

82 Misc.3d 1251(A)

Unreported Disposition

(The decision is referenced in the New York Supplement.)

This opinion is uncorrected and will not be published in the printed Official Reports. Supreme Court, Nassau County, New York.

In the Matter of HOFSTRA UNIVERSITY, Petitioner,

v.

NASSAU COUNTY PLANNING COMMISSION,
Nassau County Planning Department, Nassau County
Real Estate Planning and Development Department,
Nassau County Attorney's Office, Nassau County
Legislature, and Nassau County, Respondents.

Index No. 606293/2023

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Decided on February 23, 2024

Opinion

Sarika Kapoor, J.

*1 NYSCEF document nos. 72, 86, 90, 93, 124, 147-163, the transcript of oral arguments held on February 20, 2024, and the respondents' two submissions offered at oral arguments, were read and considered in deciding this motion.

Relief Requested

The petitioner, Hofstra University (hereinafter Hofstra), moves for a judgment declaring that the annulment of the respondents' actions in this Court's decision and order dated November 9, 2023, included the annulment of the respondent Nassau County's consent and the putative assignment to nonparty Las Vegas Sands of Nassau County's prior lease of the Nassau Coliseum to Nassau Live Center, LLC, and for attorneys' fees, costs, and all other relief as this Court deems just and proper.

Background

In January 2023, nonparty Las Vegas Sands Corp. (hereinafter Sands) announced its plan to pursue a casino project on the land on which the Nassau Coliseum sits and other adjacent land. The land on which the Nassau Coliseum sits is owned

by Nassau County, and at the time the plan was announced, nonparty Nassau Live Center, LLC (hereinafter NLC), held a lease to the Nassau Coliseum (hereinafter the original lease). To allow Sands to begin planning, Nassau County, Sands, and NLC agreed to a "lease transfer," which comprised the three acts of: (1) assigning the original lease from NLC to LVS NY Holdco 2, LLC (hereinafter LVS), a holding company of Sands (hereinafter the assigned lease), (2) terminating the assigned lease, and (3) entering into a new lease, with Nassau County as landlord and LVS as tenant, for the Nassau Coliseum (hereinafter the new lease).¹

The three acts composing the lease transfer were effectuated by a number of agreements: (1) the assignment of the original lease from NLC to LVS was effectuated by an agreement entitled "Assignment and Assumption of Amended and Restated Lease"; (2) the termination of the assigned lease was effectuated by an agreement entitled "Ground Lease Termination Agreement" and by the new lease; and (3) Nassau County and LVS entered into a new agreement for the Nassau Coliseum by entering into a new lease, which was executed by Zac Hudson on behalf of LVS on April 26, 2023, and by Bruce A. Blakeman as County Executive of Nassau County on May 26, 2023. These agreements, read collectively, demonstrate that the transfer of the original lease from NLC to LVS, the termination of the assigned lease, and the term commencement date of the new lease, all occurred on the same date: June 2, 2023 (NYSCEF 162).

*2 As relevant to motion sequence 003, the "Assignment and Assumption of Amended and Restated Lease" provided:

THIS ASSIGNMENT AND ASSUMPTION OF AMENDED AND RESTATED LEASE (this "Assignment") is made as of June 2, 2023 (the "Assignment Effective Date") by [NLC] to and in favor of [LVS].

...

NOW THEREFORE, in consideration of the mutual promises contained hereinafter and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by the parties hereto, [NLC] hereby irrevocably, absolutely and unconditionally assigns and transfers to [LVS] all of [NLC's] right, title, interest, claim and estate, legal, equitable or otherwise, in, to and under the Lease and the Property, and [LVS] accepts and assumes all of the covenants, obligations, and liabilities of [NLC] under the Lease.

(NYSCEF 162).

The “Ground Lease Termination Agreement” provided, in relevant part:

“WHEREAS, [Nassau County] and [LVS] are a party to [the assigned lease]...

“WHEREAS, the parties desire to terminate the [assigned lease] as of the Effective Date.

“NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

1. The [assigned lease] is hereby terminated effective as of the date of this Agreement.

2. From and after the date hereof, [Nassau County] and [LVS] shall have no further liability to each other arising out of the [assigned lease], except for any liabilities which have accrued prior to the date hereof and except for any obligations contained in the [assigned lease] which expressly survive termination of the [assigned lease].”

(NYSCEF 93, p. 160 of 457 of PDF).

The new lease, with Nassau County as landlord and LVS as tenant, provided, in relevant part:

“WHEREAS, [Nassau County] owns those certain tracts, pieces, and parcels of land, situated in Uniondale, County of Nassau (the “County”), State of New York, constituting approximately 71.6 acres, as more particularly described in Exhibit 1 annexed hereto and made a part hereof (collectively, the “Demised Land”);

“Whereas, the Demised Land, or a portion thereof, is currently subject to the [original lease] ...;

“WHEREAS, [LVS] intends to enter into the Assignment and Assumption of Existing Lease (as hereinafter defined) to acquire [NLC's] interest in the [original lease];

“WHEREAS, [NLC's] interest in the [original lease] will be assigned to and assumed by [LVS] within 60 days after the Effective Date;

“WHEREAS, [Nassau County] and [LVS] desire to: (a) terminate the

Assumed Lease (as defined below) and (b) enter into a new lease (i.e., this Lease) for the Premises (as hereinafter defined), all on the terms and subject to the conditions hereinafter set forth;”

(NYSCEF 93, p. 1 of 457 of PDF).

