

**Havana Cent. NY 3, LLC v Gateway Prods.,
Inc.**

2007 NY Slip Op 31268(U)

May 16, 2007

Supreme Court, New York County

Docket Number: 0601153/2007

Judge: Richard B. Lowe

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

PRESENT: ALICIA LOWE
Justice

PART 89 56

HAWANA CENTRAL NY3

- v -

GATWAY PROMOTIONS INC

INDEX NO. 60153/07
MOTION DATE 4/26/07
MOTION SEQ. NO. 001
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

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

FILED

MAY 22 2007

NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 5/16/07

RICHARD P. LOWE JR

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

-----x

HAVANA CENTRAL NY 3, LLC

Index No: 601153/07

Plaintiff

-against-

DECISION AND ORDER

GATEWAY PRODUCTIONS, INC and
NORTH FORK BANK,

Defendants

-----x

RICHARD B. LOWE III, J:

FILED
MAY 22 2007
NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff Havana Central NY 3, LLC (“Havana Central”) brings the instant action against Gateway Productions, Inc (“Gateway”) and North Fork Bank (“North Fork”) (collectively, “the Defendants”) for breach of warranty, fraudulent concealment, a declaratory judgment, and for injunctive relief. ¹ In the instant Order to Show Cause, Havana Central moves this Court pursuant to CPLR 6301, *et seq* and NY UCC § 5-109(b) enjoining North Fork from paying out on a Letter of Credit in favor of Gateway and, in turn, enjoining Gateway from drawing down on the same.

¹ Havana Central has yct to serve the complaint on the Defendants.

BACKGROUND

Havana Central is a limited-liability company organized under New York law with its place of business in New York County. It is a small, upscale restaurant chain owned by Jeremy Merrin (“Merrin”).

Gateway is a New York corporation with its principal place of business in New York. Kirk Michel (“Michel”) and Katie Gardner (“Gardner”) are Gateway’s shareholders.

Until February 1, 2006, Gateway owned a restaurant known as the “West End.” It is located at 2509-11 Broadway, New York, New York, a building owned by Columbia University. On the aforementioned date, Havana Central and Gateway entered into an asset-purchase agreement whereas the former agreed to purchase West End’s assets from the latter.

Pursuant to the agreement, Havana Central agreed to pay Gateway \$1.5 million for the assets. Upon signing the agreement, Havana Central would place \$100,000.00 in escrow for delivery to Gateway at closing, with an additional \$80,000.00 payment at that time. Furthermore, Havana would execute, at closing, a \$600,000.00 promissory note that bore a 4.5% interest rate. The Note was to be paid in eight equal, quarterly installments of \$75,000.00 plus accrued interest commencing in April 2007.

The Note defines “Event of Default” to include failure by Havana Central to make a principal or interest payment after the expiration of five (5) business days from the date Gateway provides notice. Upon the default declaration, Gateway can declare the entire principal and unpaid interest balance immediately due and payable.

Havana Central's obligations under the promissory note are secured by a standby letter of credit issued by North Fork. North Fork is a wholly-owned subsidiary of Capital One Financial Corporation. It is organized under New York law, and has its banking business here.

The first payment on the promissory note came due on April 9, 2007. Havana Central failed to remit payment to Gateway on that date. Gateway notified Havana Central that the latter was in default; Havana Central then submitted payment on April 10, 2007. The payment, however, only included the \$75,000.00 principal; it did not include the accrued interest. Gateway cashed the check on or about April 17, 2007.

On April 18, 2007, Gateway notified Havana that the latter was still in default. Accordingly, Gateway demanded the note's acceleration payment, which equals \$552,453.08. Havana Central submitted a check on April 18, 2007 for \$26,852.04, the amount of interest due on April 9, 2007. Gateway received the check on April 19, 2007, but rejected it because of its aversion that the Note's payment was already accelerated and the proffered check did not satisfy Havana Central's now-current obligation.

On April 18, 2007, Havana Central learned from North Fork that Gateway attempted to draw down on the Letter of Credit. Havana Central, through its counsel, requested North Fork to refuse Gateway's request. North Fork stated that they would not comply with Havana Central's request absent a court order.

Havana Central moved by Order to Show Cause, seeking a preliminary injunction preventing Gateway from drawing down on the Letter of Credit and North Fork from paying on it. It avers that it is entitled to this relief because it tendered the entire amount due for the April 9, 2007 payment. Additionally, it contends that the injunction is warranted based on its

allegation that Gateway made misrepresentations that induced the former to enter into the transaction.

