

127 Restaurant Corp. v Rose Realty Group, LLC

2004 NY Slip Op 30261(U)

December 15, 2004

Supreme Court, New York County

Docket Number: 603653/01

Judge: Joan A. Madden

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

HON. JOAN A. MADDEN

PRESENT: _____ J.S.C. Justice

PART 11

127 Restaurant Corp.

FILED

INDEX NO. 603653/01

MOTION DATE _____

Rose Realty Group LLC

DEC 20 2004

MOTION SEQ. NO. 000

NEW YORK COUNTY CLERK'S OFFICE

MOTION CAL. NO. _____

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

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

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is consolidated with motion sequence nos. 006 + 007, and the consolidated motions are determined in accordance with the annexed decision and order.

FILED

DEC 20 2004

NEW YORK COUNTY CLERK'S OFFICE

Dated: December 15, 2004

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

J.S.C.

J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
127 RESTAURANT CORP.,

INDEX NO. 603653/01

Plaintiff,

-against-

ROSE REALTY GROUP, LLC, H.G. SKYVIEW, INC.,
and EL-AD SKYVIEW, INC.,

Defendants.

-----X
JOAN A. MADDEN, J.:

FILED
DEC 20 2004
NEW YORK
COUNTY CLERK'S OFFICE

In this action involving commercial restaurant premises, defendant/landlord Rose Realty Group, LLC ("Rose Realty"), moves for an order pursuant to CPLR 3212 granting summary judgment on its counterclaim for back rent against plaintiff/tenant 127 Restaurant Corp. ("127 Restaurant"), and summary judgment dismissing the complaint (motion sequence no. 005). Co-defendants Skyview, Inc. and El-Ad Skyview, Inc. (collectively "Skyview") also move for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint and all cross-claims asserted against them (motion sequence no. 006). Plaintiff 127 Restaurant moves for an order granting leave to amend its complaint, for reargument of this Court's order dated December 11, 2003, and for summary judgment as to liability as to certain claims against defendants Rose Realty and Skyview.¹

Plaintiff 127 Restaurant operates a restaurant known as Le Madri which occupies the first floor and cellar of the building located at 127-131 Seventh Avenue in Manhattan. Plaintiff occupies the premises pursuant to a 20-year lease dated April 24, 1997, with the owner,

¹The three motions, sequence nos. 005, 006 and 007, are consolidated for disposition.

defendant Rose Realty's predecessor in interest, L.M. 18 Realty Corp. When Rose Realty acquired the property on September 16, 1998, it became the assignee of the lease. Under the terms of the lease, 127 Restaurant is entitled to the benefits of a Declaration of Easement dated November 19, 1985 (hereinafter the "1985 Easement"), involving the abutting property at 162-164 West 18th Street. The 1985 Easement provides:

Grantor [the fee owner of 162-164 West 18th Street, the Burdened Parcel] hereby covenants, agrees, declares and grants to Grantee [the fee owner of 127-131 Seventh Avenue and 133 Seventh Avenue/166 West 18th Street, the Benefitted Parcel] in perpetuity as follows;

1. An easement for egress from the improvements constructed or to be constructed on the Benefitted Parcel, across the Burdened Parcel, as more particularly described on Exhibit D annexed hereto.
2. An easement to erect stairs to serve the improvements constructed or to be constructed on the Benefitted Parcel, and related footings, foundations, walls, frames and supports, on the portion of the Burdened Parcel more particularly described on Exhibit D annexed hereto.
3. Nothing herein shall be deemed to prohibit Grantor from changing the use of the Burdened Parcel or from erecting improvements thereon, provided always that there is maintained a legal means of egress from the improvements constructed or to be constructed on the Benefitted Parcel to grade level and across the Burdened Parcel to a public street.

Based upon this easement, plaintiff 127 Restaurant used the access provided by the easement as a means of secondary egress for the patrons and employees of its restaurant.

On May 18, 2000, defendant Skyview purchased from co-defendant Rose Realty the Burdened Parcel, for the purpose of constructing a luxury condominium building. Previously, the Burdened Parcel at 162-164 West 18th Street was an undeveloped vacant lot. At the time of the closing, Rose Realty and Skyview executed a subsequent Declaration of Easement (hereinafter the "2000 Easement"), so as to enable Skyview to begin construction and relocate the stairway providing secondary egress for 127-131 Seventh Avenue.

