

Buona Notte Inc. v 120 Mulberry St. LLC

2017 NY Slip Op 31874(U)

September 5, 2017

Supreme Court, New York County

Docket Number: 155566/2017

Judge: Robert D. Kalish

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. ROBERT D. KALISH
Justice

PART 29

BUONA NOTTE INC. d/b/a BUONA NOTTE,

INDEX NO. 155566/2017

Plaintiff,

MOTION DATE 08/28/17

MOTION SEQ. NO. 001

- v -

120 MULBERRY STREET LLC,

Defendant.

The following papers, numbered 2 to 33, read on this motion for a preliminary injunction.

Proposed Order to Show Cause—Affirmation—Exhibits A-C—Esposito Affidavit—Exhibits A-F—Leonard Affidavit—Exhibits A-B—Memorandum of Law; Signed Order to Show Cause; Affidavits of Service | No(s). 2-21

Affirmation in Opposition—Heerens Affidavit—Exhibits A-F | No(s). 22-29

Reply Affirmation—Exhibit A—Leonard Affidavit in Reply | No(s). 31-33

Motion by Plaintiff Buona Notte Inc. (d/b/a Buona Notte), brought by order to show cause, seeking a declaratory judgment mandating and requiring Defendant 120 Mulberry Street LLC to consent to the assignment of Plaintiff's lease is denied as follows:

Background

Plaintiff Buona Notte Inc. d/b/a Buona Notte ("Buona Notte") brings the instant action and order to show cause, alleging that Defendant 120 Mulberry Street LLC has unreasonably refused to consent to their assignment of the lease. (Compl. ¶ 4.)

Plaintiff alleges that "Buona Notte is a restaurant located in the heart of Little Italy, serving food in the Southern Italian tradition with an Italian decor and atmosphere, in the Little Italy style." (Esposit Aff. in Supp. ¶ 2.) Plaintiff alleges that it has been doing business as a family owned and operated enterprise at its

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

premises at 120 Mulberry street under the current lease since 1996. (Esposito Aff. ¶¶ 1, 3; Compl. ¶¶ 10-11.) Matthew Esposito is currently the President and a principal of Buona Notte, sharing ownership with three other members of his family. (Esposito Aff. ¶¶ 1, 3.)

Plaintiff alleges that at the time that the original lease was signed, the landlord was Toma Realty LLC, whose principal was Anna Capparelli. (Compl. ¶ 12.) Plaintiff alleges that it and the prior landlord re-negotiated the lease on or about May 4, 2015 “in anticipation of the Premises being sold to a new owner . . . adjusting the rent and shortening the Term so that it expires on May 31, 2025.” (Compl. ¶ 13.) Plaintiff alleges that shortly thereafter, the premises was sold to Defendant 120 Mulberry Street LLC, and that the principals thereafter had a friendly but businesslike relationship with Defendant’s principal Steven Croman. Plaintiff alleges that there have been no other modifications to the lease other than the May 4, 2015 amendment. (Esposito Aff., Ex. A [Lease] at May 4, 2015 Modification.)

Plaintiff alleges that on or about July 2016, its principals determined that Plaintiff would attempt to the sell its business. (*Id.* ¶ 18.) Plaintiff alleges that after searching for a potential buyer for several months, Plaintiff “found a purchaser and assignee, Thomas Leonard, who had impeccable financials and credit, a passionate interest in the restaurant, and connections to the Little Italy neighborhood where Buona Notte is located.” (*Id.* ¶ 21.) Plaintiff further alleges that Mr. Leonard engaged a successful chef, Michael Psilakis, to run the restaurant, who has “five restaurants, and owns two ongoing restaurants in Manhattan.” (*Id.* ¶ 22.) Plaintiff alleges that Mr. Leonard’s “plans included modest changes to the restaurant decor, while maintaining the aesthetic and atmosphere of Little Italy and the Little Italy Special District. The restaurant will continue with the name Buona Notte in the Little Italy tradition.” (*Id.* ¶ 23.)

Plaintiff alleges that pursuant to Plaintiff’s plans to sell its business, Plaintiff entered into a purchase agreement with Mr. Leonard and his corporate entity Buona Notte Restaurant Inc. on April 20, 2017, with the sale contingent on: (a) Mr. Leonard being approved for a liquor license; and (b) Defendant consenting to the assignment of the lease. (Esposito Aff. ¶ 24.)