The new lease also recited:

Section 1.03 *Termination of Assumed Lease*. Effective as of the Term Commencement Date, the Assumed Lease is hereby terminated, except each Party shall remain responsible in full for its respective obligations and liabilities thereunder that have accrued as of the Term Commencement Date, all of the same and related covenants of the Assumed Lease expressly surviving such termination.

*3 ...

Section 2.02 *Term Commencement Date*.

(a) It is understood and agreed by and between [Nassau County] and [LVS] that the term of this Lease shall commence on the date (the “Term Commencement Date”) of the acquisition by [LVS] of [NLC's] interest in the [original lease]

(b) In the event that the acquisition of the [original lease] by [LVS] does not occur within sixty (60) calendar days of the Effective Date, [Nassau County] shall have the right to terminate this Lease upon thirty (30) days written notice to [LVS].

...

Section 17.11 *Assumed Lease*. [Nassau County] acknowledges that [LVS] desires to assume all right, title and interest in and to the [original lease] from [NLC] pursuant to the assignment and assumption agreement attached as *Exhibit II* hereto (the “*Assignment and Assumption of Existing Lease*”). [Nassau County] hereby consents to the assignment of all right, title and interest in and to the [original lease] to [LVS] pursuant to the Assignment and Assumption of Existing Lease. [Nassau County] further acknowledges that in connection with the assignment to [LVS] of the [original lease] and the assumption by [LVS] of all obligations thereunder, [LVS] desires that [Nassau County] execute and deliver to [LVS]

the consent and estoppel in the form attached as *Exhibit 12* hereto (the “*Landlord Consent and Estoppel*”). [Nassau County] hereby agrees to execute and deliver the Landlord Consent and Estoppel on or prior to the Effective Date and upon the Term Commencement Date.

(NYSCEF 93, pp. 5-6, 77 of 457 of PDF).

Attached as Exhibit 12 to the new lease was a document entitled “Ground Lessor's Consent and Estoppel” (NYSCEF 93, pp. 141-165 of 457 of PDF). As relevant here, this agreement provided:

B. Consent and Agreement.

[Nassau County] hereby consents to (a) the Ground Lease Assignment on or about the Closing Date pursuant to an assignment and assumption agreement substantially set forth in [the “Assignment and Assumption of Amended and Restated Lease”] and (b) the Termination of Existing Ground Lease on or about the Closing Date pursuant to a termination of ground lease agreement substantially in the form attached hereto as Exhibit E.”

(NYSCEF 93, p. 143 of 457 of PDF).

In April 2023, Hofstra commenced this hybrid proceeding pursuant to CPLR article 78, inter alia, to annul the lease transfer, i.e., the three acts described above, and action for related declaratory relief, based upon allegations that, during the process of approving the lease transfer, the respondents violated, among other things, the Open Meetings Law, SEQRA, FOIL, and the Nassau County Administrative Code.

On May 22, 2023, the Nassau County Legislature voted to approve the lease transfer, and the new lease was executed by Nassau County Executive Bruce A. Blakeman on May 26, 2023.

On June 2, 2023, the lease transfer occurred. That is, the original lease was assigned from NLC to LVS (NYSCEF 162), the assigned lease was terminated, and the term of the new lease commenced (NYSCEF 93).

On August 10, 2023, Sands filed a petition with the Town of Hempstead to create a new zoning classification, the “Mitchel Field Integrated Resort District,” and to have the Coliseum site rezoned to that new classification to permit the construction of a casino resort or hotel resort (NYSCEF 116, 159 p. 7). On August 29, 2023, Hempstead's consultant,

Nelson, Pope & Voorhis, LLC, sent correspondence to other SEQRA involved agencies, including Nassau County, declaring Hempstead's intent to act as lead agency (NYSCEF 159 p. 8).

*4 By decision and order dated November 9, 2023, this Court, inter alia, held that the respondents violated both the Open Meetings Law and SEQRA in approving the lease transfer. Accordingly, this Court annulled the vote of the respondent Nassau County Planning Commission taken on April 27, 2023, to recommend approval of the lease transfer to the Nassau County Legislature; annulled the resolution of the Nassau County Planning Commission dated April 27, 2023; annulled the vote of the Nassau County Legislature taken on May 22, 2023, approving the lease transfer; annulled the new lease; annulled the negative declaration issued by the Nassau County Legislature pursuant to SEQRA; and remitted the matter to the Planning Commission and the Nassau County Legislature (1) to conduct a proper public hearing in accordance with all relevant statutes and rules, including the Nassau County Administrative Code and the Open Meetings Law, and (2) for the issuance of a positive declaration pursuant to SEQRA and for the preparation of an Environmental Impact Statement that considers the environmental impact of the new improvements described in Section 1.02(b) of the new lease.

