between the parties. In determining whether or not an agreement is ambiguous is a question of law to be decided by the courts and only after an analysis of the four corners of the instrument (*see* Kass v. Kass, 91 N.Y.2d 554, 566, 673 N.Y.S.2d 350 [1998]; Todd v. Grandoe Corp., 302 A.D.2d 789, 790, 756 N.Y.S.2d 658 [2003]). Suffice to say, if any ambiguity exists in the instrument, then the courts will look to extrinsic evidence and may consider such facts in its analysis of the terms therein (see F&K Supply v. Willowbrook Dev. Co., 288 A.D.2d 713, 714, 732 N.Y.S.2d 734 [2001]; Ruthman, Mercadant & Hadjis v. Nardiello, 260 A.D.2d 904, 906, 688 N.Y.S.2d 823 [1999]).

Furthermore, a fundamental tenent of contract law is that the agreements are construed in accordance with the intent of the parties and the best evidence of the parties' intent is what they express

in their written contract. Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms, without reference to extrinsic material outside the four corners of the document [internal quotation marks and citations omitted]. Goldman v. White Plains Center for Nursing Care, LLC, 11 N.Y.3d 173, 176 (2008); MHR Capital Partners L.P. v. Presstek, 12 N.Y.3d 640 (2009); Van Shift Holdings Ltd. v. Energy Improv Structure Acquisition Corp., 65 A.D.3d 405 (1st Dept., 2009).

In addition, "it is a recognized rule of construction that a court should not adopt an interpretation which will operate to leave a provision of a contract...without force and effect. An interpretation that gives effect to all the terms of an agreement is preferable to one that ignores terms or accords them an unreasonable interpretation [internal quotation marks and certain citations omitted]." Ruttenberg v. David Data Systems Corp., 215 A.D.2d 191, 196 (1st Dept., 1995).

In negotiating any contract, the courts will not look outside of the four corners of the instrument especially "where...the instrument was negotiated between sophisticated, counseled...people negotiating at arm's length [internal quotation marks and citations omitted]." Tag 380, LLC v. ComMet 380, Inc., 10 N.Y.3d 507, 513 (2008); Logiudice v. Logiudice, 67 A.D.3d 544 (1st Dept., 2009). In addition, see the most recent matter of Colonial Pacific Leasing Corp. v. Brown, 28 Misc.3d 1214(a), 2010 WL 2927283 (N.Y.Supp.) in which the court denied a motion for summary judgment and granted Defendant's motion for summary judgment dismissing the complaint based on various ambiguities in the underlying documentary evidence submitted by the Plaintiff.

An agreement "is unambiguous if the language it uses has 'a definite a precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion'" (Greenfield v. Philes Records, 98 N.Y.2d 562, 569, 750 N.Y.S.2d 565, [2002], quoting Vreed v. Ins. Co. of North America, 46 N.Y.2d 351, 355, 413

N.Y.S.2d 351 [1978]; see Williams v. Village of Endicott, 91 A.D.3d 1160, 1162, 936 N.Y.S.2d 759 [2012]).

Second, in commercial transactions, in the case law below, for over a period of fifty years, the courts have answered the proverbial call to rescue valuable commercial tenancies by developing various equitable remedies to level the playing field between the owners and tenants to avoid the forfeiture of valuable leasehold interests by tenants that have been noncompliant with the specific terms of the lease agreement, namely the timely and proper exercise of lease renewal extensions.

A search of our rich history revealed that there are several Court of Appeals decisions in the early 1970's that created the foundation for many of the underlying principles and rationale of the courts that overlook defaults in lease agreements to avoid forfeiture of commercial tenancies.

In the earlier case of Jones v. Gianferante, 305 N.Y. 135, 138, 111 N.E.2d 419, 420, the Court of Appeals recognized that equity will relieve a tenant against forfeiture of a valuable leasehold interest when the default in notice has not prejudiced the landlord and thus, resulted from an honest mistake, or similar excusable default. In order to invoke the relief under Jones, it is incumbent upon the party to establish that (1) there was an honest mistake or similar excusable fault; (2) by the tenant; and (3) no damage to the landlord'."

In S.Y. Jack Realty Co. v. Pergament Syosset Corp., 27 N.Y.2d 449, 264 N.E.2d 462, 318 N.Y.S.2d 720 (1971), the Court of Appeals further developed and expanded the above rule of law to rescue yet another commercial tenancy in which the United States Postal Service failed to deliver a properly mailed notice to renew. The court determined that "if reliance on the United States mail could possibly be characterized as "fault", it was in 'excusable fault' and, the tenant which had timely mailed a letter making known its desire to renew a 5-year lease for a store building in which it had conducted its retail business for more than 15 years, should not be deprived of a valuable asset because of the failure of

the post office to deliver the letter, where the landlord did not suffer any damage or prejudice because of the delay."

There were some specific findings that the court relied on that were significant. It was undisputed that when a notice is required to be given by a certain date, it is insufficient and ineffectual if it is not received within the time specified in the lease (See e.g.., Peabody v. Sapterlee, 160 N.Y. 174, 59 N.E. 818; Kantrowitz v. Dairymens's Lead Corp. Assn., 272 App.Div. 470, 71 N.Y.S.2d 821, aff'd, 297 N.Y. 991, 80 N.E.2d 366; Boyce v. Nat'l Commercial Bank and Trust Co., 41 Misc.2d 1071, 247 N.Y.S.2d 521, aff'd., 22 A.D.2d, 848, 254 N.Y.S.2d 127; See also Restatement, 2d, Contract (Pent. Draft No. 18 1964), Section 64, Subdivision B); 1A Corbin, Contracts (1963), Section 264; I Williston, Contracts (3d Edition 1957), Section 87).

