

**403 W. 43 St. Rest. Inc. v Ninth Avenue Realty, LLC**

2006 NY Slip Op 30284(U)

July 7, 2006

Supreme Court, New York County

Docket Number:

Judge: Faviola Soto

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PRESENT: SOTO  
Justice

PART 7

403 W. 43 ST. REST

- v -

Ninth Avenue Realty

INDEX NO. 100081/06  
MOTION DATE 6/7/06  
MOTION SEQ. NO. 001  
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 ...  
*Notice of Cross-Motion - AFFs - Exs*  
Answering Affidavits - Exhibits \_\_\_\_\_  
*Answering*  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED	
1	_____
2	_____
3	_____
4	_____

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

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.**

**FILED**  
JUL 13 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 7/7/06

TON A SOTO J.S.C.

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

*Copies mailed*

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 7

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403 WEST 43 ST. REST. INC.,

Index No. 100081/2006

Plaintiff,

-against-

NINTH AVENUE REALTY, LLC,

Defendant.

DECISION & ORDER

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HONORABLE FAVIOLA A. SOTO, J.:

**FILED**  
JUL 13 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiff commercial tenant moves, by order to show cause, for: i) a preliminary injunction; ii) a preliminary injunction enjoining defendant from terminating its lease and commencing a summary proceeding in Civil Court; iii) a declaration that the demolition clause does not permit defendant to terminate the lease, and iv) an award of attorneys' fees, pursuant to the lease.

Defendant commercial landlord opposes, and cross-moves for summary judgment, attorneys' fees, and, in the event the court grants the injunction, an order directing plaintiff to post an undertaking in an amount set by the court, but no less than \$10,000,000.00. Plaintiff opposes the cross-motion.

As the parties were encouraged to and were attempting to resolve this dispute, and pursuant to their requests, the court withheld determination of the motion and cross-motion. At their appearance on June 6<sup>th</sup>, the court granted their request to withhold decision for another 30 days, and marked the motion and cross-motion for decision on July 7<sup>th</sup>. The court now issues this decision.

## The Lease

Article 65, Paragraph (a), of the governing lease provides:

At any time that Landlord intends to demolish or to substantially remodel or rehabilitate the Building in which the demised premises are situated, Landlord...shall have the absolute right, option and privilege to terminate this lease and the demised term hereof by giving written notice ("Notice") to Tenant by personal delivery or certified mail, return receipt requested, addressed to Tenant at the Demised Premises. The Notice will be deemed given when so mailed or delivered, and shall be given not less than one hundred eighty (180) days prior to the date specified in the Notice for the termination of this Lease ("Termination Date"). Upon the Termination Date, this Lease and the term hereof shall cease, come to an end and expire as fully and completely and with the same force and effect as if the Termination Date in said Notice was the date originally fixed herein as the date for the end and expiration of this Lease and the term hereof. Tenant shall quit and vacate the entire Demised Premises and surrender them to Landlord on or before the Termination Date. As used herein and throughout this Article, "surrender" of the Demised Premises to Landlord requires delivery to Landlord of possession of the entire Demised Premises and all keys and to the building.

Paragraph (b) of Article 65 provides:

In any proceeding brought by Landlord against Tenant to recover possession of the demised premises by reason of the Landlord's exercise of its rights under Paragraph (a) of this Article 65, Tenant agrees that it will not interpose as a defense any claim or allegation addressed to the Landlord's statement of its intent to demolish or substantially remodel or rehabilitate the Building, that Landlord's intent shall not be an issue in such proceeding, and Tenant waives such defense in such proceeding. Tenant agrees that Landlord's statement of its intention is not subject to question or objection in such proceeding; provided, however, that, by separate proceeding which may not be joined with or consolidated with any proceeding brought by Landlord for possession, Tenant may allege and prove any claim it may have for damages in the event Landlord's statement of its intention described in said paragraph (a) was untrue or not bona fide.

Paragraph (c) of Article 65 sets forth the requirements for the Notice, the three month period of time tenant may remain in occupancy as a holdover tenant, if tenant executes and delivers to landlord the requisite Acknowledgment Letter, the amount due for use and

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occupancy, and that “(o)n or before the Holdover Date, Tenant shall quit and vacate the entire Demised Premises and surrender them to Landlord”.

