

**Nona Amalfi, LLC v 485-497 Ninth Ave. Partners,
LLC**

2007 NY Slip Op 30697(U)

April 6, 2007

Supreme Court, New York County

Docket Number: 0600309/2007

Judge: Judith J. Gische

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

PRESENT: GISCHE
Justice

PART 10

NONA AMALFI, LLC

INDEX NO. 600309/07

- v -

485-497 NINTH AVENUE
PARTNERS, LLC

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on 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

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NEW YORK
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**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

APR 06 2007

Dated: _____


HON. JUDITH J. GISCHÉ J.S.C.

Check one: FINAL DISPOSITION NON FINAL DISPOSITION

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10**

-----X

NONA AMALFI, LLC,
Plaintiff,

-against-

485-497 NINTH AVENUE PARTNERS, LLC,
Defendant.

-----X

Decision/Order

Index#600309/2007
Mot. Seq. #001

Present:
Hon. Judith J. Gische
J.S.C.

Pursuant to CPLR §2219(a) the court considered the following numbered papers on this motion:

| PAPERS | NUMBERED |
|---|----------|
| OSC, ML affd., SLD affirm., exhibits..... | 1 |
| Notice of X-motion, WR affirm., DI affd., exhibits..... | 2 |
| SLD affirm. In opp/reply, ML affd., exhibits..... | 3 |
| LL Reply affirm..... | 4 |

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Glsche, J.;

Upon the foregoing papers the decision and order of the court is as follows:

Plaintiff is a commercial tenant ("tenant") operating an Italian restaurant in units 493B and 495A located at 485-497 Ninth Avenue, New York, New York ("premises"). Defendant is the landlord of the premises ("landlord"). A Ten (10) Day Notice to Cure dated January 18, 2007 was served on the tenant. It is undisputed that the cure period was due to expire on January 31, 2007.

On January 31, 2007 this court signed an Order to Show Cause ("OSC") which granted a temporary restraining order tolling the cure period. The OSC provided that it was to be personally served on defendant on or before February 8, 2007. Based upon tenant's

representation that it could not serve plaintiff within the time provided, the service date was extended by the Court to February 16, 2007.

The tenant is essentially seeking a Yellowstone injunction. The OSC also seeks a declaration of rights under the lease and punitive damages. The Landlord has cross-moved to dismiss the action. In the alternative it opposes the request for a Yellowstone injunction and as yet a further alternative it requests that any such injunction be subject to certain conditions.

Jurisdiction

The court first addresses to jurisdictional claims made. Landlord argues that because the OSC was not served along with the filed summons, it is jurisdictionally defective. He argues that even were this court to find that the summons was served, because it fails to provide appropriate notice, it is jurisdictionally defective.

There is no dispute that the tenant did not serve the OSC along with the summons and notice by February 8, 2007, the service date originally ordered by the court. On February 13, 2007, however, the court extended the date for service to February 16, 2007. Service of the OSC along with the papers on which it was based and the filed summons with notice were served in accordance with CPLR §308 on February 16, 2007. Contrary to the Landlords' position, the papers were timely served in accordance with court orders.

As to the sufficiency of the summons with notice, the court holds that because the summons was served along with the OSC and supporting papers, the landlord had more than sufficient notice of the claims being made against it in this action. In fact the OSC sets out the ultimate declarations sought in the underlying proceeding. The landlord's arguments are based upon solely looking at the summons and the endorsement upon it

with looking at all to the supporting documentation served at the same time. This crabbed reading of the summons with notice is not necessary. The summons and supporting OSC certainly were rich with sufficient detail to serve due process and make this action jurisdictionally supportable. Miller v. North Shore Towers Assoc., 119 Misc 2d 644 (NY Sup 1983).

The cross-motion to dismiss is therefore denied.

Yellowstone Injunction

The purpose of a Yellowstone injunction is to allow a tenant, threatened with the termination of its lease, to obtain a stay. The stay tolls the running of the cure period so that, after a determination of the merits, the tenant may cure the defect and avoid a forfeiture of the leasehold. First Natl. Stores v. Yellowstone Shopping Ctr., *supra*; Long Island Gynecological Servs. v. 1103 Stewart Avenue Associates, 224 AD2d 591 (2nd dept. 1996). In order to obtain a Yellowstone injunction the tenant must demonstrate that: it holds a commercial lease; it has received from the landlord a threat that the lease will be terminated; it requested injunctive relief prior to the termination of the lease and it is prepared and able to cure the alleged defaults. Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Associates, 93 NY2d 508 (1999).

