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FILED AND ENTERED  
On November 17, 2008  
WESTCHESTER  
COUNTY CLERK

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

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

-----X  
DAMARO RESTAURANT GROUP, LLC,

Plaintiff,

-against-

GAZETTE REALTY HOLDINGS, LLC and YONKERS  
DOWNTOWN WATERFRONT DEVELOPMENT and  
"JOHN DOE" 1-10,

Defendants.  
-----X

Index No. 13312/08

Motion Date: 9/05/2008  
SEQ # 2,3

**DECISION, ORDER  
AND INTERLOCUTORY  
JUDGMENT**

Scheinkman, J:

Plaintiff Damaro Restaurant Group, LLC ("Plaintiff" or Damaro) moves for summary judgment on its First and Second Causes of Action which seek declaratory relief (Seq. No. 2). Defendant Gazette Realty Holdings, LLC ("Gazette") cross-moves, pursuant to CPLR 3211, to dismiss Damaro's First Cause of Action, and, pursuant to CPLR 3212, for summary judgment granting it declaratory relief (Seq. No. 3). The motion and the cross-motion are consolidated for purposes of this decision.

Damaro operates a restaurant in the City of Yonkers, in a building owned by Defendant Yonkers Downtown Waterfront Development Corporation ("YDWDC"). Damaro's presence on one floor and the basement of the building is authorized by to a written contact, labeled "Lease", with Gazette, which itself has a lease with the owner, YDWDC. Damaro contends that, despite the stated nomenclature and its payment of rent to Gazette for eight years, the "Lease" which it signed with Gazette is really, in the eyes of the law, an "Assignment" by Gazette of its lease with YDWDC. Gazette asserts that the "Lease" is really a "sublease."

While the distinctions between leases, subleases, and assignments involve fine points of law and the application of ancient precedents, the debate here is not a dry, academic exercise. Though the "Lease" is almost eight years old, and Damaro and Gazette have lived in evident harmony thereunder, it has apparently been dusted off and the niceties of real estate law examined because the parties have heard the footsteps, and the lure, of a real estate developer. Gazette's lease with YDWDC allows Gazette to buy the building at the end of the lease term. The present controversy over whether the Lease is what it purports to be has been stimulated by the entrance onto the Yonkers scene of a developer who has expressed interest in acquiring the subject property, among others in the neighborhood. Damaro is, in essence, asking that the Court declare that Gazette assigned its lease with YDWDC to Damaro and, therefore, Damaro, not Gazette, holds the purchase option. The resolution of the controversy would thus undoubtedly strengthen, or weaken, the respective bargaining positions of Damaro and Gazette in their negotiations with the developer and with each other.

Of some interest, YDWDC asserts that it is an "innocent bystander" and takes no position on the points in contention, other than to suggest what it believes would be a fair and reasonable outcome of the entire action. What the law requires, and what is fair and reasonable, are not necessarily coterminous. YDWDC does request, however, leave to apply for indemnification for its counsel fees, though it is not entirely clear whether the claim for fees is against only Gazette or also Damaro. This claim, along with Gazette's claims for indemnification based on expenses and attorneys' fees incurred in defending itself in another action between Damaro and its restaurant supplier, have been reserved for future determination and will not be addressed now.

### **BACKGROUND AND FACTS**

The parties agree on the basic facts. YDWDC is a local economic development authority and is the owner of property located at 55 Main Street, Yonkers (Affidavit of Joseph Spiezio, sworn to August 22, 2008 ["Spiezio Aff."] at ¶ 3; Affidavit of Robert Leggio, sworn to August 8, 2008 ["Leggio Aff."] at ¶ 3). The property is improved with a three story building known as the Gazette Building (Spiezio Aff. At ¶ 3; Leggio Aff. at ¶ 3) (the "Building").

#### **A. *The Master Lease***

As part of an effort to redevelop downtown Yonkers, YDWDC leased the entire Building to Gazette pursuant to a written lease agreement, dated as of January 1, 2002 (the "Master Lease") (see Spiezio Aff., Ex. D; Leggio Aff., Ex. A). Gazette contemplated leasing, reconstructing and equipping the Building (Master Lease at 1).

The Master Lease is for a term of running from November 1, 2001 to October 31, 2016 (Master Lease, § 2.3 [a],[b]). The Master Lease restricts what the

Building may be used for. On the ground floor, commercial retail uses are permitted, subject to the requirements of the city zoning ordinance, and those uses include certain restaurant uses. The basement may be used for commercial retail and tenant storage. The second and third floors may be used for commercial and professional offices (Master Lease, § 1.2 [f]). The Master Lease gives Gazette the option to purchase the Building at end of the term for an amount equal to the greater of: (a) the total outstanding balances on certain mortgages; or (b) 80% of the then fair market value of the Building (Master Lease, § 2.3[g]).

Leasing the ground floor space to a restaurant was clearly important to YDWDC. The Master Lease required that Gazette enter into a "sublease" with a restaurant subtenant within six months of November 1, 2001 and that the restaurant subtenant take up the entire retail space on the ground floor (Master Lease, § 1.2 [g][1]). Further, the Master Lease defined the quality of the subtenant by reference to examples of high-end restaurants in Westchester County, such as Mulino's in White Plains, the Willet House in Port Chester, and Harry's in Hartsdale (Master Lease, § 1.2[g]).

The Master Lease provides that the Lease may not, whether or in part, be assigned without YDWDC's consent, except to an entity controlled by Gazette's principal, Joseph F. Spiezio. However, the "Facility" (that is, the Building [see Master Lease at 1]), may be subleased, without YDWDC's consent, subject to certain conditions, specifically: the sublease is not to relieve Gazette from liability under the Master Lease; the sublease must be, and must state, that it is "subject and subordinate" to the Master Lease and its use restrictions; a copy of the sublease must be promptly given to YDWDC; and "that part, if any, of the term of any such sublease or any renewal or extension thereof, which shall extend beyond a date one day prior to the expiration or earlier termination of the Term of this [Master] Lease, shall be a nullity" (Master Lease § 6.1 [a] and clauses [i] through [v]).