Paragraph (d) of Article 65 provides that if tenant fails or refuses to vacate on the Termination Date or Holdover Date, as applicable, Landlord “shall have the right to institute and maintain such actions or proceedings at law and/or in equity, including but not limited to dispossess proceedings..”. Paragraph (e) of Article 65 provides for a payment to be made to tenant if it vacates on the termination or holdover date during the first eight years of the term only; subsequent to the expiration of the eighth year, no demolition payment is due tenant.

#### The Termination Notice

By certified mail, return receipt requested, landlord sent tenant a notice, dated July 6, 2005. The reference is “Lease Agreement dated July 1997 between Ninth Avenue Realty, LLC (as successor to Eastern Pork Products Company), and 403 W. 43<sup>rd</sup> St. Restaurant, Inc., Tenant Premises: Store and garden in the building known as 403-405 West 43<sup>rd</sup> St. (The “Lease”). The notice advises that “pursuant to Article 65 of the above-referenced Lease, Landlord is hereby terminating the Lease as of January 31, 2006 (the ‘Termination Date’). ”

#### The Summons and Complaint and the Motion

By summons dated January 3, 2006 and verified complaint dated December 19, 2005, filed simultaneously with the order to show cause, plaintiff seeks injunctive and declaratory relief, damages and punitive damages, and attorneys’ fees. The order to show cause, dated January 5, 2006, originally returnable January 19<sup>th</sup> and thereafter adjourned until February 23<sup>rd</sup> and March 9<sup>th</sup>, seeks injunctive and declaratory relief directed at the Notice of Termination.

As noted earlier, at the parties’ request and as the parties were attempting to resolve this

dispute, the court has withheld decision and only now issues this decision.

The complaint alleges, by way of background, that: defendant is the owner of a building located on the northwest corner of 43<sup>rd</sup> Street and Ninth Avenue known as 607-609 Ninth Avenue a/k/a 401-05 West 43<sup>rd</sup> Street, referencing the location as the "Building"; plaintiff has operated the restaurant Café Le Madeleine on West 43<sup>rd</sup> Street between Ninth and Tenth avenue since approximately 1979; a portion of the Building is a single story structure known as 403-405 West 43<sup>rd</sup> Street, and the remaining portion of the Building is five stories tall, is a horizontal multiple dwelling containing 12 apartments, and is known as 401 West 43<sup>rd</sup> Street, 607 Ninth Avenue and 609 Ninth Avenue; the Department of Buildings (DOB) records has a single Certificate of Occupancy for the Building using the address 401-405 West 43<sup>rd</sup> Street, also known as 607-609 Ninth Avenue; the Building is listed as a single lot on the tax map; the roof beams for the building used as a dining room for plaintiff's restaurant are an integral part of the adjoining building at 407 West 43<sup>rd</sup> Street, also owned by defendant.

Plaintiff references the initial lease agreement(s) in 1979, its renovation of the initial space in 1979, its renovation at its expense and with the then landlord's consent of other spaces in 1981, 1983 and 1984 into a single integrated space. Following the renovation and reconfiguration, the demised premises consists of a restaurant with a garden, offices, bathrooms, a wine cellar, preparation areas and storage space, and the entirety of such demised premises is used in furtherance of its restaurant business.

On or about July 1, 1997, plaintiff and defendant's predecessor in interest entered into a lease agreement for the Store and Garden in the building known as 403-05 West 43<sup>rd</sup> Street; basement of 607 Ninth Avenue; and portion of basement and ground floor of 609 Ninth Avenue,

to commence on July 1, 1997 for a period of twelve years and six months, ending on December 31, 2009. Plaintiff references the lease granting plaintiff the right to extend the lease term for an additional eight years and the specific provision for the arbitration of the new rent, and portions of paragraph 65 (a), adding emphasis to the language “the Building in which the demised premises are situated”.

Plaintiff alleges that in June 1999, a year after assuming ownership, defendant sought to prevent plaintiff from utilizing the basement area of 607 Ninth Avenue for storage even though it was authorized under the lease, and in March 2001, plaintiff complained to defendant about defendant’s failure to maintain the house trap and center roof drain as required by the lease, resulting in flooding.

Plaintiff references the Notice, and alleges that: the Notice is directed only to a portion of the leasehold; the notice does not state that demolition, remodeling or rehabilitation is contemplated for 607 Ninth Avenue a/k/a 401 West 43<sup>rd</sup> Street or 609 Ninth Avenue where the remainder of the Demised Premises are located.

Plaintiff alleges that: the Building is within the Preservation area of the Special Clinton District; the Building is not an unsafe building requiring demolition within the meaning of the current zoning regulations; defendant has not provided notice to the residential tenants; prior to the issuance of an alteration permit for a building containing residential units a certificate of no harassment from the Commissioner of Housing Preservation and Development (HPD) is needed; no alteration permit or certificate has been received and defendant has not filed demolition or remodeling or rehabilitation plans with the DOB or plans to remove roof beams and preserve the structural integrity of the east wall of 407 West 43<sup>rd</sup> Street.

Based on these allegations, plaintiff asserts, as its first cause of action, that Paragraph 65 of the Lease does not permit a termination unless the entire Building containing plaintiff's entire leasehold will be demolished or substantially remodeled or rehabilitated. It seeks a declaration that the demolition clause cannot be invoked if only a portion of the Buildings and less than the entire Demised Premises is demolished or substantially remodeled or rehabilitated, and a preliminary and permanent injunction enjoining defendant from terminating the Lease based on Paragraph 65.

As its second cause of action, plaintiff alleges that: the Building can not be demolished unless it has been found to be an unsafe Building, defendant cannot demolish or substantially rehabilitate the Building without first obtaining the necessary certification of no harassment from HPD; defendant can not demolish the Building without vacatur of the residential tenants; defendant has not given notice to the residential tenants that it intends not to renew their rent stabilized leases. Plaintiff therefore seeks a declaration that the demolition clause of the Lease cannot be invoked because demolition is impossible, and a preliminary and permanent injunction enjoining defendant from terminating the lease based on impossibility of demolition.

As its third cause of action, plaintiff seeks a declaration that the demolition clause cannot be invoked because defendant's stated intention is not bona fide, and a preliminary and permanent injunction enjoining defendant from terminating the lease.

As the fourth cause of action, plaintiff alleges that defendant breached the termination provision, and as a consequence, plaintiff is entitled to damages, including attorneys' fees. As a fifth cause of action, plaintiff alleges that defendant deliberately and without cause caused plaintiff to expend time and financial resources, that defendant's conduct is consistent with the

other harassment set forth in the complaint, and that defendant's conduct is outrageous and shocking to the conscience, and seeks punitive damages.

### The Motion

In its order to show cause, plaintiff seeks: 1) a Yellowstone injunction tolling the running of the termination notice; 2) a preliminary injunction enjoining defendant from terminating the lease and commencing a summary proceeding in Civil Court to evict plaintiff after January 31, 2006; 3) a declaration that the demolition clause of the lease does not permit defendant to terminate the lease where defendant's "stated intention is to 'demolish' only that portion of the building in which a portion of the demised premises is located, where said demolition is impossible and/or where defendant does not have a bona fide intention"; and 4) an award of attorneys' fees, pursuant to the lease. The court ordered that, pending the hearing of the motion, the termination notice was tolled.

As to those assertions within its motion papers that were also alleged within the complaint and previously referenced, the court will repeat those briefly.

Plaintiff asserts that: it has a lease for the space in which it operates the long established restaurant Café Le Madeleine, which has been in its present location since 1979; the lease expires in 2009 with an option for an additional eight years; defendant is a recent "player", having purchased this property and others in the area seven years ago.

Plaintiff argues that defendant's termination notice is a "transparent ploy to avoid the consequences of the bargain made by plaintiff with Defendant's predecessor-in-interest and Plaintiff's 'below market rent". It asserts that defendant apparently believes it can evict plaintiff from its space in two separate buildings, while demolishing only one of those buildings, or that

it can demolish the entirety of these buildings, in the process destroying twelve individual residential rent controlled or rent stabilized apartments, without prior notice or authority.

Plaintiff argues that the equities are unusually and extremely compelling in its favor and against defendant and that it will suffer irreparable harm absent the injunctive relief. It argues that it will lose its enormous investment and will be forced to shut its business, thereby losing the business and its good will which it has painstakingly established over the last 26 years, and that the restaurant is unique and irreplaceable and not only it but its neighbor(s) will suffer this loss. It asserts that it previously had a cordial relationship with defendant's predecessor in interest and took over defendant's responsibility for maintaining the building trap, while defendant has repeatedly sought to abrogate the lease. It argues that absent the injunction plaintiff will be unable to challenge the validity of the termination notice, and will not be able in the summary eviction proceeding to challenge the bona fide nature of defendant's alleged intention.

Plaintiff sets forth its assertions as to: the history of its occupancy, which began when it was one of a handful of pioneer businesses in an area then known as Hell's Kitchen and now is a gentrified, highly desirable and trendy neighborhood known as Clinton; its renovation of the space and its use of the space as a restaurant, where it seats 120, grosses \$3 million annually and is a highly regarded fixture in the theater district and has received many accolades; the records of the HPD and the C of O; the history and provisions of the lease and renewal lease.

It argues that defendant does not have clean hands, defendant's intent to demolish is not bona fide, and defendant's intent is to harass plaintiff and to sweeten the deal defendant made with the prior landlord at plaintiff's expense. Plaintiff argues it seeks to preserve the status quo, a Yellowstone injunction is needed to toll the running of the termination notice, and this court

[\* 10 ]  
but not Civil Court can provide the complete relief it requests.

As to the likelihood of success on the merits, its argues that a review of the lease and long established precedent show that: the demolition clause does not permit a termination based on defendant's intended partial demolition; a landlord cannot dispossess a tenant from part of his premises held under a single tenancy; defendant's stated intent is not bona fide, as defendant failed to comply with administrative prerequisites and defendant has a prior history of failing to honor the lease; due process requires that plaintiff be granted the opportunity to challenge the bona fide nature of defendant's stated intent.

The Opposing Papers, the Cross-Motion and the Answer

In opposition and in support of its cross-motion, defendant submits affidavits from its manager and its architect, and an affirmation from its counsel. It argues that it is entitled to exercise its rights under Article 65, which was negotiated at arms length by sophisticated parties, and that plaintiff, after having benefitted from the terms of the lease and its substantially below market rents, now seeks to prevent the landlord from the benefit of the bargain.

Defendant argues that it retained architects, who performed a feasibility and zoning analysis prior to the issuance of the termination notice, which firm made several site visits and took measurements of the existing structures, commissioned a detailed survey of the existing buildings to maximize the use of the lot area. Defendant and the architects are now considering four different proposals with four different floor plan layouts for the project. It asserts that all of the proposals include its intended demolition of the commercial space occupied only by the restaurant, which is necessary to build to the height allowed by the zoning code, the proposals all provide for the integration of the buildings, and the proposals are not prohibited by the

[\* 11 ]

restrictions cited by plaintiff which may apply to residential buildings but not to plaintiff, a commercial tenant in a non-residential building.

Defendant further points to the preliminary evaluation performed by its elevator consultants, and the proposals of its architects. It asserts that in addition to the demolition to permit the building of a new building of up to six stories, it will convert the corner building to an elevator serviced building, integrate the new building with existing building, and substantially remodel the existing structure with the elevator, new surfaces and fixtures, new bathrooms and/or new kitchens. It asserts that, contrary to plaintiff, it does not intend to dispossess any residential tenant, and all of plaintiff's arguments regarding the impossibility of the project and of accomplishing defendant's intent to demolish are wrong.

As to the Yellowstone injunction, defendant argues that this relief is not applicable here, as there is no right or ability to cure.

As to the injunction request, defendant argues that plaintiff has failed to show entitlement to this relief as well: 1) the landlord has proceeded in accordance with the lease; 2) plaintiff cannot show a likelihood of success on the merits and by the clear terms of the lease cannot challenge, and indeed has waived its rights to challenge the landlord's bona fide intent (which it argues it has demonstrated, in any event); and 3) plaintiff's relief is limited, as agreed to by the commercial parties in the lease, to damages in a separate proceeding, and the commercial tenant waived its rights to other relief, as clearly set forth four times in the lease.

Nor can the tenant show that a balance of the equities lie in its favor, as it reaped the benefits of the lease and cannot now seek to prevent the defendant from exercising its lease rights, and it is tenant who is seeking to avoid its obligations under the lease and hold the

landlord hostage to extract further financial considerations. Defendant further argues that, contrary to plaintiff's assertions, it has not dealt unfairly with or harassed plaintiff, and the two incidents that occurred five years and seven years ago or a settled dispute with another tenant, do not show differently. Additionally, defendant argues that any one of the alternatives will greatly enhance the value and appeal of the final building, both to the neighborhood and to the owner.

As to summary judgment, defendant argues that there are no genuine issues of disputed fact, and it is entitled to dismissal of this action as a matter of law. It asserts that it is not seeking partial demolition or partial substantial remodeling. Rather, it is completely demolishing the Restaurant and is completely and entirely remodeling the remaining Building, as permitted under the lease and not prohibited by the zoning code or laws governing residential apartments. Defendant further argues that while it need not do so, as plaintiff in the lease waived its rights to challenge the bona fide intent of the landlord, defendant has demonstrated the bona fides of its intent.