The 2000 Easement provides:

WHEREAS, Grantor [Skyview, the fee owner of the Burdened Parcel] wishes to declare a certain easement in favor of Grantee [Rose Realty, the fee owner of the Benefitted Parcel], as described herein.

NOW, THEREFORE, in consideration of the sum of Ten Dollars (\$10) simultaneously herewith paid and such other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, it is hereby agreed as follows:

(1) Grantor shall (a) remove the existing steel exterior staircase currently attached to the eastern wall of the building located on the Benefitted Parcel and encroaching upon the Burdened Parcel and construct a new exterior staircase at the southeast corner of the building located on the Benefitted Parcel in the area marked as "up" on the drawing annexed hereto to as Exhibit D ("New Staircase"); and (b) construct a walkway from the New Staircase to the southerly section of the Easement (hereafter defined) as shown in the hatched section on Exhibit D.

(2) Grantor shall construct the building to be built on the Burdened Parcel in such a manner as to permit egress from the walkway on the Benefitted Parcel, as is set forth in the crosshatched area marked on Exhibit D. Accordingly, Grantor hereby grants to Grantee an easement for egress from the building on the Benefitted Parcel across the Burdened Parcel ("Easement"), as more particularly described on Exhibit E annexed hereto.

(3) Nothing herein shall be deemed to prohibit Grantor from changing the use of the Burdened Parcel or from erecting improvements thereon, provided that the Easement is always maintained.

In January 2001, Skyview began excavating the Burdened Parcel, and on or about March 1, 2001, construction of building began.

Beginning in March 2001, 127 Restaurant ceased paying rent to Rose Realty, and on July 23, 2001, 127 Restaurant commenced the instant action against Rose Realty and Skyview. On or about August 3, 2001, Rose Realty commenced a summary non-payment proceeding against 127 Restaurant, seeking possession of the subject premises, and rent arrears, real estate charges, water and sewer charges and late charges in the amount of \$76,322.42, for period from March through

July 2001. By stipulation dated January 11, 2002, the parties agreed to discontinue the summary non-payment proceeding without prejudice to the assertion of all claims, affirmative defenses and counterclaims, in the instant Supreme Court action. Consequently, on or about January 23, 2002, 127 Restaurant served and filed an Amended Verified Complaint against Rose Realty and Skyview, seeking monetary damages, a permanent injunction and a declaratory judgment. The Amended Complaint asserts eight causes of action, including breach of lease, wrongful interference with the easement, nuisance, breach of the covenant of quiet enjoyment and conversion. Essentially, 127 Restaurant alleges that Rose Realty breached the lease by not providing the full benefits of the 1985 easement, and in failing to repair and maintain the air conditioning and heat systems, and the roof. 127 Restaurant seeks to enjoin defendants from interfering with and eliminating its right to the means of egress created by the 1985 easement, and a declaration that the 2000 Easement is null and void, and the 1985 Easement is valid.

Defendant Rose Realty answered the amended complaint, asserting several affirmative defenses, as well as a cross-claim against Skyview, and a counterclaim against 127 Restaurant for rent arrears covering the period from March 2001 through February 2002. In its Reply to Amended Answer, 127 Restaurant asserted eight affirmative defenses to the counterclaim, including constructive and actual eviction.

On April 22, 2002, Rose Realty secured an order to show cause for summary judgment against 127 Restaurant on its counterclaim for back rent. In an interim order dated April 25, 2002, this Court granted Rose Realty's motion only to the extent of directing 127 Restaurant to pay Rose Realty future rents and additional rent as provided under the lease, into the escrow account of Rose's attorney. The Court's interim order noted that "as agreed," 127 Restaurant to

provide Rose Realty with the names of three engineers to inspect the HVAC system and the names of three roofers/engineers to inspect the roof, with the cost to be shared by the parties. By order dated May 20, 2002, the Court denied Rose Realty's motion for 127 Restaurant to deposit into court, back rent due and owing since March 2001.

By an order dated December 11, 2003, this Court denied 127 Restaurant's motion to suspend or reduce its payment of current rent to Rose, and for an injunction preventing Skyview's construction of the condominium building on the adjoining property. On that same date, this Court issued a further order determining several discovery issues raised in a separate motion and cross-motion.

