

<b>Supersol 661 Amsterdam, LLC v The C.E.G. Company</b>
2006 NY Slip Op 30373(U)
February 26, 2006
Supreme Court, New York County
Docket Number: 0603469/2007
Judge: Richard B. Lowe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUD. Lawrence  
Justice

PART 27m

Supersol 661 Amsterdam LLC

INDEX NO.

603069107

MOTION DATE

11/20/07

MOTION SEQ. NO.

001

MOTION CAL. NO.

The C.E.G. Company et al

- v -

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

PAPERS NUMBERED

Notice of Motlon/ 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

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

**FILED**

MAR 04 2008

NEW YORK COUNTY CLERK'S OFFICE

HON. RICHARD S. LOWE, III

Dated: 2/26/08

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 56

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SUPERSOL 661 AMSTERDAM, LLC,

Plaintiff,

Index No. 603469/07

-against-

THE C.E.G. COMPANY and AMSTERDAM  
CONDOMINIUM,

Defendants.

**FILED**  
MAR 04 2008  
NEW YORK  
COUNTY CLERKS OFFICE

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**HON. RICHARD B. LOWE, III:**

Plaintiff Supersol 661 Amsterdam, LLC (Supersol) is a commercial tenant of the C.E.G. Company (CEG), which owns the commercial unit in defendant Amsterdam Condominium (the Condominium). Plaintiff moves, by order to show cause, for an order staying and tolling the cure period in CEG's notice to cure pending final determination of this action; compelling arbitration; and granting a preliminary injunction in aid of arbitration so that the arbitration award will not be rendered ineffectual. The Condominium cross-moves, pursuant to CPLR 3211, to dismiss the third cause of action in the complaint as against it, and awarding it costs and disbursements of this motion. The Condominium also opposes plaintiff's request for a *Yellowstone* injunction, and to compel arbitration. CEG opposes that portion of the motion that seeks to compel arbitration.

**BACKGROUND**

CEG owns certain units in the Condominium, including the commercial unit. CEG leased the commercial unit to Supersol, pursuant to a lease dated September 30, 2005 (the Lease), in order for Supersol to operate a supermarket in the commercial unit. Supersol invested

over \$1 million to renovate the space, and to address concerns raised by defendants.

Nonetheless, there were complaints regarding noise, vibrations, water vapor and certain other related issues by some of the residents of the Condominium. The complaints seem to originate from two apartments in the building, one on the first floor and one on the second floor. The building houses approximately 100 residents.

The parties unsuccessfully tried to resolve the issues. On October 10, 2007, CEG served Supersol with a notice to cure alleging certain defaults under the Lease as well as certain bylaws of the Condominium. Supersol contends that each of the "defaults" has either already been cured or the process for the cure has already commenced, satisfying Supersol's obligation.

The major portion of the alleged defaults pertains to noise and vapor which occur as a result of the refrigeration/cooling system. Supersol, CEG and the Condominium, together with their attorneys and acoustical engineers, met to work out a solution to the problems. Based on those discussions, Supersol submitted three sets of plans to the Condominium for its approval. The Condominium did not respond for several months. A letter was thereafter received in which the Condominium's attorneys said that they would not consider the plans. Supersol contends that the Condominium's allegations of default were made in bad faith and evidence a nefarious intent by the Condominium to harass the supermarket out of the commercial unit. It argues that it spent over one million dollars to renovate the premises, and was required to make other expenditures to install a temporary air conditioning system for the summer of 2007 due to the Condominium's failure to approve one of the plans for a long-term solution to the problems.

The Lease provides:

If Landlord and Tenant do not agree as to whether the level of a particular noise, vibration or odor is reasonable within fourteen (14) days after notice of a

complaint is given to Tenant, then it is agreed that the reasonableness of the level of a particular noise, vibration or odor shall be determined by a person designated by the Council of New York Cooperatives (or if said organization is not then in existence, then by a similar organization designated by Landlord), which person shall have not less than ten (10) years' experience in the restaurant or supermarket business in mid-town Manhattan. The parties agree to be bound by such determination and Tenant agrees to implement the cure recommended by such person (if any) within thirty (30) days (or if such cure cannot be implemented within said period, then Tenant agrees to commence such cure within said period and to diligently work to implement same thereafter). If a third party complainant continues to prosecute its own complaint, and if there is issued an order or judgment of any court having jurisdiction, or a violation, order, direction, ruling or the like is issued by any municipal authority having jurisdiction (all of the foregoing hereafter referred to as an "Order"), then Tenant shall comply with such Order within the time permitted by law... .