Within an hour after the release of this Court's decision and order on November 9, 2023, this Court received three unsolicited, ex parte phone calls from Thomas A. Adams, Esq., who is the County Attorney for the respondent Nassau County. Adams, who introduced himself to chambers staff as “Judge Adams,”² in one of the phone calls exclaimed that the decision and order annulled the entire lease, that the old lease does not revert, and that as a result of the decision and order, there is no tenant at the Nassau Coliseum. Adams advised chambers staff that the respondents' counsel would be seeking a stay of the decision and order before the end of that day.³

At 4:15 p.m. on November 9, 2023, at the respondents' counsel's request, this Court heard oral arguments over the phone for 45 minutes on an application by the respondents to stay this Court's decision and order. Consistent with Adams's phone call, the respondents primarily argued that the annulment of the lease meant that there was no tenant at the Nassau Coliseum, and therefore no entity had the authority to run the events that were scheduled to be held at the Nassau Coliseum. Counsel for the respondents argued that there was a basketball game scheduled for that evening, as well as other

upcoming events, and with the new lease annulled, there was no entity with the authority to take tickets, provide security, et cetera.⁴ The Court also heard Hofstra's counsel's position. At the end of the phone call, this Court denied the application for a stay.⁵

On November 10, 2023, the Appellate Division, Second Judicial Department (hereinafter the Appellate Division), granted the respondents' application for a temporary emergency stay of this Court's decision and order dated November 9, 2023. Also on November 10, 2023, the respondents filed a notice of appeal of this Court's decision and order, and moved in the Appellate Division for a stay of this Court's decision and order pending hearing and determination of the appeal. In an attorney affirmation submitted in support of the respondents' motion for a stay pending the hearing and determination of the appeal, the respondents argued to the Appellate Division, among other things, that:

- this Court's decision and order "annulled the lease ... under which [Sands] is currently operating the Nassau Coliseum" (NYSCEF 158 ¶ 5);
- "Sands' present lack of authority to operate the Nassau Coliseum is already causing substantial disruption ... which will only grow as time passes absent a stay" (NYSCEF 158 ¶ 6);
- *5 • securing a casino license [and] zoning permission and other approvals ... will be more difficult if not impossible if [Sands] does not have a valid lease" (NYSCEF 158 ¶ 6);
- Sands' planned "resort and casino will require extensive planning, designing, and numerous licensing and zoning approvals, which in turn required that [Sands] first assume site control by entering into a lease for the property. [Sands] also needed the lease so that it could operate the Coliseum in the meantime" (NYSCEF 158 ¶ 8);
- The Nassau County Legislature previously determined that the lease 'must be authorized in order for' ... Sands to 'undertake the necessary planning activities, make licensing, land use, and funding applications, and other necessary activities to secure required approvals for development' (Nassau County Legislature's Negative Declaration at 2 ...)" (NYSCEF 158 ¶ 20);
- "a stay will cause Hofstra no prejudice ... Sands continuing to pursue the zoning and land use applications

that it needs before any construction begins plainly does not harm Hofstra. Likewise, Hofstra will not face any prejudice from ... Sands continuing to operate the Nassau Coliseum and host events there free of the legal uncertainty about its ability to do so" (NYSCEF 158 ¶ 26).

Attached as an exhibit to the attorney affirmation submitted in support of the respondents' motion to the Appellate Division for a stay pending the hearing and determination of the appeal was the affidavit of Arthur Walsh, the Chief Deputy County Executive of Nassau County. Walsh stated, inter alia, that "Nassau County will be severely harmed if the lease is annulled, even temporarily. Absent a valid lease for someone to operate the Nassau Coliseum, the Coliseum may have to immediately cease operations." Walsh further stated, "Nassau County will also be harmed if the lease remains annulled because it will jeopardize the County's economic development plans. Nassau County leased the land on which the Nassau Coliseum sits to [Sands] so that [Sands] could operate the Coliseum while seeking to build, after receiving all necessary permits, licenses, and zoning changes and variances, an integrated resort and potential casino at the site."

While the Appellate Division's temporary emergency stay was in effect, the respondents continued to pursue environmental review in the Town of Hempstead, rather than in Nassau County, as directed by this Court's decision and order dated November 9, 2023. On December 5, 2023, the Town of Hempstead passed a resolution declaring itself as the lead agency for SEQRA review of the proposed casino project (*see* NYSCEF 159 p. 23 of 27 of PDF).

By decision and order on motion dated December 13, 2023, the Appellate Division denied the respondents' motion for a stay pending hearing and determination of the appeal, thereby lifting the temporary emergency stay that had been issued on November 10, 2023 (NYSCEF 155).

On December 28, 2023, Greenberg Traurig, LLP, sent a letter the Town Attorney of the Town of Hempstead (NYSCEF 154). This letter stated that the assigned lease, i.e., the original lease that had been assigned from NLC to LVS, was still in effect. The letter further provided that "[t]his leasehold interest allows [LVS] to proceed with its application to change the underlying zoning district of the Premises and seek approval of the Conceptual Master Plan made by Verified Petition, dated August 1, 2023, to the Town of Hempstead." The penultimate paragraph of the letter provided:

*6 “While the [decision and order dated November 9, 2023] invalidates the County's approval of the “lease transfer” and the New Lease, it does not affect the [assigned lease] or invalidate the Assignment. The Assignment was a private transaction, not subject to SEQRA between two nonparties to the Article 78 Proceeding - LVS NY and NLC. To be clear, the relief granted by the Court makes no mention of the Assignment and instead focuses solely on the conduct and actions of different public County entities. More specifically, the [decision and order dated November 9, 2023,] invalidates the May 22, 2023, resolution of the Nassau County Legislature approving the New Lease and the New Lease itself Neither action impacts the Assignment and/or the [assigned lease]. Based upon the foregoing, LVS NY has a valid leasehold interest and may proceed with the Application [to change the underlying zoning district of the Premises and seek approval of the Conceptual Master Plan made by Verified Petition, dated August 1, 2023, to the Town of Hempstead].”