Additionally, since the landlord took no steps to find another tenant or to lease the space, it was found that the Appellate Division appropriately relieved the tenant of its default to give the requisite timely notice of the renewal of its lease or to perform some other condition precedent to renewal; no harm or prejudice befell the landlord and it was not due to bad faith. (Citing Jones v. Gianferante, 305 N.Y. 135, 111 N.E.2d 419; Rizzo v. Morrison Motors Inc., 29 A.D.2d 912, 289 N.Y.S.2d 903; Ringelhein v. Karsch, 112 N.Y.S.2d 130; Application of Tott, Sup., 81 N.Y.S.2d 344; see also I Corbins I, Contracts (1963), Section 35, p.146; MacNeil, Time of acceptance, 112 U. Pa. Law Rev. 947, 975; Rash, N.Y. Landlord & Tenant in Summary Proceedings (1950), 1970 Supp., Section 210, p.116; I Williston, Contracts (3d Edition, 1957), Section 76, p.249).

The court further established that "a longstanding location for a retail business is an important part of the goodwill of that enterprise, so the tenant stands to lose a substantial and valuable asset". Moreover, as was conceded in that case, the landlord did not suffer any damage or prejudice because of a delay resulting from the non-delivery of the letter to the landlord. The court specifically finding that the default was "excusable" fault and should not operate to deny the Defendant of a valuable asset.

Later in the 70's, in the often cited case of J.N.A. Realty Corp. v. Crossbay Chelsea, Inc., 42 N.Y.2d 392, 366 N.E.2d 1313, 397 N.Y.S.2d 958 (1977), the Court of Appeals determined that improvements in real property, coupled for the first time with the concept of goodwill as a valuable asset, rescued yet another commercial tenancy based on principles of equity. New York courts have recognized that the right to renew a lease is a vested equitable right (J.N.A. Realty Corp. v. Crossbay Chelsea, Inc., *supra*). Where a tenant assignee had made considerable improvements in the premises, $40,000.00 at the inception of the purchase and an additional $50,000.00 during the tenancy and where its location was lost, the restaurant would undoubtedly lose a considerable amount of its customer goodwill, the tenant assignee who failed to renew the lease at the proper time would be entitled to equitable relief if there is no prejudice to the landlord. It was particularly significant that the tenant had invested $15,000.00 in improvements, at least part of which was expended, after the option had expired (emphasis added).

In that case, the court had not been asked to consider whether a tenant would be entitled to equitable relief from the consequences of his own negligence or "mere forgetfulness" as the court had held in the Fountain case, *supra*. In Gianferante, the default was due to an ambiguous lease and in S.Y. Jack, the notice was mailed but never delivered. In the past, equitable relief was often denied if it appears that there was a willful or gross negligence by the tenant versus a forfeiture as a result of the tenant's own negligence or inadvertence. The matter was remanded to determine whether the owner, in fact, suffered a prejudice as a result of the late filing of the notice of option to renew.

One of the primary questions raised in J.N.A. Realty, *supra*, and similar cases upon which it relied, is whether the tenant would suffer a forfeiture if the landlord is permitted to enforce the letter of the agreement. The fact that the tenant in possession had made a "considerable investment and improvements on the premises" and "would undoubtedly lose a considerable amount of his customer's goodwill if he lost his location, would suffer a forfeiture", constitutes sufficient grounds to relieve him of his negligence.

In sum, New York courts will intervene to relieve a commercial tenant from the forfeiture of the valuable leasehold resulting from the tenant's failure to exercise its option in a timely way if his failure to act was the result of an honest mistake or similar excusable default provided that the landlord is not prejudiced. The negligence in failing to exercise the options in the J.N.A. Realty case was extended for four and a half months. Other delays have been for less a period of time (S.Y. Jack Realty Co. v. Pergament Syosset Corp., *supra*) (37 days); (Jones v. Gianferante, *supra*, (13 days); Modlin v. Town and Country Tax, Inc., 42 A.D.2d 586, 344 N.Y.S. 703 (14 days); Rizzo v. Morrison Motors Inc., 29 A.D.2d 912, 289 N.Y.S.2d 903 (6 days).

Now looking further into the element of time, in Harlinton Realty Corp. v. Farmiloe-Burke Corp., 108 Misc.2d 690, 438 N.Y.S.2d 691, the court was called on to determine whether or not the passage of 17 months after the lease expiration could pass the test for equitable relief. Equitable relief must always depend upon the facts of a particular case (J.N.A. Realty Corp. v. Crossbay Chelsea, Inc., *supra*, 42 N.Y.2d at 400, 397 N.Y.S.2d 958, 366 N.E.2d 1313).

The court found that the Respondent possessed a valuable lease interest and that it made considerable investments in the premises. The fact that the landlord made no particular commitments with respect to the property and would not be prejudiced if the tenant is relieved of its default, was evidence against forfeiture. Since the landlord continued to send rent notices to the tenant for 18 months requesting payment of the old rent and accepted the rent for the entire period of time, almost one-third of the renewal period, the landlord should not be permitted to require strict adherence to the notice requirements for exercising the options (relying on Modlin v. Town and Country Tax, Inc., *supra*).

As this rule of law has been perfected in the judicial system, the Appellate Division, Second Department, in Mass Properties Co. v. 1820 New York Ave. Corp., 152 A.D.2d 727, 544 N.Y.S.2d 180, found that the "the task for determining whether a tenant shall be relieved of a default in exercising an option is threefold. The tenant must show (1) that the default was excusable; (2) that the default will

result in a substantial forfeiture by the tenant; and (3) that the landlord would not be prejudiced (J.N.A. Realty Corp. v. Crossbay Chelsea, Inc., supra). The basis for the determination in that case was that the neglect was inadvertent, not prejudicial to the landlord but prejudicial to the tenant by forfeiture of a valuable interest invested in the diner enterprise operated by the tenant. See also P.L. Dev., Inc. v. T. Fetterman, 293 A.D.2d 657, 740 N.Y.S.2d 634, finding that the Plaintiff timely exercises option to purchase the Defendant's premises given that the Plaintiff's large expenditures on the property, the lack of prejudice of the Defendant that the option is given effect and the honest mistake would have led to the Plaintiff's short delay in exercising its options, equity compels specific performance of the option (Hirsch v. Lindor Realty Inc., 63 N.Y.2d 878, 484 N.Y.S.2d 196, 742 N.E.2d 1024; J.N.A. Realty Corp. v. Crossbay Chelsea, Inc., *supra*; Pitkin Seafood v. Pitrock Realty, 146 A.D.2d 618, 536 N.Y.S.2d 527; 2M Realty Corp. v. Bochn, 204 A.D.2d 620, 612 N.Y.S.2d 207).