The Instant Order to Show Cause seeks temporary restraints on Gateway and North Fork with respect to the Letter of Credit, pending resolution of the preliminary injunction. The Temporary Restraining Order was put into effect on April 19, 2007.²

DISCUSSION

CPLR 6301 et seq.

A party seeking a preliminary injunction pursuant to CPLR 6301 must show “(1) a likelihood of success on the merits, (2) irreparable injury if provisional relief is not granted, and (3) that the equities are in [its] favor” (*J.A. Preston Corp. v Fabrication Enterprises, Inc.*, 68 NY2d 397, 406 [1986]). The purpose of a motion for a preliminary injunction is to maintain the status quo until the merits of the case are heard and determined. (*Id.*) However, because preliminary injunctions “determine the litigation and give the same relief which is expected to be obtained by the final judgment” (*Xerox Corp. v Neises*, 31 AD2d 195, 197 [1st Dept 1968], quoting 28 NY Jur, *Injunctions* § 19), a preliminary injunction will not be granted without “great caution and only when required by imperative, urgent, or grave necessity, and upon clearest evidence, as where the undisputed facts are such that without an injunction order a trial will be futile.” (*Id.*)

² The Honorable Rolando T. Acosta, Justice of New York State Supreme Court, Civil Branch, put the restraints in place. The instant action and motion were subsequently transferred to this Court because it qualifies as a commercial matter pursuant to Part 202.70(b) of the Uniform Civil Rules of the Supreme and Civil Courts..

A. Likelihood of Success on the Merits

Havana Central's argument for its likely success on the merits is two-fold. First, it avers that its default is only deminimus, and Gateway's acceleration of the note is disingenuous and in bad-faith. Second, it contends that Gateway committed a fraud by allegedly misrepresenting the status of its permits with respect to West End. Each argument will be addressed in turn.

i. Declaration of Default

Where "the language is clear, unequivocal and unambiguous, the contract is to be interpreted by its own language." (*R/S Assocs. v N.Y. Job Dev. Auth.*, 98 NY2d 29, 32 [2002].) "When parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms." (*Id.*)

Here, the asset-purchase provides, in relevant part

. . . Buyer acknowledges that all payments due under the Note shall be made to Seller. . . Any such payment which is not timely made, shall, after failure to cure within five (5) days after written notice of default, entitle Seller to. . . accelerate the Note and draw-down the [Letter of Credit] in full payment of the outstanding balance thereof.

(*Spiegel Aff'd, Ex 1 at page 34, ¶ (b)*)

Furthermore

Seller's right to draw-down the [Letter of Credit]. . . shall be absolute and not subject to abatement, reduction, set-off, defense, counterclaim or recoupment, and will not be affected by reason of any claim that Buyer may have against Seller under this Agreement, or otherwise, for any reason whatsoever.

(*Id, Ex 1 at page B1, ¶ 1*)

The agreement is clear: if Havana Central fails to cure the defect of not making its payment on time within five days of notice, Gateway has the right to accelerate the Note's payment. Here, Havana Central was required to make payment on April 9, 2007; it did not.

Gateway sent the notice of default. By April 14, 2007, five days later, Havana Central had not cured its default.

Havana Central's aversion that its default was "immaterial" because it eventually paid the April 9, 2007-amount due is without legal support. To be sure, Havana Central fails to offer this court any binding legal authority that its default was immaterial and Gateway acted in bad-faith by adhering to the agreement's plain-meaning. Quite the contrary, a court may not generally enjoin the beneficiary of a letter of credit from receiving her/his payment thereunder. (*See, Fertico Belgium, SA v Phosphate Chems Exp Ass'n, Inc*, 100 AD 2d 165 [1st Dept 1984].) However, if there is evidence that fraud was involved, the enforcement of the fraudulent party's rights will be enjoined. (*See, Fifty States Mgt Corp v Pioneer Auto Parks*, 46 NY 2d 573 [1979].)

ii. Fraud

Here, Havana Central contends that Gateway made certain misrepresentations in order to induce it to enter into the asset-purchase agreement. Debra J. Guzov ("Guzov"), Havana Central's counsel in the instant action, attests that

Havana Central learned that a permit authorizing the Restaurant to maintain a 48-seat sidewalk café, which Gateway had represented was properly renewed, had not been renewed, and that due to an intervening change in the law Havana Central could only maintain a 24-seat sidewalk café.

