

Bayou Bros. Food Corp. v Gristede' s Operating Corp.

2008 NY Slip Op 31059(U)

April 4, 2008

Supreme Court, Nassau County

Docket Number: 7888-07/

Judge: Leonard B. Austin

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INDEX
No. 17888-07

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 12 NASSAU COUNTY

PRESENT:
HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: 001 - 10-24-07,
002 - 11-29-07

_____ x
BAYOU BROTHERS FOOD CORP.,

Submission Date: 12-13-07
Motion Sequence No.: 001, 002/MOT D

Plaintiff,

COUNSEL FOR PLAINTIFF
Lederman, Abrahams & Lederman, LLP
567 Broadway
Massapequa, New York 11758

- against -

GRISTEDE'S OPERATING
CORP./NAMDOR, INC. and FINKEL,
GOLDSTEIN, ROSENBLOOM & NASH,
LLP, as Escrow Agents,

COUNSEL FOR DEFENDANT
(for Gristede's & Namidor)
Finkel Goldstein Rosenbloom & Nash,
LLP
26 Broadway
New York, New York 10004

Defendants.

_____ x

(for Centre Financial LLP)
Lazer, Aptheker, Rosella & Yedid, P.C.
Melville Law Center
225 Old Country Road
Melville, New York 11747

ORDER

The following papers were read on Plaintiff's motions to consolidate and for summary judgment:

Motion Sequence No. 1

- Order to Show Cause dated October 12, 2007;
- Affidavit of Leonard Mandell sworn to on October 5, 2007;

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In Opposition to Motion Sequence No 1

Affirmation of Zachary Murdock, Esq. dated October 23, 2007;

Reply Motion Sequence No. 1

Affirmation of Robert S. Powers, Esq. dated October 23, 2007;

Motion Sequence No. 2

Notice of Motion dated November 14, 2007; ...
Affidavit of Leonard Mandell sworn to on November 14, 2007;

In Opposition to Motion Sequence No. 2

Affirmation of Kevin J. Nash, Esq. dated December 5, 2007;

Reply Motion Sequence No. 2

Affirmation of Leonard Mandell sworn to on December 12, 2007.

Motion Sequence 1 and 2 have been consolidated for disposition.

In Motion Sequence 1, Plaintiff, Bayou Brothers Food Corp. ("Bayou") move to consolidate this action with an action pending before this Court captioned *Gristede's Operating Corp.,/Namdor, Inc. v. Centre Financial LLC*, Index No. 9371/07 ("Gristede's Action").

In Motion Sequence 2, Bayou moves for summary judgment against the Defendants.

BACKGROUND

Bayou entered into an agreement dated February 22, 2007 ("Agreement") with Defendants, Namdor, Inc. and Gristede's Operating Corp. ("Gristede's"), to purchase the furniture, fixtures, equipment, inventory and appurtenances of a Gristede's

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supermarket located 220 Birch Hill Road, Locust Valley, New York. The sale was contingent upon the landlord, Centre Financial LLC ("Centre"), consenting to the assignment and assumption of the lease. Bayou paid a deposit due on contract in the sum of \$100,000 which was to be held in escrow by Gristede's attorneys, Finkel, Goldstein, Rosenbloom & Nash, LLP pending closing.

Gristede's and Bayou attempted to obtain Centre's consent to the assignment of the lease. By letter dated March 2, 2007, Centre rejected Gristede's proposed assignment of the lease to Bayou.

Gristede's lease with Centre permitted assignment only to a "high quality chain grocery store." The lease also contained a provision which prevented Gristede's from assigning the lease without the consent of the landlord, which consent could not be unreasonably withheld. Centre rejected the proposed assignment to Bayou on the ground that Bayou was not a "high quality chain grocery store".

Gristede's lease contained a provision that, in the event Centre refused to consent to the assignment, Gristede's could submit to arbitration the issue of whether Centre's consent had been unreasonably withheld. After receipt of the letter from Centre withholding consent to the assignment, Gristede's demanded such arbitration.

