

**J.S. Gourmet, Inc. v Bretton Woods Homeowners
Association, Inc.**

2002 NY Slip Op 30002(U)

November 18, 2002

Supreme Court, Suffolk County

Docket Number: _510026/7422

Judge: John J.J. Jones

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SHORT FORM ORDER

INDEX NO.: 0026742/2000
SUBMIT DATE: 7/31/2002
MTN. SEQ.#: 003; 004

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 SUFFOLK COUNTY

Present:

HON. JOHN J.J. JONES, JR.
Justice

MOTION DATE: 003-4/10/2002
004-6/12/2002

MOTION NO.: 003 - MG; CDISP *SJ*
004 - XMG

-----X
J.S. GOURMET, INC.,

Plaintiff,

-against-

BRETTON WOODS HOMEOWNERS
ASSOCIATION, INC., ARTHUR SHOLINSKY :
and ANTHONY SIKORSKI,

Defendants.

-----X

PLTF'S/PET'S ATTY:

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DEFT'S/RESP'S ATTY :

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ANTHONY SIKORSKI
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Upon the following papers numbered 1 to 61 read on this motion and separate motion for summary judgment dismissing the complaint; Notice of Motion/Order

to Show Cause and supporting papers 1-19; Notice of Cross Motion and supporting papers 20-45; Answering Affidavits and supporting papers 46-57; Replying Affidavits and supporting papers 58-59; 60-61; Other _____; it is,

ORDERED that this motion by defendant, Bretton Woods Home Owners Association, Inc. (Bretton Woods), for summary judgment dismissing the first and second causes of action in the complaint and granting judgment in its favor on its counterclaim asserted against the plaintiff, J. S. Gourmet, Inc., doing business as Garden Cafe at Bretton Woods (J. S. Gourmet), and the separate motion by defendants, Arthur Sholinsky and Anthony Sikorski, deemed herein to be a cross-motion for an order granting summary judgment in their favor dismissing the complaint against them, are determined as set forth herein.

Defendant Bretton Woods is a residential condominium community with approximately 2,500 residents in Coram, Suffolk County. Plaintiff entered into a contract dated April 24, 2000 with the defendant Bretton Woods to operate a restaurant and snack bar on the premises of the defendant's condominium complex. Plaintiff alleges in the first cause of action in the complaint that the defendant Bretton Woods breached the contract by "locking out" plaintiff from the kitchen area of the facility on or about August 20, 2000 and from the snack bar area on or about September 5, 2000. It is alleged in the second cause of action that the defendant converted and misappropriated personal property with a value of \$16,396.66. Plaintiff claims in the third cause of action that the individual defendants Sholinsky and Sikorski, who are residents of Bretton Woods, coordinated and led a boycott of plaintiff's restaurant facilities by the residents of Bretton Woods and interfered with plaintiff's contractual relationship with Bretton Woods. Defendant Bretton Woods answered the complaint and asserted counterclaims against plaintiff for alleged breach of the contract and failure to pay rent for the total amount of \$11,440.00.

According to the terms of the contract between plaintiff and Bretton Woods, plaintiff was engaged "to operate the restaurant and snack bar concession for Twenty-nine (29) months beginning 1 May 2000 and continuing through 30 September 2002." Plaintiff retained the right to curtail the restaurant operating hours or to close the restaurant entirely in the event the number of restaurant patrons fell below 100 per week averaged over an 8-week period. The contract also provided, however, for the payment of rent in the amount of \$440.00 per month for a period of 28 months. It was specified in paragraph 9 of the contract as follows: "Should [J. S. Gourmet] decide to curtail restaurant operating hours or close the restaurant entirely, [J. S. Gourmet] shall continue rent payments until the total dollar amount (12,320.00) is repaid to [Bretton Woods] at which time all the equipment listed . . . will be under the ownership of [J. S. Gourmet]." By e-mail dated August 12, 2000, plaintiff gave Leonard Silverstein, president of the Bretton Woods Home Owners Association, the following notification:

Due to lack of community support the Restaurant is officially closed. We appreciate the support you and Barbara gave us but the few fans we had weren't enough. . .

The same day, plaintiff sent Joseph Loney, the administrator of Bretton Woods, a similar e-mail:

You will see from the copy of the email I sent Lenny that the Restaurant is officially closed due to the obvious boycott that is still going on (even after the meeting) and this lack of community support has made it totally unprofitable.

I am prepared to fulfill the schedule of the snack bar until Labor Day. The snack bar will be open on Labor Day from 7:00 am - 6:00 pm (weather permitting) but as far as my participation in the Labor Day Party idea, I think it is obvious that without support it is pointless to even try.

