

**1701 Rest. on Second, Inc. v Armato Props., Inc.**

2007 NY Slip Op 34511(U)

January 3, 2007

Supreme Court, New York County

Docket Number: 110983/2006

Judge: Karen S. Smith

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This opinion is uncorrected and not selected for official publication.

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK - I.A.S. PART 44

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1701 RESTAURANT ON SECOND, INC. d/b/a  
PAT O'BRIEN'S,

Plaintiff,

Index No. 110983/2006

-against-

ARMATO PROPERTIES, INC.

**FILED** Decision and Order

JAN 10 2007

NEW YORK  
COUNTY CLERK'S OFFICE  
Defendant

-----X  
HON. KAREN S. SMITH

Plaintiff's application for a Yellowstone Injunction enjoining and restraining defendant landlord from (1) terminating or cancelling plaintiff tenant's lease based upon the July 21, 2006 five day Notice of Default (hereinafter "Notice"), (2) interfering with Plaintiff/tenant's right of possession of the premises, (3) commencing a summary holdover proceeding to recover possession of the premises based on the defaults alleged in the Notice, (4) commencing any action to declare plaintiff/tenant's leasehold interests in the premises cancelled or terminated, (5) terminating plaintiff/tenant's leasehold interests based on the Notice, and (6) terminating plaintiff/tenant's use and right of possession of the premises, is granted. Defendant/landlord's cross-motion to dismiss the instant application is denied.

The plaintiff is a local bar which serves drinks primarily to a young clientele and which is located on the ground floor of a small residential building on the upper east side of Manhattan. The building is owned by the respondent, which is made up of two sisters who inherited the building from their father. The defendant's primary complaint concerning the plaintiff's operation of the bar is that it is noisy and dirty and interferes with the enjoyment by the residential tenants in the building. Defendant also complains about (1) conditions in the premises which have caused damage to portions of the basement, (2) plaintiff's violations of rules and regulations of the City of New York and the New York State Liquor Authority, and (3) plaintiff's failure to obtain the required insurance for the premises - all violations of provisions of the lease.

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There is no dispute between the parties that (1) plaintiff holds a commercial lease for the premises, (2) received a Notice of default for the premises, and (3) applied for the instant injunctive relief prior to the termination of the lease - three out of the four elements required to obtain a Yellowstone Injunction (*Zona, Inc. V. Soho Centrale, LLC*, 270 AD2d 12, 13 [1<sup>st</sup> Dept. 2000]). The dispute between the parties is whether plaintiff meets the fourth element necessary to obtain the requested relief - whether plaintiff is prepared and maintains the ability to cure the alleged defaults by any means short of vacating the premises.

The court held hearings on August 21, 25, 28 and on October 11 and 12, 2006 at which time the parties presented evidence. At the hearings it became clear that plaintiff did possess the requisite insurance for the premises but had obtained it later than requested and had failed to provide defendant with proof that plaintiff had obtained the requisite policy. The evidence presented also showed that while there may have been a few occasions when the plaintiff allowed some garbage to accumulate in the area designated for garbage and may have allowed cigarette butts from the patrons to remain on the area in front of the premises for a short period of time, in general, plaintiff had collected and disposed of the garbage as required by the lease and had cleaned up the affected areas as well. Certainly plaintiff expressed a willingness and ability to correct such problems if they occur in the future and further pointed out that there had not been any violations cited for such conditions by the municipal authorities. As for the complaint of noise, particularly noise from the backroom of the bar where much of the noise and vibrations seem to emanating, plaintiff states that it soundproofed the room soon after the Notice was served. The problem in this regard, is that there appears to have been promises by the tenant to make such remedial repairs in the past, but had failed to do so. The video made by the sisters of the noise in front of the bar on two separate occasions, was insufficient to support defendant's claims that the noise was beyond the acceptable decimal levels for this type of establishment. Nor did defendant call an expert witness to testify as to these matters. While the court credits the testimony of the residential tenant who resides immediately above the bar that she has been disturbed on occasion by noise and smoke from the bar and area around the bar, her testimony alone was insufficient to support the noise claims in the Notice. As for the claims of damages to the premises by operation of the bar, plaintiff demonstrated that it had repaired the leak from the

sinks by the bar which had caused some water damage and further stated that it was prepared to repair or cause to be repaired any water damage in the basement in the non demised area which can be attributed to any damage emanating from the demised portion of the premises.

The court rejects defendant's remaining claim in the Notice, that plaintiff is subject to eviction for having failed to comply with all laws and regulations of the City and State of New York in that plaintiff had received a few violations from the State Liquor Authority for selling alcohol to minors and for selling liquor at a minimal price for a set period of time. The lease provision itself simply requires all such violations be paid for by the tenant. The evidence presented at trial showed that all such violations have been handled by private counsel hired by plaintiff and were either dismissed or a fine will be imposed on a remaining pending matter, which will be paid by plaintiff. In addition, plaintiff presented evidence that it has purchased equipment and hired a bouncer to check on its patrons' identification documents. The consent decree entered into by with the City of New York, arising out of a nuisance action brought by the City against plaintiff for selling to under age patrons, in which plaintiff agreed to be permanently enjoined from violating any rules or regulations in the future, has yet to be violated. While there is a pending State Liquor Authority complaint pending concerning plaintiff's sale of liquor at a minimal price for a set period of time, there has been no finding as of yet in this matter.

The court is not unsympathetic to the concerns of the defendant/landlord in this action regarding the operation of this bar in a residential building. The growing "alcoholic" culture among many young people, a subject of nightly news programs, is often accompanied by less than responsible behavior. The lease for the premises, however, permits use of the premises as a bar and restaurant. While plaintiff concedes that it is currently operating the premises solely as a bar, there is nothing in the lease preventing such limited use. With such use, comes noise, side walk smoking and other behaviors which may be in direct conflict with the needs and desires of residential tenants. Such a conflict, however, cannot be resolved by evicting the businesses which cater to such clientele, absent a clear showing of lease violations for which the business is unwilling or unable to cure. Such a showing was not made in the instant case, the court having found, as stated above, either that the violations did not in fact exist at the time the Notice of Default was served, or that plaintiff has taken all steps necessary to cure the listed violations.

For the above stated reasons, the court grants plaintiff's request for a preliminary injunction. This constitutes the decision and order of the court.

Dated: January 3, 2007  
New York, New York

  
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KAREN S. SMITH, J.C.C.

**FILED**  
JAN 10 2007  
NEW YORK  
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