

**Harlem Real Estate LLC v New York City Economic  
Dev. Corp.**

2007 NY Slip Op 30071(U)

March 6, 2007

Supreme Court, New York County

Docket Number: 0111768

Judge: Marilyn Shafer

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

PRESENT: MARILYN SHAFER

PART 62

Justice

Harlem Real Estate LLC, ET AL.

INDEX NO.

111768/06

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

NYC Economic Development Corp., ET AL.

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  
pursuant to attached items

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

**FILED**  
MAR 13 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 3/6/07

MARILYN SHAFER

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

**PRESENT: HON. MARILYN SHAFER**  
*Justice*

**PART 62**

**HARLEM REAL ESTATE LLC and CITARELLA  
OPERATING LLC,**

**Plaintiff,**

**-against-**

**NEW YORK CITY ECONOMIC DEVELOPMENT  
CORPORATION AND THE CITY OF NEW YORK,**

**Defendants.**

**INDEX NO. 111768/06**

**MOTION DATE \_\_\_\_\_**

**MOTION SEQ. NO. 001**

The following papers, numbered 1 to 4, were read on this motion:

PAPERS NUMBERED

Notices of Motion — Affidavits — Exhibits

1

Answering Affidavits — Exhibits — Memorandum of Law

2, 3

Replying Affidavits

4

**Cross-Motion:  Yes  No**

**Upon the foregoing papers, it is ordered that the plaintiffs' motion is denied.**

Plaintiff Citarella Operating LLC (“Citarella”) is a gourmet style food market with various retail operations throughout the New York metropolitan area. In or about April of 1999, defendant New York City Economic Development Corporation (“EDC”) issued a request for proposals (“RFP”) for real property owned by New York City (the “City”) located at 441 West 125<sup>th</sup> Street and 426-458 West 126<sup>th</sup> Street in New York County (the “Premises”). EDC is a local development corporation organized pursuant to section 1411 of the New York State Not-For-

Profit Corporation Law to provide assistance in stimulating investment in the City; broadening the City's tax base; relieving and reducing unemployment, promoting and providing for additional and maximum employment, and bettering and maintaining job opportunities for residents of the City by encouraging industry to locate and remain in the City. The goal of the RFP was to have the Premises developed.

Citarella then established plaintiff Harlem Real Estate LLC ("HRE"), a real estate holding company, for the purpose of acquiring the Premises. On May 3, 2001, the EDC approved the sale of the Premises to HRE in connection with the business operations of (1) Citarella and (2) HRE for food preparation, light manufacturing operations, warehousing, office space and a retail store. EDC then conveyed title of the Premises to HRE (the "Deed"). The Deed to HRE required HRE to: 1) commence rehabilitating the Premises within six months; 2) complete the rehabilitation within two years; 3) obtain a certificate of occupancy for use of the Premises for corporate offices, warehouse area, light manufacturing and a retail store; and 4) use the Premises exclusively in connection with HRE's business operation for five years.

Pursuant to section 384.a of the New York City Charter (the "Charter"), mayoral authorization of the sale of the Premises to HRE provided that HRE was to use the Premises as corporate offices, a warehouse/storage area, food preparation area and retail store. Additionally, the RFP informed proposers that the existing buildings on the Premises are in poor condition and that most of the Premises is located in a district zoned for light manufacturing. In late 2002 or early 2003, HRE determined that the buildings on the warehouse portion of the Premises were economically and physically infeasible for rehabilitation and they needed to be demolished and redeveloped in some alternate fashion. Around the same time, HRE and EDC began discussing a possible lease proposal for another City-owned property located at 600 Food Center Drive in

Bronx County (“Hunts Point”).

On or about February 2004, the parties entered into a Modification of Deed (the “Modification”) to extend HRE’s time to complete the rehabilitation. Pursuant to the Modification, HRE was to complete rehabilitation of the portion of the Premises for use of the retail store and obtain a certificate of occupancy no later than July 31, 2004. The Modification further provided that HRE was to commence the remaining rehabilitation at the Premises (the “warehouse portion”) no later than August 31, 2004 and to complete such rehabilitation, with a certificate of occupancy, no later than April 30, 2005. The retail store opened in February 2005.

On or about July 25, 2006, the EDC issued a Notice of Default (the “Notice”) to HRE informing HRE that it was in default of its obligations under the Deed because: 1) it failed to obtain a certificate of occupancy for the retail store by July 31, 2004; 2) it did not commence the rehabilitation work at the warehouse portion by August 31, 2004; 3) it failed to obtain a certificate of occupancy for the warehouse portion of the Premises; and 4) it did not use the Premises for corporate offices, warehouse area or food preparation operation for a period of five years. The Notice further provided that if HRE failed to cure the violations within 30 days, then EDC would take further action to enforce its rights under the Deed, including but not limited to recovering possession of the Premises.

Plaintiffs now bring this order to show cause for an order “granting a *Yellowstone* type and/or injunctive relief,” enjoining and restraining the defendants, their employees, servants, agents, attorneys, affiliated agencies and all other persons, entities or affiliated agencies acting on behalf of, or in concert with, the defendants, from taking any action in furtherance of that certain Notice of Default dated July 25, 2006 from the EDC to HRE and Citarella. Plaintiffs contend that the circumstances here are analogous to a tenant seeking a *Yellowstone* injunction, in that

they hold a valuable interest in real property and that defendants have declared a default, on grounds that plaintiffs have forfeited the real property, which should revert to defendants. Plaintiffs further contend that they are entitled to a “traditional injunction” under CPLR §6301 based on the fact that plaintiffs have a likelihood of success on the merits, that plaintiffs will suffer irreparable injury, and that the balancing of equities is in plaintiffs’ favor. Specifically, plaintiffs assert that the EDC knew and actively participated in the Hunts Point transaction whereby plaintiffs moved their warehousing and food production to Hunts Point. Plaintiffs further allege that the EDC knew that plaintiffs were not going to rehabilitate the warehouse portion of the Premises for its originally intended purpose. Plaintiffs claim that the EDC had full knowledge of this since the former vice president of the EDC, Stephen Hayes (“Hayes”), advised plaintiffs to submit alternative development proposals to the EDC for the warehouse portion of the Premises. Plaintiffs allege that defendants should now be estopped from disclaiming Hayes’ actions.

In opposition, defendants maintain that plaintiffs are not entitled to a *Yellowstone* injunction since they failed to satisfy the requirement of holding a commercial lease. Defendants further maintain that plaintiffs similarly cannot establish the prerequisites for an injunction. Defendants argue that plaintiffs cannot establish that they will be irreparably harmed if their motion is denied because the EDC would have to seek a court order to regain possession of the Premises and the plaintiffs will have an opportunity to litigate their claims. Moreover, defendants claim that the fact that plaintiffs entered into a lease with the EDC for the space at Hunts Point does not relieve them of their obligations pursuant to the Deed. Defendants further assert that neither Hayes nor the EDC had the authority to waive the conditions subsequent proscribed under the Deed and that the doctrine of estoppel may not be invoked to prevent a

municipality from disclaiming the unauthorized act of its employees.

As a preliminary matter, plaintiffs' request for a *Yellowstone* injunction is denied since plaintiffs cannot satisfy the requirements for one, namely, that they have a commercial lease. In requesting a *Yellowstone* injunction, the movant must show that "(1) it holds a commercial lease; (2) it received from the landlord either a notice of default, a notice to cure, or a threat of termination of the lease; (3) it requested injunctive relief prior to the termination of the lease; and (4) it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises" (*225 E. 36<sup>th</sup> St. Garage Corp. v 221 E. 36<sup>th</sup> Owners Corp.*, 211 AD2d 420, 421 [1<sup>st</sup> Dept 1995]). Although a *Yellowstone* injunction maintains the status quo of a commercial tenant during the dispute, it does not nullify the remedies to which a landlord is otherwise entitled under the parties' contract (*Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Avenue Associates*, 93 NY2d 508 [1999]).