(Order to show Cause Ex A p 22 § 58.03)

By letter dated October 8, 2007, the Condominium advised CEG that it was allegedly in default under certain articles of the Condominium's bylaws. The alleged breaches are all based on actions or behavior of Supersol. CEG then forwarded its own Notice to Cure, dated October 10, 2007, to Supersol, in which it attached the Condominium's letter. Supersol then sought relief through this motion. CEG did not seek arbitration at any time.

CEG contends that it is caught between the demands of the Condominium and Supersol. However, it asserts that this claim is not arbitrable, because this is not a matter where the landlord and tenant disagree about the noise, vibration or odor level, but that the Condominium raises the claim. CEG argues that since the Condominium is not a party to the Lease, it is not bound by the arbitration clause. Because the arbitration clause is limited as to its subject, it should not be read expansively to include disagreements with the Condominium, especially where, as here, the Condominium is not bound by the arbitration agreement. CEG further maintains that, even if the dispute were arbitrable with respect to CEG, the dispute is inextricably

intertwined with the dispute between CEG and the Condominium, and that, therefore, the issues should be resolved in the pending legal action, not in arbitration. Finally, CEG maintains that if this court grants a *Yellowstone* injunction, Supersol must file an undertaking.

The Condominium cross-moves to dismiss the third cause of action in the complaint as against it. The cause of action, for tortious interference, alleges that the Condominium's bad faith and malicious complaints to CEG, together with its unreasonable withholding of approval for any of Supersol's plans, has prevented Supersol from being able to properly perform its obligations under the Lease. The Condominium also opposes Supersol's motion seeking *Yellowstone* injunctive relief.

## DISCUSSION

### *Yellowstone Injunction*

Supersol contends that it is entitled to a *Yellowstone* injunction because it has sought to remedy the problems that the Condominium alleges exist, but the Condominium has prevented any remedy by refusing to act on its plans. The Condominium contends that Supersol has not acted in good faith, and is in breach of various provisions of the New York City Noise Code and Air Pollution Control Code. It points to various problems that arose during renovations, as well as the noise that results from employees' behavior in the store. For example, the Condominium asserts that when employees page each other on a loudspeaker, use cash registers, open and shut refrigerator doors, load and unload boxes, and transport inventory up and down the steel staircase, there are vibrational and acoustical noises that disturb the residents living above the store.

The Condominium contends that Supersol did not negotiate about what could be done in

good faith, and in fact, at some point, told its noise engineer not to engage in further conversations or meetings. Supersol contends that it not only engaged in conversations in good faith, but drew up three plans, at considerable expense, based upon the discussions, and that the Condominium failed to act on them. The Condominium claims that the plans involve putting equipment on the roof, which Supersol has no right to do. Supersol maintains that it was the Condominium that wanted the equipment relocated to the roof, and that is the reason that the plans are based upon the roof location. The parties recitation of the facts sharply contradict. They disagree about virtually everything regarding not only the problems that exist, but what they have, themselves, outlined as appropriate remedies.

The purpose of a *Yellowstone* injunction is to permit a tenant to toll the running of the cure period contained in a notice of default “so that after a determination of the merits, the tenant may cure the defect and avoid a forfeiture of the leasehold.” (*Purdue Pharma, LP v Ardsley Partners, LP*, 5 AD3d 654, 655 [2d Dept 2004], quoting *Top-All Varieties v Raj Dev. Co.*, 151 AD2d 470, 471 [2d Dept 1989]). In order to obtain relief, the tenant must demonstrate that it holds a commercial lease, it has received a notice to cure or notice of default, an application for a temporary restraining order was made prior to the termination of the lease, and that the tenant has the desire and ability to cure the alleged default by means short of vacating the premises (*Id.*). It is with respect to the last of these elements that the Condominium disputes plaintiff’s showing.