Centre sent Gristede's a Notice of Default dated May 3, 2007 ("Notice"). The Notice stated that Gristede's was in default on the lease as a result of its failure to pay late charges in connection with the payment of rent due on April 1, 2007, its failure to provide a certified statement in accordance with the lease and its failure to keep the

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store fully stocked and staffed during business hours. The Notice indicated that Centre would utilize all available remedies if these defaults were not cured. The Notice further indicated that Gristede's did not have the right to arbitrate Centre's refusal to consent to the assignment until all of Gristede's defaults had been cured.

Upon receipt of the Notice, Gristede's commenced an action seeking a declaration that it was not in material default on the lease and that Centre did not have the right to terminate the lease. Gristede's moved for a *Yellowstone* injunction in connection therewith. See, First National Stores, Inc. v. Yellowstone Shopping Center, Inc., 21 N.Y.2d 630 (1968).

The motion for a *Yellowstone* injunction was denied. However, Gristede's and Centre consented to mediation before Special Referee Thomas V. Dana. As a result of the mediation, the action was settled. Pursuant to the terms of the settlement Gristede's was to purchase the property from Centre.

After Gristede's had failed to obtain Centre's consent to the assignment of the lease, Bayou commenced this action. In this action, Bayou seeks to cancel the Agreement and to obtain a refund of the deposit paid on contract.

The Agreement provides the Gristede's was to promptly apply to the landlord for the right to assign the lease to Bayou. The Agreement further provides:

"Seller [Gristede's] shall promptly notify Buyer [Bayou] if the Landlord either (a) rejects the proposed assignment or (b) fails to act with respect to the proposed assignment within 30 days of execution of this agreement, in which event Buyer

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may attempt to deal directly with Landlord to obtain necessary consent or else terminate this agreement, in which event the deposit shall be refunded to Buyer and the parties shall have not (*sic*) further rights against one another.”

Bayou asserts that, since Gristede's did not obtain the consent of the landlord to the assignment, it can terminate the Agreement and obtain a refund of the deposit paid on contract.

Gristede's opposes the motion asserting Bayou cannot cancel the agreement until the issue of whether Centre reasonably withheld its consent to the assignment has been decided. After Gristede's received the notice from Centre that consent to the assignment was being denied and Bayou was so advised, Bayou attempted to negotiate directly with Centre to obtain consent to the assignment. Gristede's asserts that Bayou lost its right to unilaterally terminate the Agreement by negotiating directly with the Centre.

DISCUSSION

A. Consolidation

Since the Gristede's action is settled, the motion to consolidate must be denied as moot.

B. Summary Judgment

The Agreement is a contract. A contract will be interpreted in accordance with the intent of the parties as expressed in the language of the agreement. Greenfield v. Philles Records, Inc., 98 N.Y.2d 562 (2002); and Katina, Inc. v. Famiglietti, 306 A.D.2d

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440 (2nd Dept. 2003). The terms of an agreement are to be interpreted in accordance with their plain meaning. Greenfield v. Philles Records, Inc., *supra*; and Tikotzky v. New York City Transit Auth., 286 A.D.2d 493 (2nd Dept. 2001). The court is to give "...practical interpretation to the language employed and the parties' reasonable expectations." Slamow v. Del Col, 174 A.D.2d 725, 726 (2nd Dept. 1991), *aff'd.*, 79 N.Y.2d 1016 (1992).

A clear and complete written agreement should be enforced in accordance with its terms. South Road Assocs., LLC v. International Business Machines Corp., 4 N.Y.3d 272 (2005); and Greenfield v. Philles Records, Inc., *supra*; and W.W.W. Assocs. v. Giancontieri, 77 N.Y.2d 157 (1990).

The question of whether an agreement is ambiguous is a question of law to be determined by the Court. Innophos, Inc. v. Rhodai, S.A., 10 N.Y.3d 25 (2008); and W.W.W. Assocs. v. Giancontieri, *supra*; and JJFN Holdings, Inc. v. Monarch Investment Properties, Inc., 289 A.D.2d 528 (2nd Dept. 2001).

