ADA Dining Corp. v 208 E. 58th Street, LLC

2006 NY Slip Op 30421(U)

April 11, 2006

Supreme Court, New York County

Docket Number: 102255/06

Judge: Carol R. Edmead

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SCANNED ON 4/17/2006

[*1]

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

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

INTERIM ORDER

ADA Dining Corp.

208 E. 58th St. LLC

INDEX NO. 102255/06

MOTION DATE

MOTION SEQ. NO.

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

FILED

APR 17 2006

COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, it is ordered that this motion

Plaintiffs ADA Dining Corp. and Darshan R. Shah ("plaintiffs") bring this matter before the court, seeking an order pursuant to CPLR 6301

(a) enjoining and restraining defendants 208 East 58th Street, LLC ("208") and Kiran C. Patel ("defendants") during the pendency of this action

(I) from in any manner or by any means taking any actions, including but not limited to the commencement of summary proceedings, to terminate plaintiffs' lease for and/or to oust plaintiffs from the entire building known as and located at 208 East 58th Street, New York, New York (the "Building" or "Premises");

(ii) from disturbing in any manner the possession and rights of plaintiffs in and to the Building;

(iii) from taking any steps to terminate plaintiffs' lease and/or tenancy in and ~~the Building based~~ upon a ~~certain Notice to Cure dated February 7, 2006;~~ and

Dated: _____ J.S.C.

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

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Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

(iv) from serving any other notices to cure and/or default and/or termination against the plaintiffs regarding the Building.

Defendants cross move for an order pursuant to CPLR 6312, directing the plaintiffs to post a substantial undertaking in an amount to be determined by the Court but respectfully submitted to the Court an amount not less than $50,000 and directing plaintiffs to pay all past rent and prospective use and occupancy and additional use and occupancy for the Premises in the amount reserved in the parties' Lease.

Plaintiffs subsequently seek a default judgment against defendants based upon their failure to appear, answer or otherwise respond to the complaint.

The Lease, executed on August 20, 2004, between 208 East 58th Street, LLC ("Landlord") and ADA Restaurant, Inc. ("Tenant") (the "Lease"), provides, in relevant part as follows:

ARTICLE 3. RENT

3.1 **Amount of Payment of Rents**

The rent is payable without the Landlord's demand on the first day of each month during the Lease term in equal monthly installments at a minimum of $25,000.00 per month payable to Landlord on the first (1st) day of each month without protest. If this Lease commences or terminates in the middle of the rental period, the rent will be prorated on a daily basis. Any rent that is not paid within five (5) days of its due date shall be charged a late fee of five percent (10%) of the total amount of the payment due, not to exceed the laws of the State of New York.

. . . . . .

"Authority: The parties have full power and authority to enter into this Lease and to consummate the performance contemplated hereby. No other proceedings on the part of the parties are necessary to authorize the execution and delivery of this Lease or the Lease does not conflict with the parties' Articles of Incorporation/Organization, bylaws, operating agreement or ethics rules which may bind the parties in its actions. This Lease constitutes a valid and legally binding agreement of the parties, enforceable against the parties in accordance with its terms."

"Exhibit A" to the Regulations and Operating Agreement of 208 East 58th Street, LLC

executed on August 19, 2004 according to the defendants and on the 20th, according to the plaintiffs (the "Operating Agreement"), provides, in relevant part as follows:

> 5. ADA to become commercial tenant of 208 with a minimum of $25,000.00 due per month as rent to 208 from ADA's restaurant and apartment rent profits, The terms of the commercial lease are set out in more detail in that certain Commercial Lease Agreement between ADA and Guarantors and 208 executed simultaneously with the Agreement and made a part hereof by reference.

To the degree that the Operating Agreement directs that ADA is to pay rent to 208 "from ADA's restaurant and apartment rent profits," it is in conflict with the Lease which has no such condition.