(NYSCEF 154).

After Greenberg Traurig LLP sent the above letter, the respondents resumed their pursuit of SEQRA review in the Town of Hempstead and held two public scoping hearings on the proposed casino development on January 18, 2024 (NYSCEF 159 pp. 7-8).

Although the Appellate Division granted the respondents' unopposed motion for a preference in the calendaring of their appeal from this Court's decision and order dated November 9, 2023 (NYSCEF 155), and counsel for the respondents stated that the respondents “intend to resolve this appeal as quickly as possible, including by perfecting their appeal well in advance of the deadline to do so” (NYSCEF 158 ¶ 27), as of the date of this decision and order, which is more than three months after the respondents' filed their notice of appeal, they have not yet perfected their appeal.

Motion Sequence 003

By notice of motion dated January 29, 2024, Hofstra moves, inter alia, for a judgment declaring that the annulment of the respondents' actions in this Court's decision and order dated November 9, 2023, included the annulment of the respondent Nassau County's consent and the putative assignment of the original lease from NLC to LVS. In a memorandum of law submitted in support of the motion, counsel for Hofstra asserts

that the respondents seek to manufacture a loophole is this Court's decision and order by mischaracterizing the decision and order as not annulling the putative consent by Nassau County to the assignment of the original lease from NLC to LVS. Counsel asserts that, throughout the process of securing approval of the lease transfer and at the public hearings held on March 2, April 20, and April 27, 2023, the respondents maintained that the assignment of the original lease from NLC to LVS was an integral component of the transfer. Additionally, the original lease explicitly provided that any assignment required the consent of Nassau County, and the new lease expressly provided for Nassau County's putative consent to the assignment of the original lease from NLC to LVS. Counsel also notes that Sands' effort to proceed with environmental review before the Town of Hempstead deviates sharply from the position taken by the respondents in their stay applications to this Court and to the Appellate Division, which was that this Court's decision and order dated November 9, 2023, deprived Sands of the right to operate or develop the Nassau Coliseum. Accordingly, counsel contends that the respondents should be estopped from contending otherwise in opposition to this motion.

In a memorandum of law submitted in opposition to the motion, counsel for the respondents first asserts that Hofstra lacks standing to seek a declaration that the assignment of the original lease from NLC to LVS was invalid, as no parties to this litigation were parties to the assignment. Second, the counsel for the respondents asserts that Hofstra cannot invalidate the private assignment without joining NLC and LVS as necessary parties. Third, counsel for the respondents asserts that, even without the County's consent, the private assignment of the original lease remains in full force and effect. Counsel contends that the original lease did not require the County's consent for assignments “involving ... any other Person whose common stock is quoted on a recognized security exchange,” which includes Sands. Moreover, even if Nassau County's consent to the assignment were required, counsel contends that an assignment without obtaining consent would not render the assignment void; rather, it would constitute an “event of default” under the original lease, thus allowing Nassau County to seek damages or an injunction if it wished to do so.

*7 Counsel for the respondents further contends that the SEQRA review process may proceed in the Town of Hempstead even if this Court determines that the assigned lease was annulled by this Court's decision and order. Counsel asserts that this Court's November 9, 2023 decision and order

held that SEQRA review which considers the environmental impact of the development outlined in Section 1.02(b) of the new lease must be conducted prior to Nassau County re-entering into a new lease, which “has nothing to do with whether the Hempstead-led process may proceed.” Counsel contends that the Hempstead-led process was triggered in August 2023, when Sands filed a zoning petition in the Town of Hempstead, and is not dependent on the validity of the new lease or the assigned lease. Counsel asserts that, on July 31, 2023, Nassau County, as the owner of the Coliseum site, consented to the filing of a zoning petition, which was independent of any lease. Counsel further contends that the respondents have complied with this Court's decision and order dated November 9, 2023, and that, unless this Court's decision and order is overturned, Nassau County will not enter into a new lease with Sands, at a minimum, until environmental review in the Town of Hempstead is completed.

With regard to the arguments made by the respondents in their stay application to this Court and in their motion for a stay to the Appellate Division, counsel for the respondents asserts that:

“After review of the relevant agreements, Respondents subsequently determined that Sands was in fact able to operate the Coliseum pursuant to the [assigned lease] because ... the [assigned lease] was still in full force and effect following this Court's Order. But that conclusion was not immediately obvious. Rather, it required analyzing the Order, the [assigned lease], and the Private Assignment. This analysis was still incomplete when Respondents filed their stay requested less than twenty-four hours after the Order was released.”