Paragraph 46 of the lease states:

“Tenant shall have the right to sublease or assign this Lease upon the express terms and conditions that (a) the Landlord shall, in writing, consent to such assignment, which consent shall not be unreasonably withheld; (b) that the assignee shall, in writing, assume all of the terms, covenants and conditions of the lease on the part of the Tenant to be performed; (c) that a duplicate original copy (of the sublease in the event of a sublease) or the assignment of the lease and said assumption shall be delivered to the landlord within ten (10) days from the making of said assignment or sublease; (d) that nothing contained herein shall authorize Tenant, subtenant or any assignee of Tenant to conduct any business in said premises other than as permitted by this lease; (e) that notwithstanding said assignment or sublease, the assignor or sublessor shall remain liable and responsible hereunder as if said lease had not been assigned; (f) that, at the time of making of such assignment or sublease Tenant shall not be in default under any of the terms, covenants and conditions of this lease.”

(Esposito Aff., Ex. A [Lease] ¶ 46.)

Plaintiff alleges that pursuant to the above provision, it then immediately sought Defendant’s consent to the assignment, but that Plaintiff and Mr. Leonard “were having difficulty getting the attention of the Defendant-Landlord.” (Compl. ¶ 25.) In addition, Plaintiff alleges that it fell behind on rent and utility payments, but that after a landlord-tenant proceeding, Plaintiff produced a certified check to Defendant for the arrears. (*Id.* ¶¶ 27-28.)

Plaintiff alleges that on May 5, 2017, “Mr. Leonard had a pleasant discussion and interview with Mr. Croman and his staff member and in-house counsel (Kimberly Sholomon, Esq.), and received an application form.” (*Id.* ¶ 31.) During this meeting, Mr. Leonard explained his employment history “as a managing director of the global pharmaceutical firm AstraZeneca where he handled substantial accounts.” (*Id.* ¶ 32.) Mr. Leonard’s attorney Mitchell May, Esq. also called into the meeting and described “the substantial financial backing” behind Mr. Leonard’s restaurant venture. (*Id.* ¶ 33.)

Plaintiff alleges that on or about May 10, 2017, Mr. Leonard scanned and emailed the completed application form to Defendant’s management office and in-house legal counsel Kimberly Sholomon, and that Ms. Sholomon emailed Mr.

Leonard on May 12 stating that she was forwarding said application to Defendant's commercial leasing department for review. (*Id.* ¶¶ 34-35.)

However, Plaintiff alleges that "simultaneously by letter dated May 10, 2017 (received May 12, 2017), Ms Sholomon returned the arrears check, indicated that the applicant's materials had not been received . . . and that Defendant-Landlord was unhappy that Mr. Leonard had no prior restaurant experience." (*Id.* ¶ 36.) However, Plaintiff alleges that Ms. Sholomon texted Mr. Leonard on May 15, 2017 that she would "follow up" with the commercial leasing department concerning Mr. Leonard's application, and that Mr. Leonard subsequently asked on multiple occasions if Defendant required "any additional items." (*Id.* ¶¶ 37, 39.)

Plaintiff alleges that on May 18, 2017, Defendant accepted a second arrears check from Plaintiff and that the arrears were at that point "fully paid up" and the landlord-tenant case was discontinued. (*Id.* ¶ 40.)

Plaintiff alleges that it subsequently attempted to reach Defendant by email and telephone for several weeks and received no response. (*Id.* ¶ 42.) Plaintiff alleges that then on June 15, 2017, Defendant's counsel advised Plaintiff "that the assignment had been rejected for the sole reason that Mr. Leonard had no prior restaurant experience." (*Id.* ¶ 43.)

Written Arguments

Plaintiff argues that Defendant is unreasonably denying consent to the assignment on the purported grounds that the proposed assignee lacks restaurant experience.

Defendant counters that it requires the following information from the proposed assignee:

- (a) federal business tax returns for the last two years;
- (b) business banking statements showing the revolving balance for the past two years, and;
- (c) a letter from the proposed assignee's CPA that includes a net worth statement.