The Condominium contends that Supersol’s refusal to acknowledge that it is in default of the Lease is evidence that it has no intention of curing, as required for a *Yellowstone* injunction. However, Supersol has repeatedly stated in its papers that if there is a finding that it has not

complied, it will do whatever it is ordered to do in order to cure. Thus, Supersol has stated that it will cure. With respect to the remainder of the Condominium's assertions, they are all vigorously disputed by Supersol. Therefore, at this stage of the litigation, it would be inappropriate to allow the Condominium to prevail, thereby causing Supersol to lose the 15-year lease it negotiated, together with the substantial improvements that it has invested in the commercial space, rather than to maintain the status quo until the merits can be established<sup>1</sup>.

#### *Arbitrability*

CEG contends that the dispute is not subject to arbitration because it is not based upon CEG being dissatisfied with the noise level, but with complaints from the Condominium. CEG contends that the arbitration provision in the Lease is triggered only when CEG finds the noise or vibration level unacceptable, not when the Condominium does.

CEG sent Supersol a notice to cure. Once it sent that notice, it said, in effect, that Supersol is in default for the stated alleged breaches. The fact that it acted only after the Condominium sent it a notice of default does not mean that it has nothing to do with the dispute. By sending Supersol the notice to cure, and not disputing the Condominium's allegations, it, in effect, said that it agrees with the allegations. Therefore, because it disputes Supersol's allegations with respect to noise and vibration levels, the issue is arbitrable.

#### *Applicability of the Arbitration Clause to the Condominium*

Supersol maintains that the Condominium is bound by the arbitration clause contained in the Lease because the Condominium was heavily involved in the lease negotiations. Supersol

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<sup>1</sup> The court notes that CEG, which actually served the notice to cure, does not offer any arguments in opposition to the *Yellowstone* injunction. Its arguments focus on whether the dispute is subject to arbitration.

states that Mr. Goldstick, of CEG, sat on the Condominium Board, and told Supersol that the transaction would not be consummated without the Condominium's agreement and consent. There were various issues that arose during the negotiations that Mr. Goldstick stated that he had to consult with the Condominium about. Specifically, the arbitration provision was particularly contentious, and various drafts were circulated. Supersol was told that if the Condominium had not approved the language of the arbitration clause, it would not have been included in the Lease, or CEG would not have signed the Lease. Thus, Supersol contends that the Condominium was intended to be bound by the arbitration clause, and should be required to arbitrate in accordance with the rules governing non-signatories.

The Condominium maintains that it is not a signatory or a party to the Lease, and therefore should not be compelled to submit to arbitration. The Condominium further asserts that the Lease violations are inextricably intertwined with the underlying claims referenced in the default notice as to CEG's violation of the Condominium's bylaws and declaration. Since the Condominium is arguably not bound by the arbitration clause, and the issues are intertwined, the Condominium concludes that the purported arbitration clause does not mandate a stay of any further proceedings.

There is no question that a party must have agreed to arbitrate before it can be compelled to do so. However, even if an agreement is not signed by that party, if it is evident that the party intended to be bound by the contract, it can be compelled to arbitrate (*God's Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc., LLP*, 6 NY3d 371 [2006]).

If [the party seeking to compel arbitration with a non-signatory is] able to show that any of the five circumstances - to wit, (1) incorporation by reference, (2) assumption, (3) agency, (4) veil-piercing/alter-ego, and (5) estoppel - under which a non-signatory may be compelled to arbitrate a claim with a signatory to an

agreement containing an arbitration clause applies, the District Court must enter an order directing the parties to arbitrate their claims under the ... agreements [internal citation omitted].

(*Denney v BDO Seidman L.L.P.*, 412 F3d 58, 70 [2d Cir 2005]). Here, the parties vigorously dispute the role that the Condominium played in the negotiation and execution of the Lease. Supersol contends that the Condominium should be compelled to arbitrate based on estoppel, because of its involvement in negotiating the clause.

