

248 Buffalo Realty LLC v Roadhouse Foods, Inc.

2008 NY Slip Op 30004(U)

January 2, 2008

Supreme Court, Nassau County

Docket Number: 3084-06/

Judge: Leonard B. Austin

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INDEX
No. 13084-06

**SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 14 NASSAU COUNTY**

PRESENT:

HONORABLE LEONARD B. AUSTIN
Justice

**Motion R/D: 9-20-07
Submission Date: 9-20-07
Motion Sequence No.:002/MOT D**

248 BUFFALO REALTY LLC,

Plaintiff,

**COUNSEL FOR PLAINTIFF
Rosenberg & Fortuna, LLP
666 Old Country Road - Suite 810
Garden City, New York 11530**

- against -

COUNSEL FOR DEFENDANT

**ROADHOUSE FOODS, INC.,
SELECTFORM, INC., ROGER BASILE,
FRANK BASILE and SCOTT
BERGMAN,**

NO APPEARANCE

Defendants.

x

ORDER

The following papers were read on Plaintiff's motion to reargue:

- Notice of Motion dated August 30, 2007;
- Affirmation of David I. Rosenberg, Esq. dated August 30, 2007.

Plaintiff, 248 Buffalo Realty LLC ("Buffalo"), moves to reargue from the order of this Court dated August 13, 2007 to the extent it denied it's motion for leave to

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enter a default judgment against Defendant, Roadhouse Foods, Inc. ("Roadhouse") on the breach of lease causes of action.

BACKGROUND

A. Facts

Buffalo is the owner of 248 Buffalo Avenue, Freeport, New York (the "Premises"), the Premises is a free standing building used primarily as a warehouse.

Defendant, Selectform, Inc. ("Selectform"), leased the Premises from Buffalo. After several amendments, the lease was extended through July 31, 2008.

On July 31, 2004, Selectform, as sublessor, entered into a sublease agreement for the Premises with Roadhouse Foods, Inc. On July 2, 2005, Selectform, as assignor entered into an Assignment and Assumption of Lease ("Assignment") for the Premises with Roadhouse, as assignee. The Assignment canceled the Sublease and assigned Selectform's interest in the lease to Roadhouse. Selectform did not surrender its lease with Buffalo.

In October 2005, Roadhouse defaulted on the lease by failing to pay late charges, taxes and rent. As a result, Buffalo commenced a non-payment proceeding in the Nassau County District Court. Buffalo obtained a money judgment and a judgment of possession. The District Court issued a warrant of eviction. Upon execution of the warrant, Buffalo was restored to possession.

Upon being restored to possession, Buffalo discovered damage to the roof, garage doors and interior of the Premises. Buffalo alleges that Roadhouse violated

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provisions of the lease relating to its use and occupancy of the Premises. The breach of lease causes of action seek to recover the damages sustained by Buffalo as a result of those violations.

Buffalo also alleged that Defendants, Roger Basile, Frank Basile and Scott Bergman, who are alleged to be officers of Roadhouse, removed two air conditioning units from the roof of the Premises.

B. Causes of Action Against Roadhouse

The complaint alleges three causes of action against Roadhouse.

The first cause of action seeks to recover damages arising out of the damage to the garage doors and the failure to comply with the Freeport Village Code.

The second cause of action alleges that Roadhouse violated the following lease provision:

“[[i]f tenant shall default in the observance or performance of any term or covenant on Tenant’s part to be observed or performed under or by virtue of any of the terms or provisions in any article of this lease, then, unless otherwise provided elsewhere in this lease, Owner may immediately or at any time thereafter and without notice perform any obligation of Tenant thereunder. If Owner in connection with the foregoing or in connection with any default by tenant in the covenants to pay rent hereunder, makes any expenditure or incurs any obligations for the payment of money, including but not limited to attorneys fees, in instituting, prosecuting or defending any action or proceedings, then Tenant will reimburse Owner for such sums so paid or obligations incurred with interest and costs. The foregoing expenses incurred by reason of Tenant’s default shall be deemed to be additional rent hereunder.”

Paragraph 3 of the Lease prohibits the tenant from making any alterations to the Premises without Buffalo’s prior written consent. Paragraph 4 of the Lease requires the

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tenant to maintain and repair the Premises. Buffalo seeks to recover the costs and expense incurred in repairing the damage to the roof, interior and garage doors resulting from Roadhouse's actions.

The third cause of action against Roadhouse relates to a liquidated damages provisions of the lease that states:

"Tenant shall pay the Owner as liquidated damages for the failure of Tenant to observe and perform said Tenant's covenants herein contained, any deficiency between the rent hereby reserved and/or covenanted to be paid and the net amount, if any, of the rents collected on account of the subsequent lease or leases of the demised premises for each month of the period which would otherwise have constituted the balance of the term of the lease."

Buffalo also alleges a cause of action against all Defendants seeking to recover damages to the roof and interior resulting from removal of the air conditioners from the roof of the Premises by the individual Defendants.

C. Prior Order

Plaintiff had previously moved for leave to enter a default judgment and to have the matter set down for an assessment of damages against Defendants Roadhouse, Roger Basile and Frank Basile.¹

By order dated August 13, 2007, this Court denied Buffalo's motion for leave to enter a default judgment on any of the causes of action based upon Roadhouse's alleged breach of the lease or violation of the Freeport Village Code.

¹ Selectform, Inc. has appeared in the action. Defendant Scott Bergman does not appear to have been served.

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The Court found that a sublessee could not be the landlord's direct tenant unless the sublessor surrender its lease with the landlord. Since Selectform did not surrender its lease to Buffalo, Roadhouse was not Buffalo's direct tenant. Since Buffalo and Roadhouse were not in privity, Buffalo could not sue Roadhouse for breach of the lease.