Furthermore, equity will save a long term tenant from a *de minimus* breach of a lease where there is no discernible prejudice to a landlord (*40+33 61st St. Realty v. Dalton*, 203 WL 21911088 (App. Term, 2d Dept., 2003) including where rent payments are fully tendered by the tenant though not always precisely on time (41st St. Ave. Realty LLC v. Choices Women's Medical Ctr., Inc., 188 Misc.2d 274, 276, 726 N.Y.2d 859, 861 (App. Term, 2d Dept., 2001).

See the application of this principle by Judge Singh in the matter of Rachel Bridge Corp. v. Dishi, 4 Misc.3d 1021(A), 2004 WL 2008629 (N.Y.C. Civ. Ct.), finding that the default of the tenant was inadvertent and excusable "and was caused in part by a contradictory document prepared by the landlord" [(citing Jones v. Gianferante, *supra*, where the tenant was excused for the failure to timely exercise renewal based on ambiguity in the renewal option)]. In the analysis of the substantial forfeiture by the tenant, the court concluded that the expenditure of $150,000.00 for the granite storefront, the total cost of the construction being $480,000.00 and the additional $60,000.00 spent building by Rachel Bridge by the additional of new offices on the second floor was deemed a substantial forfeiture where the court

intervened to excuse the default in the exercise of the option. In that case, the new use of the property as developed by the tenant necessitating a change in zoning, substantial construction and investment was also significant. (The court citing Nanuet Nat'l Bank v. Saramo Holding Co., 153 A.D.2d 927, 454 N.Y.S.2d 734 (2d Dept., 1989) which found that the expenditure of $180,000.00 in construction of a two-story building and additional sums spent over the 20-year term constituted substantial improvements). Further, the amount of goodwill earned at the location over 20 years was reflected in the willingness by the new tenant to pay a tenfold increase for the space (S.Y. Jack Realty Co. v. Pergament Syosset Corp., *supra*, 27 N.Y.2d 449, 318 N.Y.S.2d 720, 269 N.E.2d 462 (1971) (loss of good will of a retail enterprise is a substantial and valuable asset)). Based upon those facts, Judge Singh dismissed the holdover proceeding with prejudice.

At the Appellate Term, Second Department in Brook v. Elabed, 7 Misc.3d 132(A), 80 N.Y.S.2d 230, 2005 WL 975680 (N.Y. Sup. Ct., App. Term), a case similar to the case at bar, the landlord instituted a commercial holdover proceeding predicated upon a Notice of Termination of an alleged month-to-month tenancy. The commercial lease, which terminated on July 31, 2002, granted the tenant an option to renew for an additional five years at a 5% increase each year. Since no particular method for exercising an option to renew is prescribed in the lease, a tenant may adopt any reasonable method at the end of the term to indicate that the tenant elects to renew the lease. The tenant's election may be implied from continuing in possession after expiration of the lease (see Foster v. Stewart, 96 App.Div. 814 [1921]; Schwalven v. Cholowaczuk, 75 Misc.2d 98 [1973]), particularly when the tenant remains in possession and invests additional sums in the commercial space. Since the tenant not only remained in possession but tendered a check to the landlord in the amount required on the renewal, the court upheld the lower court determination that the lease was fittingly renewed, and affirmed the dismissal of the summary proceeding.

In Popyork, LLC v. 80 Court St. Corp., 23 A.D.3d 538, 806 N.Y.S.2d 606, 2005 N.Y.SlipOp. 08965, the Appellate Division, Second Department, found that the tenant, which operated a fast food restaurant, was entitled to relief from the consequences of its untimely renewal. The tenant paid $550,000.00 to acquire the former tenant's rights over two years after the initial term of the lease had commenced as well as invested approximately $300,000.00 in improvement. The court reasoned that the tenant stood to lose its goodwill that it shared with that local community as its customer base and the landlord offered no evidence that it was prejudiced by late notice of the lease renewal option which it received approximately four months before the fifth term of the lease was due to expire. The Appellate Division, relying on the three-prong test established above, and on Street Beat Sportswear v. Waterfront Realty, 6 A.D.3d 693, 775 N.Y.S.2d 160; Comprehensive Health Solutions v. TrustCo Bank Nat'l Assn., 277 A.D.2d 861, 715 N.Y.S.2d 796; O'Malley v. Ruggiero, 245 A.D.2d 1129, 667 N.Y.S.2d 531; Dan's Supreme Supermarkets v. Redmond Realty Inc., 216 A.D.2d 512, 628 N.Y.S.2d 790, determined that although it was undisputed that the Plaintiff failed to timely exercise its option, equity should intervene to relieve the tenant of the consequences of an untimely renewal where the elements of the three-prong test are found. The declaratory judgment action was remitted to the Supreme Court for an entry of a judgment declaring that the Plaintiff effectively exercised its option to renew the lease.

This court, in reviewing the case of 135 E. 57th St. LLC v. Daffy Inc., 91 A.D.3d 1, 934 N.Y.S.2d 112, 2011N.Y.SlipOp. 08497, interestingly for the first time observed that the court granted equitable relief in a case where no improvements were ever performed in the subject premises. In another well-written pivotal decision by Justice Saxe, writing for the majority, he traces the historical development of the rule of law in this area of lease extension options and the avoidance of lease forfeitures in commercial tenancies. As the presiding Justice, he emphasized that "the law generally exacts a high price for failure to comply with the precise language of a contract" (see e.g., Vermont Teddy Bear Co. v. 538 Madison Realty Co., 1 N.Y.3d 470, 775 N.Y.S.2d 765, 809 N.E.2d 870 [2004]). But, in some situations, principles

of equity and the fundamental convenants of fair dealings have softened the often harsh results of common law rules of strict contract construction. "These equitable principles such as the doctrine of substantial performance, import the concept of fundamental fairness to the context of contractual dispute litigation. One equitable construction that has been used to protect parties from the harsh results of strict contract construction is the principle underlying this Appeal, that equity will intervene to avoid forfeiture". The main issue, as articulated by the majority, is "whether this exercise of equitable authority was proper, given that the tenant did not prove that it made substantial improvements in anticipation of continued occupancy." *Id* at pg 3.

