

**Genovese Drug Stores, Inc. v William Floyd Plaza,
LLC**

2008 NY Slip Op 32011(U)

July 8, 2008

Supreme Court, Suffolk County

Docket Number: 0004146/2008

Judge: Jeffrey Arlen Spinner

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

P R E S E N T :

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 3-12-08 (004)
MOTION DATE 3-26-08 (005 & 006)
MOTION DATE 6-1-08 (007)
ADJ. DATE 6-11-08
Mot. Seq. # 004 - MG; # 005 - MotD
006 - XMD; # 007 - MD

-----X
GENOVESE DRUG STORES, INC., :
 :
 :
 Plaintiff, :
 :
 - against - :
 :
 WILLIAM FLOYD PLAZA, LLC, d/b/a :
 SHIRLEY OPERATING ACCOUNT, :
 :
 Defendant. :
-----X

HERRICK, FEINSTEIN LLP
Attorneys for Plaintiff
2 Park Avenue
New York, New York 10016

ROSENBERG & ESTIS, P.C.
Attorneys for Defendant
733 Third Avenue
New York, New York 10017

Upon the following papers numbered 1 to 98 read on these motions to stay proceedings/for preliminary injunction/for dismissal and this cross motion for preliminary injunction; Notice of Motion/ Order to Show Cause and supporting papers 1 - 17; 18 - 36; 51 - 56; Notice of Cross Motion and supporting papers 37 - 50; Answering Affidavits and supporting papers 57 - 91; Replying Affidavits and supporting papers 92 - 98; Other ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is

ORDERED that the application (#004) brought by plaintiff by order to show cause, for an order pursuant to CPLR 326(a), staying the summary holdover proceeding in District Court pending the hearing and determination of this motion, and to remove the summary proceeding and consolidate it with this action, is decided as follows; and it is further,

ORDERED that plaintiff's motion (#005) for an order pursuant to CPLR 3212 granting Genovese's motion for partial summary judgment on the issue that defendant is not entitled to terminate the lease, for an order for a permanent injunction, and for an order striking defendant's fifth and sixth affirmative defenses is decided as follows; and it is further

ORDERED that defendant's cross-motion (#006) for an order pursuant to CPLR 3211 and 3212 dismissing the complaint in its entirety or, in the alternative, for an order removing the action to the District Court is decided as follows; and it is further

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ORDERED that the application brought by plaintiff (#007) by order to show cause for an injunction enjoining the Sheriff of Suffolk County from enforcing the eviction order issued by the District Court in the summary holdover proceeding bearing Index Number BRLT 557-08, is decided as follows:

On or about April 30, 1975, Genovese entered into a lease with C&G Developers, Inc. ("C&G"), defendant's predecessor-in-interest, through which plaintiff leased a 12,000 square-foot lease premises in the William Floyd Shopping Center in Shirley, New York. The lease is long-term, and any right to terminate the lease is extremely limited to the actual abandonment by Genovese of the leased premises.

The lease had an initial term ending on January 31, 1997. Pursuant to the lease, plaintiff was unconditionally entitled to renew the lease, with no modification of its provisions, for up to two (2) additional ten-year terms. On July 20, 2006, Genovese exercised the second of those options to renew and extended the lease term through January 31, 2017.

In February 2000, Genovese sought to expand the leasehold premises by 3,000 square feet and entered into a separate agreement, "Lease Amendment No. 3 ("the Third Lease Amendment"), through which Genovese leased an additional 3,000 square feet of space. The 3,000 foot additional space is defined within the Third Lease Amendment as the "Additional Premises".

Paragraph 3 and Rider 3-A to the Third Lease Amendment reflects a series of agreements with respect to renewal of the leasehold for those "Additional Premises," as well as with respect to a financial settlement in the event that the leasehold for the "Additional Premises" was terminated.

Paragraph 3 of the Third Lease Amendment provides:

Notwithstanding anything to the contrary set forth in the Lease, the term of the Lease as it relates to the Additional Premises is hereby extended for a period of five (5) years (the "Extension Period"), such Extension Period beginning February 1, 2000 and ending January 1, 2005, under the same terms and agreements as set forth in the Lease unless otherwise modified herein. [Rider 3-A].

Rider 3-A to Lease Amendment No.3 provides that: "Notwithstanding anything in this (sic) lease to the contrary, each of Tenant and Landlord shall have the right to terminate the lease on an annual basis, commencing February 1, 2001, and on each anniversary thereof, provided that the party terminating the Lease shall give six months' written notice of such termination to the other party ... "

On December 13, 2001, Genovese and defendant's predecessor-in-interest entered into a lease termination agreement through which the Third Lease Amendment, comprising Genovese's leasehold interest in only the 3,000 square feet of additional premises, was terminated effective January 31, 2002 (the "Termination Agreement").

The termination agreement provides that termination of Genovese's leasehold interest applied only to the additional premises, and did not affect Genovese's right to continued occupancy of the main, 12,000

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square-foot leased premises conveyed by the main lease.
The agreement provides, in relevant part:

WHEREAS, Landlord and Tenant are desirous of amending the Lease to terminate Tenant's use and occupancy as to the Additional Premises only, as referenced and defined in Amendment 3; and ...

WHEREAS, the parties agree that the Lease with respect to the balance of the Demised Premises shall remain in full force and respect notwithstanding the termination with respect to the Additional Premises; and ...

WHEREAS, notwithstanding the expiration date contained in the Lease, Landlord and Tenant have agreed to terminate the Lease with respect to the Additional Premises only, subject to the terms and conditions contained herein.

On December 17, 2003, defendant was conveyed the fee estate and became the landlord under the lease. Thereafter, on August 24, 2006, defendant sent Genovese a "Six (6) Month Notice of Termination of Lease" (the "Termination Notice"). In the Notice, defendant purports to "elect to terminate the term of the lease effective as of February 1, 2008 for the entire 12,000 square-foot leased premises".

On September 29, 2006, Genovese's counsel wrote to defendant's counsel to respond to the termination notice and rejected defendant's purported right to terminate the lease. On October 10, 2006, defendant's counsel responded, arguing that in all places where the 3,000 square feet of additional space ("the Additional Premises") is referred to, the specific words "3,000 square feet of additional space" are inserted. However, where the amendment refers to lease termination in Rider 3-A, those words are missing and, therefore defendant argues, it clearly was the intent of the parties, as consideration for that amendment, to give the landlord the right to terminate the lease on six month's notice. On November 1, 2006, Genovese's counsel again wrote to defendant's counsel, rejecting defendant's interpretation of the contract. In response, defendant's representative contacted Genovese and asked whether it intended to vacate the entire 12,000 square foot leased space, on or after February 1, 2008, the putative "termination date" set forth in the alleged termination notice

On February 6, 2008, plaintiff commenced this action on the grounds the new landlord based the "Notice of Termination" upon a provision in the Third Lease Amendment relating to the 3,000 square feet of "Additional Premises" — an agreement, it argues, that had been terminated long before (December 2001) the new defendant-landlord had even taken title to the property. Counsel for defendant was advised that a Supreme Court action had been commenced. Less than two weeks after service of the complaint, defendant commenced the holdover proceeding in Sixth District Court.

At bar, plaintiff seeks to have the proceeding pending in the Sixth District Court transferred to and consolidated with the instant action. Plaintiff also seeks a preliminary injunction enjoining the Sheriff of Suffolk County from enforcing the eviction order issued by the District Court in the summary holdover proceeding bearing Index Number BRLT 557-08. Pursuant to the instant order to show cause seeking a preliminary injunction, a temporary restraining order is in effect, pending the hearing of the instant

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motion, enjoining defendants from conveying, encumbering or otherwise alienating the subject property. Additionally, pursuant to the order to show cause, the proceeding pending in the Sixth District Court has been stayed.

The motion to remove and consolidate is granted. Where common questions of law or fact exist, a motion to consolidate pursuant to CPLR 602(a) should be granted absent a showing of prejudice to a substantial right by the party opposing the motion (*see*, CPLR 602; *Nigro v Pickett*, 39 AD3d 720, 833 NYS2d 655 [2nd Dept. 2007]). A review of the record indicates that the interests of justice and judicial economy would be served by removal of the District Court holdover proceeding to Supreme Court and consolidation with the instant matter, since both actions involve the same parties, the claims arise out of the same circumstances, and the proof with respect to each action will overlap. Further, any claim of prejudice by defendant is disingenuous. When Genovese filed the instant action, counsel for Genovese notified defendant's counsel of the impending lawsuit prior to actual service, provided counsel with a courtesy copy of the pleadings, and discussed the matter over the telephone. Nevertheless, defendant filed a second, virtually identical proceeding in District Court. Not only are there common issues of law and fact and no showing of prejudice to defendant, only consolidation will permit inclusion of plaintiff's equitable claims.

Accordingly, the application (#004) brought by plaintiff by order to show cause, for an order pursuant to CPLR 326(a), staying the summary holdover proceeding in District Court under Index No. BRLT 557-08, seeking to evict plaintiffs pending the hearing and determination of this motion, and to remove the summary proceeding and consolidate it with this action is granted; it is further

ORDERED that the Clerk Of the District Court of the County of Suffolk, Sixth District, upon being served with a copy of this Order with Notice of Entry is directed to transfer all papers filed in his office in the aforementioned proceeding to the Clerk of the Supreme Court, Suffolk County, to be tried jointly with the instant action, and it is further

ORDERED that the a separate note of issue and certificate of readiness be filed and separate fees paid for each action (including the fee for an RJI). Each party shall be entitled to a separate bill of costs; and it is further

ORDERED that a copy of this Order with Notice of Entry shall be served on all parties to the actions combined and the Clerk of Suffolk County.

Plaintiff's motion (#005) for an order pursuant to CPLR 3212 granting Genovese's motion for partial summary judgment on the issue that defendant is not entitled to terminate the lease, for an order for a permanent injunction, and for an order striking defendant's fifth and sixth affirmative defenses is decided as follows:

Defendant argues the sole issue herein is whether tenant's commercial lease was properly terminated pursuant to its express terms, and therefore the dispute should be resolved by the District Court in the pending landlord-tenant proceeding.

Defendant argues that Rider 3-A to the Third amendment to the Lease, specifically permits the

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landlord to give the tenant six months notice to terminate the lease. Defendant further argues that, by virtue of its letter dated August 28, 2006, the lease has in fact been terminated. The plaintiff failed to take any action with regard to that notice within the six month window and waited until after the termination date to bring on the within action in the attempt to prevent the landlord from commencing its holdover proceeding.

Plaintiff argues the termination notice provides no explanation of defendant's basis for seeking to terminate the entire lease based. Further, Genovese notes, defendant's reliance on Paragraph 3 and Rider 3-A of the Third Lease Amendment is misplaced as those provisions are *expressly* restricted to the Additional Premises, the lease for which had already been terminated (emphasis added).

It is a well settled proposition in contract law that when parties set down their agreement in a clear, complete document, the terms of their writing should be enforced (*see, The Vermont Teddy Bear Co., Inc. v 538 Madison Realty Co.*, 1 NY3d 470, 775 NYS2d 765 [2004]; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 565 NYS2d 440 [1990]). Further, in real property transactions, interpreting an agreement to imply something which the parties did not include should be avoided (*see, Two Guys from Harrison-NY, Inc. v S.F.R. Realty Assoc.*, 63 NY2d 396, 482 NYS2d 465 [1984]).

Whether or not a writing is ambiguous is a question of law to be resolved by the court (*see, W.W.W. Assoc. v Giancontieri, supra*). The court finds that Paragraph 3 of the Third Lease Amendment clearly and unambiguously applied only to the additional premises, i.e., the additional 3,000 square feet and not to the original 12,000 square foot leased premises. Similarly, Rider 3-A permitting termination of the lease upon six months notice, clearly and unambiguously applied only to the 3,000 square feet of additional space. Upon execution of the "Termination Agreement" with respect to the additional premises on January 31, 2002, Rider 3-A became a nullity.

Accordingly, plaintiff's motion (#005) for an order pursuant to CPLR 3212 granting Genovese's motion for partial summary judgment on the issue that defendant is not entitled to terminate the lease is granted.

Plaintiff's motion for an order for a permanent injunction, and for an order striking defendant's fifth and sixth affirmative defenses is, therefore, denied as academic.

Defendant's cross-motion (#006) for an order pursuant to CPLR 3211 and 3212 dismissing the complaint in its entirety or, in the alternative, for an order removing the action to the District Court is denied as academic.

The application brought by plaintiff (#007) by order to show cause for an injunction enjoining the Sheriff of Suffolk County from enforcing the eviction order issued by the District Court in the summary holdover proceeding bearing Index Number BRLT 557-08, is also denied as academic.

Dated: JUL 08 2008

FINAL DISPOSITION

NON-FINAL DISPOSITION

J.S.C.

JEFFREY ARLEN SPINNER