

Cipriani 200, LLC v 200 Fifth Ave. Owner, LLC

2007 NY Slip Op 33570(U)

October 31, 2007

Supreme Court, New York County

Docket Number: 0602657/2007

Judge: Jane S. Solomon

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

PRESENT: SOLOMON
Justice

PART 53

Cipriani 200, LLC

INDEX NO.

602657/07

MOTION DATE

200 Fifth Avenue

MOTION SEQ. NO.

2

Owner LLC

MOTION CAL. NO.

The following papers, numbered 1 to 9 were read on this motion to/for preliminary injunction

PAPERS NUMBERED

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

1-4

Answering Affidavits -- Exhibits

5-7

Replying Affidavits

8-9

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance
with the annexed memorandum decision
and order.

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

FILED

NOV 02 2007

NEW YORK
COUNTY CLERKS OFFICE

Dated: 10/31/07

JANE S. SOLOMON ^{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 55

-----X
CIPRIANI 200, LLC,

Plaintiff,

-against-

200 FIFTH AVENUE OWNER,

Defendant.

INDEX NO. 602657/2007

DECISION and ORDER

-----X
JANE S. SOLOMON, J.

Plaintiff Cipriani 200, LLC ("Cipriani") moves by order to show cause for a preliminary injunction barring defendant 200 Fifth Avenue Owner LLC ("Owner") from drawing down on a letter of credit, no. 1136552080, issued by Commerce Bank, N.A. ("Commerce Bank") in the amount of \$200,000 (the "L/C") pending the resolution of the disputes between Cipriani and Owner concerning the current lease between them ("Lease"), pursuant to which, Cipriani, as tenant, occupies certain ground floor, mezzanine, and basement space in the building located at 200 Fifth Avenue, in Manhattan, and enjoining Commerce Bank from paying out any sums from the L/C upon presentment of the L/C by Owner to Commerce Bank. Owner opposes; Commerce Bank appeared at oral argument by counsel, but submitted no papers.

On August 14, 2007, Cipriani was notified by Commerce Bank that Owner had presented one or more sight drafts to draw down the L/C. The L/C provides that:

[d]rawings under this Letter of Credit shall be by one or more sight drafts ... accompanied by ... a statement by you ... certifying that:

"The amount of this drawing represents an application of the security deposit in accordance with the [Lease] ..."

The relevant section of the Lease provides that:

[i]t is agreed that in the event Tenant defaults in respect of any of the terms, provisions and conditions of this lease, including, but not limited to, the payment of fixed annual rent and additional rent, Landlord may use, apply or retain the whole or any part of the security so deposited to the extent required for the payment of any fixed annual rent and additional rent or any other sum as to which Tenant is in default or for any sum which Landlord may expend ... by reason of Tenant's default in respect of any of the terms ... of this lease ...

Because Commerce Bank did not tell Cipriani what documents Owner had presented, Cipriani's initial papers on this motion could only speculate as to Owner's basis for presenting the L/C and argue that Cipriani had not defaulted on the Lease in any respect. Kevin Fallon, the vice president of the company that manages the Building for Owner, now states in his affidavit that the basis for Owner's attempt to draw down the entire amount of the L/C was that Cipriani was, at that time, in default in paying additional rent, in the amount of \$6,137.42.

As a general rule, the issuer's obligation under a letter of credit is completely independent of disputes concerning the underlying contract between the applicant, at whose request the letter is issued, here Cipriani, and the beneficiary, who under the terms of the letter is entitled to have its presentation honored, here Owner. See e.g. Nissho Iwai Europe PLC v. Korea First Bank, 99 N.Y.2d 115 (2002); 410 Sixth Ave.

[* 4]

Foods v. 410 Sixth Ave., 197 A.D.2d 435 (1st Dep't 1993); Chiat/Day v. Kalimian, 105 A.D.2d 94 (1st Dep't 1984). However, it has long been the law that active intentional fraud in the underlying transaction, by a beneficiary of a letter of credit, justifies an injunction barring the honoring of that letter of credit (United Bank Ltd. v. Cambridge Sporting Goods Corp., 41 N.Y.2d 254 [1976], citing Sztejn v. Schroder Banking Corp., 177 Misc. 719 [Sup. Ct., N.Y. Co. 1941]), and that fraud in the presentment, that is, a submission by the beneficiary of forged or false documents, is also a sufficient basis for enjoining the honoring of a letter of credit. Hyosung America, Ltd. v. Sumagh Textile Co., 25 F. Supp 2d 376 (S.D.N.Y. 1998), aff'd 189 F.3d 461 (2d Cir. 1999); see also Titleserv, Inc. v. Zenobio, 210 A.D.2d 311 (2nd Dep't 1994); 410 Sixth Ave. Foods v. 410 Sixth Ave., 197 A.D.2d 435, supra.

Currently, Uniform Commercial Code ("UCC") § 5-109(b) provides, in relevant part:

[i]f an applicant claims that a required document is forged or materially fraudulent or that honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant, a court of competent jurisdiction may temporarily or permanently enjoin the issuer from honoring the presentation or grant similar relief against ... other persons ...

Here, inasmuch as Owner was required by the L/C to certify that the draw was in accordance with the Lease, and inasmuch as the Lease provides that the amount drawn down may not exceed the amount by which Cipriani is in default, any

certification that Owner may have provided to Commerce Bank to support drawing down the entire \$200,000, because of a default in the amount of \$6,137.42, would have been materially fraudulent. Accordingly, Cipriani has shown that it is likely to prevail on the merits, and that the equities tip in its favor. In addition, Cipriani has shown that it will suffer irreparable injury absent injunctive relief. The Lease provides that, if Owner draws down a portion or all of the L/C, Cipriani must restore that amount so as at all times to maintain a letter of credit in the amount of \$200,000. The threat to Cipriani's creditworthiness and goodwill suffices to establish irreparable injury. See Four Times Sq. Assoc., L.L.C. v. Cigna Investments, 306 A.D.2d 4 (1st Dep't 2003) (enjoining invasion of lockbox account on claim of default).

Accordingly, Cipriani's motion for a preliminary injunction pursuant to CPLR § 6311 is granted, and it hereby is

ORDERED that Owner, its successors and assigns, directors, officers, agents, servants, attorneys, employees and all others acting or purporting to act on behalf of any of them, are enjoined from presenting a sight draft or such other documentation to Commerce bank that would permit it to draw down on the L/C, pending resolution of the disputes between Cipriani and Owner concerning the Lease, provided that, however, if it is finally determined that Cipriani was not entitled to an injunction, Cipriani will pay to Owner all damages and costs which may be sustained by reason of this injunction; and it

further is

ORDERED that Commerce Bank, it successors and assigns, directors, officers, agents, servants, attorneys, employees and all others acting or purporting to act on behalf of any of them, are enjoined from making any payments to Owner upon presentment of any sight draft or other documentation that would permit it to draw down on the L/C, pending further court order.

Dated: October 31, 2007

ENTER:



J.S.C.

FILED TO BE RECORDED

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