

Andejo Corporation v South Street Seaport Limited Partnership

2007 NY Slip Op 34297(U)

January 18, 2007

Supreme Court, New York County

Docket Number: 0603707/2004

Judge: Marcy S. Friedman

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

PRESENT: MARCY S. FRIEDMAN
Justice

PART 57

Andeja Corp.
- v -
Smith Street Leasing

INDEX NO. 603707/04
MOTION DATE _____
MOTION SEQ. NO. 012
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for enforce u + o order

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... Cross-Motion
Answering Affidavits — Exhibits _____
PAPERS NUMBERED 1, 1a, 2
Replying Affidavits to review Memo of Law 3, Supp Memos 1, 2, 3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is granted as per accompanying
decur/order dated 1/18/07. The cross-motion
was previously decided pursuant to decision on
the record on 9/28/06, so ordered on 10/3/06.

FILED
JAN 25 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/18/07 Marcy S. Friedman
J.S.C.

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

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 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x

ANDEJO CORPORATION, et al.,

Plaintiffs,

- against -

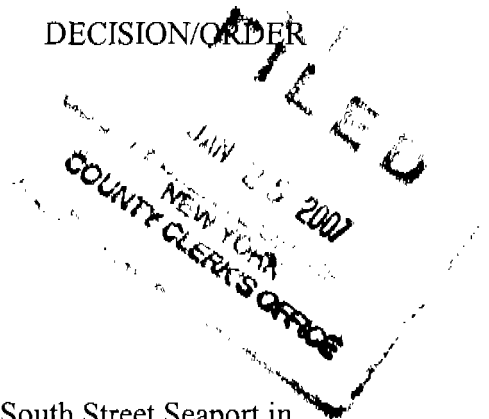
SOUTH STREET SEAPORT LIMITED
PARTNERSHIP, et al.,

Defendants.

_____ x

Index No.: 603707/04

DECISION/ORDER



In this action, plaintiffs, who are tenants of Pier 17 at the South Street Seaport in Manhattan, seek damages against defendant South Street Seaport Limited Partnership, the net lessee of the premises, on the ground that defendant breached its fiduciary duty to plaintiffs by failing to market and promote the Seaport as required by plaintiffs' leases and the by laws of the South Street Seaport Merchant's Association. Defendant interposed counterclaims for ejectment. Defendants move for an order declaring plaintiffs in default of their obligations to pay use and occupancy during the pendency of this action, pursuant to an order of this court dated May 5, 2006. Plaintiffs cross-move for renewal and reconsideration of the May 5, 2006 order. By decision on the record on September 28, 2006, the transcript of which was so ordered on October 3, 2006 ("October 3, 2006 order"), this court held that plaintiffs have failed to demonstrate that use and occupancy is not owed as claimed by defendant or to raise a triable issue of fact in this regard. The court reserved decision on defendant's motion, pending supplemental briefing on the proper remedy for plaintiffs' failure to pay use and occupancy. The

October 3, 2006 order also denied plaintiffs' cross-motion for renewal with respect to the May 5, 2006 order.¹

The court now holds that defendant is entitled to a separate money judgment against each plaintiff who failed to pay use and occupancy pursuant to the May 5, 2006 order. Plaintiffs fail to demonstrate that defendant is financially unstable or may be unable to satisfy a judgment in plaintiffs' favor in the event they prevail on their damage claims in this action. Accordingly, a stay of entry of the money judgments pending determination of plaintiffs' damage claims is not warranted. (See Stigwood Org. v Devon Co., 44 NY2d 922 [1978]; Alec Peters Assocs. v Roberts, 249 AD2d 219 [1st Dept 1998].) Nor does plaintiff establish any basis, either legal or factual, for staying entry of the judgments pending discovery as to defendant's financial condition. Plaintiffs' alternative argument that entry of the judgments should be stayed pending determination of the appeal from the May 5, 2006 order is moot, the order having been affirmed by decision of the Appellate Division (2006 NY Slip Op 09055, 2006 NY App Div Lexis 14405).

The court further holds that defendant is entitled to a judgment of ejectment against each plaintiff against whom a money judgment is entered, with a stay of execution of the judgment of ejectment on condition that such plaintiff 1) pays the money judgment within 30 days after service of a copy of the money judgment and judgment of ejection with notice of entry; and 2) pays future monthly use and occupancy, pursuant to the terms of the May 5, 2006 order. In the event of any default in payment, defendant may apply to this court, on five days written notice to plaintiff, plus five days for mailing, to vacate the stay of execution of the judgment of ejectment.

¹In addition, the October 3, 2006 order denied plaintiffs' motion to dismiss defendant's ejectment counterclaims.

(See Calvert v Le Tam Realty Corp., 118 AD2d 426 [1st Dept 1986]; 313 W. 57 Rest. Corp. v 313 W. 57th Assocs., 186 AD2d 466 [1st Dept 1992], lv dismissed 83 NY2d 952 [1994].)

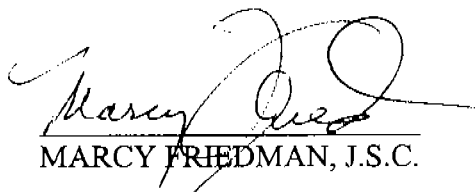
Finally, plaintiffs Ry-Allie Candy Corp. (“Ry-Allie”) and Roslu Corp. (“Roslu”) appear to contend that the May 5, 2006 order should not have awarded use and occupancy against them at the lease base rent rate because their tenancies have now expired, and that the order did not treat them consistently with Broadway Beat and a View of the World, for which the court ordered hearings to set the use and occupancy amount. The court finds that Ry-Allie and Roslu are not in the same position as Broadway Beat and a View of the World because the latter two tenants stipulated to warrants of eviction and defendant’s claim against them for past use and occupancy required a final resolution. The tenancies of Ry-Allie and Roslu have expired but they have not agreed to vacate and are remaining in possession while litigating defendant’s ejection counterclaims. The award against them is thus an interim award in order to maintain the status quo.² As the Appellate Division affirmance of the May 5, 2006 order held, it is proper to order a hearing only as to holdover tenants for which the determination of use and occupancy would be final, not interim, and that “[t]o the extent the base rents do not represent fair valuations of current market rates, tenants’ remedy is a speedy trial.” (2006 NY App Div Lexis 14405, **2. See also 64B Venture v American Realty Co., 179 AD2d 374 [1st Dept 1992], lv denied 79 NY2d 757 [upholding award of use and occupancy at rate under expired lease, pending final determination after hearing of amount to be set for use and occupancy during period of stay of eviction].)

²In any event, the expiration of the tenancies of Ry-Allie and Roslu would not affect the provision of the May 5, 2006 order directing them to pay use and occupancy at the base rent rate for the period before the expiration of the tenancies.

Settle order granting defendant's motion. The order should award defendant South Street Seaport Limited Partnership a judgment of ejectment against each plaintiff against whom a money judgment is entered, with a stay of execution of the judgment of ejectment on condition that such plaintiff 1) pays the money judgment within 30 days after service of a copy of the money judgment and judgment of ejection with notice of entry; and 2) pays future monthly use and occupancy, pursuant to the terms of the May 5, 2006 order. The order should provide that in the event of any default in payment, defendant may apply to this court, on five days written notice to plaintiff, plus five days for mailing, to vacate the stay of execution of the judgment of ejectment. A copy of the breakdown of the amount of each money judgment should be annexed to the proposed order.

This constitutes the decision of the court.

Dated: New York, New York
January 18, 2007


MARCY FRIEDMAN, J.S.C.

FILED
JAN 25 2007
NEW YORK
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