The majority acknowledged and recognized the firm set of rules articulated by the landlord that when a contract required written notice to be given within a specified time period, the notice is ineffective unless it is received within that time (Oppenheimer and Co. v. Oppenheimer, Appel, Dickson and Co., 86 N.Y.2d 685, 693, 363 N.Y.S.2d 732, 660 N.E.2d 415 [1995], Maxton Bldrs. v. Lo Galbo, 68 N.Y.2d 373, 378, 509 N.Y.S.2d 507, 502 N.E.2d 184 [1986]. But, in reply, the court reminded the landlord that there is an exception carved out by the court that apply equitable grounds where a forfeiture would result from the tenant's neglect or inadvertent (J.N.A. Realty Corp. v. Crossbay Chelsea, Inc., *supra*). In Daffy's, it was determined that the four-day delay in providing the one-year's notice required by the lease did not prejudice the landlord in that case. The record showed that Daffy never claimed that it exercised the option timely based upon the date of the letter. "The option renewal letter emailed with the cover page, dated February 4, 2010, and the fax cover sheet was time stamped February 4, 2010. Moreover, the corporation controller who prepared the letter provided a credible explanation for the error. We accepted trial court's conclusion that the misdating was not prompted by either bad faith or an intent to defraud and that the four-day delay was an honest mistake."

As important, the court went on to indicate that as J.N.A. Realty Corp., *supra* explained, equity does not intervene when a party fails to timely exercise a contractual option because "the loss of the option does not ordinarily result in the forfeiture of any vested right" (42 N.Y.2d at 374, 397 N.Y.S.2d 958, 366 N.E.2d 1313). The reason is that the option itself does not create an interest in the property, and no rights accrued until the condition precedent has been met by giving notice within the time period specified", however, while options such as stock options or options to buy do not create a vested interest in the property so that the loss of the property may be treated as a forfeiture, lease renewal options are different. Equity may intervene where a tenant in possession of the premises under an existing lease neglected to timely exercise a renewal option because "he might suffer a forfeiture if he had made valuable improvements in the property" (*Id*).

Furthermore, the court declared that in a case where improvements relied on by the tenant had been made during the first two years of the lease, they had already been amortized and depreciated by the time of the attempted renewal so that the tenant had "reaped the benefit of all initial expenditures," and concluded that there was insufficient evidence that the tenant would suffer a forfeiture (see Soho Dev. Corp. v. Dean & DeLuca, 131 A.D.2d 385, 386, 517 N.Y.S.2d 498 [1987], Wayside Homes v. Percelli, 104 A.D.2d 650, 659, 480 N.Y.S.2d 29 [1984] *lv. denied*, 64 N.Y.2d 602, 485 N.Y.S.2d 1024, 475 N.E.2d 126 [1984]; Trieste Group, LLC v. Ark Fifth Ave. Corp., 13 A.D.3d 207, 787 N.Y.S.2d 258, [2004]).

Although the Court of Appeals has authorized equitable relief against untimely renewal where there has been no indication that substantial improvements had been made in the premises, J.N.A. Realty Corp., *supra*, the Appellate Division, in reliance on S.Y. Jack Realty Co. v. Pergament, *supra*, affirmed the granting of equitable relief to the commercial tenant not because

of substantial improvements to the premises would otherwise be forfeited but "to preserve the tenant's interest in a longstanding location for a retail business because this is an important part of the goodwill of that enterprise, [and thus] the tenant stands to lose a substantial and valuable asset" (J.N.A. Realty at 398, 397 N.Y.S.2d 958, 366 N.E.2d 1313; S.Y. Jack Realty at 453, 318 N.Y.S.2d 720, 267 N.E.2d 462). The court opined that "although there is evidence that Daffy's like Dean & DeLuca in Soho Dev. Corp. v. Dean & DeLuca, 131 A.D.2d 385, 517 N.Y.S.2d 498 (1987) *supra*, had widespread name recognition unrelated to any particular store location, the evidence was sufficient to support a finding that Daffy's 57th Street store, in particular, had garnered substantial goodwill in its approximate 15 years at the location, which goodwill was a valuable asset that would be damaged by its ouster from the premises. "[E]quity may intervene to protect against forfeiture of substantial and valuable asset of a business is goodwill." The court also found it significant that most of the store's 114 employees would lose their jobs and benefits if the store were to close and no alternate location was available as well as evidence of the mistake by the company's controller in failure to calendar the renewal deadline. Finally, the location was shown to be "one of Daffy's top producing retail locations and the landlord failed to establish any prejudice resulting from the breach" (see Cellular Tel. Co. v. 210 E. 86th St. Corp., 14 A.D.3d 305, 306, 787 N.Y.S.2d 284 [2005]). The facts justified the finding in favor of Daffy's and the court allowed the tenant to remain in possession.

