

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D20321
W/kmg

_____AD3d_____

Argued - January 3, 2008

WILLIAM F. MASTRO, J.P.
STEVEN W. FISHER
MARK C. DILLON
WILLIAM E. McCARTHY, JJ.

2007-06255

DECISION & ORDER ON MOTION

Glenball, Ltd., appellant,
v TLY Coney, LLC, respondent.

(Index No. 6605/07)

Motion by the appellant for leave to reargue an appeal from an order of the Supreme Court, Kings County (Kramer, J.), dated May 13, 2007, which was determined by decision and order of this Court dated February 5, 2008.

Upon the papers filed in support of the motion and the papers filed in opposition and relation thereto, it is

ORDERED that the motion is granted; and it is further,

ORDERED that upon reargument, the decision and order of this Court dated February 5, 2008 (*Glenball, Ltd. v TLY Coney, LLC*, 48 AD3d 415), is recalled and vacated, and the following decision and order is substituted therefor:

Pearlman, Apat & Futterman, LLP, Kew Gardens, N.Y. (Martin M. Seinfeld of counsel), for appellant.

Matalon & Shweky PLLC, New York, N.Y. (Joseph Lee Matalon of counsel), for respondent.

In an action, inter alia, to permanently enjoin the defendant from terminating a lease and for a judgment declaring that the plaintiff is not in default under the lease, the plaintiff appeals, as limited by its brief, from so much of an order of the Supreme Court, Kings County (Kramer, J.), dated May 13, 2007, as granted those branches of the defendant's cross motion which *were pursuant to CPLR 3211(a)(1) and (7) to dismiss the first cause of action and, in effect, to dismiss the second cause of action without prejudice to the plaintiff's right to assert the issues raised by that cause of*

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action as a defense in a summary proceeding to recover possession of real property.

ORDERED that the order is modified, on the law, by deleting the provision thereof granting that branch of the cross motion which was, in effect, to dismiss the second cause of action without prejudice to the plaintiff's right to assert the issues raised by that cause of action as a defense in a summary proceeding to recover possession of real property, and substituting therefor a provision denying that branch of the cross motion; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements, and the matter is remitted to the Supreme Court, Kings County, for further proceedings on that cause of action, and the entry of an appropriate declaratory judgment thereafter.

The plaintiff's first cause of action alleged that its lease with the defendant landlord remains valid solely because the defendant landlord improperly served the required notice of lease termination. Contrary to the plaintiff's contention, however, the defendant's service of the notice of lease termination, which the plaintiff concedes was personally served upon one of its officers on Sunday, February 18, 2007, was not defective. Neither the lease itself nor the terms of the plaintiff's tenancy required service of the notice of lease termination to be made pursuant to any statutory provision. Nor did the lease specify that such a notice was to be treated as legal process. As such, the provisions of the General Business Law barring service of "legal process" on Sundays are not relevant or applicable (*see* General Business Law §§ 2, 11; *cf. DiPerna v Black*, 187 Misc 437). Further, the plaintiff does not allege any prejudice from such service. Accordingly, such service was valid (*see Suarez v Ingalls*, 282 AD2d 599; *cf. Fortune Limousine Serv., Inc. v Nextel Communications*, 35 AD3d 350, 353) and the Supreme Court properly granted that branch of the defendant landlord's cross motion which was to dismiss the first cause of action for failure to state a cause of action.

Although the Civil Court is the preferred forum for the resolution of landlord-tenant disputes in circumstances in which the tenant may obtain full relief in a summary proceeding (see Post v 120 E. End Ave. Corp., 62 NY2d 19, 28; All 4 Sports & Fitness, Inc. v Hamilton, Kane, Martin Enters., Inc., 22 AD3d 512, 513), here, no such summary proceeding was pending when the Supreme Court decided the motion. Moreover, a determination of the plaintiff's second cause of action, which is for a judgment declaring that the lease remains valid to the extent of permitting it to store its amusement park equipment on the leased premises during the term of the lease, cannot be made, as a matter of law, on the instant record. We therefore remit the matter to the Supreme Court, Kings County, for further proceedings on that cause of action, and the entry of an appropriate declaratory judgment thereafter (see Lanza v Wagner, 11 NY2d 317, 334, appeal dismissed 371 US 74, cert denied 371 US 901).

The plaintiff's remaining contentions are without merit.

MASTRO, J.P., FISHER, DILLON and McCARTHY, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court