Counsel for the respondents further argues that:

“Prior to the Court's Order, the County had not determined whether the [assigned lease], without the [new lease], was sufficient for the Sands to undertake those planning activities and applications. There was no need to do so, as the County believed the [new lease] was valid and sufficient on its own. Following the Order, however, it became necessary for the County to determine whether the [assigned lease] provided sufficient site control for the Sands to undertake those activities and applications, and the County concluded that it did.”

Lastly, counsel for the respondents contends that the respondents should not be judicially estopped from arguing

that Sands currently has a valid lease to the Nassau Coliseum because the contrary position previously taken in the stay requests did not result in a judgment in the respondents' favor, as their motion for a stay pending the hearing and determination of the appeal was denied, and the emergency stay issued by the Appellate Division did not prejudice Hofstra.

In a memorandum of law in reply, counsel for Hofstra argues that the assignment of the original lease from NLC to LVS required the consent of Nassau County, that this Court's decision and order dated November 9, 2023, annulled that consent, and, therefore, the assignment of the lease is invalid. Counsel contends that the respondents' new position—that the consent of Nassau County was not required for the assignment—contradicts the record, which is replete with administrative and legislative steps taken by respondents in the efforts to have Nassau County approve the assignment. Counsel contends that the respondents' reliance on section 19.11 of the original lease is irrelevant and inapplicable, and does not trump the specific contractual language governing any assignment—found in sections 19.1 and 19.2—which explicitly require Nassau County's consent. With respect to the respondents' shifting positions, counsel for Hofstra asserts that the respondents should be estopped from recasting their arguments. After litigating for months whether consent to the lease assignment was properly authorized under state and county law, the respondents should not be heard for the first time to contend that no consent was ever required. Moreover, after convincing a justice of the Appellate Division to grant a temporary emergency stay based on their representations that Sands could not otherwise operate the Nassau Coliseum, the respondents should not be allowed to argue that no prohibition ever existed.

*8 With regard to the respondents' argument that, even if consent were required, the failure to obtain such consent constituted an event of default, which Nassau County had the option to ignore, counsel for Hofstra asserts that this contention is contrary to the Open Meetings Law and the Nassau County Administrative Code. With regard to the respondents' argument that NLC and LVS are necessary parties, counsel for Hofstra asserts that, from its commencement, this proceeding/action has challenged the respondents' refusal to adhere to their duties under state and county law. Counsel also asserts that this Court's decision and order directed SEQRA review to occur before the Nassau County Legislature, rather than the Town of Hempstead. Counsel contends that the current Hempstead-led SEQRA

review “makes even less sense now” that the new lease has been annulled, because the review is either based on the annulled lease, which currently has no legal effect, or is based on the assigned lease, which in no way allows for the development of a casino.

Discussion

Hofstra has standing to move for the declaration sought. Contrary to the respondents’ contention, the assignment of the original lease from NLC to LVS is not a mere private transaction between nonparties. Rather, one of the parties to the assigned lease is Nassau County, the property at issue is public property, owned by Nassau County, and the Nassau County Administrative Code contemplates that Hofstra, as a neighboring landowner, has an interest in the disposition of the public land upon which the Nassau Coliseum sits (*see* Nassau County Administrative Code § 11-8.0[b][1]; *see also* *Matter of Kogut v Village of Chestnut Ridge*, 214 AD3d 808, 803 [2d Dept 2023]).

Turning to the merits, since the respondents concede that this Court’s November 9, 2023 decision and order annulled Nassau County’s consent to the assignment of the original lease from NLC to LVS (NYSCEF 159 p. 6), the primary issue raised on this motion is whether Nassau County’s consent was required for the assignment of the original lease from NLC to LVS. Since December 2023, Sands has been operating the Nassau Coliseum and proceeding with its casino development plans, including proceeding with SEQRA review in the Town of Hempstead, pursuant to its purported authority to do so under the assigned lease. As outlined above, on December 13, 2023, the Appellate Division denied the respondents’ motion for a stay pending the hearing and determination of the appeal, thereby lifting the temporary emergency stay that had been issued on November 10, 2023, and shortly thereafter, by letter dated December 28, 2023, Greenberg Traurig, LLP, advised the Town of Hempstead that the assigned lease was in full force and effect and, therefore, Sands could proceed with its casino development plans, including SEQRA review in the Town of Hempstead.

Even if this Court were to agree with the respondents’ contention that the assignment of the original lease from NLC to LVS did not require the consent of Nassau County, the fact remains that the assigned lease has been terminated. The parties’ submissions throughout this litigation amply demonstrate that the assigned lease was terminated on the

“Term Commencement Date” of the new lease. The “Term Commencement Date” of the new lease was defined by the new lease as the date that the original lease was assigned from NLC to LVS (NYSCEF 93 p. 6), which occurred on June 2, 2023 (NYSCEF 162), and Section 1.03 of the new lease, entitled “Termination of Assumed Lease,” provided that, “Effective as of the Term Commencement Date, the [assigned lease] is hereby terminated” (NYSCEF 93 p. 5). Thus, the assigned lease was terminated on June 2, 2023.

