

Outback/Empire I, LP v Kamitis, Inc.

2006 NY Slip Op 30623(U)

March 22, 2006

Sup Ct, Westchester County

Docket Number: 05195/05

Judge: John R. LaCava

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

TRC 3/23/06

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
OUTBACK/EMPIRE I, LIMITED PARTNERSHIP,

Plaintiff(s),

-against -

KAMITIS, INC.,

Defendant(s).

-----X
LaCAVA, J.

DECISION/ORDER

Index No:
05195/05

Motion Date:
1/13/05

Seq's 3-6

The following papers numbered 1 to 7 were considered in connection with this motion by plaintiff for summary judgment, and the cross-motion by defendant for an order dismissing the amended supplemental complaint; and the motion by plaintiff for a preliminary injunction, and the cross-motion by defendant to vacate the temporary restraining order:

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION/AFFIDAVIT/AFFIRMATION/EXHIBITS	1
MEMORANDUM OF LAW	2
CROSS MOTION/AFFIRMATION	3
AFFIRMATION IN OPPOSITION/EXHIBIT	4
ORDER TO SHOW CAUSE/AFFIRMATION/EXHIBITS	5
CROSS MOTION/AFFIRMATION/EXHIBITS	6
AFFIRMATION IN OPPOSITION	7

This is contract action relating to Plaintiff Outback/Empire 1, a Limited Partnership ("Outback"), which commenced this action for, among other things, breach of contract and specific performance against defendants Kamitis, Inc. ("Kamitis"), Christ Moundroukas, and Dino Moundroukas in connection with a July 27, 2004 lease agreement entered into between Outback, as lessee, and Kamitis, as lessor, for the purposes of operating a restaurant and bar under the name "Outback Steakhouse" at the commercial premises located at 945 Main Street, Yorktown, New York.

Outback is a Florida limited partnership which, as per its complaint and the proposed amended complaint, is duly authorized to conduct business in the State of New York. Defendant Kamitis is a New York Corporation which has, as its principals, defendants Christ Moundroukas and Dino Moundroukas. Christ Moundroukas signed the lease as president of Kamitis and initialed each page of the lease. Dino Moundroukas signed the lease as a witness.

Although the "Effective Date" of the lease is defined as the date the lease was executed, Kamitis had up to 30 days after the execution date to convey the property to Outback. More specifically, section 1.3(B) of the lease provides that Kamitis must tender the premises "on or before thirty (30) days after the Effective Date with the Landlord's personal property, trash and other debris removed . . ."

The lease also contains contingencies in Section 1.4 which provides at 1.4(A) that Kamitis was to supply Outback with a description of the property within 15 days of the "Effective Date," (July 27, 2004). In turn, within 30 days of the receipt of the description, Outback was to obtain a survey of the property. Outback had a period of 60 days beginning either at the time the lease was signed or upon Outback's receipt of the description of the property, whichever came later, to conduct any inspections and investigations it deemed appropriate. The lease further provides at 1.4(A):

The obligations of Tenant under the Lease are expressly conditioned upon the Tenant being satisfied, in its sole and absolute discretion, with the results of such studies, inspections and investigations. If Tenant is not satisfied with the results from its studies, inspections or investigations, in Tenant's sole and absolute discretion, then Tenant may terminate this Lease by written notice to Landlord on or before the fifth (5th) business day following the end of the Inspection Period whereupon this Lease shall be of no further force or effect. . .

Section 1.4(B) of the lease obligates Outback to use "due diligence and commercially reasonable efforts. . . to obtain, at its sole cost and expense,. . . in its sole and absolute discretion, all building permits, and any other approvals, licenses or permits. . . as may be required from all government authorities. . ." If Outback was unable to secure the necessary permits or if the cost of necessary improvements was unsatisfactory to Outback, Outback could terminate the lease. The lease also requires "Landlord . . . to use its best reasonable efforts to assist Tenant in obtaining the Permits and

Approvals.”

