

W.A.M.M. Bagels, Inc. v Munroe

2003 NY Slip Op 30083(U)

September 26, 2003

Supreme Court, New York County

Docket Number: 601702/03

Judge: Carol R Edmead

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ~~HON. CAROL EDMEAD~~ Justice

PART 35

W. A. M. M. Baker's Inc.

INDEX NO. 601702/07

Edward B. Munroe

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-11, 12

~~13~~ 13

14

SCANNED
OCT 06 2003

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

ORDERED that plaintiffs motion for removal of the Holdover Proceeding pending in the Civil Court and consolidating said Holdover Proceeding with the instant action is granted; and it is further

ORDERED that upon such removal and consolidation, plaintiff's motion for an order preliminarily enjoining defendants Munroe and 1380Madison, from commencing or prosecuting any further judicial or administrative actions or proceedings against plaintiff, without prior leave of Court, is granted; and it is further

ORDERED that all parties shall appear for a Preliminary Conference before Justice Carol Edmead, Part 35, 71 Thomas Street, New York, NY on September 30, 2003 at 2:15 P.M.*; and it is further

ORDERED that counsel for plaintiff shall serve proof of notice of entry upon all parties within 20 days from the date of entry of this order.

The foregoing constitutes the decision and order of this Court.

* The Court notified all parties of the Preliminary Conference via facsimile on September 26, 2003

Dated: 9/26/03

HON. CAROL EDMEAD S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
W.A.M.M. BAGELS, INC. d/b/a THE BAGELRY and/or
THE CORNER BAGEL MARKET,

Plaintiff,

Index No. 601702/03

DECISION/ORDER

-against-

ELINOR B. MUNROE and 1380 MADISON AVENUE,
L.L.C.,

Defendants.

..... X
HON. CAROL EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action for declaratory and injunctive relief, plaintiff moves by order to show cause (1) pursuant to CPLR§ 602 for removal of a holdover proceeding pending in the Civil Court of the City of New York, Part 52 (“Holdover Proceeding”) and consolidating said Holdover Proceeding with the instant action and (2) pursuant to CPLR Article 63, upon such removal and consolidation, preliminarily enjoining defendants Elinor B. Munroe (“Munroe”) and 1380Madison Avenue L.L.C. (“1380 Madison”), from commencing or prosecuting any further judicial or administrative actions or proceedings against plaintiff, without prior leave of Court.

Factual and Procedural History

Plaintiff operates a bagel store in a building located at 1380Madison Avenue in Manhattan (the “Building”), pursuant to a lease between defendant Munroe and plaintiff, as tenant, for a twelve-year term which runs through February 2005 (the “Lease”).

Defendants served upon plaintiff a Notice of Termination dated January 23, 2002 (the “Termination Notice”), wherein defendants state that they have “determined to demolish the

'Building' and that pursuant to Article 44 of the Lease (the "Demolition Clause"), the term of the Lease will terminate on May 31, 2003. The Demolition Clause states:

This lease is terminable by Owner [Munroe] at any time after the end of the fifth year of this lease (i.e., after February 28, 1998), to permit demolition of the building or building-wide renovation involving an expenditure of \$500,000.00 or more, provided, however, that Owner shall give Tenant not less than 120 days prior written notice by registered or certified mail. In the event of such termination, provided Tenant has expended at least \$250,000 for construction costs at the premises, Owner will make a cash payment to Tenant in accordance with the following schedule. . . . Tenant shall submit to Owner annually evidence of amounts expended for such construction costs. If Tenant fails or refuses to vacate on the date fixed in said notice and after receipt of such cash payment, Owner shall thereupon have the right to institute and maintain such proceedings, as it sees fit, to remove the Tenant from the demised premises for holding over after the expiration of the term.