The conclusion that the assigned lease was terminated is also thoroughly established by the record. The following statements were made at the March 2, 2023 hearing of the Nassau County Planning Commission:

MR. PERRAKIS: ... Nassau County’s requesting permission to assign the existing leases on the Long Island Marriott Site and the Coliseum Site to a new operator. *The leases will ultimately be terminated and new leases will be entered into for both sites.* Nassau County Department of Public Works approves this request.

*9 The purpose of the hearing tonight is to allow the public to comment on the County’s jurisdiction of the assignment, *termination and enter into new leases* of County properties.

...

MR. MEYER: Good evening. Josh Meyer, West Law Group, 81 Main Street, White Plains, New York 10601.

Thank you for the opportunity to introduce this project to the Commission...

As you may be aware, we’re currently in the process of negotiating two separate leases with Las Vegas Sands on the—on the “Coliseum parcels” and the “hotel parcels.” And then the County Legislature will need to approve:

The assignment of the existing leases from the existing tenant to Las Vegas Sands;

The termination of the leases;

And then entering into two separate leases for the “Coliseum parcel” and the “hotel parcels”

(NYSCEF 72, pp. 50-51, 55 [emphasis added]).

Additionally, at the meeting of the Nassau County Legislature on May 22, 2023, Josh Meyer stated as follows:

MR. MEYER: Good afternoon, Presiding Officer and members of the Legislature. My name is Josh Meyer of West Group Law and I'm outside counsel for Nassau County for the lease negotiations.

At the committee meetings two weeks ago, I provided an in-depth review of the lease provisions, and this afternoon I will just provide some highlights of the proposed lease before you today for approval.

The term of the lease will be 99 years. The effective date will be the date the County Exec executes the lease. The term commencement date, which would be required to occur within 60 days of the effective date, and LVS must close on the assignment and assumption of the existing lease with the existing tenant Nassau Live Center LLC. *By entering into this lease, the prior lease will terminate and the 99 year lease term will run from the term commencement date.*

(NYSCEF 86 pp. 123-124 [emphasis added]).

A PowerPoint presentation prepared by Nassau County, entitled "Summary of Lease Agreement," dated May 22, 2023, similarly provided:

- Term Commencement Date:
- Within 60 days of Effective Date:
- LVS must close on the assignment and assumption of the existing lease with Nassau Live Center LLC,
- *By entering into this Lease, the prior lease will terminate*
- 99 year Lease term will run from the Term Commencement Date

(NYSCEF 90 p. 2 [emphasis added]).

At oral arguments on motion sequence 003, which were held on February 20, 2024, counsel for the respondents confirmed that the respondents' current position is that the assigned lease was never terminated (tr at 33, lines 24-25; tr at 34, lines 1-22). When asked if both the assigned lease and the new lease were in effect at the same time, counsel for the respondents essentially argued that when the term of the new lease commenced, the assigned lease remained valid, and once this Court annulled the new lease, the assigned lease came back into effect (tr at 27-39).⁶ This position is inconsistent with the respondents' myriad submissions,

summarized above, demonstrating that the assigned lease was terminated on the "Term Commencement Date" of the new lease. "Under the doctrine of judicial estoppel, or estoppel against inconsistent positions, a party is precluded from inequitably adopting a position directly contrary to or inconsistent with an earlier assumed position in the same proceeding" (*Cobenas v Ginsburg Dev. Cos., LLC*, 133 AD3d 812, 813 [2d Dept 2015] [internal quotation marks omitted]) or in a different proceeding (*see D&L Holdings, LLC v RCG Goldman Co. LLC*, 287 AD2d 65, 71-72 [1st Dept 2001]). "The doctrine rests upon the principle that a litigant should not be permitted to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise. The policies underlying preclusion of inconsistent positions are general consideration[s] of the orderly administration of justice and regard for the dignity of judicial proceedings. In short, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position" (*H&R Block Bank v Page*, 199 AD3d 780, 782 [2d Dept 2021]). "[A]pplication of the doctrine of judicial estoppel does not require entry of a judgment" (*Riconda v Liberty Ins. Underwriters, Inc.*, 187 AD3d 1081, 1082 [2d Dept 2020] [internal quotation marks omitted]; *see D&L Holdings, LLC v RCG Goldman Co. LLC*, 287 AD2d at 72).

***10** Here, on November 10, 2023, the respondents successfully obtained a temporary, emergency stay of this Court's decision and order dated November 9, 2023, from the Appellate Division. It is apparent from the arguments made to this Court on November 9, 2023, and in the arguments made in the attorney affirmation submitted in support of the respondents' motion to the Appellate Division for a stay pending the hearing and determination of the appeal, that the arguments made in the emergency stay application were based on assertions that, as a result of this Court's decision and order dated November 9, 2023, Sands did not have the authority to operate the Nassau Coliseum or to pursue the development of a casino. After the Appellate Division vacated the stay on December 13, 2023, the respondents changed their position, and now argue that Sands had the authority to operate the Nassau Coliseum and to pursue the development of a casino the whole time. Moreover, on December 5, 2023, while the temporary emergency stay was in effect, the Town of Hempstead passed a resolution declaring itself as the lead agency for SEQRA review of the proposed casino project (NYSCEF 159, p. 23 of 27 of PDF), despite this Court's directive in the November 9, 2023 decision and order

