

ADA Dining Corp. v 208 E. 58th St., LLC

2008 NY Slip Op 31308(U)

May 1, 2008

Supreme Court, New York County

Docket Number: 0102255/2006

Judge: Carol R. Edmead

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PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Index Number : 102255/2006
ADA DINING CORP.
vs.
208 EAST 58TH STREET
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 2/21/08
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

FILED

Upon the foregoing papers, it is ordered that this motion **MAY - 5 2008**

NEW YORK COUNTY CLERK'S OFFICE

In accordance with the Memorandum Decision, it is hereby ORDERED that:

The motion by the LLC for summary judgment dismissing the original Complaint as against the LLC is granted, and the first and second causes of action for a *Yellowstone* and permanent injunction tolling the cure period of the Notice to Cure are dismissed, as moot; severance of the third and fourth causes of action against Kiran C. Patel is granted; and the fifth cause of action for attorneys' fees is dismissed.

The branch of the LLC's motion for summary judgment on its second counterclaim to recover all outstanding rent and use and occupancy is denied.

The branch of the LLC's motion for summary judgment on its third counterclaim for attorneys' fees and statutory costs, and fourth counterclaim for a judgment of ejectment and immediate possession are premature at this juncture.

The branch of the LLC's motion for an order turning over to the LLC the cash undertaking in the amount of \$100,000, which plaintiffs posted pursuant to this Court's orders is denied.

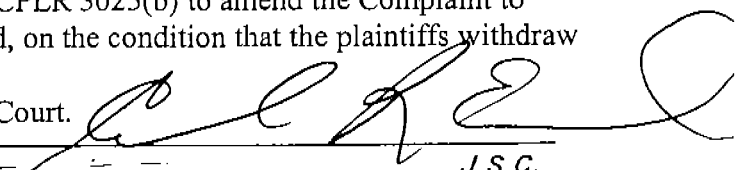
The branch of the LLC's motion for an order vacating the Notice of Pendency filed by plaintiffs against the premises located at 208 East 58th Street, New York, New York is granted.

The cross-motion by Patel for summary judgment dismissing the third and fourth causes of action of the Complaint as asserted against him is granted.

Plaintiffs' cross-motion for leave pursuant to CPLR 3025(b) to amend the Complaint to allege new causes of action against the LLC is granted, on the condition that the plaintiffs withdraw or discontinue with prejudice, the Florida Action.

Dated: This constitutes the decision and order of the Court.

5/1/08


HON. CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 35

-----X
 ADA DINING CORP. and DARSHAN R. SHAH,

Plaintiffs,

Index No. 102255-2006

-against-

DECISION/ORDER

208 EAST 58TH STREET, LLC and KIRAN C. PATEL,

Defendants.
 -----X

MEMORANDUM DECISION

In this action for, *inter alia*, a *Yellowstone* injunction, defendant 208 East 58th Street, LLC (the "LLC") now moves by order to show cause for (1) summary judgment dismissing the Complaint as against the LLC, (2) severance of the third and fourth causes of action against Kiran C. Patel ("Patel"), (3) summary judgment on defendant's second, third, and fourth counterclaims, (4) an order turning over to the LLC the cash undertaking in the amount of \$100,000, which ADA Dining Corp. ("ADA Dining") and Darshan R. Shah ("Shah") (collectively "plaintiffs") posted pursuant to this Court's orders, and (5) for an order vacating the Notice of Pendency filed by plaintiffs against the premises located at 208 East 58th Street, New York, New York (the "Building").

Patel supports the motion by the LLC, and in adopting the arguments therein, cross moves for summary judgment dismissing the third and fourth causes of action of the Complaint as asserted against him.

In response, plaintiffs cross move for leave pursuant to CPLR 3025(b) to amend the Complaint to allege new causes of action against the LLC.

FILED

MAY - 5 2008

NEW YORK
 COUNTY CLERK'S OFFICE

Factual Background

The Building at issue was formerly owned by Beauville Realty Corp., a company owned and controlled by Shah.

The LLC purchased the Building at a foreclosure sale on or about August 19, 2004, and instituted an Operating Agreement, whereby ADA Dining and Patel were designated as the initial Members of the LLC.