On or about May 30, 2003, plaintiff commenced this action seeking, among other things, (a) a declaration that the Termination Notice is a nullity and was served in bad faith and (b) a permanent injunction enjoining defendants from taking any further steps regarding the Termination Notice or otherwise seeking to recover possession of the subject premises pursuant to the Demolition Clause. Plaintiff alleges that defendants do not intend to demolish the building, but instead, entered into a contract to sell the Building and seek to terminate the Lease in order to deliver the Building vacant pursuant to such contract.' Plaintiff also contends that prior to serving the Answer in this action, (1) plaintiff tendered rent checks for June and July 2003, which were deposited, (2) plaintiff tendered rent for August 2003, and (3) on two occasions, defendants have attempted to return the three

¹ Paragraphs 9 and 10 in defendants' Answer confirms that "Defendant, 1380 Madison Avenue, L.L.C., has entered into a contract of sale to sell the building to a third party [and] no demolition permit has been filed with respect to the building."

* 4]
monthly rent payments.²

Subsequently, on September 2, 2003, defendant 1380 Madison commenced the Holdover Proceeding for a judgment of possession. On September 16, 2003, plaintiff served its Verified Reply to the Counterclaims, discovery notice and notice for deposition for both defendants, in the instant action.

Plaintiff now contends that the Holdover Proceeding should be consolidated with the instant action and removed to this Court because (1) both actions involve common parties and questions of law and fact; (2) plaintiff will be denied its substantial rights concerning the discovery in this action if the Holdover Proceeding continues, and (3) this Court is the proper venue for the resolution of the dispute between the parties, given that plaintiff sought injunctive relief herein. Plaintiff contends that in both actions, the Court will have to determine whether (1) the Termination Notice is a nullity and was served in bad faith and (2) plaintiff is entitled to retain possession of the premises pursuant to the Lease. Plaintiff also contends that in the absence of consolidation, plaintiff will have to proceed to trial in the Holdover Proceeding without the benefit of critical discovery (unavailable in the Holdover Proceeding) and thereafter proceed to trial in this action on the same facts and issues.

Furthermore, plaintiff seeks a preliminary injunction, on the grounds that all the criteria have been satisfied: (1) plaintiff will succeed on the merits of its action in light of the admissions in defendants' Answer; (2) plaintiff will suffer irreparable harm; and (3) the equities favor plaintiff in that plaintiff commenced this action over three months prior to the commencement of the Holdover

² Plaintiff claims that defendants attempted to return the August 2003 rent payment check and a check drawn on 1380 Madison's account for \$22,000.00 representing the sum plaintiff paid for June and July, 2003. According to plaintiff, these rent payments have been re-delivered to defendants' counsel.

Proceeding, and defendants sought and were given additional time to serve their Answer in this action, which was not served upon plaintiff until after 1380 Madison commenced the Holdover Proceeding. Plaintiff argues that although discovery in this action will not be completed prior to the hearing in the Holdover Proceeding, such delay was caused by the repeated extensions of time requested by defendants to answer the Complaint.

In opposition,³ defendants contend that the Lease permits the Owner to terminate the Lease prior to the expiration of the Lease “to permit demolition of the building.” Thus, defendants argue that “no where in the lease does it state that the current Owner must undertake the demolition or building-wide renovation.” Moreover, such distinction is one without a difference. Furthermore, defendants contend that under the contract of sale, the purchase price is tied to the demolition work to be undertaken by the prospective purchaser, and the defendants’ purchase price shall be determined with respect to the construction work done as a result of the demolition.

Defendants also contend that the issue in the instant action, i.e., whether the defendants are entitled to recover possession based upon the Termination Notice, should be heard in the Civil Court, the preferred forum for said proceeding. Defendant also points out that plaintiff does not provide any reason why the Civil Court is powerless to hear and determine whether the Termination Notice is a nullity. The claims set forth by plaintiff in the instant action, including whether the Termination Notice was issued in bad faith, would be virtually identical to the defenses interposed by plaintiff in the Holdover Proceeding. Further, there is no prejudice to respondent, since the Civil Court may

³Defendants also contend that plaintiffs rent checks for June and July, 2003 were inadvertently accepted for a short period of time, and returned in August 2003 together with the August rent. September rent was also remitted and returned to plaintiff. Thus, defendants argue that since there was no meeting of the minds, no month-to-month tenancy was created, and the mere inadvertent acceptance of rent does not vitiate the prior Termination Notice.