(*Guzov Aff'd at page 2, ¶ 5*)

Havana Central also learned that a number of New York City Building Department violations, which Gateway had represented were removed or addressed prior to closing, had not in fact been removed or addressed.

(*Guzov Aff'd at page 2, ¶ 6*)

In opposition to Guzov's attestation that Gateway committed a fraud because it misrepresented the 48-capacity, it proffers Joseph Spiegel's ("Spiegel") affidavit. Unlike Guzov,

Spiegel has first-hand knowledge of the negotiations regarding the asset-purchase agreement. He attests that

Gateway had a permit issued by the Department of Consumer Affairs, which authorized us to operate a 48-seat sidewalk café for West End. Gateway was able to obtain the permit for 48 seats, because the Community Board which can either support or oppose such a permit, had in the past supported. . .

(*Spiegel Aff'd* at page 2, ¶ 5)

Shortly before the closing, Gateway applied to renew its sidewalk café permit. . . [and] I appeared on behalf of Gateway before Community Board #9M. . . At that hearing, the Community Board. . . stated that Gateway's renewal application had been approved for "a 12 foot café, but that it was grandfathered." He further stated that: "When the new folks [Havana Central] come, we will want to conform to our 8 foot policy." A copy of the minutes. . . is attached as Exhibit 8 to the Michael Affidavit.

(*Id.*, ¶ 7)

. . . the grandfathering of the sidewalk café permit applied only to Gateway. . . I communicated to Jeremy Merrin of Havana Central what had transpired at the hearing. He seemed unconcerned about the whole matter.

(*Id* at page 3, ¶ 8-9)

I learned subsequently that when Havana Central went before the Community Board about one month later on May 4, 2006, for approval of its own application to operate a sidewalk café. . . the Community Board. . . supported the application for renewal of the sidewalk café, provided it extends no further than 8-feet from the building line. A copy. . . of the minutes is attached as Exhibit 9 to the Michel Affidavit.

(*Id.*, ¶ 11)

Spiegel's attestations, with the accompanying documentary evidence, indicate that Merrin was aware that the 12-foot extension, which would allow a 48-person dining area, was applicable only to Gateway during its tenure as West End's owner. Indeed, this communication to Merrin prior to the asset-purchase agreement's closing is indicative that a fraud was not committed against Havana Central with respect to West End's seating capacity. Furthermore, the

asset-purchase agreement does not contain a factual representation that Havana Central will be able to maintain West End's 48-seat capability.

With respect to Guzov's attestation that Gateway falsely represented that any building-code violations were removed prior to the closing, schedule 3.21 of the asset-purchase agreement provides that

A search in the New York State department of buildings records dated December 14, 2005 revealed a number of outstanding violations. The Seller believes that these violations have been addressed with the acquisition of a public assembly permit and temporary certificate of occupancy.

(Michel Aff'd, Ex 1)

Furthermore, Michel attests that

Gateway, had, however, been advised by Columbia University, the landlord for the building occupied by the restaurant, that the building code violations had been addressed with the acquisition of a public assembly permit and a temporary certificate. This was all the information that Gateway could and did provide to Havana Central with respect to these violations, which was and is consistent with Gateway's representations in the Asset Purchase Agreement.

(Id, at page 13, ¶ 57)

The asset-purchase agreement's language, along with Michel's attestation, do not indicate that Gateway falsely promised that violations were definitively removed. The contract clearly states that Gateway *believed* that the violations were cured. Michel's attestation provides the basis for Gateway's belief, which is premised upon the representations made to it by Columbia University, the building's owner.

Accordingly, Havana Central has not demonstrated that it would likely succeed on the merits based upon the agreement. To be sure, Gateway has a contractual right to accelerate the note's payment when Havana Central is in default. Havana Central was in default, and its

contention that its failure to submit payment on time was de minimus and therefore should not be held against it, is without merit. Furthermore, Havana Central fails to show “upon the clearest evidence possible”, at this juncture, that Gateway committed a fraud upon it in the asset-purchase agreement’s execution. (*See, Xerox, supra*)

B. Irreparable Harm

In order to authorize the issuance of a preliminary injunction, the “complainant must allege appropriate and sufficient facts to show that plaintiff will suffer imminent and irreparable injury unless injunction is granted, that plaintiff will suffer substantial damages unless an injunction is granted, and that plaintiff has no adequate remedy at law.” (*Mancias v City of Buffalo*, 39 Misc 2d 389 [1963].)