Notwithstanding this, a special restriction on a sublease for the ground floor space to a proposed restaurant tenant is imposed. As to a proposed restaurant tenant, YDWDC's prior written approval, not to be unreasonably withheld, is required with respect to the identity of the proposed sublessee and the nature and quality of the operations to be conducted by that sublessee (Master Lease, § 6.1[b]).

*B. The Damaro Lease*

Spiezio commenced a search for a restaurant operator who would bring "white tablecloth" restaurant to Yonkers (Spiezio Aff. at ¶ 30). That operator turned out to be Damaro, whose managing member is Robert Leggio.

By written Lease, dated December 23, 2002, Gazette leased the ground floor retail space to Damaro (the "Damaro Lease") (Spiezio Aff., Ex. E; Leggio Aff., Ex.

B). Damaro opened and has successfully operated a restaurant known as *Zuppa*. (Leggio Aff. at ¶ 8).

The Damaro Lease is for the entire ground floor and for most of the basement<sup>1</sup> (Leggio Aff., Ex. E, Rider at 1). Other portions of the Building are leased by Gazette to others for a variety business uses<sup>2</sup> (Spiezio Aff. at ¶ 4). It is unclear whether any portions of the Building have been retained by Gazette.

The written Damaro Lease is notable in several respects. It consists of a four page pre-printed lease form which is followed by typed 12-page Rider. But most significantly, for present purposes, the Damaro Lease provides that its term is to commence on January 1, 2003 and end on December 31, 2023 (Leggio Aff., Ex. E, Lease at 1). This is notable because the Damaro Lease has a term that is longer, by several years, than the Master Lease.<sup>3</sup> Spiezio asserts that, during the lease negotiations with Damaro and its attorney, both Damaro's representative (unnamed) and the attorney, Martin Grossman, Esq., asked to see the Master Lease and Spiezio provided a copy (Spiezio Aff. at ¶¶ 31-32). Leggio asserts that he and his father, Phillip Leggio, negotiated the lease and that, during the negotiations, he and his father asked to see the Master Lease but Spiezio never provided it (Leggio Aff. at ¶¶ 7, 10). However, Leggio concedes that he was given a copy of the Master Lease approximately two years after the Damaro Lease was signed (Affidavit of Robert R. Leggio, sworn to August 29, 2008 ["Leggio Reply Aff."] at ¶ 2). This would place Leggio as being in possession of a copy of the Master Lease by early 2005.

Leggio asserts that he was unaware, at the time, that the Damaro Lease had a longer term than the Master Lease (Leggio Aff. at ¶ 10). Spiezio does not explain the discrepancy, but asserts that it makes no difference as after the Master Lease expires his "leasehold interest converts to a fee interest on November 1, 2016" (Spiezio Aff. at ¶ 35). This is not quite true. While Gazette does have a purchase option, the exercise thereof is not self-executing and, further, Gazette's ability to exercise the purchase option is dependent upon Gazette refraining from an "Event of Default" (such as non-payment of rent which is not timely cured) as well as upon the non-termination of the Master Lease (Master Lease §§2.1[e], 7.1, 8.1). On the other hand, the Damaro

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<sup>1</sup>Section 5 of the Lease Rider provides that Damaro has a license to use all of the basement except for common area hallways and mechanical rooms.

<sup>2</sup>According to Spiezio, other subtenants include a Yonkers City Councilmember, the Yonkers Chamber of Commerce, a newspaper, an engineer, a title company and a mortgage broker (Spiezio Aff. at ¶ 4).

<sup>3</sup>In addition, Damaro has an option to extend the term of the lease by five additional years (Damaro Lease, Rider §19).

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Lease provides that, for as long as Damaro pays the rent and performs its obligations, Damaro is entitled to quietly enjoy the premises; but this "covenant shall be conditioned upon the retention of title to the premises by Landlord [Gazette]" (Damaro Lease, Landlord Covenant, First).

The Damaro Lease contains a number of other provisions of note. In Section Second of the pre-printed form, Damaro agreed to permit Gazette to access the premises at reasonable times during business hours and to permit Gazette to make repairs and improvements to all parts of the building, which, presumably includes the portion leased to Damaro. The relevant language is as follows:

That, throughout said term the Tenant will ... permit at all times during usual business hours, the Landlord and representatives of the Landlord to enter the demised premises for the purpose of inspection, and to exhibit them for purposes of sale or rental; suffer the Landlord to make repairs and improvements to all parts of the building or to any occupation thereof; suffer the Landlord to erect, use, maintain, repair and replace pipes and conduits in the demised premises and to the floors above and below....

Should Damaro fail to pay rent or additional rent, then Gazette is permitted to re-enter and remove all persons and property therefrom (Damaro Lease at 2). The Damaro Lease also expressly provides that it is "subject and subordinate" to the terms of the Master Lease (Damaro Lease, Rider Section 12).

C. *The Parties' Subsequent Conduct*

Spiezio avers that Damaro accepted two years' free rent from Gazette and also accepted \$200,000 from Gazette and YDWDC (Spiezio Aff. at ¶ 47). He also avers that Damaro paid rent to Gazette for 42 consecutive months, paid water and sewer charges quarterly to Gazette, and maintained insurance which insured Gazette's interest as landlord (Spiezio Aff. at ¶¶ 48-49). Spiezio also states that, as early as 2002, he met with officials with YDWDC and its attorneys "to explore an early exercise of the purchase option and that it has always been his intention to exercise the purchase option" (Spiezio Aff. at ¶¶ 19, 20). He submits minutes of a YDWDC board meeting held on December 19, 2002 which reflect that, at the meeting, there was "a brief mention again" of Spiezio's acceleration of the purchase of the Gazette building. He also provides a copy of a letter from an attorney to the YDWDC's James Pinto, dated September 10, 2002, which indicates that Pinto was charged with negotiating a current purchase price with Spiezio (Spiezio Aff., Ex. H).