Before the Court now, are three separate motions in which the parties are each seeking summary judgment. First, the Court will consider that portion of Rose Realty's motion for summary judgment on its counterclaim for back rent against 127 Restaurant for the period of March 2001 through April 2002.

127 Restaurant Corp. does not dispute that it failed to pay rent from March 2001 through April 2002. The issue is whether 127 Restaurant can be relieved of its obligation to pay rent, based on the defense of partial actual or constructive eviction. In its Reply to the Counterclaim, 127 Restaurant asserts a Second Affirmative Defense that it was constructively or actually evicted from a portion of the premises "due to *inter alia*, Rose's failure to repair and/or replace the air-conditioner(s) at the Subject Premises, Rose's wrongful interference with an easement of egress at the Subject Premises, Rose's failure to repair/replace the roof at the Subject Premises and/or Rose's creation of a nuisance at the Subject Premises." In its papers in opposition to the motion, plaintiff further argues that the vacate order issued by the Department of Buildings on

[* 7]
February 21, 2003, is still in effect, and as a result the restaurant cannot operate at full capacity.

To constitute an eviction, either actual or constructive, there must be a wrongful act by the landlord which deprives the tenant of the beneficial enjoyment or actual possession of the leased premises. Barash v. Pennsylvania Terminal Real Estate Corp., 26 NY2d 77, 82 (1970). For an actual eviction to exist, the landlord must wrongfully oust the tenant from physical possession of the leased premises. Id. There must be a physical expulsion or exclusion, and even if the tenant is ousted from only a portion of the demised premises, the eviction is actual, if only partial. Id. at 82-83. With a constructive eviction, no physical expulsion or exclusion of the tenant is required, but the landlord's wrongful acts must substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises, or a portion of the premises. Id. at 83. With a constructive eviction, however, the tenant is required to abandon possession of the premises. Id.

Here, 127 Restaurant has failed to make a sufficient showing that it was actually or constructively evicted. Assuming without deciding that 127 Restaurant was experiencing problems with the air conditioning, heat or leaks from the roof, it is undisputed that 127 has continued to remain in possession of the premises and has been operating its restaurant. 127 Restaurant's assertion that it was unable to use some tables in the dining room due to inadequate air conditioning or heat, is insufficient to establish a substantial and material deprivation of the beneficial use and enjoyment of the premises, which would suspend its obligation to pay rent. Compare Johnson v. Cabrera, 246 AD2d 578, 579 (2nd Dept)(where landlord obligated to correct the frozen pipe condition which left the leased premises without any heat or hot water for two months during the winter, tenant was constructively evicted and not obligated to pay rent).

127 Restaurant additionally asserts that as a result of Rose Realty's failure to repair the roof, there are leaks in the kitchen when it rains and large garbage pails have to be set up to catch the water, which take up about 10% of the total area of the kitchen. Such circumstances do not rise to the level of a substantial and material deprivation of the use of the premises, nor an actual abandonment of the premises, sufficient to constitute a constructive eviction and relieve 127 Restaurant of its obligation to pay rent. Compare Manhattan Mansions v. Moe's Pizza, 149 Misc2d 43 (Civ Ct, NY Co (1990)(landlord's failure to repair leak constituted a constructive eviction, where tenant's need to repeatedly close coffee shop was a partial abandonment of the premises, and tenant was deprived of the beneficial use of the tenancy since the leak was primarily around the grill area, preventing coffee shop from being able to prepare or serve food, and thus preventing tenant from operating as a restaurant).

The Court notes, that while 127 Restaurant alleges that it was unable to use the restaurant at full capacity of approximately 200 persons, the restaurant's records, which defendants obtained during discovery, unequivocally show that numerous private parties were held at Le Madri, during 2000 through 2002, which included 100, 120, 150, 175, 180, 200 and 350 persons. Thus, such allegations are belied by plaintiff's own records.

To the extent 127 Restaurant is relying on the Building Department's vacate order as a defense to Rose Realty's counterclaim for back rent, such reliance is misplaced as the vacate order was not issued until February 21, 2003, which was well after the March 2001 through February 2002 period for which Rose Realty is seeking back rent.

Further, 127 Restaurant has not been deprived of the beneficial use of the 1985 Easement which provided the restaurant with a secondary means of egress. "As a rule, where the intention

in granting an easement is to afford only a right of ingress and egress, it is the right of passage, and not any right in a physical passageway itself, that is granted to the easement holder.” Lewis v. Young, 92 NY2d 443, 449 (1998). Moreover, absent a demonstrated intent to provide otherwise, a landowner, consistent with the beneficial use and development of its property, can relocate an easement of ingress and egress, as long as the landowner bears the expense of relocation, and the change does not frustrate the parties’ intent or object in creating the easement, does not increase the burden on the easement holder, and does not significantly lessen the utility of the easement of ingress and egress. See id at 452.

Here, the secondary means of egress created by the 1985 easement, was not eliminated, but merely altered in accordance with express provision in the 1985 Easement, in which Rose Realty reserved its right to change the use of the adjoining property and erect improvements, “provided always that there is maintained a legal means of egress from the improvements constructed or to be constructed on the Benefitted Parcel to grade level and across the Burdened Parcel to a public street.” In connection with Rose Realty’s sale of the burdened parcel to Skyview, and Skyview’s anticipated development of the property, Rose Realty and Skyview executed the 2000 Easement which essentially acknowledged that the construction of a building on the property adjoining 127 Restaurant would eliminate the secondary means of egress from the restaurant. Thus, the 2000 Easement was intended to provide for an alternative means of secondary egress, by providing for the construction of a new stairway leading from 127 Restaurant’s premises to a walkway through the new building and out to the street, thereby preserving 127 Restaurant’s easement of egress. While 127 Restaurant alleges that it was subjected to some inconvenience during Skyview’s construction, and that Skyview received

several Building Department violations in connection with the passageway through the new building, there is nothing in the record to indicate that these were anything more than temporary conditions, for which Rose Realty bore no responsibility.

Under these circumstances, where Rose Realty did not physically exclude 127 Restaurant from the premises, nor substantially and materially deprive 127 Restaurant of the beneficial use of any portion of the premises, and 127 Restaurant did not actually abandon the premises, there is no basis for finding a partial actual or constructive eviction, and 127 Restaurant's obligation to pay rent was never suspended. Barash v. Pennsylvania Terminal Real Estate Corp., *supra*; 428 Camera Corp. v. Tandy Corp., 272 AD2d 72, 73 (1st Dept 2000); Graubard Mollen Horowitz Pomeranz & Shapiro, 240 AD2d 161 (1st Dept 1997), *aff'd* 93 NY2d 508 (1999). While, as noted below, 127 Restaurant is still entitled to pursue its claims for damages based on the breach of the lease involving some of these same allegations, such claims do not suspend its independent obligation to pay rent. Earbert Restaurant, Inc. V. Little Luxuries, Inc., 99 AD2d 734 (1st Dept 1984); 113 Downtown LLC v. B & G Enterprises, 2000 WL 31056700 (App. Term, 1st Dept 2002)(n.o.r.). A tenant in possession remains obligated to pay rent, but may still seek recovery for any loss based upon the difference between the value of the premises as they were intended and the value as a result of the breach. West Broadway Glass Co. v. I.T.M. Bar Inc., 245 AD2d 232 (1st Dept 1997).

Defendant Rose Realty is, therefore, entitled to summary judgment on its counterclaim for back rent against 127 Restaurant for the period of March 2001 through April 2002. Rose Realty submits an affidavit of its managing partner, Luigi Caiola, and supporting documentation, that the total amount owed is \$367,152.04. As the opposition papers submitted by 127

Restaurant, do not dispute this amount, Rose Realty is entitled to judgment against 127 Restaurant, in the amount of \$367,152.04.²

Turning to the motions by Rose Realty and Skyview for summary judgment dismissing the complaint, as determined below, those motions are granted in part and denied in part.

The complaint includes three separate claims directly related to the issues surrounding the 1985 and 2000 easements, and the secondary means of egress created by those easements. The First Cause of Action alleges that Rose Realty breached the lease by not providing 127 Restaurant with the full and entire benefits of the 1985 easement. The Second Cause of Action seeks a permanent injunction and damages, alleging that Rose Realty and Skyview have obstructed, hindered and eliminated the means of egress afforded to 127 Restaurant under the lease and the 1985 easement. The Fourth Cause of Action seeks a declaratory judgment that the 2000 Easement is void and the 1985 Easement is valid. The Court's determination herein, that 127 Restaurant was not deprived of the beneficial use of the 1985 Easement, was based upon a finding that the 2000 Easement did not eliminate the means of egress originally created under the 1985 easement, and necessarily included a determination that the 2000 Easement is valid. In light of these determinations, the issues raised in the First, Second, and Fourth Causes of Action, have been addressed and rejected as a matter of law, and as such those causes of action are dismissed as without merit. Since this is, in part, a declaratory judgment action, the Court will issue a judgment declaring that the 2000 Easement is valid.

²Although Rose Realty's First Counterclaim for back rent, includes a demand for attorney's fees, its motion for summary judgment is silent as to attorney's fees. Thus, since the attorney's fees issue is not properly before the Court, the Court makes no determination at this time, as to Rose Realty's claim for attorney's fees.

The Third Cause of Action alleges that Rose Realty and Skyview have damaged 127 Restaurant by creating a nuisance caused by excessive noise, jolting, pounding and vibrations at the construction site on Skyview's adjoining property. It cannot be disputed, however, that Rose Realty has absolutely no control over or relationship to the construction work at the adjoining property, which is owned by Skyview. Thus, 127 Restaurant cannot maintain a claim for nuisance against Rose Realty. With respect to Skyview, 127 Restaurant has failed to establish misconduct rising to the level of a private nuisance, as 127 Restaurant has neither produced nor alleged facts showing or tending to show that Skyview's action or inaction caused a substantial and unreasonable interference with its use and enjoyment of the premises. See Copart Industries, Inc. v. Consolidated Edison Co., 41 NY 2d 564, 569-570 (1977); Kaniklidis v. 235 Lincoln Place Housing Corp., 305 AD2d 546, 547 (2nd Dept 2003). Thus, the Third Cause of Action is dismissed as to Skyview and Rose Realty.

The Fifth and Seventh causes of action allege that Rose Realty breached the lease by failing to repair or replace the air conditioning and heat systems, and the roof, and that 127 Restaurant has incurred damages, including the cost of necessary repairs. While Rose Realty does not dispute that it has an obligation under the lease to maintain and repair the roof, and the heat and air conditioning systems, it contends that 127 Restaurant's allegations "are palpably false." On the record before the Court, however, summary judgment dismissing these claims is not warranted, in light of the conflicting affidavits and documentary proof.

Rose Realty submits an affidavit of its managing member, Luigi Caiola, and supporting documents, which show that it replaced the roof in March 2001, and repaired the roof in February 2002; Rose Realty also reimbursed 127 Restaurant in April 2001, for some "heating work" done

in March 2001. While Rose Realty admits that it received a letter dated March 26, 2001, from 127 Restaurant, requesting that the roof and wall leaks be repaired, and that the air conditioning unit be replaced, it contends that the air conditioning unit was still functioning, and consequently did not need to be replaced at that time.

In response, 127 Restaurant Corp. submits an affidavit from its President, Giuseppe Luongo, that the air conditioning system first started to breakdown in March 2001 and continued to do so through October 2001, and as a result it was compelled to rent temporary air blowers. 127 Restaurant provides copies of invoices, including one dated June 15, 2002 for \$1,200 for "air condition rental," and another dated May 12, 2001 from Martack Heating & Air Conditioning to Le Madri Restaurant, for \$1,117.70 for repairs to the air conditioning system.

When the parties presented these conflicting allegations to the Court in April 2002, the Court issued an order directing 127 Restaurant to provide Rose Realty with the names of three engineers to inspect the heat and air conditioning systems and the names of three engineers or roofers to inspect the roof. 127 Restaurant submits a copy of a report dated June 3, 2002, from Concord Restoration, Inc., of an inspection of the roof, which details the conditions observed and recommends that the roof be replaced in its entirety due to those conditions. 127 Restaurant also provides a copy of a report dated July 17, 2002, from Karl Beitin Associates, Consulting Engineers, of an inspection of the air conditioning system, concluding that the air conditioning unit was more than adequate for the premises, assuming all systems were functioning, but that it was not performing up to its rated capacity because it had not been properly maintained. Recommending the performance of specific maintenance, which would also resolve problems with the heating system, the inspecting engineer reported that he was at the premises the day after

the coils were cleaned and the temperature outside was 95 degrees and the inside temperature was 73 degrees, which indicated that the 20 ton unit "was producing a substantial amount of cooling."