At this time, some discussion and review of the cases in which the court would not recognize a forfeiture is in order. It is clear that when the tenant has put the initial improvements in the property, the sums depreciated over the time of the lease and where no new additional improvements were made, equity will not intervene to prevent the forfeiture. In Soho Dev. Corp. v. Dean & DeLuca, 131 A.D.2d 385, 517 N.Y.S.2d 498, the Appellate Division, First Dept.

found against the tenant and allowed their ouster. The evidence showed that "the majority cost of improvements made by the tenant were incurred during the first two years of the lease. Presumably, all of these improvements are effectively amortized and depreciated over the life of the lease. Consequently, the tenant has "reaped the benefit of any initial expenditures." (Wayside Homes v. Purcell, 104 A.D.2d 650, 651, 480 N.Y.S.2d 29 [2d Dept. 1984]) *lv to appeal denied*, 64 N.Y.2d 602, 485 N.YS.2d 1027, 415 N.Y.E.2d 126. In addition, the fixtures associated with the gourmet food could still be relocated. The relocation of Dean & DeLuca would have little effect on their business; particularly since there were other locations available in the Soho area and the tenant was not mislead by the landlord's conduct. More importantly, there was no ambiguity in the lease, no failure to timely deliver a lease renewal and accordingly, the tenancy did not mandate protection against forfeiture and the landlord was entitled to a judgment of possession. *See also* 5 East 41st Check Cashing Corp. v. Park and Fifth Owner LLC, 44 A.D.3d 373, 843 N.Y.S.2d 573 (App. Div., 1st Dept.) whereby the court determined that the Plaintiff failed to set forth sufficient evidence of any such improvements made with the intent to renew the lease (citing Soho Dev. Corp. v. Dean & DeLuca, *supra,* and held that "... there is record evidence that the tenant made no improvements that would otherwise invoke equity relief" (see e.g., 95 E. Main St. Svc. Sta. v. H&D All Type Auto Repair, 162 A.D.2d 440, 441, 556 N.Y.S.2d 385 [1990]). The Plaintiff, thus, failed to show any equitable interest that would warrant protection against forfeiture.

In 221-06 Merrick Blvd. Assoc. v. Crescent Electrical Acquisition Corp., 24 Misc.3d 138[A], 897 N.Y.S.2d 673, 2009 WL 2177839 (N.Y. Sup. Ct., App. Term, 2d, 11th & 13th Jud. Dists.), the Appellate Term found that the tenant failed to offer sufficient proof that it made improvements in reliance on the lease renewal. According to the court, all of the tenant's

witnesses and documentary evidence submitted failed to distinguish between repairs which the tenants were required to perform by the lease and any actual improvements made by the tenant. Moreover, the tenant did not allege it would lose any goodwill if it had to change location and accordingly, the tenant failed to establish that it would suffer forfeiture if the lease were not renewed.

Similarly, in Redlyn Electric Corp. v. Lewis Shiffman, Inc., 81 A.D.3d 621, 915 N.Y.S.2d 880, 2011N.Y.SlipOp. 00666, the Appellate Division, Second Department, in an action for a declaratory judgment seeking a finding that the tenant has validly renewed the lease by asserting various causes of action, the court declined to exercise its discretion to save the tenancy. Following a non-jury trial, the Supreme Court found that the renewal provision in the lease was not ambiguous because of the use of the word "or/and" in the renewal provision was a scrivenor's error and the Plaintiff had not validly renewed the lease and awarded the Defendant damages on a counterclaim. The court determined that the renewal provision was clear and unequivocal. "The lease provides that if the Plaintiff intended to renew the lease," it was to notify the lessor "of its intention to exercise such option or by a written notice delivered to the lessor personally or by certified mail, return receipt requested, not less than 6 months prior to the end of the term of the lease". Such provision was deemed to contain no ambiguity and the tenant did not prevail in that proceeding.

In addition, in Marina Tower Assoc. Ltd. v. 325 Southend Corp., 2013 WL 2097572 (N.Y. Sup. Ct., Appellate Term), the court found that the tenant's default in the exercise of the option was hardly inadvertent or technical but resulted from its apparent inability to afford the rental amount specified in the lease option provision or to successfully renegotiate the rental terms of the option.

In Baygold Assoc., Inc. v. Congregation Yetev Lev of Monsey, Inc., 27 Misc.3d 1202[A], 910 N.Y.S.2d 403, 2012 WL 1253477 (N.Y. Sup. Ct., Rockland County) the court found that the tenant was not entitled to equitable relief excusing its failure to exercise the option. In that case, notwithstanding the fact that it was a sublease agreement not recognized by the landlord unlike the Respondent in this case, the court specifically found that "the forfeiture rule was crafted to protect tenants in possession who make improvements of a substantial character with an eye toward renewing the lease, not to protect the revenue stream of an out-of-possession tenant like Baygold". Similarly, it cannot be said that Baygold's improvements – made over 20 years earlier when it was a tenant in possession – was made with a view toward renewal of the lease such as Baygold's equitable interest in a renewal. The court held that J.N.A. Realty, *supra*, is restricted to tenants who made "considerable investment and improvements" to the premises in anticipation of the lease renewal or would lose a considerable amount of goodwill should the lease not be renewed. "This narrow equitable doctrine was never intended to apply in a circumstance like this, where the out-of-possession tenant failed to make any improvement in anticipation of the renewal and does not possess any goodwill in the location. Even assuming that the out-of-possession tenant's failure to comply with the commercial lease renewal provision was a result of an excusable default, non-renewal would not result in a forfeiture by the tenant as required for equitable relief excusing the tenant's failure to timely exercise its option to renew". The tenant had not made any improvements in the premises in over 20 years, had already reaped the benefits from any capital expenditures that it had made before that time and did not possess any goodwill in the "ongoing concern" of the business.

As this Court now focuses on the case at bar, the myriad of cases stated above prove that the courts will exercise discretion to prevent forfeiture when it is clear that a business would

suffer irreparable harm due to minor oversight. However, not all leases forfeiture, warrant judicial intervention.