The record is not conclusive on this question. In order to determine whether the Condominium's involvement was sufficient to estop it from refusing to arbitrate, the court must hold a hearing on that issue. If, in fact, the Condominium was heavily involved, and approved the arbitration clause, it will be required to arbitrate. This is so because otherwise the arbitration clause becomes illusory. It is obvious that any complaints regarding noise, odors, or vibrations would be from residents of the building, not from CEG on its own initiative. In keeping with the long-established rule that the courts do not read provisions in contracts in a manner in which they have no meaning, it would be improper for this court to ignore the reality that the Condominium would be likely to be involved in any complaints of the nature that the arbitration clause purports to address. Thus, if Supersol can demonstrate that the Condominium was involved in, and agreed to, the arbitration provision, the Condominium will be required to arbitrate those issues.

CEG's argument that the dispute before the court falls within the exception in the arbitration clause regarding third parties is not compelling. That portion of the clause discusses what happens if there is litigation by a third party that results in a court order. Here, there is no such court order, nor is there any other litigation pending regarding this issue. Consequently, the exception does not apply.

### *Cross Motion to Dismiss Third Cause of Action*

The Condominium contends that the third cause of action for tortious interference must be dismissed because the interference with the contract must be intentional, not merely incidental to some other lawful purpose, and the defendant has to have acted with intent to harm the plaintiff without economic or other lawful excuse or justification (*see Alvord and Swift v Muller Constr. Co.*, 46 NY2d 276 [1978]; *B. Boman & Co. v Professional Data Mgt.*, 218 AD2d 637 [1st Dept 1995]). The Condominium maintains that Supersol alleges bad faith and malicious complaints, but that the Condominium has clearly set forth the bona fides of its complaints regarding Supersol's activities.

Initially, it bears noting that this is a pre-answer motion to dismiss, and all allegations must be accepted as true and the complaint liberally construed in favor of the plaintiff. (CPLR 3211; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Here, Supersol has alleged in the complaint and in Mr. Garber's affidavit, that the Condominium acted with malice, and that it was the Condominium's actions that prevented Supersol from complying with the Lease. If Supersol is able to prove that the Condominium did so, it will have a viable cause of action, because any of the purported "bona fides" that the Condominium has set forth, if credited, would be further evidence of the damage the Condominium caused, rather than support for the Condominium's position. Thus, it would be premature to dismiss the third cause of action at this juncture.

### *Undertaking*

Generally, when a *Yellowstone* injunction is granted, the movant must post an undertaking (*see e.g. Peron Rest. v Young & Rubicam*, 179 AD2d 469 [1st Dept 1992]). However, an undertaking is not always required, particularly when the dispute is not a monetary

one, and the plaintiff made a substantial investment in the premises (*WPA/Partners LLC v Port Imperial Ferry Corp.*, 307 AD2d 234 [1st Dept 2003]; *John A. Reisenbach Charter School v Wolfson*, 298 AD2d 224 [1st Dept 2002]; *Kuo Po Trading Co. v Tsung Tsin Assn.*, 273 AD2d 111 [1st Dept 2000]). Here, defendants do not dispute that Supersol has invested over a million dollars in renovating the premises. Under these circumstances, there is no need for an undertaking.

#### CONCLUSION

Accordingly, it is hereby

ORDERED that so much of plaintiff's motion as seeks an injunction tolling the period to cure the alleged defects is granted and the time period within which to cure any alleged defects is tolled until after the determination of the merits of the underlying complaints; and it is further

ORDERED that the portion of plaintiff's motion that seeks to compel arbitration is held in abeyance pending a hearing before a Special Referee regarding the extent to which defendant Amsterdam Condominium was involved in the negotiation and acceptance of the arbitration provision in the lease between plaintiff and defendant C.E.G. Company; and it is further

ORDERED that the issue of whether Amsterdam Condominium should be compelled to arbitrate is hereby referred to a Special Referee pursuant to CPLR 4212 to hear and report or otherwise determine if stipulated to by the parties pursuant to CPLR 4301 and it is further

ORDERED that defendant Amsterdam Condominium's cross motion is denied.

It is directed that a copy of this order with notice of entry be served upon the Trial

Support Office who shall set this matter down before a Special Referee.

This shall constitute the Order and Decision of the Court.

Dated: February 26, 2006

ENTER:



J.S.C.

MON. RICHARD B. LOWE, HI

**FILED**  
MAR 04 2008  
NEW YORK  
COUNTY CLERK'S OFFICE