Spiezio's assertions are not contradicted by Leggio, except that Leggio

denies receiving a copy of the Master Lease until two years after the Damaro Lease was signed. Nevertheless, Leggio does not dispute that, despite having a copy of the Master Lease, and thus being able to ascertain that the Damaro Lease had a longer term than the Damaro Lease, Damaro continued to treat Gazette as its landlord (e.g., by paying rent, paying water and sewer charges, and by carrying insurance that named Gazette as Damaro's landlord). The Court notes that the Damaro Lease recites that its terms and provisions are in compliance with what the Damaro Lease calls a "sub lease" from YDWDC. (Of course, this is not entirely so, at least so far as Gazette purported to give Damaro a greater term than permitted under Gazette's Lease with YDWDC).

*D. The Developer Approaches*

According to Leggio, after several years, a developer by the name of Nicholas Sprayregan entered the Yonkers scene and embarked on a campaign of purchasing real estate in downtown Yonkers (Leggio Aff. at ¶ 11). Leggio claims that Sprayregan "struck a tentative deal with the powers that be in Yonkers to purchase the position of Gazette in the demised premises" (*id.* at ¶ 12). Leggio avers that he was approached by Spiezio and asked to sign an estoppel certificate (*id.* at ¶ 13). The document that Leggio was asked to sign bears a date of May 2008. In the document, Damaro would acknowledge to a purchaser of Gazette's interest, Rising Development – Gazette, LLC ("Rising Development") that Damaro had paid its rent to Gazette, that neither Damaro nor Gazette were in default, and that Damaro had no right to purchase the leased premises or the building itself (Leggio Aff., Ex. J).

Spiezio submits some documents which shed further light on the approach of the new developer. Specifically, a transcript of a YDWDC Board meeting held on March 19, 2008, discloses that Pinto, YDWDC's executive director, informed the Board that Sprayregan was the head of Rising Development Company and was interested in acquiring a lease for the Gazette building. At Pinto's request, Sprayregan addressed the Board regarding his company and its plans. In the course of that discussion, Yonkers Mayor Phil Amicone, the Chair of the YDWDC Board, stated that a dialogue with Sprayregan had started several months earlier when Sprayregan came in with his partner to talk about their downtown acquisitions (Spiezio Aff., Ex. I). The Board and Sprayregan discussed Sprayregan's vision for the area and, specifically, his plans for the Gazette building, as to which he was asking for Board approval for an assignment of Gazette's interest to Sprayregan's company. In response to a question from the Mayor, Sprayregan stated that his company had no interest in razing the Gazette Building as it was "far too aesthetically beautiful to do that." Of some interest, Mayor Amicone reported that at least some of the Board members were interested in making sure that *Zuppa* could stay, but the Mayor advised that the time to sit down and talk about the future of the restaurant was after the lease was assigned.

On March 19, 2008, the Board adopted Resolution 8-2008 which

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authorized YDWDC to agree to consent to an assignment of the Master Lease to Rising Development from Gazette, subject to certain conditions.

*E. This Litigation*

The present litigation was commenced by the filing of a Summons and Verified Complaint on June 12, 2008. Damaro presents three Causes of Action. In its First Cause of Action, Damaro alleges that, by giving Damaro a longer term than it had, Gazette assigned all of its rights in the Master Lease to Damaro, including Gazette's purchase option. As relief, Damaro asks for a declaratory judgment that it holds the rights in the Master Lease that were originally Gazette's, including the right to the purchase option (Complaint at ¶¶ 16-22). In the Second Cause of Action, Damaro asserts that it has no obligation to provide the estoppel certificate that Gazette asked it to sign in connection with the proposed transfer of Gazette's interest to Rising Development. Damaro asks the Court to declare that Damaro need not provide the estoppel certificate (Complaint at ¶¶ 22-8). In the Third Cause of Action, Damaro asserts that it and Gazette had previously been sued by Restaurant Supply Corp. of Westchester and that the attorney for Gazette had written to them, claiming that Damaro was responsible for the underlying claim and for Gazette's attorneys' fees and that Damaro's failure to pay would be a breach of the Damaro Lease. Damaro pleads that Gazette's claims are not valid under the Damaro Lease and that, in any event, because the Damaro Lease was really an assignment, Gazette cannot claim a breach. Again, Damaro seeks a declaration that its view is correct (Complaint at ¶¶ 30-37).

Gazette interposed a Verified Answer dated July 24, 2008 wherein it denies the material allegations of the Complaint, and asserts affirmative defenses and a counterclaim. Gazette asserts, in essence, that the Damaro Lease is a sublease and not an assignment and, if it were, such an assignment would be barred by the Master Lease as YDWDC did not consent to the assignment. It asks that the Court declare the Damaro Lease is a sublease and that the Court nullify that portion of the term of the Damaro Lease which exceeds the term of the Master Lease. It also seeks an award of attorneys' fees for the defense of this action and for the defense of the Restaurant Supply case as well. Gazette seeks money damages on account of Damaro's alleged tortious interference with Gazette's business relationships with YDWDC and Rising Development. It also contends that, should the Court find that Damaro Lease is really an assignment, that Damaro should be required to pay for the assignment, in the sum of \$3,300,000. Damaro has interposed a Reply, dated August 8, 2008, which denies the material allegations of Gazette's counterclaims.

YDWDC separately interposed a Verified Answer dated July 14, 2008. In the answer, YDWDC asserts a cross-claim for indemnification against Gazette in the event any judgment is entered against YDWDC, and for the attorneys' fees and expenses it incurs in the defense of the action.

At the time that it commenced the action, Damaro brought on an application seeking *Yellowstone* relief. However, that application was withdrawn after it became clear that Gazette had not taken any steps to terminate the Damaro Lease. In the course of those proceedings, the Court expressed the view that the parties' arguments were essentially legal in nature and the litigation might be amenable to prompt resolution upon motions for summary judgment. Counsel agreed, though they desired to obtain discovery prior to engaging in motion practice, principally discovery of the public records maintained by YDWDC. Such discovery occurred and the Court established a briefing schedule for the summary judgment motions.