(Opp. Affirm. ¶ 24.) Defendant states that: (a) Plaintiff and Mr. Leonard have not provided the proposed assignee's federal business tax returns for the past two years; (b) that it has only been provided with "business bank statements showing a revolving balance for the past two months"; and (c) that the submitted CPA letter fails to include a statement of net worth. (*Id.*)

In addition, Defendant asserts that it normally requires a personal guarantor for a commercial lease where the named tenant is a corporate entity. (*Id.* ¶ 26.) Defendant states that in order to evaluate the financial status of the personal guarantor, it needs the following items from said guarantor:

- (1) federal tax returns, including 1099 and W2 forms, for 2015 and 2016;
- (2) the proposed guarantor's last three pay stubs;
- (3) a CPA letter with a net worth statement for the proposed guarantor;
- (4) personal bank statements from the last three months; and
- (5) a photograph ID.

(Opp. Affirm. ¶ 26; Oral Arg. Tr. at 11:18-15:02.) Defendant asserts that it has not received unredacted copies of the following: (1) federal tax returns with 1099 and W2 forms, from the last two years; (2) the last three pay stubs for the proposed guarantor; (3) a CPA letter with a statement of the proposed guarantor's net worth; (4) personal bank statements for the last three months; and (5) a photograph ID. (Opp. Affirm. ¶ 26; Oral Arg. Tr. at 15:03-25:17.)

Defendant contends that its concern about Mr. Leonard's lack of restaurant experience constitutes a reasonable basis under the law for denying the assignment. (*Id.* ¶¶ 28-39.) Defendant further argues that Mr. Leonard's apparent engagement of a "celebrity chef" does not negate its concerns about Mr. Leonard's lack of restaurant experience because "[a]n employee, and particularly a celebrity chef, is free to quit and move on at will" and that "the quitting, moving and relocation of such celebrity chefs are frequent news in the newspaper restaurant page." (*Id.* ¶ 36.)

In addition, Defendant states that Plaintiff is again in arrears on its rent and utilities charges, and that this alleged default prohibits the assignment from taking effect under paragraph 46 (f) of the lease. (*Id.* ¶ 20.) In particular, Defendant

alleges that Plaintiff has failed to pay water charges in the amount of \$2,339.97 in water charges, \$6,000 for the July rent, and \$6,458 for real estate taxes. (*Id.* ¶¶ 20-21.)

In reply, Plaintiff provides an affidavit of Mr. Leonard stating that “I provided substantial financials to Defendant-Landlord including 2016 tax returns, a statement showing earnings to date in 2017, and other investment information showing that I have plenty of income and funds to pay for any contingencies in the restaurant business.” (Leonard Reply Aff. ¶ 21.) Plaintiff also points out that Mr. Leonard’s proposed assignee, Buona Notte Restaurant Inc., “is a new company, so it does not have prior years tax returns over the restaurant’s operations. (Leonard Reply Aff. ¶ 23.)

Plaintiff also states in reply that Mr. Leonard has been running a restaurant named Il Cortile next door to Buona Notte for several months now and that that restaurant is doing well. (Reply Affirm. ¶ 47.) Plaintiff argues that this should render “moot” Defendant’s concerns about Mr. Leonard’s lack of experience in the restaurant business. (*Id.*)

Oral Arguments

Counsel for the parties appeared before the Court on Wednesday, August 9, 2017, for oral argument on the instant motion.¹

In addition to orally reiterating the arguments made on the motion papers, the parties and the court went over the aforesaid items that Defendant requested regarding Mr. Leonard’s financial background pursuant to an August 8, 2017 email from Defendant to Plaintiff that was shown to the Court. Plaintiff’s counsel agreed to provide the following items of information in unredacted form for Mr. Leonard:

- (1) federal tax returns, including 1099 and W2 forms, for 2015 and 2016;
- (2) the proposed guarantor’s last three pay stubs or any documents showing income for the last three months;
- (3) a CPA letter with a net worth statement;
- (4) personal bank statements from the last three months; and

¹ The Court received the minutes from the oral arguments on Sunday, August 27, 2017.

(5)a photograph ID.

(Oral Arg. Tr. at 11:18-25:17.) In addition, to the extent that the following items of information exist, Plaintiff's counsel agreed to provide the following information in unredacted form for the proposed assignee Buona Notte Restaurant, Inc.:

- (a) federal business tax returns for the last two years;
- (b) business banking statements showing the revolving balance for the past two years; and
- (c) a letter from the proposed assignee's CPA that includes a net worth statement.