According to the affidavit of Loney submitted in support of the motion by Bretton Woods for summary judgment, at no time did Ferris or any other representative of plaintiff request access to the kitchen area of the restaurant after Bretton Woods changed its locks on or about August 20, 2000 or to the snack bar after the locks were changed on or about September 5, 2000. Moreover, there has never been a request made for the return of plaintiffs kitchen equipment nor has plaintiff ever been denied access to the kitchen or snack bar for the purposes of removing its property.

According to Loney, a loan of \$12,194.94 was given to plaintiff for the purchase of kitchen equipment and, pursuant to paragraph 9 of the contract, repayment was to have been made in 28 monthly installments of \$440.00 each until \$12,320.00 was repaid to Bretton Woods. Upon full repayment, ownership of the equipment was to have transferred to plaintiff but, since plaintiff failed to repay the loan in its entirety, ownership remains with Bretton Woods. In his affidavit submitted in support of the motion, Leonard Silverstein attested to the facts that the locks to the restaurant and snack bar were changed after the plaintiff closed each facility and that the plaintiff never requested access to remove any equipment it owned. It is the contention of the defendant Bretton Woods that the kitchen equipment, therefore, is owned by Bretton Woods. Moreover, it is asserted by Bretton Woods that plaintiff is liable on the counterclaim for unpaid rent totaling \$11,440.00.

The principal of J. S. Gourmet, Janet Ferris, testified at her deposition that she entered into the contract with Bretton Woods with the expectation that the arrangement would generate profits, notwithstanding her awareness that prior restaurant businesses at the condominium complex had been unsuccessful. Ferris admitted that while she had visited the restaurant approximately 5 or 6 times before executing the contract, she did not speak with the prior restaurant operator nor did she investigate why the prior operation failed to be profitable. She also admitted that she was advised by the president of the

homeowners' association on June 24, 2000, during the period she was operating the restaurant, that patrons complained that the food was not hot, the sandwich bread was stale, the coffee was cold, the snack bar was dirty and that the facility was not being properly maintained. A second complaint about the cold food was given to Ferris the following day. Moreover, Ferris acknowledged that she had been made aware that the golf group and the ladies group were dissatisfied with the facility. According to the testimony of Ferris, rumors that a boycott was being organized began in or about the second week of July, although Ferris admitted that she never heard anyone speak of boycotting the restaurant, nor did she see any placards or flyers about a boycott. It was her belief, however, based on their absence as customers, that the individual defendants told their friends and neighbors not to patronize the restaurant. No proof to support such assertion, however, has been presented. Nevertheless, Ferris claims that defendant Sikorski admitted at a meeting in August 2000 that he and Arthur Sholinsky were "responsible for starting the boycott."

In support of the defendants' motions for summary judgment, it is averred in the affidavit of defendant Sikorski that he was not a member of the board of directors of Bretton Woods and was not involved in contract discussions with plaintiff. He attended a meeting on August 4, 2000 concerning the possibility that the plaintiff would close the restaurant because it was not making a profit. At the meeting, there was also a discussion about the Sikorski's dissatisfaction with the quality of the food provided by the plaintiff at a dinner held on July 22, 2000 and he admitted to Ferris that he personally was "boycotting" and would not eat at the restaurant as a result of his dissatisfaction with Ferris' failure to provide gourmet food as promised at the dinner. It is also averred by Sikorski, however, that he "never attempted to exert any influence over the other residents and never told them to stop patronizing Plaintiffs snack bar and restaurant."

Defendant Sholinsky also submitted an affidavit in it is stated that, although he was a member of the Bretton Woods board of directors in 2000, he was not involved in the negotiations regarding plaintiffs operation of the restaurant facilities. While he was initially pleased with the plaintiffs operation of the restaurant and snack bar, he became dissatisfied with the service and the food in July 2000. He also became aware of complaints by other residents about things like the service being poor, the dinners becoming more expensive, the portion sizes becoming noticeably smaller and the extra charges being imposed for crackers or sauce. He also knew of residents who decided not to patronize the restaurant, although he denied ever suggesting or encouraging other residents stop patronizing the restaurant facilities.

In opposition to the motions, Janet Ferris submitted her affidavit in which she acknowledged that the loan by Bretton Woods of \$12,300 to purchase needed kitchen equipment was to have been repaid in the form of rent at a rate of \$440 per month for the 28-month period from June 30, 2000 to September 30, 2002. She does not dispute defendant's allegation that such rent payments were not made in full. Rather, Ferris claims that the alleged boycott of the restaurant by Bretton Woods and the subsequent "lock

out”constituted a breach of the agreement. While plaintiff offered no proof to support her claim that the individual defendants influenced or exerted pressure upon others to compel a “boycott” of the restaurant and snack bar, she submitted the affidavit of employee Susanne Uebler, who took notes at a meeting held on August 4, 2000 which allegedly reflect that Sikorski stated, “I started the boycott personally” when Ferris inquired about the lack of patronage at the restaurant. It is also asserted that Sikorski admitted that he advised his friends not to eat at the restaurant. Viewed in a light most favorable to plaintiff, such evidence fails to demonstrate that residents of Breton Woods did not patronize the restaurant facilities based upon actions undertaken by the individual defendants. Rather, plaintiff admits to having received complaints about service, food pricing and food quality. Furthermore, she acknowledges that many of the residents of Breton Woods were difficult to please and claims that they were “. . . senior citizens who for the most part were querulous individuals who would never be satisfied. . .”

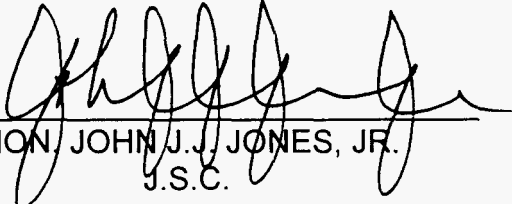
The law is well-established that summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial (see **Andre v Pomeroy**, 35 NY2d 361, 362 NYS2d 131, 320 NE2d 853 [1974]; **Benincasa v Garrubo**, 141 AD2d 636, 529 NYS2d 797 [2d Dept 1988]). The courts have repeatedly held that in order to obtain summary judgment, movant must establish its claims or defenses sufficiently to warrant a court’s directing judgment in its favor as a matter of law (see **Gilbert Frank Corp. v Federal Insurance Co.**, 70 NY2d 966, 525 NYS2d 793, 520 NE2d 512 [1988], citing **Zuckerman v City of New York**, 49 NY2d 557, 427 NYS2d 595, 404 NE2d 718 [1980]; **Friends of Animals v. Associated Fur Mfrs.**, 46 NY2d 1065, 416 NYS2d 790, 390 NE2d 298 [1979]). The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests (see **Gilbert Frank Corp. v Federal Insurance Co.**, *supra*). On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue (see **S.J. Capelin Associates v Globe Mfg. Corp.**, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [1974]). However, the court must also determine whether the factual issues presented are genuine or unsubstantiated (**Prunty v Keltie’s Bum Steer**, 163 AD2d 595, 559 NYS2d 354 [2d Dept 1990]). If the issue claimed to exist is not genuine but is feigned and there is nothing to be tried, then summary judgment should be granted (**Prunty v Keltie’s Bum Steer**, *supra*, citing **Glick & Dolleck v Tri-Pac Export Corp.**, 22 NY2d 439, 293 NYS2d 93, 239 NE2d 725 [1968]; **Columbus Trust Co. v Campolo**, 110 AD2d 616, 487 NYS2d 105 [2d Dept 1985], *affd*, 66 NY2d 701, 496 NYS2d 425, 487 NE2d 282).

In this case, the fact that plaintiff notified Breton Woods that she was voluntarily closing the restaurant and snack bar is not disputed. Furthermore, plaintiff does not deny that she failed to make monthly payments to Breton Woods according to the terms of the contract after she notified the defendant that she was closing the restaurant. Moreover, plaintiff has not disputed the assertion by Breton Woods that she never requested access to the kitchen facilities and was never denied access after the locks were changed. Under the circumstances, plaintiff’s allegation under the first cause of action that the defendant

breached the agreement is without merit. Furthermore, since plaintiff failed to repay defendant's loan of \$12,320.00 for the purchase of kitchen equipment, title to the equipment did not pass to plaintiff and, thus, plaintiff's claim of conversion can not be maintained. As the evidence before this Court demonstrates that the plaintiff terminated the agreement by closing the restaurant and snack bar and that she failed to make required rental payments, defendant Bretton Woods is entitled to summary judgment dismissing the first and second causes of action. Furthermore, plaintiff's unsubstantiated allegations about a boycott are insufficient to defeat the individual defendants' motion for summary judgment. There is no evidence that Bretton Woods residents who complained about the plaintiff's food and service or those who failed to patronize the facilities were compelled or otherwise influenced to do so by the individual defendants. There is no evidence substantiating plaintiff's claim of tortious conduct. Assuming it were true that defendant Sikorski stated that he "started the boycott personally", such statement, without more, is not evidence of actionable conduct. Accordingly, the applications by defendants for summary judgment dismissing the complaint are granted and the complaint is hereby dismissed. Moreover, as defendant Bretton Woods has demonstrated and it has not been disputed that plaintiff failed to pay rent due under the contract in the total amount of \$11,440.00, said defendant is awarded judgment on its second counterclaim against plaintiff in such amount, plus interest, costs and disbursements.

Settle judgment on notice.

DATED: 18 Nov. 02



 HON. JOHN J. JONES, JR.
 J.S.C.

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