

**Crescent Land Dev. Assoc. v Metropolitan
Rest. Group of Levittown, Inc.**

2008 NY Slip Op 31167(U)

April 10, 2008

Supreme Court, Albany County

Docket Number: 1971-06/

Judge: Ute W. Lally

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SCAW

SHORT FORM ORDER

mg

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

CRESCENT LAND DEVELOPMENT ASSOC.,

Plaintiff(s),

-against-

MOTION DATE: 3/10/08
INDEX NO.: 11971/06
MOTION SEQ: 3

METROPOLITAN RESTAURANT GROUP OF LEVITTOWN,
INC., LONG ISLAND RESTAURANTS, LLC and
DAMON'S RESTAURANTS, INC.,

Defendant(s).

DAMON'S RESTAURANTS, INC.,

Third Party Plaintiff(s),

-against-

NILESH P. PATEL and VIRAL H. PATEL,

Third Party Defendant(s).

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	1-3
Answering Affidavits.....	4-7
Replying Affidavits.....	8-10
Briefs:	

Upon the foregoing papers, it is ordered that this motion by third-party defendants Niles P. Patel and Viral Patel (hereinafter "the Patels") and non-party Able Restaurant Group, Inc. (hereinafter "Able") for an order pursuant to CPLR 1013 permitting Able Restaurant Group, Inc. to intervene in this action is granted.

The plaintiff seeks to recover money damages from former tenants and guarantors for unpaid rent in connection with an alleged breach of contract pursuant to a commercial lease. Defendant Damon's Restaurants, Inc. (hereinafter "Damon's") was a guarantor of the subject lease. Defendant Metropolitan Restaurant Group of Levittown, Inc. (hereinafter "Metropolitan") was one of the tenants. Defendant Long Island Restaurant, Inc. (hereinafter

"LIR") was also a lessee. Plaintiff's complaint seeks damages from Damon's as guarantor of one year of Metropolitan and LIR's lease obligations to it.

On or about October 13, 2006, Damon's served an answer and asserted cross-claims against defendants Metropolitan and LIR seeking indemnification for any amount Damon's is required to pay plaintiff on the guaranty of the lease. On or about August 8, 2007 Damon's commenced a third-party action against LIR's principals, the Patels and other individuals, alleging that the Patels' failure to satisfy the lease obligations flowing to plaintiff constituted a breach of the franchise agreement. On or about September 13, 2007, Damon's filed an Amended Third Party Summons and Complaint only against the Patels on claims substantially related to the Patels' alleged obligations pursuant to the franchise agreement. On or about January 31, 2008, non-party Able moved to intervene. Able's proposed claims arise out of Damon's alleged breach and wrongful termination of the franchise agreement between Able and Damon's.

The Patels are the sole officers, directors and shareholders of Able. They claim that Able approached Damon's regarding a franchise on Long Island. Damon's advised Able that in order to obtain a franchise on Long Island, Able would have to enter into a Franchise Development Agreement with Damon's and purchase an existing franchise located at 3535 Hempstead Turnpike, Levittown, New York. On April 29, 2004, Damon's advised Able that it approved Able as a franchisee. In the reply affidavit in support of the within motion Able enclosed a copy of a letter dated April 29, 2004, on the letterhead of Damon's from its Director of Franchise Sales stating:

Dear Viral:

I am pleased to report that your application for a Damon's Grill franchise has been approved.

As we discussed earlier this week during our telephone conversation, the Approval Committee expressed serious concerns related to the abilities of the current General Manager/Operator at the Levittown, NY store. Thus, it is strongly recommended that your group, during the ownership transition, closely scrutinize the performance of that individual. You should consider an immediate search for a likely, qualified replacement as Operator and begin plans for a transition as

soon as possible.

Please contact me if you have any questions related to your approval or the process as we move forward. Later this week I will send you a proposed Development Agreement for your review.

I am looking forward to working with you in the future and on behalf of everyone at the Damon's Grill home office, I would like to be the first to welcome you.

On May 28, 2004, in accordance with the terms and conditions of the Franchise Development Agreement between Damon's and Able, Able alleges that through its affiliate LIR it purchased the Levittown restaurant from Metropolitan, signed a Franchise Agreement for that location with Damon's and accepted an assignment and assumption of the lease with the plaintiff. The personal guaranty between Damon's and the Patels as personal guarantors refers to a Franchise Agreement between Damon's and Able Restaurant Group, LLC d/b/a Long Island Restaurant, Inc., a limited liability company. Further, the Release and Settlement Agreement dated May 15, 2006, between Damon's and Long Island Restaurants, LLC, Nilesh P. Patel and Viral H. Patel (collectively, the "Long Island Parties") states that "[t]hese Releases do not apply to any claims the parties may have arising out of the Franchise Development Agreement dated May 18, 2004 between Damon's and Able Restaurant Group, Inc." Able asserts had it not applied for a franchise from Damon's, paid a development fee of \$40,000 and entered a franchise agreement with Damon's, there would be no landlord-tenant relationship between plaintiff Crescent and LIR, or any franchisor-franchisee relationship between Damon's, LIR and Patel. Able further alleges that had Able not entered into the Franchise Agreement with Damon's, LIR would not have accepted an assignment and assumptions of the lease between Metropolitan and Crescent. Nilesh P. Patel states he "was one of many members of LIR, which is defunct and has been unable to appear or to defend against Crescent's claims against it herein."