(*Id.*)

In response to Defendant's assertion that it required that the prospective assignee provide a personal guarantor, Plaintiff's counsel stated that Mr. Leonard offered to provide Defendant with a "good guy guarantee." (Oral Arg. Tr. at 28:14-30:04.) Plaintiff's counsel explained that this meant that, in the event that assignee breached the lease and failed to pay any rent, Mr. Leonard would thereby be personally liable for the rent for the period of time before assignee vacated the premises, but not for the period remaining on the lease after assignee vacated. (*Id.*)

In addition, Plaintiff's counsel presented Defendant's counsel with a check to cover the outstanding rent, and stated that it would look into the \$2,339.97 in water charges and \$6,458 for real estate taxes. (Oral Arg. Tr. at 10:06-11:17.) Plaintiff's counsel stated that these real estate taxes were its obligation under the lease and that they had not yet been paid because Plaintiff had only recently received notice of the amount due; and Plaintiff's counsel stated that water charges were Plaintiff's obligation under the lease, but noted that \$2,339.97 appeared to be rather high given that the restaurant had been closed for several months. (*Id.*)

Discussion

The Instant Motion is Denied Because It Seeks the Ultimate Relief Rather than to Maintain the Status Quo.

“The purpose of a provisional remedy is to maintain the status quo, pending a hearing on the merits, rather than to determine the parties' ultimate rights.” (35 *New York City Police Officers v City of New York*, 34 AD3d 392, 393–94 [1st Dept 2006].) Here, the status quo would be to maintain the current landlord-tenant relationship between Defendant and Plaintiff respectively, and forcing Defendant to consent to a new addition to that current relationship would amount to altering the status quo.

Moreover, the instant case is similar to a case that was decided by Judge Kern in *Fay's Restaurant & Bar, Inc. v. 141 Chrystie Street Corp*, (2015 WL 3750127, at *1 [Sup. Ct., NY County June 20, 2015]), where the tenant-plaintiff moved by order to show cause to require the landlord-defendant to consent to its proposed assignment. In that case, the underlying lease contained a provision stating that the subject premises could be assigned to a third-party “but only with the landlord's ‘written consent, which ...will not be unreasonably withheld or delayed.’” (*Id.*) The tenant there asked the landlord for its consent to the proposed assignment and the landlord responded by requesting certain financial documents from the proposed assignee “to determine the viability of the proposed tenant, which plaintiff provided.” (*Id.*) The landlord did not grant its consent, but the tenant began performing construction on the premises apparently under the assumption that the landlord did grant its consent. The landlord then served a notice to cure regarding said construction by the tenant, and the tenant moved for the aforesaid relief.

Judge Kern denied the tenant's motion by order to show cause for a “preliminary injunction directing defendant to consent to the assignment.” (*Id.* at *6.) Judge Kern reasoned that the motion sought the ultimate relief, rather than to maintain the status quo: “The present status quo, which has been in place since the inception of the Lease in 2010, is that plaintiff is the tenant of the subject premises and that the Lease has not been assigned to Saigon Shack. Plaintiff is therefore not

entitled to a preliminary injunction as the consent to the assignment of the Lease is the ultimate relief sought by plaintiff in the complaint.” (*Id.*)

The instant case appears to be similar to the facts before Judge Kern in *Fay's Restaurant*, and this Court believes that the same result is appropriate. Accordingly, the instant motion is denied because—under the guise of a provisional remedy—it seeks the ultimate relief, rather than to maintain the status quo.

CONCLUSION

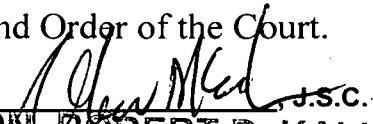
Accordingly, it is hereby

ORDERED that Plaintiff Buona Notte Inc.’s motion brought by order to show cause, seeking a declaratory judgment mandating and requiring Defendant 120 Mulberry Street LLC to consent to the assignment of Plaintiff’s lease is denied; and it is further

ORDERED that Plaintiff Buona Notte Inc. and Defendant 120 Mulberry Street LLC shall proceed forthwith completing the discovery outlined in this Court’s Preliminary Conference Order (NYSCEF Document No. 34).

The foregoing constitutes the Decision and Order of the Court.

Dated: September 5, 2017
New York, New York


HONORABLE ROBERT D. KALISH
J.S.C.

- 1. Check one:.....
- 2. Check if appropriate:..... MOTION IS:
- 3. Check if appropriate:.....

- CASE DISPOSED NON-FINAL DISPOSITION
- GRANTED DENIED GRANTED IN PART OTHER
- SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE