

**779 RSD Operating Corp. v Fanny Grunberg &
Associates, LLC**

2006 NY Slip Op 30368(U)

January 11, 2006

Supreme Court, New York County

Docket Number:

Judge: Sherry Klein Heitler

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

PRESENT: Sherry Klein HEITLER
Justice

PART 30

779 RSD OPERATING CORP.

INDEX NO. 601694/05

MOTION DATE _____

MOTION SEQ. NO. 2

MOTION CAL. NO. _____

- v -
FANNY GRUNBERG + ASSOCIATES, LLC

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 in accordance with the memorandum decision dated 1.11.06

FILED
JAN 25 2006
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1.11.06

Sherry Klein Heitler
SHERRY KLEIN HEITLER J.S.C.

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

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 30**

-----X

779 RSD Operating Corp.,

Plaintiff,

-against-

FANNY GRUNBERG & ASSOCIATES, LLC,

Defendant.

SHERRY KLEIN HEITLER, J.:

Index No. 601694/05

DECISION & ORDER

FILED
JAN 25 2006
NEW YORK
COUNTY CLERK'S OFFICE

In this commercial landlord/tenant matter, the plaintiff, 779 RSD Operating Corp., seeks an order enjoining the defendant, Fanny Grunberg & Associates, LLC, from recovering possession of the premises by virtue of the failure to timely renew their lease and to amend the complaint to add a cause of action for a judicial declaration that plaintiff should be excused from its late exercise of the renewal option under the lease agreement. The defendant opposes this application.

In May of 2005, after being served with a Notice of Termination, based upon an alleged unauthorized assignment or subletting of the premises, plaintiff commenced this action, seeking a Yellowstone injunction. Plaintiff received a temporary Yellowstone injunction and cured its alleged default.¹ However, during the course of the litigation, plaintiff realized that it failed to exercise one of the two (2) five (5) year renewal options provided for in its lease. Accordingly, this motion was filed.

¹ The defendant contends that the issue of unauthorized sublet has been resolved and there are no remaining issues in this case. The plaintiff does not dispute this fact.

In September of 1995, defendant/landlord and plaintiff/tenant entered into a lease agreement for the commercial space located at 779 Riverside Drive, New York, New York. The lease contains a renewal option which must be exercised after the first ten (10) year period in order to secure the lease for another five (5) years, with another five (5) year option to renew. Plaintiff/tenant failed to timely exercise the option and now asks the court to permit it to amend its complaint to include a cause of action for declaratory judgment, declaring that plaintiff should be excused from its late exercise of the renewal option under the lease and enjoining the defendant from commencing an action in Civil Court based on the expiration of the lease. Defendant/landlord opposes plaintiff's application and argues that the case should be dismissed as the plaintiff may assert his claim as a defense to a Civil Court action.

With respect to the amended complaint, defendant's counsel claims that a copy of the amended complaint was not included in his set of motion papers. As such, he states that he requested an additional copy and was advised by plaintiff's counsel that he must put the request in writing. Plaintiff's counsel does not deny that this transpired or indicate that an additional copy was sent to the defendant. As the defendant was unable to adequately consider the plaintiff's application to amend its complaint, plaintiff's request to amend the complaint is denied.

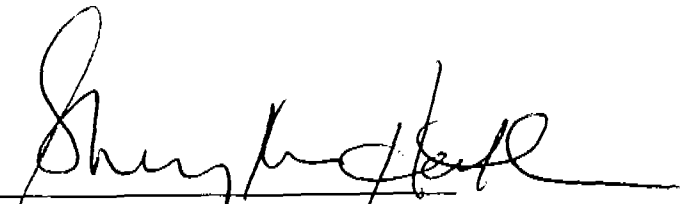
With regard to defendant's argument that this action belongs in Civil Court, it is beyond dispute that Civil Court is the appropriate forum to resolve disputes over the possession of a leasehold premises (see, Cox v. J.D. Realty Assoc., 217 A.D.2d 179 [1st Dept., 1995]). Additionally, unless it clearly appears that the relief sought is unavailable in Civil Court, summary proceedings should not be stayed (see, Lun Far Company v. Aylesbury Associates, 40 A.D.2d 794, 794 [1972]; see also, Kanter v. East 62nd Street Associates, 111A.D.2d 26, 28 [1st Dept., 1985]). Further, Civil

Court can hear equitable claims as long as they are being used as a shield and not as a sword (see, Sterling National Bank v. Kings Manor Estates, 2005 N.Y. Slip. Op. 5160rU *26; 9 MISC.3d 1116A [1st Dept., 2005]). As a result, Civil Court can hear any defense to a claim whether it be legal or equitable in nature (see, 220 V Electrical Dealer Supply v. Rondat, Inc., 111 MISC.2d 100, 101 [Supr. Court, N.Y. County, 1981]). Finally, it is noted that the plaintiff does not dispute that this matter may be properly determined in Civil Court.

Accordingly, plaintiff's motion is denied.

This shall constitute the decision and order of the court.

DATED: JANUARY 11, 2006



SHERRY KLEIN HEITLER
J.S.C.

FILED
JAN 25 2006
NEW YORK
COUNTY CLERK'S OFFICE