First, the burden of proof in this case is on the Petitioner, and the Court finds that the Petitioner has sustained its *prima facie* case by the submission of proof in admissible form to substantiate compliance with RPAPL § 741 and proved the elements of the petition. The Petitioner established proof of ownership of the subject premises by a certified copy of the deed of ownership, dated October 3, 2014, in which Right On Nostrand Avenue LLC transferred all rights, title and interest to 525 NOSTRAND LLC. This transfer was an arm's length transaction based on the payment by the Seller and Purchaser of New York City Real Property Transfer Taxes and the New York City Real Estate Transfer Taxes (Petitioner's Exhibit "1"). The Petitioner also established that there is a landlord and tenant relationship between the parties that was created by a written lease agreement which commenced on March 15, 2010 and terminates March 30, 2015 between the Petitioner's predecessor in interest, Promenade Development LLC and WAZI ULLAH and JANNATUL KAWSER (Petitioner's Exhibit "2"); and the premises sought to be recovered is in conformity with the lease and rider thereto as "525 Nostrand Avenue, Ground Floor Store, Brooklyn, New York 11216", is not in dispute in this proceeding and has been adequately described in the petition.

The Petitioner has demonstrated the proper rent for the subject premises is $3646.52, and the Court concurs with the Petitioner, by the application of simple mathematics pursuant to the lease agreement, which states that the monthly rent shall increase 5% each year (Petitioners' Exhibit 2 at Paragraph 2 entitled "Rent and Deposit"). Notwithstanding the admittance into evidence of the rent ledgers from October 1, 2014 to October 8, 2015 which claims rent and additional rent due and owing in the sum of $18,396.16, no evidence was admitted to

substantiate the "article 26 additional rent", property tax reimbursement, and insurance reimbursement, as charges to the Respondent's account and accordingly, these charges are denied without prejudice and severed for a plenary action. The Petitioner simply failed to produce any real estate tax bills, insurance certificates or binder (*Accord*) to establish the proper insurance charges and no testimony was elicited to substantiate the article 26 additional rent clause. In regard to the later charge, the Respondent asserted a valid defense to this proceeding and thus, could not be construed as a holdover tenant until the conclusion of this case and a finding in the Petitioner's favor. Although this is a contractual provision acknowledged and accepted by the parties, the parties cannot abrogate case and statutory authority and the Court certainly cannot implement this provision under the facts and circumstances in this case.

For the reasons stated above, the Court shall examine the base rent and the insufficient funds bank fees (NSF) charge only. The rent records provide that during the course of this proceeding and based on the records presented by the Petitioner and not disputed by the Respondent, there were thirteen months from October 1, 2014 to October 31, 2015 that transpired herewith and the monthly rent in accordance with the lease is $3,646.52 at 13 months for a total of $47,404.76 plus $100.00 (NSF) for a grand total of $47,504.76. Notwithstanding the Petitioner's attempt to increase the rent for the commercial store during the pendency of this litigation, the base rent shall remain in the sum of $3,646.52. The two rent ledgers, the first rent ledger dated June 11, 2015 and the second rent ledger dated October 12, 2015, attempt to increase the rent, which as stated above is denied. The Court examined the rent ledger for the purpose of obtaining the sums paid by the Respondent and finds that from October 1, 2014 to October 31, 2015, the Respondents paid the sum of $41,307.66. Thus, $47,504.76 minus

$41,307.66 equals $6,197.10 (Petitioner's Exhibit "5" and "5-A") and the Court finds that this is the sum due and owing by the Respondents through the date of trial.

Based on the above, the Petitioner has sustained its prima facie case, and the burden shifts to the Respondent to substantiate its defenses. The pivotal defense in this case involves the Respondent's claims that the above lease was extended for an additional five years.

The first line of inquiry in the case at bar is whether the pertinent provisions of the lease are clear and unambiguous. Although the above cases demonstrate that the courts have overlooked noncompliance in certain cases, the courts have not allowed the Respondents to completely deviate from the requirements of the lease.

Paragraph 1 entitled 1 "Term", provides in pertinent part as follows: "This lease shall commence on March 15, 2010....and shall terminate on march 30th, 2015...with an option of extending the lease for an additional 5 years".

Paragraph 28 (b) entitled "Notices" also provides in relevant part as follows: "Each provision of this lease...and other requirements with reference to sending, mailing or delivery of any notice..., shall be deemed to be complied with when and if the following steps are taken:

> (b) Any notice or document required to be delivered hereunder shall be deemed to be delivered, whether actually received or not, when deposited in the United States mail, postage prepaid, registered mail, return receipt requested, addressed to the parties hereto at the respective addresses set out opposite their names below, or at such other address as they heretofore specified by written notice..."

The court has examined the entire lease and finds that there are no other provisions in the lease that govern the option and notice. There is no ambiguity here now that the Court has had an opportunity to examine all of the evidence. The Respondent was mandated to extend the lease for an additional five years prior to the expiration of the lease.. Most leases contain some provision requiring the tenant to notify the owner in advance. The lack of this usual term is not fatal or render the lease ambiguous. A simple analysis mandates a finding that the option be exercised in writing and prior to the termination of the lease. So, the above provisions require the Respondents to exercise the option on or before March 30, 2015 by registered mail, return receipt requested, addressed to the parties hereto at such other address as they heretofore specified by written notice (Petitioner's 2(a) Paragraph 28 (b)).

As shown above with the multiple cases involving lease forfeiture, a clear rule of law has been perfected in the judicial system and it is worthy of repetition here, "the task for determining whether a tenant shall be relieved of a default in exercising an option is threefold. The tenant must show (1) that the default was excusable; (2) that the default will result in a substantial forfeiture by the tenant; and (3) that the landlord would not be prejudiced (J.N.A. Realty Corp. v. Crossbay Chelsea, Inc., *supra*); Mass Properties Co. v. 1820 New York Ave. Corp., 152 A.D.2d 727, 544 N.Y.S.2d 180.

In this instance, the Respondents not only did not comply with the above lease terms. Respondent's Exhibit "D", a letter dated September 10, 2014, to Right On Nostrand Avenue LLC in care of BCB Property Management at 515 Madison Avenue, 1201, New York, NY 10022 signed by both Respondents, purports to exercise the lease extension. The Respondent admitted that the written notice was sent by regular first class mail and not by registered mail, return receipt requested.