Analysis

Yellowstone Injunction

The purpose of the *Yellowstone* injunction is to maintain the *status quo* so that a commercial tenant may protect its valuable property interest in its lease while challenging the landlord's assessment of its rights *(see Lexington Ave. & 42nd Street Corp. v 380 Lexchamp Operating, Inc.*, 205 AD2d 421 [1st Dept 1994], *citing Post v 120 E. End Ave. Corp.*, 62 NY2d 19, 26 [1984]). A *Yellowstone* injunction forestalls the cancellation of a lease to afford the tenant an opportunity to obtain a judicial determination of its breach, the measures necessary to cure it, and those required to bring the tenant in future compliance with the terms of the lease *(see Waldbaum, Inc. v Fifth Ave. of Long Is. Realty Assocs.*, 85 NY2d 600, 606 [1995]). In order to obtain a *Yellowstone* injunction, the tenant must demonstrate (1) the existence of a commercial lease; (2) receipt from the landlord of a notice of default thereunder, a notice to cure such default, or a threat of termination of the lease; (3) application for the issuance of an injunction, made prior to the lease's termination; and (4) the tenant's ability and desire to cure the alleged default,

by any means short of vacating the premises (*New Eagle Inc. v H.R. Neumann Assoc., Inc.* 2004 N.Y. Slip Op. 50724(U); *Empire State Bldg. Assoc. v Trump Empire State Partners*, 245 AD2d 225 [1st Dept 1997]; *Marathon Outdoor, LLC. v Patent Const. Sys. Div. of Harsco Corp.*, 306 AD2d 254 [2d Dept 2003]; *WPA/Partners LLC. v Port Imperial Ferry Corp.*, 307 AD2d 234 [1st Dept 2003], *citing Herzfeld & Stern, supra*]). A tenant seeking a *Yellowstone* injunction must convince the court "of his desire and ability to cure the defects by any means short of vacating the premises" (*Cemco Rest., Inc. v Ten Park Ave. Tenants Corp.*, 135 AD2d 461 [1st Dept 1987]; *Jemaltown of 125th St., Inc. v Leon Betesh/Park Seen Realty Assoc.*, 115 AD2d 381, 382 [1st Dept 1985]).

Based on an in-court conference, the submissions, and the transcript (John A. Bonaccolta, Reporter) which is incorporated into this decision, it is hereby

ORDERED that the order to show cause by plaintiff is granted, and defendants 208 East 58th Street, LLC ("208") and Kiran C. Patel ("defendants") shall be enjoined and restrained during the pendency of this action (I) from in any manner or by any means taking any actions, including but not limited to the commencement of summary proceedings, to terminate plaintiffs' lease for and/or to oust plaintiffs from the entire building known as and located at 208 East 58th Street, New York, New York (the "Building" or "Premises"); (ii) from disturbing in any manner the possession and rights of plaintiffs in and to the Building; (iii) from taking any steps to terminate plaintiffs' lease and/or tenancy in and the Building based upon a certain Notice to Cure dated February 7, 2006; and (iv) from serving any other notices to cure and/or default and/or termination against the plaintiffs regarding the Building; and it is further

ORDERED that application for default judgment is moot; the Answer was served and

accepted in Court by plaintiff's counsel, and the defense of personal jurisdiction contained therein is withdrawn; and it is further

ORDERED that defendants shall pay use and occupancy in the amount of $25,000.00 per month effective April 2006 and continuing each month thereafter during the pendency of this litigation; the use and occupancy due and owing for April 2006 shall be delivered by close of business April 14, 2006, and use and occupancy shall be delivered to plaintiffs by the 1st of each month thereafter; and it is further

ORDERED that this matter is adjourned to April 26, 2006, 9:30 a.m. In light of the short adjournment given, defendants' application for a bond is denied at this juncture. However, if the parties have not reached a resolution by April 26, 2006, the Court will entertain arguments on the appropriate amount of the bond, which will be required to be posted by April 28, 2006.

This constitutes the interim decision and order of the Court.

FILED

APR 17 2006

COUNTY CLERK'S OFFICE
NEW YORK

Dated 4/11/06 ENTER: _____ J.S.C.

HON. CAROL EDMEAD

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