It is well established that in order to prevail upon a motion for a preliminary injunction, the movant has the burden of demonstrating by clear and convincing evidence that 1) the moving party will succeed on the merits of the action; 2) the moving party will suffer irreparable injury absent the issuance of a preliminary injunction; and 3) a balancing of equities favors the movant's position (*see* CPLR 6301; *Price Paper & Twine Co. v Miller* 182 AD2d 748 [2<sup>nd</sup> Dept 1992]; *Karl v Wood*, 137 AD2d 22 [2<sup>nd</sup> Dept 1988]). Injunctive relief will be afforded only in those extraordinary situations where the plaintiff has no adequate remedy at law and such relief is necessary to avoid irreparable injury (*Chicago Research and Trading v NY Futures Exchange*, 84 AD2d 413, 416 [1<sup>st</sup> Dept 1982]). Viewed within this framework, this Court must deny plaintiffs' motion for a preliminary injunction. The papers are devoid of any showing that plaintiffs are faced with irreparable injury. In the instant matter, the Notice merely advises HRE that EDC will

bring appropriate legal action to enforce the terms of the Deed. The denial of plaintiffs' request for a preliminary injunction will not automatically grant possession or revert title of the Premises back to the EDC. The fact "[t]hat [a] judicial proceeding might be commenced is not a sufficient basis for the exercise of Supreme Court's equitable powers" (*Cox v J.D. Realty Associates*, 217 AD2d 179, 181 [1<sup>st</sup> Dept 1995]). Additionally, plaintiffs have not shown that they would not have an adequate remedy at law if they are able to demonstrate that defendants violated their rights, and that the equities balance in plaintiffs' favor.

Plaintiffs have likewise not demonstrated a likelihood of succeeding on the merits of the case. In order to meet that burden, plaintiffs must demonstrate that the right on which they seek to ultimately prevail "is plain from the undisputed facts and if the right depends upon an issue which can only be decided upon a trial, the injunction cannot be granted" (*Zurich Depository Corporation v Gilenson*, 121 AD2d 443 [2<sup>nd</sup> Dept 1986]). Here, it is not clear that the plaintiffs would ultimately prevail. There is no evidence that plaintiffs were ever relieved of their obligations under the Deed. In fact, the Modification reaffirmed those conditions subsequent.

While plaintiffs argue that the EDC had full knowledge of their inability to rehabilitate the warehouse portion of the Premises to its originally intended purpose based upon conversations with Hayes, the Deed clearly states that it cannot be modified unless it is in writing. Moreover, plaintiffs' reliance on a letter dated November 8, 2004 from Hayes is of no moment since defendants cannot be held to the unauthorized action of their agents. It is well settled that a municipality's power to contract is statutorily restricted so as to protect the public from corrupt or ill-considered actions of municipal officials (*Henry Modell & Co., Inc. v City of New York*, 159 AD2d 354 [1<sup>st</sup> Dept 1990]). There is no proof that either Hayes or the EDC had the authority to deviate from conditions subsequent provided for in the Deed. Therefore, "those

dealing with municipal agents must ascertain the extent of the agents' authority, or else proceed at their own risk" (*Id.* at 355). Although plaintiffs claim that the defendants should be estopped from enforcing the conditions subsequent under the Deed, the Court disagrees. It is well established that the doctrine of estoppel will not lie against municipalities, public agencies or governmental subdivisions (*Matter of Parkview Associates v City of New York*, 71 NY2d 274 [1988]). The doctrine may be applied in rare circumstances "when failure to do so would operate to defeat a right legally and rightfully obtained. It cannot operate to create a right" (*Matter of Hauben v Goldin*, 74 AD2d 804, 805 [1<sup>st</sup> Dept 1980]). That is not the case here.

The purpose of preliminary injunctive relief "is to provide a provisional remedy by maintaining the status quo pending a full hearing on the merits, rather than to determine the ultimate rights of the parties and mandate corrective action" (*Jamie B v Tino Hernandez*, 274 AD2d 335, 336 [1<sup>st</sup> Dept 2000]). In granting preliminary injunctive relief, this Court would be essentially granting plaintiffs the ultimate relief sought, which "is an abuse of discretion on a motion for preliminary injunctive relief" (*New York Automobile Insurance Plan v New York Schools Insurance Reciprocal*, 241 AD2d 313, 314 [1<sup>st</sup> Dept 1997]). Accordingly, plaintiffs' motion is denied in its entirety.

This constitutes the decision and order of this Court.

Dated: March 6, 2007

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MARTIN SHAFER  
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