In light of the foregoing, a trial is necessary to resolve the issues as to whether, and if so, the extent to which Rose Realty breached its obligation to maintain and repair the roof, and the air conditioning and heating systems. Any issue as to the sufficiency of 127 Restaurant's evidence as to lost profits, is reserved for trial, since 127 Restaurant is also entitled to seek other elements of damages, including property damage and reimbursement for repairs, resulting from Rose Realty's alleged failure to maintain and repair. Thus, summary judgment dismissing the Fifth and Seventh causes of action, is denied.

The Sixth Cause of Action alleging that Rose Realty breached the covenant of quiet enjoyment, is dismissed, based on the Court's determination herein that 127 Restaurant Corp. was neither actually nor constructively evicted. See Witherbee Court Assocs. v. Greene, 7 AD3d 699 (2nd Dept 2004); Jacobs v. 200 East 36th Owners Corp., 281 AD2d 281 (1st Dept 2001). "To establish a breach of the covenant of quiet enjoyment, a tenant must show either an actual or constructive eviction." Grammer v. Turits, 271 AD2d 644, 645 (2nd Dept 2000)(citing Daye Herstein Co. v. Columbia Pictures Corp., 4 NY2d 117 [1958]).

The Eight Cause of Action is for conversion of electricity and is asserted against Skyview alone. Although Skyview is moving for summary judgment dismissing the complaint, its motion papers do not address the conversion claim. Consequently, the Eight Cause of Action shall stand.

Finally, the Court must address the motion by 127 Restaurant for reargument of this Court's December 11, 2003 discovery order, leave to amend the complaint to add a cause of

action for damages based on actual or partial constructive eviction, and summary judgment as to liability on its First, Second, Fourth, Fifth and Seventh causes of action. 127 Restaurant is not entitled to summary judgment as to any of these claims, as the First, Second and Fourth causes of action have been dismissed, and triable issues of fact exist as to the Fifth and Seventh causes of action. That portion of the motion for leave to amend the complaint to add a ninth cause of action for \$1,000,000 in damages based on a claim of actual and constructive eviction is denied, as 127 Restaurant has failed to establish the merits of the proposed amendment. Leave to reargue that portion of the Court's order dated December 11, 2003, regarding the close of discovery, is also denied.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the 2000 Easement is valid; and it is further ORDERED that the motion of defendant Rose Realty Group, LLC, for summary judgment on its counterclaim against plaintiff 127 Restaurant Corp. is granted and the Clerk is directed to enter judgment in favor of Rose Realty Group, LLC and against 127 Restaurant Corp., in the amount of \$367,152.04, together with interest as computed by the Clerk, and costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that motion of defendant Rose Realty Group, LLC, for summary judgment dismissing the complaint is granted only to the extent of severing and dismissing the First, Second, Third, Fourth and Sixth Causes of Action as asserted against defendant Rose Realty Group, LLC and the Clerk is directed to enter judgment accordingly, and the Fifth and Seventh Causes shall continue as against Rose Realty Group, LLC; and it is further

ORDERED that the motion of defendants H.G. Skyview, Inc. and El Ad-Skyview, Inc., for summary judgment dismissing the complaint and all cross-claims asserted against them granted only to the extent of severing and dismissing that Second, Third and Fourth Causes of Action in the complaint and all cross-claims as asserted against said H.G. Skyview, Inc. and El Ad-Skyview, Inc., and the Eight Cause of Action shall continue as against said defendants; and it is further

ORDERED that the motion of plaintiff 127 Restaurant Corp. is denied in its entirety; and it is further

ORDERED that the parties are directed to appear for the pre-trial conference previously scheduled for December 16, 2004 at 3:30 p.m. in Part 11, Room 351, 60 Centre Street.

DATED: December 13, 2004

ENTER:



J.S.C.

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