entertain equitable defenses and grant relief, to the extent that it may, among other things, dismiss the complaint. Defendant points out that in order for defendant 1380Madison to recover possession in the Holdover Proceeding, the Civil Court must find that the Termination Notice was valid and that the said defendant had the right to issue and serve said Notice. If the Civil Court determines that there is no validity to the Termination Notice, then defendant 1380 Madison shall not prevail and plaintiff shall have obtained the relief sought in the instant action. Defendants maintain that all of the issues raised by plaintiff herein may be resolved in the Civil Court, and are available in the Civil Court, and there is a strong policy for the Courts to preserve the Civil Court's jurisdiction over landlord-tenant disputes. Further, in the event the Civil Court determines that the Termination Notice was defective and a nullity, the plaintiff shall in effect have obtained the result it seeks from the permanent injunction, since defendant shall not be able to proceed based upon the Termination Notice.

Defendants argue that it would be highly prejudicial to defendant 1380Madison to have the Holdover Proceeding removed and consolidated and determined by the Supreme Court and not the Civil Court, which is on a faster track than the Supreme Court. Further, an order of consolidation is inappropriate where it is served to delay the opponent. Conversely, defendants argue that they would suffer extreme prejudice if the Holdover Proceeding were removed and consolidated with the instant action. Respondent's contract of sale requires that the respondent deliver possession of the Building free of any tenants and occupants. As time is of the essence with respect to the date set forth in said contract, in the event plaintiff does not vacate, respondent may lose considerable monies regarding said contract.

Defendants also oppose the grant of any injunctive relief, since plaintiff failed to demonstrate

the three prerequisite elements, given that (1) Article 44 of the Lease permits defendant to terminate the Lease for purposes of demolition; (2) the contract vendee shall demolish the building pursuant to the contract of sale; and (3) the balance of equities favor defendant since defendant stands to lose substantial sums of money as a result of any delay in this proceeding, and there is no irreparable injury to plaintiff since plaintiff can maintain its claims as equitable defenses in the Holdover Proceeding.

Furthermore, any delay in the commencement of the Holdover Proceeding, which inured to the benefit of plaintiff, was due to the personal situation of respondent's attorneys, and should not be attributed to the defendants.

In reply, plaintiff contends that since preliminary and permanent injunctive relief against defendant cannot be asserted as an affirmative defense in the Holdover Proceeding, removal and consolidation are warranted. Plaintiff argues that there is no reason why pre-trial discovery cannot be completed in weeks and this matter tried before this Court in October. Further, defendants failed to demonstrate any prejudice, since they failed to submit any contract of sale, despite this Court's request that same be produced, and failed to submit any affidavit from a representative of defendant or from the purported purchaser to confirm that someone intends to demolish the building.

Plaintiff maintains that it stands to suffer irreparable injury in the absence of injunctive relief since plaintiff could lose its valuable commercial leasehold

Conflicting Public Policies

The issue before this Court presents a conflict between well-established public policies, both of which involve promoting the efficiency of the trial process.

CPLR §602[b] provides that "[w]here an action is pending in the supreme court it may, upon

motion, remove to itself an action pending in another court and consolidate it or have it tried together with that in the supreme court.” Public policy favors consolidation when cases present common questions of law and fact (*Daniel v Motor Vehicle Acc. & Indemnification Corp.*, 181 Misc 2d 941 [N.Y.City Civ.Ct. 1991]). The purpose of consolidation is to avoid unnecessary duplication of trials, save unnecessary costs and expense and prevent the injustice which would result from divergent decisions based on the same facts (*Chinatown Apartments, Inc. v New York City Transit Auth.*, 100 AD2d 824 [1st Dept 1984]). An order of consolidation will serve to delay the opponent of consolidation, to its detriment, consolidation is inappropriate (*see J. Henry Schroder Bank & Trust Co. v South Ferry Building Co.*, 88 AD2d 570 [1st Dept 1982]). However, absent a showing of prejudice to a substantial right, the existence of common questions of law or fact justifies the granting of a motion for consolidation (*DelBello v Wilmot*, 59 AD2d 1023 [4th Dept 1977]; *Daniel v Motor Vehicle Acc. & Indemnification Corp.*, 181 Misc 2d 941, *supra*).

