

La Lanterna, Inc v Fareri Enters., Inc.

2007 NY Slip Op 34556(U)

January 30, 2007

Supreme Court, Westchester County

Docket Number: 18680/05

Judge: Kenneth W. Rudolph

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

FILED AND ENTERED ON 2-7 2007 WESTCHESTER COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK COMMERCIAL DIVISION, WESTCHESTER COUNTY

Present: HON. KENNETH W. RUDOLPH Justice.

FILED FEB 1 - 2007 TIMOTHY G. BOMI COUNTY CLERK COUNTY OF WESTCHESTER

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LA LANTERNA, INC Plaintiff, : -against- COUNTY OF WESTCHESTER --X

Index No. 18680/05 Motion Date: 11/17/06

DECISION

FARERI ENTERPRISES, INC. Defendant, : -----X

The following papers numbered 1 to 21 were read on these motions.

PAPERS NUMBERED

Table with 2 columns: Paper Description and Page Range. Includes Notice of Motion/Affirmation/Exhibits A-F (1-8), Notice of Cross Motion/Affirmation/Exhibits A-I (9-19), and Reply-Opposition Affidavit/Amended Answer, Plaintiff (20-21).

Upon the foregoing papers, it is ORDERED that this motion by defendant for an order directing vacatur of two Yellowstone injunctions, ordered by the Court on August 29, 2006, and the cross motion of plaintiff for an order denying defendant's motion and vacating the trial readiness order issued by the Court, is decided as follows.

This action emanates from plaintiff's lease from defendant of commercial premises located in the Town of North Castle ("Town").

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Plaintiff commenced this action seeking a declaration that, pursuant to the lease extension agreement between the parties, plaintiff was obligated to pay for the construction of a parking lot and patio on the leased premises, but that the actual construction was to be undertaken by defendant and its predecessor-in-interest SDR IV Realty, Inc.

By decision and order herein dated August 29, 2006, this Court, inter alia, decided as follows:

"Plaintiff has timely moved within the cure period for a Yellowstone injunction to maintain the status quo and to preserve plaintiff's ability to cure a default until after a determination of the merits. Plaintiff has made the requisite showing that it is a commercial tenant which was served with a notice of default and that it is prepared and able to cure the alleged default, should it be established, by means short of vacating the leased premises. See, 225 E. 36th Street Garage Corp. v. 221 E. 36th Street Owners Corp., 211 AD2d 420.

Accordingly, plaintiff's motion for Yellowstone injunction relief is granted; the period within which plaintiff shall cure the potential default alleged in defendant's notice dated May 25, 2006 is hereby tolled pending further order of this Court."

In the instant application, defendant's attorney contends that plaintiff has not denied that plaintiff is incapable of curing the default which is the subject of the foregoing Yellowstone relief: the Town's summons for plaintiff's failure to comply with a 1998 site approval plan for the subject premises, which defendant did not own until 2005. Plaintiff cannot cure its non-compliance with the parties lease extension agreement because the default can only be cured by re-applying to the Town planning board and such re-application is currently impossible, because the defendant/landlord must consent to such application and defendant rightfully refuses to do so consent, citing Times Square Stores Corp. V. Bernice Realty, 107 A.D.2d 677 (2d Dept. 1985).

In opposition, plaintiff's attorney argues that defendant's motion must be deemed one for reargument or renewal pursuant to CPLR 2221. Defendant cites a subsequent, October 2002 site plan obtained by defendant, which expired because defendant and its predecessor failed to construct the parking lot and other improvements on the premises. Plaintiff argues that had defendant complied with the 2002 site plan and not itself violated the lease extension agreement by not performing the construction, the Town would not have issued the subject notice or violation. The grounds for the violation are predicated on defendant's own conduct.

Defendant's motion to vacate the Yellowstone injunction in this action is denied; granting defendant's motion would effectively summarily determine the declaratory judgment issue which can only be resolved by a plenary trial.

Insofar as defendant seeks hereby to vacate the second Yellowstone injunction in the action between the parties in this Court under Index No. 11836/06, defendant's motion is denied.

Plaintiff's cross motion to vacate the Court's trial readiness order of October 11, 2006, is denied. Said order, inter alia, directed plaintiff to file a note of issue and statement of readiness within twenty (20) days thereof. If not subsequently filed, plaintiff is directed to serve and file a note of issue and statement of readiness within ten (10) days hereof and file a copy thereof with the Clerk of the Commercial Division.

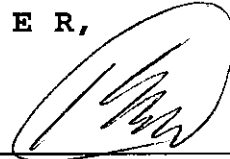
The Yellowstone injunction relief, supra, shall continue, conditioned upon plaintiff's paying all of plaintiff's monetary obligations under the lease as such obligations become due and owing.

In accord with the conference with the Court on October 11, 2006 and the consent of the attorneys for the parties, this action is referred to the Central Calendar Part to be scheduled for trial in due course upon plaintiff's filing the note of issue and statement of readiness.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
January 30, 2007

E N T E R,



HON. KENNETH W. RUDOLPH
Justice of the Supreme Court

TO: LEHRMAN, KRONICK & LEHRMAN, LLP
Attorneys for Plaintiff
199 Main Street - Suite 400
White Plains, New York 10601

LAW OFFICES OF ALAN D. SINGER
Attorneys for Defendant
5 Waller Avenue
White Plains, New York 10601