remitting the matter to the County for the issuance of a positive declaration and the preparation of an Environmental Impact Statement that considers the environmental impact of the new improvements described in Section 1.02(b) of the new lease. Under these circumstances, the doctrine of judicial estoppel precludes the respondents from arguing that the assigned lease has not been terminated and that both the assigned lease and the new lease were in effect at the same time (*see Marcial v Central Park N. Parking Sys., Inc.*, 30 Misc 3d 1233[A], 2011 NY Slip Op 50340[U], *4 [Sup Ct, NY County 2011] [“Plaintiff cannot rely on the continuing validity of the lease and assert that he is entitled to rights and benefits under the lease, after having agreed in the so-ordered stipulation that the lease terminated”]).

In any event, even if the doctrine of judicial estoppel did not apply, the contention that the assigned lease was not terminated and instead remained valid at the same time that the new lease was in effect is without merit (*see Trustees of Columbia Univ. in the City of NY v D'Agostino Supermarkets, Inc.*, 36 NY3d 69, 74 [2020] [stating that all prospective obligations flowing from a tenancy were terminated when the parties terminated the lease and entered into a surrender agreement]; *Marcial v Central Park N. Parking Sys., Inc.*, 30 Misc 3d 1233[A], 2011 NY Slip Op 50340[U], *4 [Sup Ct, NY County 2011] [“Plaintiff cannot rely on the continuing validity of the lease and assert that he is entitled to rights and benefits under the lease, after having agreed in the so-ordered stipulation that the lease terminated”]; *see also Glenball, Ltd. v TLY Coney, LLC*, 57 AD3d 843, 844 [2d Dept 2008] [affirming the Supreme Court's determination to grant that branch of the landlord's motion which was to dismiss a tenant's cause of action alleging that a lease remained valid where the landlord had properly served a notice of lease termination]; *17 E. 89th St. Tenants v Tsabbar*, 6 AD3d 309, 310 [1st Dept 2004] [“since defendant's proprietary lease terminated long before plaintiff commenced the instant ejectment action, the IAS court was powerless to revive the expired lease by evaluating the underlying dispute”]).

Moreover, this Court's annulment of the new lease did not revive the assigned lease (*see Harris v Hiscock*, 91 NY 340, 344 [1883] [stating that, where parties mutually agreed to terminate their lease and entered into an arbitration agreement to resolve the issue of damages, but the arbitrators “made no valid award[,] [t]hat does not revive the dead lease ... [t]he lease was canceled by mutual agreement The failure of the arbitration cannot restore the abandoned contract”]; *see also Swerdlow v Harlow*, 213 AD3d 521, 522 [2d Dept

1925] [holding that, where a landlord commenced a summary proceeding to recover possession of certain premises, and the lease to the premises was thereafter terminated, the discontinuance of the summary proceeding did not revive the terminated lease]), nor could the assigned lease be revived through an oral agreement between Nassau County and LVS (*see LaCarrubba v Outdoors Clothing Corp.*, 57 Misc 3d 69, 73 [App Term, 2d Dept 2017]). Rather, any new lease agreement between Nassau County and LVS would need to be in writing and comply with, among other things, the Nassau County Administrative Code and the Open Meetings Law, as discussed in this Court's decision and order dated November 9, 2023.

As outlined above, the record amply demonstrates that assigned lease was terminated on the “Term Commencement Date” of the new lease, which was June 2, 2023, months before the issuance of this Court's decision and order dated November 9, 2023. Thus, even if this Court were to agree with the respondents' contention that Nassau County's consent was not required for the assignment of the original lease from NLC to LVS, there are no circumstances under which the assigned lease could currently be in full force and effect. “[C]ourts may sua sponte conform the pleadings to the evidence” (*Matter of Barton v Barton*, 111 AD3d 1348, 1349 [4th Dept 2013]; *see CPLR 3025[c]; Harbor Associates, Inc. v Asheroff*, 35 AD2d 667, 668 [2d Dept 1970]; *see also CPLR 3017[a]*). Under the circumstances here, the appropriate declaration to be made is that the assigned lease has been terminated, and LVS and Sands currently have no leasehold interest in the land upon which the Nassau Coliseum sits. In light of the respondents' shifting positions regarding Sands' authority under the assigned lease to operate the Nassau Coliseum and to pursue the development of a casino, the respondents would not be prejudiced or surprised by such a declaration (*see generally CPLR 3025[c]; Matter of Hersh*, 198 AD3d 766 [2d Dept 2021]).