Also, presuming that the Respondent sought to exercise the option properly, they failed to send it to the proper address as stated in the lease, that is, to Promenade Development LLC at 936 Fulton Street, Commercial A, Brooklyn, NY 11238. It appears that the name and mailing address of the landlord changed. The testimony of the Petitioner' agent, **ALLISON CORREA,** the property manager, testified that for years their offices were on-site and she interacted with all the tenants. There offices were at 551 Nostrand Avenue from around 2003 and they remained at that site until November 2013, when they moved their offices to Union Square. They notified all of the tenants along with their rent bill and sent them a change of address notice. She testified that most of the tenants made rent payments at this office by personal delivery including the Respondents. The Respondents never denied that they did not put their rent in the regular mail but hand delivered the rent to the management office.

Furthermore, Petitioner's Exhibit "4" – notice to the tenants dated October 3, 2014, stating that Right On Nostrand Avenue LLC had sold the premises to 525 NOSTRAND LLC, directed that all rent payments be made payable to the new corporation and the rent be sent to 459 Columbus Avenue, Suite 316, New York, New York 10027. This document was signed only by Right On Nostrand Avenue LLC and not by 525 NOSTRAND LLC. Even if the Respondents had been confused about the address to send the lease extension, it could have been mailed again to the new landlord prior to the expiration of the lease on March 30, 2015. No lease extension was ever sent to the new landlord. Instead it was allegedly sent to 515 Madison Avenue, NY, NY; the Court still is not clear where the Respondents' got this address.

As compelling, the Respondent's never disputed this change of address or any lack of knowledge of said address, and therefore, the Court finds that the Respondents had notice of the proper address to mail the lease extension. Contrary to the claims made by the Petitioner, the

purported lease extension was timely but not mailed to the correct address. It was mailed to 515 Madison Avenue, 1201, NY, NY instead of 27 Union Square West, Suite 503, NY, NY and certainly was not mailed as prescribed by the lease by registered mail, return receipt requested, as admitted by the Respondent.

Assuming arguendo that the Respondents' had no knowledge of the new address, the Respondent's still had the option to comply with the lease by mailing the lease extension to the landlord as stated in the lease: Promenade Development LLC, at 936 Fulton Street, Commercial A, Brooklyn, New York 11238, Attention: Accounting Department. The Respondents failed to send the lease extension to even that address which was clearly stated in the lease. The Court presumes that it was not sent to this address since the Respondents had actual knowledge that the Petitioner's agent and the Petitioner had new offices at another address. The Respondent proffered no testimony as to why the option was sent to the management at the old address.

Notwithstanding the Respondent's claims that English was not their primary language, the Respondent had a legal obligation to seek counsel to determine their rights and obligations under the lease. Ignorance of the law is no excuse and unfortunately, if the Respondent were permitted to assert this claim, and prevail, the identical claim can be asserted by every business or individual that fails to act under like circumstances. The implications are far reaching particularly with commercial properties. Our Court only prescribes limited circumstances, not asserted here with commercial property as opposed to residential property, that would allow for the excuse of a language barrier to constitute an excuse not to perform a legal obligation.

The next question is whether the default in the failure to properly exercise the lease extension will result in a substantial forfeiture by the Respondents.

The Respondent has also fallen short here. Notwithstanding the evidence presented, namely, Respondent's Exhibit "B" and Exhibit "C," the Respondent has not demonstrated any form of payment for the work that was done by these alleged contractors. In Respondent's Exhibit "C," dated November 5, 2011, it is clear that this construction work was the initial construction that was required to be performed to convert this commercial meat store to a restaurant. The cost was $165,000.00. This was the Respondent's initial investment in the commercial store. Although the Respondent has stated that their evidence, including cancelled checks, were destroyed in Hurricane Sandy, the Respondent never testified that these contractors were no longer in business and that he or she could not obtain duplicate invoices of their payments. Evidence could be obtained from other sources including the bank or the businesses involved. Either way, these were the initial investments in the property and not new investments for the purpose of extending the lease.

As stated by the Appellate Division in the First Department, it is clear that when the tenant has put the initial improvements in the property, the sums depreciated over the time of the lease and no additional improvements were made, equity will not intervene to prevent the forfeiture. In Soho Dev. Corp. v. Dean & DeLuca, 131 A.D.2d 385, 517 N.Y.S.2d 498, the Appellate Division, 1st Dept., found against the tenant and allowed their ouster. The evidence showed that "the majority cost of improvements made by the tenant were incurred during the first two years of the lease. Presumably, all of these improvements are effectively amortized and depreciated over the life of the lease. Consequently, the tenant has "reaped the benefit of any initial expenditures." (Wayside Homes v. Purcell, 104 A.D.2d 650, 651, 480 N.Y.S.2d 29 [2d Dept. 1984]) lv to appeal denied, 64 N.Y.2d 602, 485 N.YS.2d 1027, 415 N.Y.E.2d 126.

In this case, this Court cannot consider the initial construction cost of presumptively, $165,000.00, even if proven by the Respondents, since the Respondents should have recouped their initial investment in the property over the five years that they have been in possession of the demised premises. Soho Dev. Corp. v. Dean & DeLuca, 131 A.D.2d 385, 517 N.Y.S.2d 498. It is the opinion of the Court that the Respondents should have negotiated a ten-year lease instead of a five-year lease and thus, would have afforded them the opportunity to recoup and to reinvest in the property. Instead, the lease was short, merely a five-year lease with a five-year option.

Respondent's Exhibit "B," the contract, which appears to be for work performed at the property in or about September 2010 (the date is illegible), was not paid in full and notwithstanding the signature by what appears to be both parties, there is no evidence of the payment of the $4,400.00, leaving the alleged balance of $2,400.00. The services that were supposed to be performed also involve the initial investment in the property-it is the kitchen fire suppression system, permits and plans submitted by the architect and the installation of the duct work and hood for the stove. These costs do not involve improvements for the purposes of a lease renewal but the initial build out for the space in 2010. Even Respondent's Exhibit "E-1"-"E-4" are plans for the initial work and have no relevance to the lease extension.