On August 20, 2004, the LLC, as "Landlord," and ADA Dining, as "Tenant" entered into a commercial lease to permit ADA Dining to operate a restaurant and lease residential apartments (the "Lease"). Shah executed the Lease individually and on behalf of ADA Dining. The term of the Lease was three years, "commencing September 1, 2004 and ending August 31, 2007" (Article 2.1). Rent was "payable . . . on the first day of each month . . . in equal monthly installments at a minimum of \$25,000.00 per month . . ." (Article 3.1).

Based on the failure to pay rent for the period of September 2004 through February 2006, the LLC served a three-day Notice to Cure to terminate the Lease unless plaintiffs cured such default by February 20, 2006. This action for, *inter alia*, a *Yellowstone* injunction ensued.

In this action, plaintiffs seek (1) a *Yellowstone* and permanent injunction tolling the cure period of the Notice to Cure on the ground that the Notice to Cure is invalid and that the plaintiffs are ready, willing and able to cure the defaults alleged therein; (2) breach of contract against defendant Patel; (3) breach of fiduciary duty against Patel; and (4) attorneys' fees.

In reply, the LLC asserts the following counterclaims: (1) a declaration of the LLC's right under the Lease to monthly rent in the amount of \$25,750, and an order denying plaintiffs' application for injunctive relief, (2) a direction that plaintiffs pay the overdue rent, *pendete lite*,

(3) attorneys' fees and statutory costs, and (4) a judgment of ejectment and immediate possession of the Building.

By order of this Court dated April 26, 2006, plaintiffs were directed to post a \$100,000 bond and pay use and occupancy in an amount consistent with paragraph 3.2 of the Lease, *to wit*: \$25,650 "going forward." On May 3, 2006, the Court extended plaintiffs' time to post a bond to May 9, 2006. Thereafter, on June 20, 2006, the Court permitted defendants to sever their counterclaims against Shah as they could not proceed against ADA Dining, which had filed a Chapter 11 Bankruptcy petition in June 2006.¹ On June 22, 2006, this action was stayed against Shah based on notice that Shah filed for bankruptcy on October 14, 2005.

LLC's Motion

The LLC argues that plaintiffs' claims for injunctive relief to toll the termination of the Lease are moot since the Lease expired by its own terms on August 31, 2007.

It is also argued that the claim for attorneys' fees lacks merit, as there is no provision for such relief in favor of the tenant in the parties' Lease.

The LLC contends that although plaintiffs paid use and occupancy for the month of April 2006 and May 2006 pursuant to the above orders, no further payment since May 2006 has been made. In addition, plaintiffs have held over from the end of the term without permission and without any lease. Thus, pursuant to Article 12.10 of the Lease, the LLC is entitled to two times the last monthly rent after expiration of the term. For purposes of this motion only and upon the

¹ The Bankruptcy Court dismissed ADA's Chapter 11 case on July 10, 2007. The Bankruptcy Court also vacated the automatic stay on October 3, 2007, and authorized defendants to enforce their rights under the Lease.

grant of summary judgment in its favor, the LLC waives Article 12.10 of the Lease, and claims to be owed a total sum of \$532,110.87.

The LLC also contends that plaintiffs do not have a viable defense to the prior rent due under the Lease. Pursuant to the Notice to Cure, plaintiffs owed \$452,900 in base rent, and plaintiffs are entitled to summary judgment on this amount, at least as to Shah, as his bankruptcy case has been dismissed.

Given that the Lease expired on August 31, 2007, plaintiffs have no right to remain in possession of the Building. The Bankruptcy Court gave defendants permission to evict plaintiffs and summary judgment should be granted on the LLC's claim of ejectment. An order should issue directing the Sheriff or Marshall of the City of New York to eject and remove plaintiffs. And, the LLC is entitled to use the undertaking of \$100,000 as an offset against any judgment to which it is entitled. Assuming this Court grants the LLC's motion and dismisses the Complaint, then the Notice of Pendency is not supported by the underlying action and must be vacated or cancelled of record. Further, in the interest of expediency and for purposes of this motion only, the LLC waives its entitlement to attorneys' fees under the Lease.

Defendant Patel's Cross-Motion

In addition to the arguments he adopts in the LLC's motion, Patel contends that during the foreclosure proceedings, he agreed to finance the purchase of the Building. Patel then formed the LLC to be the owner of the Building. Patel asserts that under the Operating Agreement, he invested more than \$400,000 in the Building to pay off the mortgage with Eastern Savings Bank. After the LLC entered into the Lease with ADA and Shah, with the exception of several partial payments of \$1,640.33, plaintiffs failed to remit a single rent payment to the LLC.