While this policy has application to summary proceedings, the Court cannot ignore the well settled principle that the primary purpose of the summary proceeding is to provide the landlord with a simple, expeditious and inexpensive means of regaining possession of his premises in cases where the tenant refused upon demand to pay rent, or where he wrongfully held over without permission after the expiration of the term (*New York Univ. v Farkas*, 121 Misc 2d 643 [N.Y.City Civ. Ct. 1981, citing *Reich v Cochran*, 201 NY 450 [1911]); *Mitchell v City of New York*, 154 Misc 2d 222, 223 [N.Y.City Civ.Ct. 1992] [the purpose of summary proceedings is to provide the landlord with a simple, expeditious and inexpensive means of regaining possession of his premises in situations where the tenant wrongfully holds over without permission]; *Great Park Corp. v Goldberger*, 41 Misc 2d 988 [N.Y.City Civ.Ct. 1964] [the intention of summary proceedings is the speedy and

expeditious disposition of the issue as to the right of the landlord to the immediate possession of his real property]). “That ‘time is of the essence’ is revealed not only from the designation of the proceedings as summary, but from the fact that an adjournment of the trial of the issue may not be for more than ten days, ‘except by consent of all parties’” (*Great Park Corp. v Goldberger*, 41 Misc 2d 988, citing sec. 745 RPAPL). Unlike summary proceedings, Supreme Court plenary actions for are not intended, or expected to be resolved expeditiously, as such actions are commonly accompanied by delays due to over crowded calendars and pre-trial discovery

In the instant action for declaratory judgment, it is necessary to determine whether the Termination Notice is proper and valid. The issue in the holdover summary proceeding for possession is whether the landlord is entitled to possession, and any legal or equitable defense offered by the tenant to show that the landlord is not entitled to possession must be considered (*Baptist Temple Church, Inc. of New York v Mann*, 194 Misc 2d 498 [N. Y. Civ. Ct. 2002]). As such, and it is undisputed, that the issues are interrelated. However, the Civil Court cannot grant the injunctive relief sought by plaintiff (*see Moretti v 860 West Tower, Inc.*, 221 AD2d 191 [1st Dept 1995]; *Trump Village Section 3, Inc. v Sinrod*, 219 AD2d 590 [2nd Dept 1995]; *DeCastro v Bhokari*, 201 AD2d 382 [1st Dept 1994]; *Hotel New Yorker Pharmacy, Inc. v New Yorker Hotel Corp.*, 40 AD2d 967 [1st Dept 1972]).

This Court determines that the Supreme Court is the appropriate forum to resolve the aforementioned issues. The First Department has routinely held that where there is an action in Supreme Court for a declaratory judgment and injunctive relief, and a Holdover Proceeding between the parties involve common questions of law and fact, the two actions should be consolidated and resolved in the Supreme Court (*DeCastro v Bhokari*, 201 AD2d 382, *supra* [granting consolidation

in the interest of judicial economy where resolution of the action in Supreme Court would necessarily resolve the issues in the holdover proceeding, and where the injunctive relief sought in Supreme Court was unavailable in the summary proceeding]; *Braun v Fraydun Realty Co.*, 158 AD2d 430 [1st Dept 1990] [holdover proceeding should be removed from civil court and consolidated with action in Supreme Court, New York County, by tenants and son for declaratory judgment where proceedings are interrelated, and to avoid the expense of two-track litigation]; *see e.g. Moretti v 860 West Tower, Inc.*, 221 AD2d 191 [where neither plaintiffs negligence claims nor her request for injunctive relief could be adjudicated in the nonpayment proceeding, consolidation was proper]).

Furthermore, defendant failed to make the showing of prejudice to a substantial right. Defendant's claim of prejudice arises from its purported contract of sale. However, despite this Court's direction to defendant to produce the contract of sale, defendant failed to do so. Defendant also failed to submit an affidavit of a person with actual knowledge of the terms of the contract purportedly indicating that a demolition shall take place.

