

**JPMorgan Chase Bank, N.A. v A.A.R. Restaurants  
Ltd.**

2006 NY Slip Op 30090(U)

October 18, 2006

Supreme Court, New York County

Docket Number: 0600616/0616

Judge: Jane S. Solomon

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

JANE S. SOLOMON

DECEMENT.

PART 55

Index Number : 600616/2006

JPMORGAN CHASE BANK

INDEX NO. \_\_\_\_\_

vs

A.A.R. RESTAURANTS

MOTION DATE \_\_\_\_\_

Sequence Number : 001

MOTION SEQ. NO. \_\_\_\_\_

SUMMARY JUDGMENT

MOTION CAL. NO. \_\_\_\_\_

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*is decided by accompanying memorandum decision*

**FILED**  
OCT 23 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

JANE S. SOLOMON

Dated: 10/15/06

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

FOR THE FOLLOWING REASON(S):

THIS DOCUMENT IS NOT FULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 55

-----x  
JPMORGAN CHASE BANK, N.A.,

DECISION AND ORDER

Plaintiff,

Index No. 600616/06

-against-

A.A.R. RESTAURANTS LTD. a/k/a  
AAR RESTAURANTS, LTD. and  
DINER 590, INC.,

Defendants.  
-----x

**FILED**  
OCT 23 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

Jane S. Solomon, J.:

Defendants A.A.R. Restaurants LTD. ("A.A.R.") and Diner 590, Inc. ("Diner") move for summary judgment pursuant to CPLR § 3212. Plaintiff JPMorgan Chase Bank, N.A. ("JPMorgan") cross-moves for an order: 1) denying defendants' motion; 2) that discovery not be stayed pending determination of defendants' motion pursuant to CPLR § 3214(b); 3) directing and compelling defendants to immediately disclose the existence and location of certain financial information; and 4) granting plaintiff the provisional remedy of attachment and/or injunction *pendente lite* pursuant to CPLR Article 60, 62, and 63. For the reasons below, the motions are denied.

In October 1996, JPMorgan (by its corporate predecessor) entered into a lease agreement for commercial premises located at 345 Park Avenue with the building's owner, 345 Park Avenue LP. The lease was amended in March and April 1998 and included premises occupied by the Broadway Diner ("Premises"), which defendants allegedly owned and operated. JPMorgan entered into negotiations

to take over defendants' lease, in order to permit JPMorgan to carry out its plan to install a bank at that location. In March 1998, A.A.R. agreed to terminate its lease with 345 Park Avenue LP as of January 15, 1999, rather than June 30, 2000. The termination agreement provided for JPMorgan to pay defendants \$825,000 as consideration for surrendering the lease. Subsequently, JPMorgan and A.A.R. entered into a license agreement and a counter-signed letter agreement. The agreements permitted A.A.R. to remain in possession of the premises from January 16, 1999 to May 31, 2000 provided that JPMorgan's payment to A.A.R. was reduced from \$825,000 to \$587,500 as consideration for the additional time in possession.

A.A.R. did not vacate and surrender the Premises on May 31, 2000, and remained in possession until April 30, 2006. In the period subsequent to May 31, 2000, A.A.R. did not pay JPMorgan any rent, use and occupancy, or other charges. Both the license agreement and the counter-signed letter agreement were silent as to consideration for possession after May 31, 2000. JPMorgan seeks to recover monetary judgment for defendants' use, occupancy, and possession of the Premises. Defendants contend that JPMorgan had voluntarily waived use and occupancy to induce defendants to surrender the lease for the Premises. JPMorgan argues that use and occupancy had not been waived. Instead, JPMorgan accepted a reduction in the amount to be paid to defendants for surrendering the lease as consideration for possession of the Premises from

January 1999 to May 2000 only.

"[A] license connotes use or occupancy of the grantor's premises." American Jewish Theatre, Inc., v Roundabout Theatre Co., Inc., 203 AD2d 155, 156 (1st Dept 1994). A licensor is entitled to damages for use and occupancy where a licensee has remained in possession beyond the expiration of the license agreement without the licensor's permission. See City of New York v Stapleton Studios, LLC., 4 Misc 3d, 2004 Slip Op 50889U, \*3-\*5 (Civ Ct, Richmond County).

Here, pursuant to the license agreement, defendants gave consideration to remain in possession of the Premises from January 16, 1999 to May 31, 2000 only. Defendants remained in possession of the Premises beyond May 31, 2000. The license agreement did not permit defendants to remain in possession indefinitely; it did not provide that JPMorgan waived use and occupancy beyond May 31, 2000; and it contained no automatic renewal clause. Defendants contend that the license agreement expressly provided that they would not have to pay rent as consideration for surrendering the lease. However, the license agreement merely states that defendants would not have to pay the "minimum rent" or "escalation payments," called for in the lease agreement between defendants and 345 Park Avenue LP. The license agreement required defendants to give consideration for possession to May 31, 2000, but in the form of a reduction in the consideration they received for surrendering their lease, rather than in the form of rent. Therefore, defendants'

contention that the license agreement permitted them to remain in possession beyond May 31, 2000 without use and occupancy fails. As a triable issue of material fact remains as to whether defendants were obligated to pay for use and occupancy subsequent to May 31, 2000, defendants' motion for summary judgment is denied.

In its cross-motion, JPMorgan argues that defendants' inaccurate factual claims and failure to comply with JPMorgan's discovery demands require attachment and/or injunction pendente lite, to prevent defendants from disbursing their assets, and thereby frustrating any judgment entered in plaintiff's favor. Under CPLR § 6201(3), an order of attachment may be issued where the defendant has "assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts," with the intent of frustrating the enforcement of a judgment that might be entered in plaintiff's favor.

An order of attachment requires the plaintiff to demonstrate a likelihood of success on the merits and defendants' intent to frustrate enforcement of a judgment. Bongoni v Friedlander, 176 AD2d 527, 528 (1st Dept 1991). Mere suspicion of intent is insufficient grounds for attachment. See, Waltzer v Tradescape, & Co., L.L.C., 31 AD3d 302 (1st Dept 2006). Here, there has been no showing that defendants intend to transfer property to avoid enforcement of a money judgment. Failure to comply with discovery and factual allegations that conflict with those of plaintiff's are insufficient grounds for attachment.

Therefore, the cross-motion is denied as to an order for attachment.

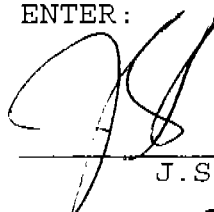
JPMorgan has also failed to demonstrate entitlement to an injunction pendente lite. Injunctive relief can only be granted where plaintiff has shown: 1) a likelihood of success on the merits; 2) irreparable injury absent injunctive relief; and 3) a balancing of equities in favor of plaintiff. Little India Stores, Inc. v Singh, 101 AD2d 727, 728 (1st Dept 1984). Failure to comply with discovery and inaccurate factual allegations do not demonstrate irreparable injury. The balance of equities is not in plaintiff's favor as it has failed to demonstrate the need to deprive defendants of control over their assets. As such, the cross-motion is denied as to an injunction pendente lite. Finally, a preliminary conference was held on July 24, 2006, and discovery issues were resolved under the preliminary conference order. Accordingly, it hereby is

ORDERED that defendants' motion for summary judgment is denied, and it further is

ORDERED that plaintiff's cross-motion is denied.

Dated: October 18, 2006

ENTER:



J.S.C.

JANE S. SOLOMON

**FILED**

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