With respect to plaintiffs' third and fourth causes of action for specific performance and breach of fiduciary duty, Patel denies ever agreeing to contribute "towards the renovation and operation of the restaurant and Building." Patel points out that the Operating Agreement clearly states that Patel's contribution to the LLC was a cash contribution of \$4,021,957.68, which were the costs associated with the purchase in foreclosure. Patel contends that he stepped into the foreclosure sale and saved Shah and ADA by paying off Eastern Savings Bank and permitting them to operate their business at the Building. He personally bore the costs of running the Building, investing approximately \$1.3 million in maintaining the Building over the last three years. Thus, plaintiffs failed to allege any basis for the relief requested and the third and fourth causes of action against Patel should be dismissed.

Plaintiffs' Cross-motion

Plaintiffs oppose the defendants' motion and cross-motion and seek to amend their Complaint to add new causes of action against the LLC and an order releasing the \$100,000 undertaking, plus interest accrued thereon.

In opposition to defendants' motions, plaintiffs contend that circumstances arising since this matter was last before the Court raise issues of fact regarding (1) the LLC's entitlement to recover the Building and any past due rent and/or use and occupancy, (2) whether the terms of plaintiffs' tenancy were changed on August 6, 2007 by mutual agreement of the parties, and thus, vitiating the Lease and the LLC's claim thereunder, (3) whether plaintiffs have been in possession of the Building since October 1, 2007 as alleged by the LLC, and (4) whether plaintiffs owe any rent at all for periods when the restaurant generated no profit.

According to plaintiffs, Shah's mother is now the sole shareholder of ADA Dining. During the Pendency of the Bankruptcy proceedings, and while this action was stayed, Shah and his mother agreed to terminate the Lease early, and agreed with Patel to enter into a new occupancy arrangement for the Building (the "Agreement"). Under the terms of the Agreement, ADA Dining would continue as a tenant of the entire Building for a period of six months, at a monthly rent of \$25,000. Further, plaintiffs increased the amount ADA Dining would otherwise have to pay the LLC pursuant to a promissory note for approximately \$4,550,000 by \$1 million to arrive at the agreed-upon price of \$5.5 million. The terms of this Agreement were annotated and confirmed by the parties, and signed by all parties, on the bank check for \$25,000 given to and accepted by the LLC in August 2007. The additional monies which the LLC is claiming here, which are approximately \$1 million, were incorporated in and subsumed by the agreed upon purchase price of \$5.5 million. Plaintiffs also point out that the Lease does not contain a merger provision precluding a subsequent oral modification or an early termination.

ADA Dining paid the LLC the first \$25,000 rent payment due for August 2007, as well as the second payment due for September 2007. The LLC accepted the August 2007 payment, but returned the September 2007 payment three weeks after its tender. Three weeks into September 2007, the LLC entered into an agreement to sell the Building to a third party for approximately \$5 million. However, Patel had already agreed to sell the Building to ADA Dining for \$5.5 million, subject to ADA Dining's exercise of an option to purchase. Subsequently, ADA Dining exercised its option and is claiming, in the proposed amended Complaint, that ADA Dining, rather than the third party, is entitled to buy the Building. It is claimed that ADA Dining's rights

are superior to any claims by the third party purchaser, and that ADA Dining stands ready, willing and able to buy the Building.

Plaintiffs contend that the restaurant has been closed since October 1, 2007, the keys have been delivered to the LLC, and plaintiffs have been out of possession since then. Thus, summary judgment for ejectment must be denied.

Further, plaintiffs are entitled to the return of the undertaking in light of the Court's grant of *Yellowstone* injunctive relief. Plaintiffs filed the undertaking as a condition to the granting of the *Yellowstone* injunction, which was properly granted. Such undertaking cannot be given to the LLC unless the *Yellowstone* injunction was improvidently issued. The monetary issues are resolved, and there are no monies owed to the LLC. Even if the Court considers the situation presented in 2006, there are factual issues regarding the conflicting terms of the Operating Agreement and Lease as to whether any monies were due thereunder.

Plaintiffs do not object to the vacatur of the Notice of Pendency. The non-party purchaser has knowledge of the circumstances presented in this action, and there is no need for a notice of Pendency to inform that entity of ADA Dining's conflicting claim to purchase the Building. However, plaintiffs reserve their right to file a new Notice of Pendency, if it becomes apparent hereafter that there is a need for a new notice of Pendency.