Courts have declined to remove a holdover proceeding and consolidate it with a Supreme Court action for declaratory judgment (*see Lun Fur Co., Inc. v Aylesbury Assoc.*, 40 AD2d 794 ([1972] [where the Civil Court had jurisdiction of the tenant's defense, and the Civil Court had jurisdiction to decide the issues involved, Court found that there was no equitable basis for removing a summary proceeding from the Civil Court where a prompt and expeditious determination may be had]; *see also Subkoff v Broadway-13th* (139 Misc 2d 176 [Sup. Ct. New York County 1988] [noting that although the Civil Court could not issue a declaratory judgment, it could grant the parties the "reality of full relief;" plaintiffs assertion of its right to a renewal lease as a defense to the summary

holdover proceeding could not result in a declaratory judgment that court, “[b]ut all of the *issues* to be heard in the declaratory judgment action will be resolved in the holdover proceeding; and if a declaratory judgment is still desired, it will be available for the asking (on motion), *after* the summary proceeding is resolved, as a matter of issue preclusion”). However, unlike the case at bar, the action for declaratory judgment such cases did not include a request for injunctive relief, which is a significant distinction.

With respect to plaintiffs request for a preliminary injunction, in light of the absence of any proof that a demolition shall take place, this Court is sufficiently persuaded that plaintiff will succeed on the merits of its action, to wit: that the Termination Notice is a nullity and issued in bad faith.

Further, contrary to defendant’s contention, it cannot be said that the balance of equities favor defendant. In the absence of any proof that a demolition shall take place, defendant failed to establish that it stands to lose substantial sums of money as a result of any delay in this proceeding. Additionally, even if plaintiff can maintain its claims as equitable defenses in the Holdover Proceeding, plaintiff cannot obtain in the Civil Court the affirmative relief, i.e., a permanent injunction, that it seeks here. Also, it cannot be said that the declaratory judgment action herein cannot be resolved expeditiously by this Court.

Therefore, in accordance with policy of avoiding duplicity of trials on the same issues, of saving unnecessary costs and expense, and preventing the injustice which would result from divergent decisions based on the same facts, plaintiffs motion for removal of the Holdover Proceeding pending in the Civil Court and consolidating said Holdover Proceeding with the instant action is granted (*Moretti v 860 West Tower, Inc.*, 221 AD2d 191 [1st Dept. 1995]) (removal of summary nonpayment proceeding from Civil Court and consolidating it with Supreme Court action

proper where both cases involved common questions of law and fact, neither plaintiffs negligence claims nor her request for injunctive relief could be adjudicated in nonpayment proceeding, and delay in determination of nonpayment proceeding would not have caused prejudice sufficient to justify denial of motion, and real controversy concerned money, not possession of premises]).

Furthermore, upon such removal and consolidation, plaintiffs motion for an order preliminarily enjoining defendants Munroe and 1380 Madison, from commencing or prosecuting any further judicial or administrative actions or proceedings against plaintiff, without prior leave of Court, is granted.

Based on the foregoing, it is hereby

ORDERED that plaintiffs motion for removal of the Holdover Proceeding pending in the Civil Court and consolidating said Holdover Proceeding with the instant action is granted; and it is further


ORDERED that upon such removal and consolidation, plaintiffs motion for an order preliminarily enjoining defendants Munroe and 1380 Madison, from commencing or prosecuting any further judicial or administrative actions or proceedings against plaintiff, without prior leave of Court, is granted; and it is further

ORDERED that all parties shall appear for a Preliminary Conference before Justice Carol Edmead, Part 35, 71 Thomas Street, New York, *NY* on September 30,2003 at 2:15 P.M.*; and it is further

ORDERED that counsel for plaintiff shall serve proof of notice of entry upon all parties within 20 days from the date of entry of this order.

This constitutes the decision and order of the Court.

Dated: September 26,2003

A handwritten signature in black ink, appearing to read 'Carol Edmead', is written over a horizontal line. The signature is cursive and stylized.

Justice Carol Edmead