The Respondents acknowledged that despite this initial build out, the business was not profitable; prompting the Respondents to change the restaurant from buffet style to a la carte. The Respondent's testimony shows that this business is in financial trouble and was not making the income anticipated by the Respondents. The ultimate decision to determine the type of restaurant was a business decision made by the Respondents. Inadequate or improper marketing of their business had adverse impacts on the profitability of the business. This business decision and accountability rests with the Respondents and not the Petitioner. Notwithstanding that fact,

there has been no evidence submitted by the Respondent to demonstrate any recent improvements in the property that would amount to a substantial loss or forfeiture of a valuable leasehold interest. The Respondents have not argued to the Court they acted "to preserve the tenant's interest in this longstanding location for their business because this is an important part of the goodwill of their business, [and thus] they stand to lose a substantial and valuable asset" (J.N.A. Realty at 398, 397 N.Y.S.2d 958, 366 N.E.2d 1313; S.Y. Jack Realty at 453, 318 N.Y.S.2d 720, 267 N.E.2d 462). In fact, no evidence of their goodwill or ties to this community were ever mentioned by the Respondents. The Respondents have only argued that their business supports three families, and although this is important to the Court, no argument was proffered that this business's goodwill is invaluable in this local community and this is the only location that the Respondent can conduct its business.

The last elements to avoid the forfeiture of the lease involves whether the Petitioner would suffer any prejudice. Starting with the estoppel certificate, the prior owner and more significantly, the current owner, relied on the execution of the estoppel certificate by the Respondent in their purchase of the property. The Court finds it unacceptable that the Respondents signed a legal document, that allegedly was contrary to their claims herein, that claimed that the option to extend the lease was not in effect and their lease expired on March 30, 2015. Notwithstanding the fact that the Respondents may not have had mastered the English language, this was a critical legal document. The Respondents should have retained a lawyer at that very moment but instead, WAZI ULLAH, executed the document at his own peril. Once again, at that very moment, the Respondents were on notice at that time the lease option had not been properly exercised and had more than ample time to correct this grave error. In fact, the Respondents should have refused to sign the document; when he did sign it without knowledge

of its meaning, it was gross negligence. The Respondent never testified to any duress or undue influence asserted against either one regarding their time in executing this document. More than ample time was given to review the document with a lawyer or to find out any legal rights about the document.

As compelling, the Petitioner relied on the document in the purchase of the property. The Petitioner detrimentally relied on the estoppel certificate in the purchase of the property. Since this is commercial property, the rate for any underlying loan would have been based on the income derived from the property and the leases or lack thereof, are considered by any lending institution. The Petitioner had every right to rely on the base rent of $3646.52 and the fact that there was no lease in effect with the commercial store.

Petitioner's Exhibit "6", an assignment and assumption of lease, rents and security deposit dated October 3, 2014 between Right On Nostrand Avenue LLC and 525 NOSTRAND LLC and Petitioner's Exhibit "6A", an assignment and assumption of leases, rents and security deposits dated March 10, 2014 between Right On Nostrand Avenue LLC and 525 NOSTRAND LLC are further evidence that the Petitioner as the purchaser relied on the legal representations made therein. The court can only presume that the first assignment was before the closing and the second assignment was after the closing. Presumptively, these assignments were for the purpose of financing the property. However, they still represent the legal status of the leases and all rights thereunder that were relied on by the Petitioner in purchasing and financing the property.

Additionally, the Petitioner testified that the rent for the commercial property is well below market and produced a lease from a comparable commercial space, namely, 543 Nostrand Avenue, Brooklyn, NY as evidence that the rent for that commercial store is $5200.00 with 5%

increases each year. From the Petitioner's perspective, this rental at $3646.52 deprives the Petitioner of a substantial profit for approximately $2,000.00 each month.

Although the court found the Respondents credible, the Respondents lacked supporting evidence to prove any additional improvements made at the property that would give this Court grounds to exercise its discretion to prevent the forfeiture of this lease. In fact, the evidence presented by the Petitioner in Petitioner's Exhibit "9" demonstrates that there have been no improvements in this property since the original work had been performed in 2010 and 2011. The photographs of the rear yard prove that the Respondents have not properly used the entire demised premises to their advantage. The rear yard could be a source of income for this restaurant; it is not being used at all. It appears that this area is at a minimum of 500 square feet and could possibly accommodate outdoor dining. The other photographs show that the premises are in decent condition, with the exception of the floors, which appear from the photographs to be worn. The restaurant has the old-fashioned "diner" appeal, which is no longer as profitable in the "New Brooklyn" as it may have been in the past.

Based upon the evidence stated above, the Petitioner has sustained a *prima facie* case by establishing proper service of the pleadings, ownership of the property and a lease agreement that has terminated by its natural terms.

The Respondent has not proven the rights to possession and has not demonstrated the proper exercise of the option to extend the lease.

Accordingly, the Court grants the Petitioner a final judgment of possession and for $6,197.10, the issuance of the warrant of eviction forthwith and the execution is stayed 30 days for the Respondent to pay the above sum to the Petitioner. Upon the payment of this sum, the Court further stays the execution of the warrant of eviction for six months to allow the

Respondent to wind down their business affairs at this location and to vacate the subject premises. The Respondent shall pay the monthly rent of $3,646.45 during the stay of the execution of the warrant of eviction on or before the 10th day of each month thereafter and upon default, the warrant shall accelerate on the simultaneous service of a Marshal's notice and five-day notice of default to the Respondent's attorney.

The Petitioner shall serve a copy of this Decision and Order with a copy of the judgment of possession and for money with notice of entry on the Respondents within 30 days of the date of entry thereof by the Clerk of the Court, and shall file proof of service thereafter with the Clerk of this Court.

In order to retrieve any and all of the exhibits that were admitted into evidence in the above captioned case, the attorneys for the respective parties must appear at the 7th floor security desk and after the proper notice to the Chambers of the undersigned, all evidence shall be returned upon the execution of the form provided for that purpose acknowledging receipt thereof.

This constitutes the Decision and Order of this court.

Dated: June 5, 2017

Hon. Harriet L. Thompson
Acting Justice of the Supreme Court