Defendant argues that the cases cited by plaintiff are not applicable here, and cite cases which it contends support their position.

Defendant similarly argues that plaintiff's arguments regarding the lease are incorrect, and that it is entitled, pursuant to the clear provisions of the lease and applicable case law, to exercise its rights under Article 65, and the tenant is not entitled, pursuant to the clear provisions of the lease and applicable case law, to the relief it seeks.

Accordingly, defendant argues that as there are no genuine disputed issues of fact in dispute, and plaintiff's causes of action fail as a matter of law, it is entitled to summary judgment as a matter of law.

In its verified answer, defendant, inter alia, denies the allegations of the complaint and refers to the lease. Defendant does not assert a counterclaim.

Opposition to the Cross-Motion and Replying Papers

Plaintiff argues that: 1) the plan which defendant now proposes is a recent invention concocted by defendant in response to its papers, and legally and factually is incapable of performance; 2) defendant should not be permitted to now overcome the fatal legal and factual deficiencies of the original notice of termination; 3) defendant's bald faced and unsupported statements as to its intent should not be accepted, particularly in light of the contradictory documentary submitted by defendant itself. It asserts that: defendant's stated intent fails to satisfy the lease requirements; defendant has not yet applied for and cannot obtain the permits; the proposed work does not constitute substantial renovation or rehabilitation, particularly as it consists of mostly cosmetic changes and does not qualify as substantial rehabilitation under the DHCR Operational Bulletin 95-2; defendant can not perform the work without tenants' consent, and, as shown on certain affidavits signed by certain tenants, these tenants do not consent; defendant has harassed plaintiff.

As to the cross- motion, plaintiff argues that, contrary to defendant's reading of the lease, plaintiff did not waive its right to challenge the bona fide nature of the landlord's intent or to obtain equitable relief, and the limitation of rights apply only to a proceeding by the landlord to recover possession. Nor should the court determine intent on a summary judgment motion, as requested by defendant, particularly as the documentary evidence belies that stated intention. Plaintiff further argues that it may proceed to obtain injunctive relief, and while there is no notice to cure, the principles of the "Yellowstone" relief apply here to the notice of termination, and it

has met the showing for injunctive relief under CPLR Section 6301. Plaintiff also argues that the amount of the bond requested by defendant is not appropriate, and the bond should be the current rental amount.

Defendant replies that plaintiff has failed to meet its burden and is not entitled to injunctive relief, arguing that: there is no purpose to be served by a Yellowstone injunction as there is no default to cure; the challenge to the content of the notice of terminate clear language of the lease bars the injunctive relief sought here and plaintiff may seek only monetary damages; there is no likelihood of success here; the parol evidence rules prohibits plaintiff from seeking to create an ambiguity to the clear language of the lease, as urged by plaintiff, and the court should not consider the affidavit from the prior landlord; the lease does not make obtaining approvals, certificates and tenant consents a condition precedent to termination; the tenant cannot show irreparable harm; a balance of equities does not lie in plaintiff's favor.

Defendant further argues that: the language of the lease favors landlord's right to possession; this lease between commercial parties should be enforced according to its clear and complete terms; tenant has not demonstrated that landlord's demolition and remodeling cannot be accomplished, and, as set forth in the accompanying architect affidavit, the landlord can and is prepared to develop the property; plaintiff's claim to monetary damages is premature and should be denied without prejudice to plaintiff's reassertion should landlord not pursue this project in good faith.

#### Discussion

Here, the court finds that under the clear language of the lease and the facts and circumstances herein, plaintiff has failed to show entitlement to the relief it seeks.

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As to the Yellowstone, the landlord has exercised its rights pursuant to Article 65 of the lease, and served its notice of termination. The Yellowstone injunction sought by the plaintiff tenant is not an appropriate relief, as there is no default to cure.

Nor has plaintiff shown an entitlement to the injunctive relief it otherwise seeks.

The showing needed for a preliminary injunction is well established. A movant on a preliminary injunction motion has the burden of establishing: 1) a likelihood of success on the merits; 2) irreparable injury in the absence of the injunction, and 3) a balancing of the equities in movant's favor. Aetna Ins. Co. v. Capasso, 75 N.Y.2d 860, 862. The granting of a preliminary injunction is a drastic remedy that should be used sparingly, and movant must establish a clear right to relief based on the law and the undisputed facts presented. Koultukis v. Phillips, 285 A.D.2d 433. The granting or denying of a preliminary injunction is subject to the sound discretion of the trial court. Borenstein v. Rochel Properties, 176 A.D.2d 171.