### THE PARTIES' MOTIONS AND POSITIONS

Damaro moves for summary judgment on its First and Second Causes of Action (Seq. No. 1). It asserts that where a tenant, such as Gazette, leases the premises to another party, such as Damaro, and gives up all of its possessory rights and retains none, the transaction is to be viewed as an assignment, not as a sublease. As to the estoppel certificate, Damaro claims that there is nothing in the Damaro Lease that requires it to provide such a certificate and there is no express or implied common law obligation to do so.

Gazette opposes Damaro's motion and cross-moves for summary judgment dismissing Damaro's First Cause of Action and for the entry of judgment declaring that the provisions of the Damaro Lease, which purport to extend the term of the Damaro Lease beyond the term of the Master Lease, a nullity, and reforming the Damaro Lease so as to provide that the Damaro Lease will expire on October 30, 2016, one day prior to when the Master Lease expires (Seq. No. 2). Gazette argues that the Damaro Lease provides that it is subject to the Master Lease and the Master Lease provides that any term of a sublease which exceeds the term of a Master Lease is a nullity. Gazette also argues that the Master Lease may not be assigned without YDWDC's consent, which consent has not been given. Gazette asserts that Damaro's conduct in paying rent to Gazette and recognizing Gazette as Damaro's landlord constitutes a waiver or abandonment of its claim that the Damaro Lease is really an assignment. Gazette contends that the relief sought by Damaro is contrary to public policy as granting it would defeat the fiduciary obligation of YDWDC to control the disposition of its property and would be contrary to the statutory provisions which control the disposition of property by public authorities. Gazette does not make any arguments concerning Damaro's Second Cause of Action regarding the estoppel certificate, though Damaro sought summary judgment thereon.

YDWDC, through an affidavit submitted by Executive Director Pinto, takes no position as to whether summary judgment should be granted on either the assignment/sublease or estoppel certificate issues. Pinto states, however, that YDWDC

would like to see Gazette assign its position to Rising Development, subject to "certain terms and conditions discussed, but not yet agreed upon, between and among YDWDC, Gazette and Rising [Development] can be reached" (Affidavit of James Pinto, sworn to August 20, 2008 [ "Pinto Aff. "] at ¶ 4). YDWDC would also like to see what it calls a sublease between Damaro and Gazette remain in effect "for the full balance of the Damaro Lease" (Pinto Aff. at ¶ 5). This language seems to suggest that YDWDC has no objection to the term of the Damaro Lease, notwithstanding that the term of the Damaro Lease exceeds the term of the Master Lease. Pinto avers that there is "strong indemnification language" in the Master Lease which entitles YDWDC to indemnification from Gazette for YDWDC's attorneys' fees in the defense of this action and, somewhat mysteriously, states that there is "like indemnification language in the Damaro Lease" (Pinto Aff. at ¶ 7). But Pinto does not cite the language in the Damaro Lease to which he refers. He asks that the Court grant YDWDC "leave to make application to the Court for the award of legal fees to YDWDC, since YDWDC is an innocent bystander to this particular litigation" (Pinto Aff. at ¶ 8).

#### THE SUMMARY JUDGMENT STANDARD

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Failure to make that initial showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York University Med. Center*, 64 NY2d 851, 643-644 [1985]; *St. Luke's-Roosevelt Hospital v American Transit Ins. Co.*, 274 AD2d 511 (2d Dept 2000); *Greenberg v Manlon Realty, Inc.*, 43 AD2d 968 [2d Dept 1974]). Once the moving party has made a *prima facie* showing of entitlement of summary judgment, the burden of production shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact or demonstrate an acceptable excuse for failing to do so (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Tillem v Cablevision Sys. Corp.*, 38 AD3d 878 [2d Dept 1007]; *Fleming v Graham*, 34 AD3d 525 [2d Dept 2006]).

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

### THE NATURE OF THE DAMARO LEASE

The ancient technical system of feudal law based the landlord-tenant relation on the existence of a reversion in the landlord. A tenant who sublet for the rest of the term parted with all interest in the premises, leaving no reversion, and thereby created an assignment – not a sublease. This was the result regardless of the terms of the instrument and regardless of the intentions of the parties. Feudal concepts permitted no other result (Friedman on Leases, Practising Law Institute, § 7:4.3). The feudal theory is that if a tenant could leave the premises in possession of one who owed no duty to the landlord, the ownership of the land would carry no benefit of fealty with it (*Midway Hotel Co. v Belleclaire Syndicate, Inc.*, 138 Misc 401, 403 [NY City Ct 1930] [Steuer, J.]).

This rule, established in England, has been long applied in New York (*Woodhull v Rosenthal*, 61 NY 382 [1875]) and, though it has its detractors (see *Stewart v Long Island R. Co.*, 102 NY 601, 617-618 [1886] [Finch J. dissenting]), courts have held that the rule is so firmly entrenched that if it is to be changed, it must be changed by the Legislature – not the courts (*New Amsterdam Cas. Co. v National Union Fire Ins. Co. of Pittsburgh*, 266 NY 254, 261-262 [1935]). The distinction between an assignment and a sublease is predicated on the two-fold privity existing between landlord and tenant; there is both privity of contract and privity of estate. Privity of contract rests, of course, upon the terms of the agreement between the parties. Privity of estate rests upon the parties' interests in the underlying realty. If the lessee transfers the entire interest in the real property covered by the lease, or even the whole interest in a part of the real property, to a third person who comes into possession, the transfer creates privity of estate between the landlord and the recipient of the transfer and, therefore, constitutes an assignment of the lease, with the assignee becoming directly liable to the original landlord (*New Amsterdam Cas. Co.*, 266 NY at 259-260). An assignment transfers all of an existing estate in land; a sublease creates a new estate.