Plaintiffs also withdraw their claims against Patel without prejudice, and do not seek any claims against Patel in the proposed amended Complaint. Such withdrawal renders Patel's motion for summary judgment moot, and same should be denied. In any event, issues of fact exist as to Patel's motion regarding his compliance with his obligations under the LLC's Operating Agreement and with respect to his breach of fiduciary duty to ADA Dining.

In support of amending their Complaint, plaintiffs seek to specifically enforce the Agreement and purchase the Building for the agreed-upon price. The Agreement is an accord and satisfaction with respect to any monies due for use and occupancy, back rent or any of the charges from ADA Dining or Shah, personally.

LLC's Reply and Opposition to Cross-Motion

The LLC argues that plaintiffs' concessions require that this Court grant summary judgment dismissing the Complaint as well as the other relief sought. As to the claim for ejectment, this issue is not moot, but effectively resolved in favor of the LLC. The LLC requires a judgment of ejectment and an order to enforce the judgment because a landlord's taking possession without a valid court order subjects the landlord to an action for treble damages pursuant to RPAPL 853. Further, Shah gave the Bankruptcy Trustee of Beauville the keys, but did not give them to any representative of the LLC.

The LLC is also entitled to vacatur of the *Yellowstone* injunction and cancellation of the Notice of Pendency, dismissal of the first two causes of action, and grant of Patel's cross-motion to dismiss the third and fourth causes of action on consent. Thus, as the first four causes of action have been withdrawn, the fifth cause of action for attorneys' fees is moot and should be dismissed.

The LLC also opposes the amendment, arguing that the proposed Complaint is palpably insufficient and devoid of merit in that the alleged transaction is not supported by a memorandum or writing signed by the party to be charged sufficient to satisfy the Statute of Frauds

The proposed Complaint is an entirely new complaint based on the alleged Agreement. The allegations of the proposed Complaint and exhibits annexed thereto are identical to the complaint filed in a Florida action.

Further, the LLC contends that there was no agreement between ADA Dining and the LLC. The Florida Court decided the very same issues which plaintiffs allege in the proposed Complaint. The Florida Court found the same allegations supported by the same exhibits insufficient as a matter of law. Therefore, the allegations in the proposed Complaint are barred by the doctrine of *res judicata*.

In the pending Florida action, the LLC raised the defense that the alleged Agreement violated the Statute of Frauds as set forth in NY Gen. Obl. Law § 5-701(a) and § 5-703. The Florida Court rendered a decision conditionally dismissing the Florida complaint on the ground that it lacked subject matter jurisdiction and that the alleged Agreement did not satisfy the Statute of Frauds. Therefore, the amended Complaint cannot be maintained because of *res judicata*.

Additionally, the Florida Action is still pending as plaintiff made a motion for additional time to serve an amended complaint. As there is another action pending between the same parties for the same causes of action, dismissal is also warranted under CPLR 3211(a)(4)

As to the LLC's counterclaims, the LLC accepts the date of ejection proffered by Shah, and waives its claim to attorneys' fees, but not to statutory costs and disbursements. Thus, the only remaining issues are back rent and use and occupancy which are the subject of the second counterclaim. Plaintiffs' opposition offers no evidence to refute any issue of non-payment and both plaintiffs have been denied a discharge of their bankruptcy proceedings.

Plaintiffs' only claim as to the amounts admittedly owed to the LLC is that they are wiped out by the so-called Agreement. However, argues the LLC, the Agreement, which does not satisfy the Statute of Frauds, has been dismissed by the Florida Court, and does not establish an accord and satisfaction. According to Patel and others, the LLC clearly preserved its rights and objected to the settlement offers of plaintiffs.

The LLC also points out that Shah does not attest that he was present at the meeting in Florida. His mother, who supplied the check, is not even a plaintiff and has not submitted an affidavit in opposition or in support of the cross-motion. Thus, plaintiff Shah has no personal knowledge as to what transpired at the meeting.

Furthermore, had the plaintiffs not posted the undertaking, the injunction would not have been granted and defendants would have obtained possession of the Building. The purpose of the undertaking was to protect the LLC against losses incurred as a result of the tolling of the cure period. The LLC has suffered damage in that it has not collected rent or use and occupancy, except for two months worth, during the entire lease term and the holdover period. Thus, the cash undertaking and accrued interest should be remitted to the LLC as an offset against its judgment.