In a Decision and Order dated June 9, 2005, the Court

ORDERED, that plaintiff's cross-motion for leave to serve and file a supplemental summons and amended verified complaint is granted to the extent herein indicated and is otherwise denied, and plaintiff is directed to serve and file same in conformance with this Decision & Order by June 21, 2005; and, it is further

ORDERED, that defendants' motion for an order granting summary judgment in its favor or, alternatively, dismissing the complaint for failure to state a cause of action is denied, as moot, as to the original complaint, since the original complaint has since been superceded by the amended complaint to the extent herein granted and is granted to the extent that the motion for leave to serve and file the amended complaint has been denied.

THE DISMISSAL MOTIONS

Plaintiff now moves for summary judgment, which motion is opposed by defendant. Defendant further cross-moves to dismiss the amended supplemental complaint, alleging that plaintiff failed to serve it in a timely manner as directed by the June 9 Order.

Plaintiff, however, has failed to include in its moving papers any of the papers previously served by him, except the supplemental summons and amended complaint, nor all of the pleadings filed as of the date of the motion. See CPLR 2214 (c); Part Rules I (d) (1). Absent said papers, the Court cannot intelligently address the motion. In any event, the Court would be compelled to deny plaintiff's motion as he fails to meet in his papers his burden of showing entitlement to judgment as a matter of law.

Similarly, defendant has also failed to include in its moving papers any of the papers previously served by him, nor all of the pleadings filed as of the date of the motion. See CPLR 2214 (c); Part Rules I (d) (1). Again, absent said papers, the Court cannot intelligently address the motion. And, the Court notes, denial of the cross-motion would be required in any event since defendant too failed to meet in his papers his burden, among other things by failing to demonstrate that plaintiff had not properly served the amended motion.

THE INJUNCTIVE RELIEF MOTIONS

Plaintiff also moves herein for a preliminary injunction. As an initial matter, the Court notes that defendant is correct that, in a Decision and Order entered in March 7, 2005 in a predecessor action involving the same parties, this Court

ORDERED, that the motion to dismiss for failure to state a cause of action and for failure to plead in accord with CPLR §3014 is granted; and, it is further

ORDERED, that plaintiff's two applications for injunctive relief, made by way of orders to show cause presented to the Court (LaCava, J.) on December 23, 2004 and again on December 28, 2005 (Colabella, J. [Duty Judge]) are denied as moot and the temporary restraining order granted by the Court (Colabella, J.) upon the presentation of the December 28, 2004 order to show cause is hereby vacated; and, it is further

ORDERED, that any further applications for injunctive relief in this action, if reinstated, or any future action with respect to the subject of this action must be made on notice to defendants.

Defendant also properly notes that, contrary to the March 7, 2005 Order, plaintiff sought injunctive relief herein without either making its application for said relief on notice to defendants, or, at the very least, alerting the Court that it had previously ruled in this regard in the predecessor matter. In addition, although plaintiff's affirmation asserts that "no previous application for the relief [i.e. a restraining order] herein prayed" had been made, in light of the motions on the predecessor action, and the Court's March 2005 Order, such an assertion is, in fact, not true. Such treatment of the Court's specific ruling on the question of injunctive relief in this matter, if not contemptuous, may nevertheless have been worthy of sanctions.

In any event, the Court would be compelled to dismiss plaintiff's motion, as it wholly fails to demonstrate the likelihood of success on the merits.

Based on the foregoing, it is hereby

ORDERED, that the motion by plaintiff for summary judgment against defendant is denied; and it is further

ORDERED, that the cross-motion by defendant for an order dismissing the amended complaint is denied; and it is further

ORDERED, that the motion by plaintiff for a preliminary injunction against defendant is denied; and it is further

ORDERED, that the restraining order directed by the Court in the Order to Show Cause signed on August 31, 2005, is hereby vacated; and it is further

ORDERED, that the cross-motion by defendant for an order dismissing the order to show cause is denied, as moot.

The parties are reminded to appear before this part, Room 1615, on March 23, 2006 at 9:30 A.M. for a Trial Readiness Conference.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: White Plains, New York
March 22, 2006

S/ _____

HON. JOHN R. LA CAVA, J.S.C.

Kuczinski, Vila, Tarallo, Pillinger & Miller, LLP
Attorneys for Plaintiff
570 Taxter Road, Suite 275
Elmsford, New York 10523

Richard W. Fulfree, Esq.
Attorney for Defendants
576 Kimball Avenue
Yonkers, New York 10704