*11 This declaration may be made without adding NLC and LVS as necessary parties. NLC is not a necessary party, as it would not be inequitably affected by the declaration. Pursuant to the Assignment and Assumption of Amended and Restated Lease, NLC irrevocably and unconditionally assigned all of its interest in the original lease to LVS (NYSCEF 162). Upon the “Assignment Effective Date,” which was June 2, 2023, NLC had no further obligations with respect to the original lease or the premises (*see Terminal Cent. v Modell & Co.*, 212 AD2d 213, 217 [1st Dept 1995]). As NLC is not a party to the assigned lease, it would not be inequitably affected by

a determination that the assigned lease has been terminated. LVS and Sands need not be joined because “[j]oinder is not necessary where ‘the interests of the nonjoined party and a party who has been joined stand or fall together’ ” (*Country Vil. Towers Corp. v Preston Communications*, 289 AD3d 363 [2d Dept 2001], quoting *Matter of Doner v Comptroller of State of NY*, 262 AD2d 750-751 [3d Dept 1999]). “[W]hen the interests of the nonjoined party and a party who has been joined stand or fall together thereby diminishing any potential prejudice, joinder may be excused” (*Matter of Doner v Comptroller of State of NY*, 262 AD2d at 751). Here, the interests of the respondents, LVS, and Sands “are so intertwined that there is virtually no prejudice” to LVS and Sands by their nonjoinder (*Matter of Long Is. Contractors’ Assn. v Town of Riverhead*, 17 AD3d 590, 594 [2d Dept 2005]). The interests of LVS and Sands are adequately protected by the respondents, as their interests to the issues presented in this proceeding/action are virtually identical (*see id.* at 594).

Conclusion

Based on the foregoing, it is hereby

ORDERED that Hofstra's motion, in effect, for a judgment declaring that the assigned lease has been terminated, and that

LVS NY Holdco 2, LLC, and Las Vegas Sands Corp. currently have no leasehold interest in the land upon which the Nassau Coliseum sits, is **GRANTED**; and it is further,

ADJUDGED and DECLARED that the assigned lease, i.e., the (original) lease that was assigned from Nassau Live Center, LLC, to LVS NY Holdco 2, LLC, has been terminated; and it is further,

ADJUDGED and DECLARED that LVS Holdco 2, LLC, and Las Vegas Sands Corp. currently have no leasehold interest in the land upon which the Nassau Coliseum sits.

Any other relief not specifically addressed herein, including Hofstra's request for attorneys' fees and costs, is **DENIED**.

The parties' remaining contentions have been considered and do not warrant discussion.

This constitutes the decision, order, and interlocutory judgment of this Court.

All Citations

Slip Copy, 82 Misc.3d 1251(A), 209 N.Y.S.3d 878 (Table), 2024 WL 2265742, 2024 N.Y. Slip Op. 50588(U)

Footnotes

- 1 To be abundantly clear, the term “original lease” refers to the lease with Nassau County as landlord and NLC as tenant. The term “assigned lease” is the original lease, but with LVS as the tenant. The “new lease” is the lease entered into in 2023 with Nassau County as landlord and LVS as tenant. The term “lease transfer” was also used in this Court's decision and order dated November 9, 2023, to describe the three acts of (1) assigning the original lease from NLC to LVS, (2) terminating the assigned lease, and (3) Nassau County and LVS entering into the new lease.
- 2 *But see* ABA Comm on Ethics & Prof Responsibility Formal Op 95-391 (1995).
- 3 Also on November 9, 2023, Nassau County Administrative Judge Hon. Vito DeStefano reported directly to the undersigned that he also received a phone call from Adams regarding the decision and order immediately after its release.
- 4 There was not, in fact, a basketball game scheduled at the Nassau Coliseum for the evening of November 9, 2023.

- 5 This Court also directed the respondents' counsel to tell Adams, presently a practicing attorney and their client in this proceeding/action, to stop calling chambers, as it was highly inappropriate.
- 6 On February 22, 2024, counsel for the respondents uploaded a letter to NYSCEF (doc. 165) requesting permission to provide this Court with a submission explaining why the "NLC Lease," which the letter defined as the original lease, i.e., the lease with Nassau County as landlord and NLC as tenant, remains in full force and effect (NYSCEF 165). The letter provided:

"At the argument, the Court *sua sponte* raised an issue that was not raised by Hofstra or otherwise addressed in the Parties' briefing, namely whether the lease between Nassau County and the Las Vegas Sands Corp.... dated May 26, 2023 ... ("New County Lease"), which the Court annulled in its November 9, 2023 Order ... operated to terminate the Amended and Restated Coliseum Lease between Nassau County and Nassau Live Center, LLC ... dated July 23, 2015 (Doc. No. 150) ("NLC Lease").

"The NLC Lease was not before the Court in connection with Hofstra's Article 78 Petition, the Order did not terminate the NLC Lease, and the Court does not have a basis to declare that lease terminated or annulled in connection with Hofstra's Motion for a Declaratory Judgment."

(NYSCEF 165). The respondents' counsel's letter requested permission pursuant to 22 NYCRR 202.8-c to brief the Court on the issue of "the continued validity of the NLC Lease" (NYSCEF 165). This Court denied the request. Indeed, this Court agrees with the respondents' counsel's contention that the original lease was not before this Court. However, the respondents' counsel misses the point, namely, that the predicate for Sands continuing to operate the Nassau Coliseum and pursue the development of a casino stems from its purported authority to do so under the *assigned lease*. To that end, at oral arguments, this Court inquired as to the respondents' position on the current effectiveness (as contrasted with its validity as a document) of the *assigned lease*. The Court sought to understand the respondents' position that the annulment of the new lease meant that the respondents could "revert" back to the *assigned lease*. The respondents' conflation of the validity of the original lease with the current effectiveness of the assigned lease is a red herring.