In order for an instrument to be an assignment, rather than a sublease, the transfer from the original tenant must convey the entire interest of the tenant. If the tenant retains a reversionary interest in the real property, then privity of estate does not arise between the landlord and the transferee (*id.*). Thus, the distinction depends solely upon the quantity of the interest or estate which passes and does not depend upon the physical quantity of the premises transferred (1 Rasch's Landlord and Tenant § 9:4 [4th ed]). That the tenant leased the premises to another for the balance of the tenant's term at a different rent or upon different terms than set in the original lease does not save the instrument being viewed as an assignment (*id.* at § 9:8). Likewise, the fact that the tenant's lease prohibits assignment does not alter the equation either; unless the prime landlord (the property owner) chooses to void the assignment, privity of estate

results and the assignment is valid (*id.* at § 9:27). For this reason, Gazette's argument that viewing the Damaro Lease as an assignment would violate public policy restrictions on the disposition of land by public authorities must fail. YDWDC has, by its own statement, taken no position on whether the Damaro Lease constitutes an assignment and certainly has not taken any action to void, or seek to void, the Damaro Lease as violative of YDWDC's rights under the Master Lease or as violative of any statutory or case law restraint on land transactions by public entities.

At bottom, Damaro's argument boils down to the contention that, because the Damaro Lease is for a longer term than the Master Lease, the Damaro Lease is a *pro tanto* assignment, not a sublease.

There is no dispute that Gazette entered into a lease with Damaro for part of the premises for a term longer than Damaro actually had from YDWDC. It is well settled that when a tenant transfers the entire estate or interest in only part of the premises, reserving no reversionary interest in that part, the transfer is a *pro tanto* assignment, not a sublease (*New Amsterdam Cas. Co.*, 266 NY at 261-262).

While Damaro focuses on part of the rule – the length of term exceeding the master lease's length of term – Damaro ignores the other part of the rule – that the transfer must involve the entire estate or interest of the transferor. Gazette did not, in fact, transfer its entire estate or interest in the portion of the premises leased to Damaro. Under the Damaro Lease, Gazette reserved not only the right to enter the premises "at all times during usual business hours" for inspection purposes but also the right to enter the premises at any time to make repairs and improvements as well as the right to erect and use the "pipes and conduits" in the demised premises. While these rights to enter the property and make use of it may be small, the existence of these rights to enter, use and occupy the demised premises defeat the claim that Gazette transferred its entire estate. The rights Gazette reserved – *i.e.*, to enter during business hours to make an inspection and repairs and the right to use the pipes and conduits – are rights which are not dependent upon Damaro's breach but are absolute in nature.<sup>4</sup>

Moreover, Gazette was granted a purchase option by YDWDC. A purchase option is both a contractual right, a covenant running with the land, and an interest in real property (*Gilbert v Van Kleeck*, 284 AD 611, 617 [1954], *lv dismissed* 308 AD 882 [1954]; *Antler v Jamaica 163 Location Corp.*, 241 AD2d 437 [2d Dept

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<sup>4</sup>While Gazette also retained the right to re-enter upon Damaro's default, it appears, though not entirely free of doubt, that a contingent right of re-entry is an insufficient reversionary interest to avoid treating a sublease as an assignment (*Nedick's Stores, Inc. v T.S.N.Y. Realty Corp.*, 156 AD2d 123 [1st Dept 1989]; *but see* *Rasch, Landlord and Tenant* § 9:7 [4th ed]).

1997]). If a tenant makes an assignment of a lease containing a purchase option, without the reservation of any interest in the property, the purchase option is ordinarily part of the assignment and exercisable by the assignee (*Gilbert v Van Kleeck, supra*). But, here, the purchase option covered the entire Building, not just the portion leased by Damaro. Damaro has not contested Gazette's continued tenancy of the balance of the Building. Nor has it argued that the purchase option is in any way divisible. By retaining undisputed possession, or at least undisputed possessory or reversionary rights in the substantial portions of the building not demised to Damaro, Gazette retained sufficient connection to the Building to retain the unitary option to purchase.

Further, because Gazette has the right to purchase the entire premises, including the Damaro space, Damaro's argument that Gazette gave up its entire estate in the building must fail. The option, which gives Gazette an estate in the land, gives Gazette the right to purchase the building and, upon purchase, Gazette's estate would continue indefinitely, well past the expiration date of the Damaro Lease (even if the five year renewal option is invoked).

The notion that Gazette maintained a reversionary interest in the premises is further supported by the Restatement (Second) of Property. In particular, section 15.1 provides "[t]he tenant has made a sublease, even though the transfer is initially for the balance of the term [of the prime lease], if the right of possession of the leased property may return to him upon the occurrence of some event" (Restatement (Second) of Property § 15.1, Comment 1; see also *In re Lafayette Radio Elect. Corp.*, 9 BR 993 [Bankr EDNY 1981] [Bankruptcy Court holds that even though sublease term extended beyond the prime lease term, it was a sublease rather than an assignment because the sublessor-tenant had a vested option to extend the prime lease beyond the sublease term]; *Allenfield Assoc. v United States*, 40 Fed Cl 471, 482, n. 8 [1998] ["Although, on its face, the Allenfield/VA lease extends beyond the term of the LCIDA/Allenfield prime lease, thus suggesting that it is not a sublease, the prime lease contains an option to purchase the property subject to the lease, thereby making the VA's lease a sublease because the possibility of reversion to the owner (i.e., Allenfield) exists"]). Accordingly, because Gazette had the option to purchase the Building at the end of the lease term in 2016 evidences Gazette's reversionary interest in the premises and the fact that the transaction was a sublease rather than an assignment *pro tanto*.

Damaro's theory is that, if its Lease is an assignment, then the purchase option belongs to it. But, this is not so even assuming *arguendo* that the Damaro Lease should be viewed as an assignment.

To begin with, it is well settled that "[a]n assignee of part of a lease may not purchase part of the premises under a general purchase option given to the original tenant of the whole" (Friedman on Leases, Practising Law Institute §15:3, *citing Van Home v Crain*, 1 Paige 455 [1829]).

Next, the purchase option is exercisable only if an "Event of Default" has not occurred. Among other things, this means that Gazette has to be current in its payment of rent for the entire Building and current with its other obligations (see Gazette Lease at §§2.3[c], 7.1). Since the exercise of the purchase option is contingent upon Gazette being in compliance with its Building-wide obligations, it is clear that the purchase option can only be exercised by Gazette and Damaro is simply a subtenant (see *Middle Village Assoc. v Pergament Home Centers, Inc.*, 184 Misc 2d 552, 553-554 [Sup Ct Nassau County 2002]).