Plaintiffs' Reply

In further support of amending their Complaint, plaintiffs argue that the amendment addresses "subsequent transactions and occurrences" between the parties that arose on and after August 6, 2007.

The original claims against the LLC based on the now-expired Lease are no longer viable. The parties redefined their relationship on August 6, 2007 in the new Agreement. If the

amendment is granted, the LLC's motion for summary judgment with respect to the new causes of action would be moot, as the original causes of action would be superceded by the new claims. And, the LLC's request for summary relief would be premature, because issue would still have to be joined with respect to the new pleading. Further, since the LLC's opposition is factually inconsistent, several issues of fact exist.

The Florida dismissal order was not a final determination, was expressly rendered without prejudice, and was based on the Florida's Court's finding that it lacked, *inter alia*, subject matter jurisdiction. Thus, a court order rendered without subject matter jurisdiction is a nullity, and thus, provides no preclusive effect against the new claims raised.

Further, the LLC's reliance on CPLR 3211(a)(4)'s proscription against two actions pending for the same relief is misplaced. The Florida action was dismissed without prejudice and said section provides that the Court need not dismiss upon this ground, but may make any order as justice requires.

Additionally, the LLC is estopped from arguing that the Florida case precludes the instant claims in New York, because the LLC argued that New York was the proper forum for "this action" and that the Florida Court lacked subject matter jurisdiction to direct any disposition of the subject property, such property being located in New York. Thus, the LLC cannot now claim that these new claims should proceed in Florida. Plaintiffs also represent that they will not restate the new claims in Florida if the proposed Complaint is accepted. And, the Florida action, if it continues, would encompass other and different claims than the claims set forth in the proposed amended Complaint.

Plaintiffs maintain that their proposed amended Complaint has merit. Plaintiffs moved for the amendment at the earliest opportunity, and the amended Complaint is supported by affidavits from individuals with intimate personal knowledge of the Agreement. The affidavits of Patel, his lawyer, and Florida lawyer, as well as the exhibits referred to in the LLC's papers also serve to confirm the material terms of the Agreement.

The LLC's argument that the Agreement is an "agreement to agree" also lacks merit, given that no material terms were left for future negotiations and the cases on which the LLC relies are inopposite.

Further, the Statute of Frauds is either inapplicable or satisfied by adequate memoranda signed and/or prepared by both parties. The only application of the Statute of Frauds to the Agreement is with respect to the option to purchase. The Agreement is for a term of six months and it is well settled that a lease for less than one year does not have to be in writing. Plaintiffs contend that the check for \$25,000 for August and September 2007 creates an issue of fact as to whether there was partial performance unequivocally referable to the Agreement. Plaintiffs contend that the LLC had second thoughts about the Agreement, and attempted to first insist on new terms, and then, attempt to return the rent payment of \$25,000 to Ms. Shah, 16 days after ADA Dining duly exercised the purchase option. However, it was too late for the LLC to renege on the deal. The August 6, 2007 payment was tendered unconditionally and there were no escrow arrangements. The LLC's retention of the check under these circumstances is tantamount to a ratification of the Agreement.

Plaintiffs argue that the proposed amendments should not be denied based on the LLC's conflicting affidavits, and although it is claimed that the LLC made no payments after May 2006,

Patel cannot explain the two \$25,000 payments made by ADA in August and September 2007 for rent under the Agreement.

And, in addition to the unresolved issues of fact and the parties' accord and satisfaction precluding any summary determination on the monetary claims, it would be premature to make any disposition regarding the LLC's counterclaims, if the Complaint were amended.

As to the bond, the plaintiffs maintain that since the *Yellowstone* injunction was properly issued, and the fact that the injunction is moot should not inure to the plaintiffs' detriment. In light of the issues of fact regarding the Agreement, the accord and satisfaction as to the past due rent, and the use and occupancy payments, there can be no summary determination to return the \$100,000 to the LLC as an offset against its monetary claims.

Finally, plaintiffs voluntarily withdraw their claims against Patel by amending the Complaint as indicated, and their withdrawal should not be deemed to be without prejudice.

In further support, Bhadra R. Shah attests that she and Patel, and their representatives, and Patel by telephone, held a meeting on August 6, 2007 in Florida. At this meeting, Patel, on behalf of the LLC and ADA renegotiated and agreed to terms on which ADA would continue in occupancy of the Building for a period of six months, during which time ADA would have an option to purchase the Building for \$5.5 million, to be exercised at any time during the six-month period. All arrears in rent and use and occupancy were calculated at the meeting and included in the \$5.5 million purchase price.

The term sheet dated August 22, 2007, drafted by Patel's attorney, provided that "Bhadra agrees to purchase the Property for \$5.5 million from the LLC" and that the sale "take place on or before January 31, 2008, time being of the essence against Bhadra," which is consistent with the

Agreement under which plaintiffs could exercise the option at any time during the six-month period and take up to January 31, 2008 to pay the purchase price.

Further, the reference on the check to a stipulation to be signed by the parties is to a stipulation providing that ADA could be evicted at any time unless the rent was paid, in order to make it easier for the LLC to evict ADA in the event of a rent default.

The agreement was not contingent upon the signing of both parties of a more formal agreement, and no business terms were left to the future.

The term sheet contained all of the material terms, but also contained a term that ADA Dining give up its right as the only other member of the LLC to a 10% distribution on liquidation of the LLC, an amount equal to \$500,000.

According to Mr. Shah, plaintiffs are ready, willing and able to purchase the Building. Additional proof of the funds available to close can be submitted *in camera*.

And, plaintiffs' accountant, Stamatakis' claim that he was to hold the \$25,000 check for August 2007 rent in escrow is false, in that no escrow agreement was discussed at the meeting, and the check could be cashed immediately.

Analysis

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Sup Ct New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for

summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient “evidentiary proof in admissible form” to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinde*r, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). Thus, the motion must be supported “by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions” (CPLR § 3212[b]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York*, *supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]).

It is uncontested that the Lease expired by its own terms on August 31, 2007, and that plaintiffs’ causes of action for injunctive relief are moot. Plaintiffs also withdraw their breach of contract and breach of fiduciary duty claims against Patel. It is also uncontested that there is no basis in the Lease for the award of attorneys’ fees in favor of plaintiffs. Thus, the LLC’s motion for summary judgment dismissing the Complaint is warranted.

The branch of the LLC's motion for summary judgment on its second counterclaim to recover the overdue rent, *pendete lite*, however, is intertwined with plaintiffs' new claims that the Agreement to lease the Building for six months included an option to purchase the Building at a price which purportedly subsumed the overdue rent.

“An option contract is an agreement to hold an offer open; it confers upon the optionee, for consideration paid, the right to purchase at a later date’ ” (*Kaplan v Lippman*, 75 NY2d 320, 324-325, 552 NYS2d 903 [1990], quoting *Leonard v Ickovic*, 79 AD2d 603, 433 NYS2d 499 [1980], *affd* 55 NY2d 727, 447 NYS2d 153 [1981]). “The most significant aspect of an option is that it grants to the holder the power to compel the owner of the property to sell whether the owner is willing to part with ownership or not” (*Metropolitan Transp. Auth. v Bruken Realty Corp.*, 67 NY2d 156, 163, 501 NYS2d 306 [1986]). An option to purchase an interest in real estate is essentially a conditional contract for a future conveyance of land, and one that cannot be revoked by the grantor; thus a lease that creates “such an option is within the Statute of Frauds (*see* 2 Corbin, Contracts §§ 417, 418 [1950])” (*Kaplan v Lippman*, 75 N.Y.2d at 325, 552 NYS2d 903, 552 NE2d 151).

A “written option agreement, standing alone, is sufficient to satisfy the writing requirement of the statute of frauds” (*Jeremy's Ale House Also, Inc. v Joselyn Luchnick Irrevocable Trust*, 22 A.D.3d 6, 798 N.Y.S.2d 416 [1st Dept 2005] citing *Kaplan v Lippman*, 75 N.Y.2d at 325, 552 N.Y.S.2d 903, 552 N.E.2d 151). As noted in *Kaplan*, the Court of Appeals stated that “[b]ecause an option to purchase an interest in real property is in effect a conditional contract for a future conveyance of land, a contract that creates such an option is within the Statute of Frauds (*see* Corbin, Contracts §§ 417, 418).”

The bank check at issue bears the following remarks: “parties to sign stipulation . . . eviction any time unless payment is cashed,” “agreed for 6 months” “\$25K/[per] month,” and “purchase price @ end of 6 months to be 5.5 million.” Two separate signatures appear on the bank check. Patel concedes that the notations are in his handwriting and contain his initials. According to ADA Dining, the “stipulation” refers to the parties reducing to writing the LLC’s right to evict ADA Dining unless payments were made. The complaint, which contains a letter from Bhadra Shah on behalf of ADA Dining indicates that ADA Dining exercised the option to purchase. Thus, accepting the allegations of the complaint as true, as this Court must, it appears that plaintiffs state a claim for specific performance of the Agreement, which includes an option to purchase the Building.

It appears that Patel and ADA Dining dispute whether there was an agreement to these terms. The Court notes that Patel claims that the acceptance of the check toward the new lease Agreement was subject to the parties’ signing of a stipulation at a later date. However, this merely raises an issue that should be explored during discovery, and does not defeat plaintiffs’ claim that the overdue rent was subsumed in the Agreement under the theory of accord and satisfaction (*Pothos v Arverne Houses, Inc.*, 269 AD2d 377, 378, 702 NY.2d 392 [2nd Dept 2000] [party seeking to establish an accord and satisfaction must demonstrate that there was a disputed claim between the parties which they mutually resolved through a new contract discharging all or part of their obligations under the original contract]).

The LLC’s assertion that the claims in the proposed Complaint are barred by *res judicata* lacks merit. *Res judicata* “involves the question of whether a plaintiff’s present claim, as distinguished from discrete issues previously litigated, has been extinguished by a final

adjudication in a prior proceeding' (*Brown v Lockwood*, 76 AD2d 721, 735, 432 NYS2d 186 [2d Dept 1980]; *Matter of Reilly v Reid*, 45 NY2d 24, 27, 407 NYS2d 645 [1978]), in which the parties, or those in privity with them, were the same as in the action presently before the court (see *Matter of American Ins. Co. [Messinger-Aetna Cas. & Sur. Co.]*, 43 NY2d 184, 189, n. 2, 401 NYS2d 36 [1977]). "Claim preclusion may result from the operation of either merger or bar. In the case of merger, an existing final judgment rendered upon the merits in a plaintiff's favor precludes further independent litigation of the adjudicated claim, the cause of action being replaced by the right to bring an action upon the judgment; in the case of bar, a similar judgment in a defendant's favor extinguishes the claim, barring a subsequent action thereon" (*Brown v Lockwood*, 76 AD2d at 735; see 5 Weinstein-Korn-Miller, NYCivPrac, par 5011.08; Rosenberg, Collateral Estoppel in New York, 44 St. John's L.Rev 165, 166; Restatement, Judgments 2d, section 17, subd [1], [2]; sections 18, 19, 20).

In the Florida action, the LLC argued, *inter alia*, for dismissal of that action on the ground that the Court lacked subject matter jurisdiction and that the agreement did not constitute an enforceable contract. In its finding, the Florida Court stated that it "agrees with each of Defendant's arguments, especially as it relates to subject matter jurisdiction and the writing not meeting the requirements necessary to satisfy the Statute of Frauds." When the Florida Court decided that it lacked subject matter jurisdiction to enforce the stipulation, the determination that the Agreement violated the Statute of Frauds was of no relevance and was a conclusion that the civil court need never have reached (see *Arroyo v Marlow*, 128 Misc 2d 950, 491 NYS2d 928 [New York Supreme Court 1985]). Whatever conclusion the Florida Court made about the purported Agreement is of no consequence since everything else became of no moment upon its

finding that it lacked subject matter jurisdiction to enforce it. Thus to consider the Agreement as violative of the Statute of Frauds based upon the decision of the Florida Court “would result in the anomalous result of following the decision of a court which itself declared that it lacked jurisdiction of the matter” (*id; cf. Norton v Southern R. Co.*, 138 Misc 784, 246 NYS 676).

In this regard, General Obligations Law (“GOL”) § 5-701 (a)(1) provides that, “Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:

By its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime.”

Similarly, GOL § 5-703(1) provides that:

1. An estate or interest in real property, other than a lease for a term not exceeding one year . . . cannot be created, granted, assigned, surrendered or declared, unless . . . by a deed . . .
2. A contract for the leasing for a longer period than one year . . . is void unless the contract or some note or memorandum thereof . . . is in writing, subscribed by the party to be charged . . .”

Assuming all of plaintiffs’ allegations to be true, the purported Agreement to lease the Building to ADA Dining for a period of six months is not governed by either GOL § 5-701 (a)(1) or GOL § 5-703(1). Therefore, the Court need not reach the issue of whether the payment of \$25,000 is unequivocally referable to the Lease so as to take the Lease out of the Statute of Frauds.

Accordingly, ADA Dining’s claim concerning the enforcement of the Agreement is not barred by *res judicata*, or the Statute of Frauds, and may be relitigated in this action.

And, contrary to the LLC's contention, the Agreement is not rendered an unenforceable "agreement to agree," since it contains the essential terms of a lease (*cf. 188-90 Eighth Ave. HDFC v Havana Chelsea Luncheonette, Inc.*, 11 Misc 3d 144, 819 NYS2d 849 [New York App.Term 2006] ["execut[ion] of a new lease with a new rental amount no less than 30 days prior to the end of the term of this lease," was missing a material term]).

Nor does CPLR 3211(a)(4) warrant denial of plaintiffs' application for an amendment. Under this section, an action may be dismissed if the same cause of action is pending between the same parties in another court. CPLR 3211(a)(4) also provides, however, that "the court need not dismiss upon this ground but may make such order as justice requires." The Court notes that the Complaint in the Florida action seeks specific performance to compel the sale of the Building to ADA Dining for \$5.5 million, and damages for breach of a written and oral agreement, and contains the same exhibits attached to the amended complaint herein. Although dismissal of the instant action is warranted under CPLR 3211(a)(4), in light of the pending Florida action, the Court conditions leave to amend the complaint upon the withdrawal or discontinuance with prejudice, of the Florida action by the plaintiffs.

The LLC's third counterclaim for attorneys' fees and statutory costs are premature at this juncture. The fourth counterclaim for a judgment of ejectment and immediate possession of the Building is premature in light of the issues of fact concerning ADA Dining's right to continued occupancy of the Building pursuant to the Agreement.

Finally, return of the bond is premature at this juncture. CPLR 6312(b) provides that "prior to the granting of a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court, that the plaintiff, if it is finally determined that he or she was not

entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction.” At the time the injunction was issued, it could not be determined whether the LLC’s claim for overdue rent was meritorious. As to the LLC’s claim that the undertaking is a form of set-off, the Court acknowledges that a set-off “is a debtor’s right to reduce the amount of a debt by any sum the creditor owes the debtor” (*see* Black’s Law Dictionary [8th ed. 2004]). Although the injunction has been rendered moot by virtue of the expiration of the Lease, the LLC’s claim to overdue rent still remains at issue, which was the impetus to the Court’s imposition of the injunction. Therefore, neither party is entitled to the return of the cash undertaking at this juncture.

Conclusion

The motion by the LLC for summary judgment dismissing the original Complaint as against the LLC is granted, and the first and second causes of action for a *Yellowstone* and permanent injunction tolling the cure period of the Notice to Cure are dismissed, as moot; severance of the third and fourth causes of action against Kiran C. Patel is granted; and the fifth cause of action for attorneys’ fees is dismissed.

The branch of the LLC’s motion for summary judgment on its second counterclaim to recover all outstanding rent and use and occupancy is denied.

The branch of the LLC’s motion for summary judgment on its third counterclaim for attorneys’ fees and statutory costs, and fourth counterclaim for a judgment of ejectment and immediate possession are premature at this juncture.

The branch of the LLC's motion for an order turning over to the LLC the cash undertaking in the amount of \$100,000, which plaintiffs posted pursuant to this Court's orders is denied.

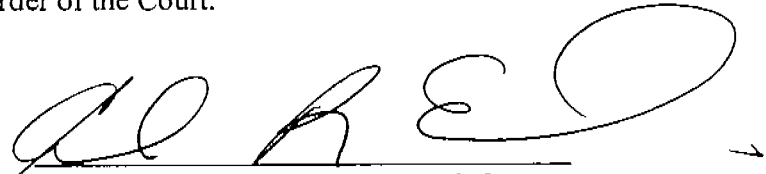
The branch of the LLC's motion for an order vacating the Notice of Pendency filed by plaintiffs against the premises located at 208 East 58th Street, New York, New York is granted.

The cross-motion by Patel for summary judgment dismissing the third and fourth causes of action of the Complaint as asserted against him is granted.

Plaintiffs' cross-motion for leave pursuant to CPLR 3025(b) to amend the Complaint to allege new causes of action against the LLC is granted, on the condition that the plaintiffs withdraw or discontinue with prejudice, the Florida Action.

This constitutes the decision and order of the Court.

Dated: May 1, 2008



Hon. Carol Robinson Edmead, J.S.C.

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