Guzov attests that irreparable harm exists because

Gateway, upon information and belief, has no significant assets and substantial liabilities. Thus any proceeds it receives from the Letter of Credit will, on information and belief, be immediately paid to creditors, leaving no assets available on which Havana Central can levy.

(*Guzov Aff’d at page 6, ¶ 19*)

Havana Central’s contention that it will be irreparably harmed absent injunctive relief because Gateway will be unable to compensate it should the former prevail is unsubstantiated. Indeed, Guzov attests “upon information and belief”, and fails to allege facts to support its assertion that Gateway will have insufficient funds to satisfy a potential judgment in Havana Central’s favor. (*See, Mancias, supra*). Havana Central fails to satisfy this second part of the three-prong test.

C. Balancing of the Equities

“In exercise of its discretion and in balancing equities, [a] court would have to weigh relative hardships that might be imposed on each of the parties by issuance or denial of

preliminary injunction. . ." (*Western New York Motor Lines, Inc v Rochester-Genesee Regional Transp. Authority*, 72 Misc 2d 712 [1973].)

Here, Havana Central is ready, willing, and able to submit the April 9, 2007 payment to Gateway. Gateway can indeed receive what is contractually owed to it now, which would spare Havana Central from having to remit the entire note's payment at this time. However, it cannot escape from this Court's analysis that these are sophisticated entities who entered into an agreement completely aware of their obligations contained therein. Sympathy for Havana Central because it is now required to pay the entire note because of its default cannot undermine the stability of its contractual obligations. (*See, First National Stores v Yellowstone Shopping Center*, 21 NY 2d 630 [1968].) Viewed in its entirety, the balance of the equities tip in Gateway's favor.

Havana Central fails to demonstrate that it will likely succeed on the merits, that it would be irreparably harmed within the injunction's imposition, and that the balance of the equities are in its favor. Accordingly, it is not entitled to a preliminary injunction under CPLR 6301 *et seq.*

N.Y. U.C.C. § 5-109(b)

In the alternative, Havana Central moves under NY Uniform Commercial Code § 5-109(b). The code provides that a court may enjoin a letter of credit's issuer from honoring a presentation based on fraud if the court finds that

2. a beneficiary, issuer, or nominated person who may be adversely affected is adequately protected against loss that it may suffer because relief is granted;
3. all of the conditions to entitle a person to the relief under the law of this state have been met; and

4. on the basis of the information submitted to the court, the applicant is more likely than not to succeed under its claim of . . .material fraud. . .

Subsections (3) and (4) set forth specific requirements that must be met before a court can grant an injunction thereunder. Subsection (3) requires that all the conditions under New York for a preliminary injunction's issuance, i.e., CPLR Article 63, must be met. Subsection (4) requires that the movant sufficiently demonstrate that it is more likely than not to succeed on its merits that a fraud was perpetrated on it.

Here, Havana Central fails to satisfy Subsection (3) because it does not satisfy all of the three-prong test's elements as articulated under CPLR 6301 *et seq* for a preliminary injunction, as discussed, *supra*. Similarly, it does not satisfy Subsection (4). Havana Central has not, at this stage, demonstrated with clear evidence that Gateway made fraudulent representations to it with respect to the asset sale. Because of the lack of such evidence, this Court cannot state that it is more likely than not that Havana Central will succeed in its underlying claim of fraud.

CONCLUSION

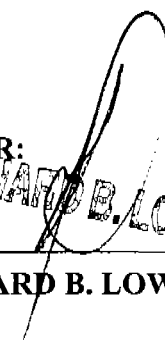
For the foregoing reasons, it is hereby

ORDERED that Havana Central's Order to Show Cause for a preliminary injunction is denied;
and it is further

ORDERED that the temporary restraints put into effect on April 19, 2007 are hereby removed.

This shall constitute this Court's decision and order.

Dated: May 16, 2007

ENTER:

RICHARD B. LOWE, III

RICHARD B. LOWE, III, J.S.C.

FILED
MAY 22 2007
NEW YORK
COUNTY CLERK'S OFFICE