Further, if in fact the Damaro Lease was an assignment, Damaro's relationship connection to the Building is by reason of privity of estate, not privity of contract (Rasch, § 9:22). Thus, Damaro would be obligated to pay rent to YDWDC for its occupancy of the property (*id.* at § 9:24) and Damaro would be bound by all covenants of the Master Lease which run with the land (*id.* at § 9:23). On the other hand, Damaro, as assignee, would be entitled to enforce those provisions of the Master Lease that run with the land, such as a renewal option (*id.* at § 9:40). But this would exist only for so long as Damaro was in possession, since Damaro has not made an agreement to assume the Master Lease. It is well settled that the original tenant can only assign the interest that he or she could lawfully convey (*id.* at § 9:9). Thus, Damaro, as assignee, can only stay until the expiration of the Master Lease and then its privity of estate ends. Here, the purchase option is exercisable only at the expiration of the Master Lease, at which point, even if the Damaro Lease is an assignment, Damaro's estate ends. Thus, Damaro could not validly exercise the purchase option in any event. In this sense, the case is akin to that presented in *Conklin Dev. Corp v Acme Markets, Inc.* (89 AD2d 769 [3d Dept 1982], *lv denied* 58 NY2d 607 [1983]), where an instrument was held to be a sublease, rather than an assignment, where the instrument permitted the original tenant to exercise renewal and required the third party to pay rent to the original tenant.

Additionally, there is significant authority that the rules concerning the differences between assignment and sublease are not to be applied in a dispute between the original lessee and its tenant (*Stewart v Long Island R. Co.*, 102 NY 601 [1886]). Where the dispute is between the original tenant and its tenant, the law will give effect to the intention of the parties to effect a lease, if such a construction is a possible one and consonant with established legal principles (*Spencer Operating Corp. v Spencer Hotel Corp.*, 17 Misc 2d 887 [App Term, 1st Dept 1959]). In this case, it is clear that the parties intended a sublease. The Damaro Lease is specifically made subordinate to the Master Lease, provides for rental of only a portion of the premises, and for the payment of rent to Gazette. Contrary to Damaro's contentions, courts have held the subtenant obligated to the paramount lease's terms when the sublease incorporates by reference the terms of the sublease or makes the sublease's terms "subject and subordinate" to the paramount lease's provisions (see *Geltzer v DuFour Pastry Kitchens, Inc.*, 34 AD3d 364 [1st Dept 2006]; *Institute for Eastwest Studies v*

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*National Audubon Socy., Inc.*, 17 Misc 3d 1108(A), 2007 NY Slip Op 51882(U) [Sup Ct NY County 2007]).

Because the Damaro Lease is explicitly made "subject and subordinate" to the Gazette Lease, Damaro is bound by the promises made by Gazette to the YDWDC, which include the provision that there could be no assignment without YDWDC's consent and the provision that any portion of a sublease's term which exceeded the master lease's term (i.e., October 30, 2016) was a nullity (see *Zafarani v Gluck*, 10 Misc 3d 1073(A), 2006 NY Slip Op 50056(U) [Sup Ct Kings County 2006], *affd* 40 AD3d 1082 [2d Dept 2007]; *Soft-Life Lens Co. v E.R. Squibb & Sons Div. of Olin Mathieson Chem. Corp.*, 23 Misc 2d 777 [NY City Ct 1960]; *cf. Antler v Jamaica 163 Location Corp.*, 241 AD2d 437 [2d Dept 1997]). The cases cited by Damaro are readily distinguishable and not controlling in this regard (*NPS Engineers and Constructors, Inc. v Underweiser & Underweiser*, 73 NY2d 966 [1989], *modfg on dissenting op of Sandler, J.*, 141 AD2d 412, 414-417 [1st Dept 1988]<sup>5</sup>; *Krasner v Transcontinental Equities, Inc.*, 70 AD2d 312 [1st Dept 1979]<sup>6</sup>). Indeed, Damaro has consistently treated and viewed Gazette as its landlord and never recognized YDWDC as its landlord. When exactly Damaro received a copy of the Gazette Lease – a disputed factual issue – is not material, given Damaro's knowing execution of the Damaro Lease, with its provision that it was subject and subordinate to the Gazette Lease. If Damaro wanted to be sure what the terms of the Gazette Lease were before signing the Damaro Lease, it should

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<sup>5</sup>*NPS Engineers and Constructors, Inc.* involved boilerplate standard form language that provided that "All of the provisions of the Overlease applying to the Overtenant are binding on you the Undertenant," which the Court construed to mean that the subtenant, upon entering into occupancy, was required as the tenant in possession to conduct itself in accordance with the obligations that had been assumed originally by the sublessor, but it did not include the sublessee's obligation to pay increased rent based on an escalation clause found in the overlease.

<sup>6</sup>*Krasner* involved a very different scenario from the present case. In that case, the owner (Transcontinental Equities, Inc.) leased to defendant Liberty Travel Service, Inc., who then subleased the premises to Krasner, who then subleased the premises to Selectronic Office Equipment, Inc., who then assigned its interest to defendant Ben-Ness Cameras & Electronics Center, Inc. After Ben-Ness surrendered the balance of its lease term to Transcontinental for the sum of \$12,000, Krasner sued Ben-Ness to recover the \$12,000. While the original lease between Transcontinental and Liberty contained a provision that any sublease was subject and subordinate to the main lease, and which required Transcontinental's consent to any assignment, the First Department held that unless the sublease contained an express reservation requiring the sublessor's consent to assignment, there was no obligation to obtain Krasner's consent to Selectronic's assignment of its sub-sublease.

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have insisted upon being provided with a copy. Assuming that Damaro executed the Damaro Lease without having a copy of the Gazette Lease, Damaro took its chances. Since this is a commercial lease, and Damaro was represented by independent counsel, Damaro is bound by the consequences of the decision to sign the Damaro Lease without, according to it, having received a copy of the Gazette Lease to which the Damaro Lease was expressly made subordinate.