With regards to the violations of the Freeport Village Code, the Court found Buffalo had neither pleaded nor proven any violations.

The Court granted Buffalo's motion to the extent it sought to recover for damage to the garage doors and set the matter down for an assessment of damages.²

D. Current Motion

Buffalo now seeks to reargue asserting the Court misapprehended the facts and misapplied the applicable law.

Buffalo asserts that the assignment and assumption agreement provided for Roadhouse to assume all of the Selectform's obligations under the lease and its amendments. By assuming Selectform's obligations under the lease, Roadhouse had a privity relationship with Buffalo. Its argument continues, that since the Court misapprehended the fact and law, upon reconsideration, Buffalo should be granted a default judgment on the causes of action upon which it was previously denied.

²The Court also granted Plaintiff's motion for leave to enter a default judgment against Roger Basile and Frank Basile for the conversion of the air conditions units and damage to the roof resulting from their removal. The Court set the matter down for an assessment of damages against them on those causes of action. That portion of this Court's August 13, 2007 order is not the subject of this motion.

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DISCUSSION

A motion to reargue must be so designated, shall be based upon an assertion that the court overlooked or misapprehended matters of law or fact when it decided the prior motion and shall be made within 30 days of service of the order with notice of entry from which reargument is sought. CPLR 2221 (d).

A motion to reargue is addressed to the discretion of the court and may granted upon a showing that the court overlooked relevant facts or misapplied or misapprehended the applicable law or for some other reason improperly decided the prior motion. Carrillo v. PM Realty Group, 16 A.D.3d 611 (2nd Dept. 2005); Hoey-Kennedy v. Kennedy, 294 A.D.2d 573 (2nd Dept. 2003); and Foley v. Roche, 68 A.D.2d 558 (1st Dept. 1979).

A motion to reargue is based solely upon the papers submitted in connection with the prior motion. New facts may not be submitted or considered by the court. James v. Nestor, 120 A.D.2d 442 (1st Dept. 1986); and Philips v. Village of Oriskany, 57 A.D.2d 110 (4th Dept. 1997).

Buffalo asserts the court misconstrued the facts by failing to take into account Paragraph 3 of the Assignment and Assumption that states::

“3. Assignee (Roadhouse) hereby assumes the full and faithful performance of all obligations (including without limitation payment of all fixed rent, supplemental rent, and other additional rent and charges) of the tenant (Selectform) under the Lease which accrue form (sic) and after the Effective Date.”

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Paragraph 1 of the Assignment and Assumption provides that, as of 12:01 a.m on August 1, 2005, Selectform was transferring its interest as tenant in the Premises to Roadhouse.

Buffalo asserts that the Court misconstrued the law. Buffalo asserts Paragraph 3 of the Assignment and Assumption creates a privity of contract relationship between Buffalo and Roadhouse.

Where an assignee accepts the assignment of the lease and expressly agrees to assume performance of the covenants of the tenant contained in the lease, the assignee is liable to the landlord in privity of estate and privity of contract. Coleridge Hart v. Socony-Vacuum Oil Co. Inc., 291 N.Y. 13 (1943); and 1 N.Y. Landlord Tenant Incl. Summary Proc. §9:34 (4th Ed.).

In Paragraph 3 of the Assignment and Assumption, Roadhouse clearly assumed the obligations of the tenant under the terms of the lease.

Based upon the aforesaid, Buffalo is correct that the Court misconstrued the facts and the law relating to Roadhouse obligations on the lease.

However, the Court did not misconstrue either the law or the facts in connection with the violation of the Freeport Village Code. Where liability is premises upon a violation or statute or ordinance, plaintiff must plead and prove the specific statute or ordinance alleged to have been violated. Alvarado v. New York City Housing Auth., 302 A.D.2d 264 (1st Dept. 2003); and Johnson v. National Railroad Passenger Corp., 83 A.D.2d 916 (1st Dept. 1981). Paragraph 6 of the Lease requires the tenant at the

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tenant's own cost and expense to comply with all municipal codes. However Buffalo has failed to plead or prove which provisions of the Freeport Village Code Roadhouse allegedly violated. This deficiency is not remedied by any of the papers submitted in support of either the original motion or the motion to reargue. The Court did not misconstrue either the law or the facts in this regard and thus, reargument must be denied.

Accordingly, it is,

ORDERED, that Plaintiff's motion to reargue is **granted** to the extent that Plaintiff is **granted** a default judgment against the Defendant Roadhouse on the breach of lease causes of action alleged in the second and third causes of action Roadhouse in the complaint and is, in all other respects, **denied**; and it is further,

ORDERED that the matter is respectfully referred to Special Referee Frank Schellace to hear and determine all issues of damages sustained by Plaintiff consistent with the order of August 13, 2007 and this order; and it is further,

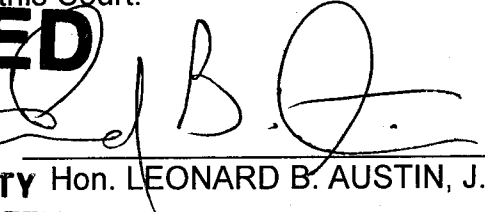
ORDERED, that upon the determination of damages by the Special Referee, the Nassau County Clerk shall enter judgment in accordance with the terms of this order and this Court's order dated August 13, 2007 together with interest as calculated by the Clerk and costs and disbursements as taxed by the Clerk.

This constitutes the decision and order of this Court.

Dated: Mineola, NY
January 2, 2008

ENTERED

JAN 04 2008



NASSAU COUNTY Hon. LEONARD B. AUSTIN, J.S.C.
COUNTY CLERK'S OFFICE