Patel asserts that an alternative to intervention might be for Able to start a new action against Damon's in this court and then seek to consolidate both lawsuits. However, since Damon's is not a New York State corporation, the Patels contend that Damon's would move to change the venue from New York.

The plaintiff opposes the intervention on the ground that the contract claims raised in the proposed intervenor complaint are unrelated to the breach of lease and rent claims raised in the main

action. Further plaintiff contends the intervention would unreasonably delay the resolution of its claim for rent citing the fact that the Patels waited six months after they appeared in the third-party action to seek to intervene on behalf of Able and further that no depositions have been held.

In opposition to the motion Damon's asserts that none of the parties has alleged that Able is responsible for damages, the absence of a common issue of fact or law between Able's claim and the main action, as well as the unreasonable delay in now seeking to intervene.

When the proposed intervenor's claim or defense has any question in common with a claim or defense involved in the action, intervention is permitted under CPLR 1013 "in the discretion of the court." Intervention by permission under CPLR 1013 can be compared with consolidation under CPLR 602 which is allowed whenever two or more actions involve a common question of law or fact. On a CPLR 1013 application, the court must consider whether the intervention (1) "will unduly delay the determination of the action" or (2) "prejudice the substantial rights of any party." The court can also consider that if intervention is refused, the likelihood of the movant bringing a separate action and then a motion for consolidation, and how that motion would likely be disposed of. If consolidation is perceived as inevitable, the court may as well permit intervention (See Siegel, David D., New York Practice, Fourth Edition, § 182, Permissive Intervention). Another reason to permit intervention is to avoid undue prejudice to Able who may be forced to proceed against Damon's in another jurisdiction while concurrently litigating the same issues with Damon's in this Court.

Without elaborating on the obscurant relationship between Long Island Restaurant, LLC, Able Restaurant Group, Inc., and the Patels, Able alleges in the proposed complaint in intervention that "on or about April 25, 2006, Damon's terminated the Franchise Development Agreement without giving any written notice to Able. In May 2006, upon suffering sufficient financial losses, LIR closed the Levittown Restaurant". The movant asserts that without Able's initial and continued involvement with the parties, LIR could not have occupied the Levittown store, for which the plaintiff is claiming rent and LIR could not have maintained the franchise agreement with Damon's upon which Damon's interposed its third-party claims against the Patels. Intervention is permitted where the intervenor has a real and substantial interest in the outcome of the main action (*Sieger v Sieger*, 297 AD2d 33; *Wapnick v Wapnick*, 295 AD2d 422; *Romonoff Rest. & Cabaret v World Wide Asset Mgt. Corp.*, 273 AD2d 292, 293; *Cross Sound Ferry Servs. v Town of Southold*, 263 AD2d 524; *Perl v Aspromonte Realty Corp.*, 143 AD2d 824, 825; *Levine v Town of Oyster Bay*, 40 Misc2d 605; *Westchester*

Humane Soc. v Hilleboe, 202 Misc 873). Based upon the allegations in the proposed complaint in intervention and the affidavits submitted in support of the within motion, the court in its discretion grants the application to intervene.

This determination of the court is conditioned on Able being represented by the same counsel as the Patels, the action continuing in its present posture without delay, and there being no reopening of any phase of the action or duplication of any proceedings to date by the intervenors, with the exception of the execution of a further modified preliminary conference order to provide for expedited discovery and to afford Damon's the opportunity to serve written discovery requests on Able and adequate time to review and analyze Able's responses in preparation for depositions.

The Patels and Able are admonished that NYCRR 130-1.1 provides for sanctions for conduct undertaken primarily to delay or prolong the resolution of the litigation. Sanctions may be retributive, in that they punish past conduct. They are also goal oriented in that they are useful in deterring future frivolous conduct by a party. Also, the imposition of sanctions may be warranted due to a party's conduct in unnecessarily wasting judicial resources and time, as well as the time of the other counsel (*Levy v Carol Management Corporation*, 260 AD2d 27; *Minister, Elders & Deacons of the Reformed Protestant Dutch Church of the City of New York v 198 Broadway*, 76 NY2d 411).

Dated: APR 10 2008



J.S.C.

ENTERED

APR 14 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**