Since the Damaro Lease is subject to the provisions of the Gazette Lease, it necessarily follows that Damaro is bound by the provision in the Gazette Lease that the term of a subordinate lease could not exceed the length of the Gazette Lease and that any attempt to give a subtenant a longer term is a nullity.

In sum, for all the reasons set forth above, the Court concludes that the Damaro Lease is a sublease, not an assignment. Having concluded that the Damaro Lease is a sublease, the Court now applies that conclusion to the disposition of the Damaro motion and Gazette cross-motion.

Damaro seeks summary judgment on its First Cause of Action which seeks a declaration that the Damaro Lease is an assignment, that Damaro holds the purchase option, and that the rent payable under the Damaro Lease is to be paid pursuant to Court direction. Since the Damaro Lease is a sublease, Damaro's motion should be denied.

Gazette cross-moves for dismissal of Damaro's First Cause of Action. But granting such relief is inappropriate since the First Cause of Action seeks declaratory judgment. The Court may not dismiss a declaratory judgment complaint merely because the plaintiffs were not entitled to the declaration sought by them; rather it is incumbent upon the Court to grant an interlocutory judgment which declares the rights of the parties (*see, e.g., Lanza v. Wagner*, 11 NY2d 317, 334 [1962], *lv dismissed* 371 US 74 [1962], *cert denied* 371 US 901 [1962]; *Temple Constr. Corp. v Sirius America Ins. Co.*, 40 AD3d 1109 [2d Dept 2007]). Accordingly, the Court will deny Gazette's cross-motion for dismissal of Damaro's First Cause of Action and enter a declaratory judgment that the Damaro Lease is a sublease and not an assignment and, further, that Damaro does not hold any of the rights under the Gazette Lease, including the purchase option, and that such rights belong to Gazette and not to Damaro.

Gazette also cross-moves, in effect, for summary judgment on its First Counterclaim which seeks a declaration that the provision of the Damaro Lease which purports to set a term beyond October 30, 2016 (one day prior to the expiration of the Gazette Lease) is null and void, that any right of renewal or extension that would extend the Damaro Lease beyond October 30, 2016 is null and void, and modifying and reforming the Damaro Lease by providing that its term expires October 30, 2016 and that any right of renewal or extension that would extend the Damaro Lease beyond that

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date is stricken. For the reasons stated, this aspect of the Gazette cross-motion should be granted.

### THE ESTOPPEL CERTIFICATE ISSUE

Damaro seeks summary judgment on its Second Cause of Action. Damaro alleges that it was asked to provide an estoppel certificate in connection with the prospective purchase of Gazette's interest in the Building by Sprayregan's company. Damaro asserts that it has no obligation to provide such a certificate and seeks a declaration to that effect. As previously noted, Gazette has not opposed this aspect of Damaro's motion.

Examination of the Damaro Lease indicates that it does not contain any provision which requires Damaro to provide an estoppel certificate. The Court may not, in the guise of construction, re-write the Damaro Lease to add terms not agreed to by the parties and make a new contract for them (*Vermont Teddy Bear Co., Inc. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]). Nor does the covenant of good faith and fair dealing support the imposition of a requirement on the part of Damaro to give an estoppel certificate. *Middle Village v Pergament Home Centers* (184 Misc 2d 552 [Sup Ct Nassau County 2000]) is directly on point. In that case, a sublessee requested that its sublessor obtain an estoppel certificate from sublessor's landlord based on language in the main lease which provided "Upon Tenant's written request, Landlord agrees to enter into a non-disturbance and attornment agreement ...." The court found that the "Tenant" referred to in that clause was the sublessor – not the sublessee – and because there was no provision in the sublease giving the sublessee the right to compel the sublessor to seek an estoppel certificate from the landlord, the Court found that the sublessor had no such obligation. Furthermore, the court held that the sublessor had not breached its obligation of good faith and fair dealing because the master lease and sublease were clear that the sublessor's refusal to seek an estoppel certificate from the landlord violated no provision in either agreement and sublessee could not use it to achieve a result contrary to the intention of the parties in their negotiated agreement.

Here, Gazette has not made any argument in support of any theory under which the Court could require Damaro to give Gazette an estoppel certificate and no viable legal theory is apparent. Accordingly, Damaro is entitled to summary judgment on its Second Cause of Action.

### CONCLUSION

The Court has considered the following papers:

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- 1) Notice of Motion of Damaro Restaurant Group, LLC dated August 8, 2008 for Summary Judgment; Affidavit of Mitchell J. Baker, Esq. sworn to August 8, 2008, together with the exhibits annexed thereto; Affidavit of Robert Leggio, sworn to August 8, 2008, together with the exhibits annexed thereto, submitted with proof of due service;
- 2) Plaintiff's Memorandum of Law in Support of its Application for Summary Judgment dated August 8, 2008, submitted with proof of due service;
- 3) Affidavit of James Pinto, sworn to August 20, 2008, submitted with proof of due service;
- 4) Notice of Cross Motion for Summary Judgment of Gazette Realty Holdings, LLC dated August 22, 2008; Affirmation (Affidavit) of Joseph F. Spiezio, III, sworn to August 22, 2008; Undated Affirmation of Jeffrey D. Buss, Esq., together with the exhibits annexed thereto, submitted with proof of due service;
- 5) Memorandum of Law of Defendant Gazette Realty Holdings, LLC in Support of Cross-Motion for Summary Judgment Dismissing Plaintiff's Complaint dated August 22, 2008;
- 6) Affidavit of Robert R. Leggio, sworn to August 29, 2008; Affidavit of Mitchell J. Baker, Esq., sworn to August 29, 2008, together with the exhibits annexed thereto, submitted with proof of due service; and
- 7) Plaintiff's Memorandum of Law in Opposition to the Cross Motion of Gazette Realty Holdings, LLC and in Reply to the Opposition of Gazette Realty Holdings, LLC to Plaintiff's Application for Summary Judgment dated August 29, 2008, submitted with proof of due service.

Based upon the foregoing papers, and for the reasons set forth above, it is hereby

ORDERED that the motion of Plaintiff Damaro Restaurant Group, LLC for summary judgment (Seq. No. 2) is granted in part and denied in part as set forth hereinafter; and it is further

ORDERED that the cross-motion of Defendant Gazette Realty Holdings, LLC to dismiss Plaintiff's First Cause of Action and for summary judgment (Seq. No. 3)

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is granted in part and denied in part as set forth hereinafter; and it is further

ORDERED that the motion of Plaintiff Damaro Restaurant Group, LLC for summary judgment as to its First Cause of Action is denied; and it is further

ORDERED that the cross-motion of Defendant Gazette Realty Holdings, LLC, to the extent that it seeks to dismiss Plaintiff's First Cause of Action, is denied; and it is further

ORDERED, ADJUDGED and DECREED that the Lease dated December 23, 2002 made between Plaintiff Damaro Restaurant Group, LLC, as Tenant, and Defendant Gazette Realty Holdings, LLC, as Landlord, is declared to be a sublease, and not an assignment; and it is further

ORDERED, ADJUDGED and DECREED that all of the right, title and interest as Lessee in the Lease Agreement, dated as of January 1, 2002, between Defendant Gazette Realty Holdings, LLC, as Lessee, and Defendant Yonkers Downtown Waterfront Development Corporation, as Lessor, inclusive of the right to exercise the purchase option contained in Section 2.3(c) thereof, is held by Defendant Gazette Realty Holdings, LLC and no part thereof is held by Plaintiff Damaro Restaurant Group, LLC; and it is further

ORDERED that the cross-motion of Defendant Gazette Realty Holdings, LLC, to the extent that it seeks summary judgment on its First Counterclaim is granted; and it is further

ORDERED, ADJUDGED and DECREED that the provision of the Lease dated December 23, 2002 made between Plaintiff Damaro Restaurant Group, LLC, as Tenant, and Defendant Gazette Realty Holdings, LLC, as Landlord, which purports to provide that the term thereof ends on December 31, 2023 is declared null and void; and it is further

ORDERED, ADJUDGED and DECREED that the provision of the Lease dated December 23, 2002 made between Plaintiff Damaro Restaurant Group, LLC, as Tenant, and Defendant Gazette Realty Holdings, LLC, as Landlord, which purports to provide that the term thereof ends on December 31, 2023 is modified and reformed to provide that the term thereof ends on October 30, 2016; and it is further

ORDERED, ADJUDGED and DECREED that the provisions of Paragraph 19 of the Rider to the Lease dated December 23, 2002 made between Plaintiff Damaro Restaurant Group, LLC, as Tenant, and Defendant Gazette Realty Holdings, LLC, as Landlord, which purport to provide that the Tenant shall have the option to extend the

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term of the said Lease for an additional five (5) years upon certain terms and conditions are declared null and void; and it is further

ORDERED, ADJUDGED and DECREED that the Lease dated December 23, 2002 made between Plaintiff Damaro Restaurant Group, LLC, as Tenant, and Defendant Gazette Realty Holdings, LLC, as Landlord, is modified and reformed by striking, in its entirety, Paragraph 19 set forth in the Rider to the said Lease; and it is further

ORDERED that the motion of Plaintiff Damaro Restaurant Group, LLC for summary judgment as to its Second Cause of Action is granted; and it is further

ORDERED, ADJUDGED and DECREED that Plaintiff Damaro Restaurant Group, LLC has no obligation to provide an estoppel certificate in connection with any prospective sale, assignment, or other disposition by Defendant Gazette Realty Holdings, LLC of its interest in the Lease Agreement, dated as of January 1, 2002, between Defendant Gazette Realty Holdings, LLC, as Lessee, and Defendant Yonkers Downtown Waterfront Development Corporation, as Lessor; and it is further

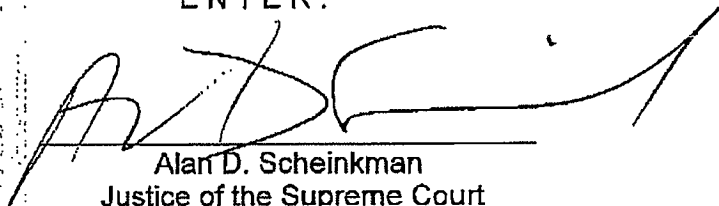
ORDERED that counsel for the parties shall appear before this Court for a status conference on December 5, 2008 at 9:30 a.m. for the purpose of scheduling further proceedings in this action; and it is further

ORDERED that the status conference hereinabove provided for may not be adjourned without the prior written approval of the Court.

This constitutes the Decision, Order and Interlocutory Judgment of the Court.

Dated: White Plains, New York  
November 17, 2008

ENTER:

  
Alan D. Scheinkman  
Justice of the Supreme Court

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
SPIEZIO FAMILY HOLDINGS, LLC.

: Index No.: 7549/08

Plaintiff,

-against-

HAROLD P. COOK, III,

Defendant.

-----X  
JOSEPH F. SPIEZIO, III,

: Index No.: 23552/06

Plaintiff,

-against-

NICHOLAS TARZIA, HAROLD P. COOK, III,  
JOSEPH PERCONTI, ANIL K. ARORA,  
PERCONTI & COOK, BRUCE BOHUNY,  
RICHARD DINAR and PROGRESSIVE  
BUILDING MANAGEMENT CO. INC.

Defendants.

-----X  
**PLEASE TAKE NOTICE** that the within is a true copy of a Decision and Order of the Honorable Alan D. Scheinkman, Justice of the Supreme Court, Westchester County, dated October 20<sup>th</sup>, 2009 and entered by the Clerk of the Supreme Court, State of New York, Westchester County, on the 20<sup>th</sup> day of October, 2009.

Dated: October 21, 2009  
Yonkers, New York

~~SMITH, BUSS & JACOBS, LLP~~

By: 

**Jeffrey D. Buss, Esq.**

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