Here, plaintiff has waived its rights to seek injunctive relief. Contrary to plaintiff's arguments, the language in this commercial lease is clear and there is no inquiry into intent. Article 65, Paragraph (a) provides that the Landlord shall have the absolute right to terminate the lease. Article 65, Paragraph (B) provides, repeatedly, in clear language, that tenant agrees that it waives and will not interpose as a defense any claim or allegation addressed to the landlord's statement of its intent to demolish or substantially remodel or rehabilitate the building, and that the landlord's statement of its intention is not subject to question or objection. The remedy left to tenant is that by way of separate proceeding, tenant may allege and prove any claim it may have for damages in the event landlord's statement of its intention was untrue or not bona fide. And, contrary to plaintiff's arguments, Article 65 does apply here.

Accordingly, tenant can not now seek to have the court rewrite the commercial lease where the provisions are clear, and the motion seeking injunctive relief is denied, tenant's remedy for challenging the landlord's intent being that for monetary damages.

The court also denies that part of the motion seeking declaratory relief and attorneys' fees. First, while styled as a request for declaratory relief, plaintiff is in essence seeking relief that it waived in the lease. Second, to the extent, if at all, plaintiff's request for declaratory relief is not an improper attempt to do indirectly what it cannot do directly, it has failed to set forth the basis upon which it can seek this relief by way of motion and, to the extent the court can consider the request on the merits, has failed to show that Article 65 does not apply herein.

The court finds that the landlord's plans and proposal to eliminate the one story structure and building and to build a six story building in its place is, as a matter of law, a substantial remodeling of the "Building".

Plaintiff also has not shown entitlement to attorneys' fees pursuant to the lease on this motion.

The court in part grants and in part denies the cross-motion for summary judgment.

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case". Winegrad v. New York University Med. Center, 64 N.Y.2d 851. Once the proponent has made the showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320,324. Moreover, "[s]ummary judgment is designed to expedite all civil cases by eliminating from the

Trial Calendar claims which can properly be resolved as a matter of law...[W]hen there is no genuine issue to be resolved at trial, the case should be summarily decided." Andre v. Pomeroy, 35 N.Y.2d 361. Mere conjecture, speculation and conclusory assertions are insufficient. The role of the court in determining a summary judgment motion is issue finding, not issue resolution. The opponent of the motion is entitled to all reasonable inferences in its favor.

Here, defendant met its burden and demonstrated that there are no genuine issues of fact in dispute and that it is entitled to judgment, as a matter of law, dismissing those causes of action in the complaint seeking injunctive and declaratory relief. Plaintiff has failed to defeat this showing by admissible evidence, and the first, second and third causes of action are dismissed.

As to defendant's argument that the fourth cause of action in contract seeking monetary damages is premature and should be dismissed without prejudice, the court does not now agree and denies that part of the summary judgment motion, without prejudice.

The court also dismisses the fifth cause of action, improperly asserting a separate cause of action for punitive damages. While it is unclear if plaintiff can properly replead and assert a claim for punitive damages, this dismissal also is without prejudice.

The court denies that part of the cross-motion seeking attorneys' fees, as the answer does not assert a counterclaim for attorneys' fees, with leave to renew. While an argument can be made that defendant is entitled to attorneys' fees pursuant to the lease as the prevailing party and this request can be made as part of this cross-motion, the court declines to now grant attorneys' fees.

The parties are advised that as I have been appointed a Court of Claims Judge and will be sitting in the Court of Claims, Justice Michael Stallman will be the Presiding Judge in Part 7.

Accordingly, it is

ORDERED that plaintiff's motion is denied in its entirety; and it is further

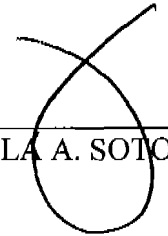
ORDERED that defendant's summary judgment motion is in part granted and in part denied to the extent indicated, and the first, second, third and fifth causes of action of the complaint are severed and dismissed; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that a preliminary conference is scheduled for August 24, 2006, at 9:30 a.m., 111 Centre Street, Room 949; and it is further

ORDERED that defendant shall serve notice of entry with a copy of this decision and order upon the County Clerk and the Trial Support Office within thirty days of entry.

Dated: New York, New York  
July 7, 2006

  
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FAVIOLA A. SOTO, J.S.C.

Copies mailed

**FILED**  
JUL 13 2006  
NEW YORK  
COUNTY CLERK'S OFFICE