

**C & E 608 Fifth Ave. Holding, Inc. v Swiss Ctr., Inc.**

2007 NY Slip Op 30243(U)

March 12, 2007

Supreme Court, New York County

Docket Number: 0100245

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
HON. JOAN A. MADDEN

PRESENT: J.S.C.  
*Justice*

PART 11

Index Number : 100245/2006  
C & E 608 FIFTH AVENUE  
vs  
SWISS CENTER  
Sequence Number : 002  
AMEND SUPPLEMENT PLEADINGS

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*and cross-motion are determined in accordance with the annexed decision and order.*

**FILED**

MAR 20 2007

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: March 12, 2007

J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

[\* 1]

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: PART 11

-----X  
C & E 608 FIFTH AVENUE HOLDING, INC. d/b/a  
C & E FIFTH AVENUE HOLDING, INC. d/b/a  
CHALANO & CO.,

INDEX NO. 100245/06

Plaintiff,

-against-

SWISS CENTER, INC.

Defendant.

-----X  
JOAN A. MADDEN, J.:

**FILED**  
MAR 20 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

In this action involving a dispute between a commercial tenant and landlord, this court issued a decision and order dated July 7, 2006 granting plaintiff-tenant's prior motion for a Yellowstone injunction, and denying defendant-landlord's prior cross-motion to dismiss the complaint. Plaintiff now moves for an order pursuant to CPLR 3025(b), granting leave to amend the complaint. Defendant opposes the motion to amend, and cross-moves for leave to reargue the denial of its prior cross-motion to dismiss the complaint.

Leave to amend a pleading should be freely given within the court's discretion, absent prejudice or surprise to the opposing party, and provided the amendment is not plainly lacking in merit. See CPLR 3025(b); Edenwald Contracting Co., Inc. v. City of New York, 60 NY2d 957 (1983); Mezzacappa Bros., Inc. v. City of New York, 29 AD3d 494 (1<sup>st</sup> Dept), lv app den, 7 NY3d 712 (2006); Lambert v. Williams, 218 AD2d 618 (1<sup>st</sup> Dept 1995). As the party seeking amendment, plaintiff has the burden of establishing the merit of the proposed amendment. See Zaid Theatre Corp. v. Sona Realty Co., 18 AD3d 352 (1<sup>st</sup> Dept 2005); Hynes v. Start Elevator,

Inc., 2 AD3d 178 (1<sup>st</sup> Dept 2003).

Plaintiff has made a sufficient showing to be entitled to amend the complaint. Plaintiff seeks to add four paragraphs regarding defendant's alleged breach of its implied obligation to exercise good faith and act reasonably in responding to plaintiff's requests for approval of proposed signs for the interior of the premises. These additional allegations introduce no new causes of action or theories of recovery, but merely amplify the pleadings, and as such, are not prejudicial to defendant. See Colon v. Citicorp Investment Services, 283 AD2d 193 (1<sup>st</sup> Dept 2001). Moreover, even though defendant submits an affidavit disputing the veracity of the new allegations, plaintiff submits an affidavit by a person with firsthand knowledge as to the facts sought to be added. Under these circumstances, leave to amend is granted.

As to defendant's cross-motion, "[a] motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law." Foley v. Roche, 68 AD2d 558, 567 (1<sup>st</sup> Dept 1979). Reargument is not intended "to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided . . . [or] to provide a party an opportunity to advance arguments different from those tendered on the original application." Id at 567-568.

Leave to reargue is denied, as defendant is simply attempting to present new arguments which differ from those presented in support of its original cross-motion to dismiss the complaint. Id. However, even if defendant's arguments were considered, dismissal is not warranted. Although the first paragraph of Article 41 of the lease does not explicitly state that the landlord's approval of interior signs "shall not be unreasonably withheld or delayed," the

obligation to exercise good faith and act reasonably is nevertheless implied, as it is implied in all contracts, including commercial leases. See 511 West 232<sup>nd</sup> Owners Corp. v. Jennifer Realty Co., 98 NY2d 144, 153 (2002); Dalton v. Educational Testing Service, 87 NY2d 384, 389 (1995). While defendant is correct that an obligation cannot be implied that would be inconsistent with other terms of the lease, see 511 West 232<sup>nd</sup> Owners Corp. v. Jennifer Realty Co., supra, plaintiff's claim for breach of the implied obligation of good faith and fair dealing with respect to defendant's failure to respond to its requests to install interior signs, is not inconsistent with any other terms of the lease. The lease provision explicitly stating that the landlord cannot unreasonably withhold or delay its approval of plaintiff's request to erect an exterior signs, is not inconsistent with the provision governing the approval of interior signs, which implicitly obligates the landlord to act reasonably. The fact that plaintiff has a separate contractual right to erect a sign on the exterior of the premises, does not mean that it must forgo and can be arbitrarily be deprived of the benefit of its independent contractual right to place signs on the interior of the windows and entrance doors of the premises. Defendant submits no legal authority calling into question this court's prior holding that defendant did not have unfettered discretion to approve, disapprove or ignore plaintiff's requests to install the interior signs. See Hirsch v. Food Resources, Inc., 24 AD3d 293, 296 (1<sup>st</sup> Dept 2005); Tradewinds Financial Corp. v. Refco Securities, Inc., 5 AD3d 229, 231 (1<sup>st</sup> Dept 2004).

Finally, the court notes that the discovery issues raised in the motion papers were resolved when the parties appeared for oral argument.

Accordingly, it is hereby

ORDERED that plaintiff's motion to amend the complaint is granted and the proposed

amended complaint in the form annexed to the motion papers shall be deemed served upon service of a copy of this order with notice of entry; and it is further

ORDERED that defendant shall have 20 days from such service to serve and file an amended answer; and it is further

ORDERED that defendant's cross-motion for reargument is denied; and it is further

ORDERED that the parties are directed to appear for the status conference previously scheduled for April 19, 2007 at noon, in Part 11, Room 351, 60 Centre Street.

DATED: March 17, 2007

ENTER:

  
\_\_\_\_\_  
J.S.C.

**FILED**  
MAR 20 2007  
NEW YORK  
COUNTY CLERK'S OFFICE