Ambiguity exists where the terms of the agreement are susceptible to two reasonable interpretations. Uribe v. Merchants Bank of New York, 92 N.Y.2d 336 (1998); and Around the Clock Delicatessen, Inc. v. Larkin, 232 A.D.2d 514 (2nd Dept. 1996). Ambiguity does not exist simply because the parties urge different interpretations of its terms. Bethlehem Steel Co. v. Turner Construction Co., 2 N.Y.2d 456 (1957); and Elletson v. Bonded Insulation Co., Inc., 272 A.D.2d 825 (3rd Dept. 2000).

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Parol evidence will not be considered in interpreting a contract unless the contract is ambiguous. South Road Assocs., LLC v. IBM Corp., 4 N.Y.2d 272 (2005); and 767 Third Avenue, LLC v. Orix Capital Markets, LLC, 26 A.D.3d 216 (1st Dept. 2006).

The court may not add or delete provisions of an agreement under the guise of interpretation nor may the Court interpret the language of an agreement in such a way as would be contrary to the intent of the parties. Petracca v. Petracca, 302 A.D.2d 576 (2nd Dept. 2003); and Tikotzky v. New York City Transit Auth., *supra*. The court should not interpret an agreement to impliedly contain provisions that are not specifically stated. Vermont Teddy Bear Co., Inc. v. 538 Madison Realty Co., 1 N.Y.3d 470 (2004).

The Agreement is not ambiguous. The Agreement provides that in the event the landlord's consent to the assignment is not obtained, Bayou can cancel the Agreement and obtain a refund of the deposit paid on contract. The Agreement does not incorporate either directly or by reference the provisions of Gristede's lease which granted Gristede's the right to arbitrate the issue of whether the landlord's consent to the assignment was unreasonably withheld. The Agreement does not make Bayou's right to terminate the Agreement contingent upon whether the landlord reasonably or unreasonably withheld its consent to the assignment or whether the lease provides Gristede's with a method for obtaining the landlord's consent should the landlord unreasonably withhold its consent to the assignment. The Agreement gives Bayou the right to terminate if the landlord refuses to consent to the assignment.

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Gristede's argument that Bayou's entering into direct negotiations with the landlord resulted in Bayou waiving or forfeiting its right to terminate is without merit. Even with direct negotiations, Bayou might not be able to obtain the landlord's consent.

The party seeking summary judgment must establish an entitlement to judgment as a matter of law. Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986); and Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

Once the party seeking summary judgment makes a *prima facie* showing of entitlement to judgment as a matter of law, the party opposing the motion must come forward with proof in evidentiary form to establish the existence of triable issues of fact or must demonstrate an acceptable excuse for its failure to do so. *Id.*; Davenport v. County of Nassau, 279 A.D.2d 497 (2nd Dept. 2001); and Bras v. Atlas Construction Corp., 166 A.D.2d 401 (2nd Dept. 1991).

Bayou has established a *prima facie* entitlement to judgment as a matter of law. Gristede's has not established the existence of any triable issues of fact or an acceptable excuse for its failure to do so. Summary judgement is appropriate.

Accordingly, it is,

ORDERED, that Bayou's motion to consolidate the Gristede's Action and this action is **denied** as moot; and it is further,

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ORDERED, that Bayou's motion for summary judgment is **granted**. Finkel, Goldstein, Rosenbloom & Nash, LLP, as escrow agents are directed to pay Bayou within ten days of service of the copy of this order with notice of entry the sum of \$100,000 representing the deposit paid on contract; and it is further,

ORDERED, that in the event Finkel, Goldstein, Rosenbloom & Nash, LLP fails to pay Bayou the deposit paid on contract in accordance herewith, the County Clerk is directed to enter judgment in favor of Plaintiff Bayou Brothers Food Corp. and against Defendants Gristede's Operating Corp./Namdor, Inc and Finkel, Goldstein, Rosenbloom & Nash, LLP in the sum of \$100,000 together with interest at the statutory rate from September 20, 2007 together with costs and disbursements as taxed by the Clerk.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
April 4, 2008


Hon. LEONARD B. AUSTIN, J.S.C.

ENTERED

APR 10 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE