

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 32

<hr/>	X	INDEX NO. 6931/09
NSA, INC.		
- against -		MOTION SEQ. NOS.: 1 & 2
L.I.C. FOOD COURT, INC., et al.		BY: MARKEY, J.
<hr/>	X	DATED: June 24, 2009

In this action for a permanent injunction and other related relief, defendant Nick Limberatos a/k/a Nicholas Limberatos (Nick) seeks to stay a nonpayment proceeding pending in Civil Court, Queens County entitled *NSA, Inc. v L.I.C. Food Court, Inc.*, (L&T Index No. 82414/2008) and to remove that proceeding and consolidate it with this action. By separate order to show cause plaintiff NSA, Inc. (NSA) seeks to 1) enjoin defendants from removing equipment identified in an equipment lease, 2) direct defendants to return previously removed equipment and 3) remove the subject equipment and to have defendants move these items to a location of plaintiff's choice.

NSA is the owner of premises located at 45-01 Northern Boulevard, Long Island City, in Queens County (premises). In May 2006, NSA entered into a commercial lease of the premises with Artos Restaurant Corp. (Artos) executed by Nick, a shareholder of Artos. Nick states that as a result of extensive renovations and repairs made to the premises, difficulties arose in keeping current on rental obligations. It is further alleged that NSA waived the rental fees for 2007 due to the increase in value of its property. In 2008,

Nick advised NSA of his intentions to sell the business to defendant L.I.C. Food Court, Inc. (L.I.C.). By letter agreement dated July 1, 2008, NSA consented to the assignment of the lease to L.I.C., and Artos and L.I.C. acknowledged both the uncured defaults in the amount of \$117,301.99 and their joint and several liability of this sum. The agreement provided that in lieu of payment of the debt, certain equipment located at the premises would be conveyed by L.I.C. to NSA in satisfaction of the monies owed. L.I.C. executed a lease modification agreement, bill of sale and a four-year equipment lease with NSA with an option to purchase the equipment at the end of the term for a nominal sum. Defaults under the equipment lease included any default in the performance of obligations under the original lease dated May 1, 2006 as well as the modified lease.

NSA commenced this action to recover sums due under the equipment lease and for a permanent injunction. A separate nonpayment proceeding against only L.I.C. for defaults in rental obligations under the premises lease was instituted in Civil Court, Queens County.

It is Nick's contention that NSA has attempted to mislead the Civil Court as to actual sums owed by intertwining the separate leases on the premises and equipment. He, therefore, seeks consolidation to avoid inconsistent judgments and promote judicial economy. It is also noted that L.I.C. has defaulted in this action and that Nick indicates his relationship to L.I.C. is that of an employee working at the premises in a managerial capacity.

The Civil Court is the preferred forum for resolution of landlord tenant matters. (See, *All 4 Sports & Fitness, Inc. v Hamilton, Kane, Martin Enters., Inc.*, 22 AD3d 512 [2nd Dept. 2005].) The issues raised herein concerning the rental sums outstanding under the premises lease may be raised as defenses in a Civil Court nonpayment proceeding. (See, *Top-All Varieties, Inc. v Raj Dev. Co.*, 151 AD2d 470 [2nd Dept. 1989].) As the lease provides that the tenant “will not interpose any counterclaim” in the summary proceeding, this contractual term cannot be circumvented by seeking consolidation. (See, *LRHC Flatbush, N.Y., L.L.C. v Aftor T. Realty, Inc.*, 282 AD2d 577 [2nd Dept. 2001] [citing cases].) Moreover, Nick has appeared solely on his own behalf and has no apparent authority to raise issues on behalf of L.I.C., a party in default in this action.

Accordingly, the application by Nick for a stay of the summary proceeding under Index No. 82414/2008 and for consolidation with this action is denied. An expeditious resolution of the nonpayment proceeding will also resolve the separate issue in this action as to whether a default in rental for the premises triggered a default under the equipment lease.

A party seeking a preliminary injunction must establish the likelihood of success on the merits, irreparable injury and the balancing equities in its favor. (*Aetna Ins. Co. v Capasso*, 75 NY2d 860 [1990]; *Iron Mtn. Info. Mgt., Inc. v Pullman*, 41 AD3d 656 [2nd Dept. 2007]; *Gerstner v Katz*, 38 AD3d 835 [2nd Dept. 2007].) To the extent NSA seeks mandatory relief, injunctions of this type are granted only in extraordinary circumstances, as

movant would receive the ultimate relief requested. (*See, Village of Westhampton Beach v Cayea*, 38 AD3d 760 [2nd Dept. 2007]; *Matos v City of New York*, 21 AD3d 936 [2nd Dept. 2005]; *SHS Baisley, LLC v Res Land, Inc.*, 18 AD3d 727 [2nd Dept. 2005].) Plaintiff has not met the heavy burden of proving a clear right to this remedy. (*See, MacIntyre v Metropolitan Life Ins. Co.*, 221 AD2d 602 [2nd Dept. 1995].) The documentary evidence presented, however, is sufficient to establish that certain equipment was conveyed to NSA and leased back to L.I.C. Under these circumstances, the preservation of these assets during the pendency of this action is warranted. (*See, Ruiz v Meloney*, 26 AD3d 485 [2nd Dept. 2006]; *Ying Fung Moy v Hohi Umeki*, 10 AD3d 604 [2nd Dept. 2004].)

Accordingly, a preliminary injunction is granted only to the extent that defendants are enjoined from removing, selling, transferring, assigning or encumbering equipment identified in the equipment lease dated July 10, 2008. The foregoing is conditioned upon plaintiff providing an undertaking pursuant to CPLR 6312. Upon settlement of the order, the parties may submit proof and recommendations as to the amount of the undertaking. (*See, Chiu Cheuk Chan v. 28-42, LLC*, 2009 WL 129893, 2009 NY Slip Op 50080 [U] [Sup Ct Queens County 2009] [decision by the undersigned]; *Nand Land LAL v. Shiri Guru Ravidas Sabha of New York Inc.*, 2008 NY Slip Op 51720[U] [Sup Ct Queens County 2008]; *Daily Bread Café Inc. v. City Lights at Queens Landing Inc.*, 2007 WL 3375899, 2007 NY Slip Op 52158 [Sup Ct Queens County 2007]; *Molyneux-Petraglia v. Northbridge Capital Mgmt. Inc.*, 2007 WL 1203597, 2007 NY Slip Op 50845[U] [Sup Ct

N.Y. County 2007]; *Citadel Mgt. Inc. v. Hertzog*, 182 Misc 2d 902, 906 [Sup Ct Queens County 1999]; *Connor v. Cuomo*, 161 Misc 2d 889, 897 [Sup Ct Kings County 1994]; *Jewelry Realty Corp. v. 55 West 47 Co.*, 90 Misc 2d 407, 408 [Sup Ct N.Y. County 1977].)

Settle one order.

Hon. Charles J. Markey
Justice, Supreme Court, Queens County

Dated: Long Island City, New York
June 29, 2009

Appearances:

For the Plaintiff: Schwartzman Garelik Walker & Troy, P.C., by Daniel S. Wohlfarth, Esq., 1979 Marcus Avenue, ste. 210, Lake Success, NY 11042

For the Defendant Nick Limberatos: Katerina N. Arvaitakis, Esq., 48-02 25th Avenue, ste. 414, Astoria, NY 11103