There is no dispute that tenant holds a commercial lease and that it has received a threat from the landlord that its lease will be terminated. The temporary stay was obtained on the date that the cure period was due to expire. Landlord's primary argument is that the tenant has not shown that it is prepared and able to cure the claimed alleged defaults in the time that remains for cure.

The Notice to Cure served by the landlord sets out many alleged lease defaults.

The tenants's principal position is that it is not in default. It otherwise claims that the landlord's principal complaint (from which most others flow) is that it has not obtained certificates of final approval from the appropriate governmental agencies for construction work it undertook at the premises. It has shown that it is actively pursuing such approvals, the application for which was made before the Notice to Cure was sent. It expects such final approvals in a matter of weeks.

Certainly the issue of whether the tenant is even in default can be asserted as a defense in a summary proceeding. The Yellowstone injunction is addressed to the ability to cure in the event the tenant is unsuccessful in these defenses. While the court and the tenant cannot say with certainty the a governmental agency will issue the final approvals, it appears that the tenant has done and is willing to do everything it can to obtains such approvals. This satisfies the requirement that the tenant is willing and able to cure the defaults should the court find any such defaults.

Condltions

The Landlord seeks a direction that the tenant continue to pay monthly use and occupancy as a condition to the continuation of the Yellowstone injunction. This is a reasonable condition and the court orders that such use and occupancy be paid in the amount otherwise reserved as rent in the lease. This shall be paid as rent comes due under the lease. To extent that any regular rent has come due since the Notice of Cure has been served which is currently outstanding as arrears, the court orders that it be paid as accrued use and occupancy no later than 30 days after service of this Order with Notice of entry upon tenant's attorneys.

The landlord also seeks that a bond be posted as a condition to the injunction. It

argues that it should be protected in the event that it suffers financial loss as a result of the injunction, if at the end of the case the tenant loses. The tenant opposes arguing that the payment of rent is sufficient to protect against the potential financial losses.

In this case additional financial loss might result to the landlord in the form of fines against the premises if it turns out that governmental approvals are not forthcoming for the tenant's construction. This financial risk is not otherwise compensable from use and occupancy. It is also not quantified and possibly not even quantifiable at this time. The difficulty in determining the amount of the bond, however, should not leave the landlord unprotected. The court therefore orders that as a condition to the injunction the tenant post a bond in the amount of \$5,000.

The tenant is given 15 days from the date of service of this order upon its attorney to serve and file such bond. In the interim, the temporary restraining order set forth in the January 31, 2007 OSC remains in place.

Miscellaneous

Tenant also seeks ultimate declarations of the parties rights on this OSC. Such declaration cannot be made at this time, but awaits a final determination on the merits of tenant's action for declaratory relief.

Conclusion

In accordance herewith, it is hereby:

ORDERED that plaintiffs motion for a Yellowstone injunction is granted and the period in which plaintiff can cure any defaults under the lease set out in the Notice to Cure is hereby tolled pending final adjudication of this matter; and it is further

ORDERED that the continuance of the Yellowstone injunction is conditioned upon plaintiff paying: [1] prospective monthly use and occupancy to defendant in the amount reserved in the lease and [2] arrears, if any, within 30 days after service of this order with Notice of Entry upon plaintiff's attorneys; and it is further

ORDERED that the continuance of the Yellowstone injunction is conditioned upon plaintiff serving and filing a bond in the amount of \$5,000 within 15 days after service of this order with Notice of Entry upon plaintiff's attorneys; and it is further

ORDERED that plaintiff's motion for declaratory and other relief is denied at this time; and it is further

ORDERED that defendants cross-motion to dismiss is denied; and it is further

ORDERED that plaintiff is directed to serve and file a complaint within 15 days after service of this order with Notice of Entry upon plaintiff's attorneys; and it is further

ORDERED that a preliminary conference is set before this court for June 7, 2007 at 9:30 am; and it is further


ORDERED that an requested relief not otherwise granted herein is denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
April 6, 2007

So Ordered:

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J.G. J.S.C.