

**Gangi Foods, Inc. v BSY Enters, Inc.**

2008 NY Slip Op 32122(U)

July 11, 2008

Supreme Court, Suffolk County

Docket Number: 0035529/2007

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

**PRESENT:**

HON. JOSEPH FARNETI  
 Acting Justice Supreme Court

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 GANGI FOODS, INC.,

Plaintiff,

-against-

BSY ENTERPRISES, INC., KENNETH  
 YEVIN and JUDITH YEVIN,

Defendants.

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ORIG. RETURN DATE: FEBRUARY 21, 2008  
 FINAL SUBMISSION DATE: FEBRUARY 28, 2008  
 MTN. SEQ. #: 002  
 MOTION: MD

ORIG. RETURN DATE: MARCH 6, 2008  
 FINAL SUBMISSION DATE: MARCH 6, 2008  
 MTN. SEQ. #: 003  
 MOTION: MD

**PLTF'S/PET'S ATTORNEY:**  
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Upon the following papers numbered 1 to 9 read on these motions \_\_\_\_\_  
FOR AN ORDER OF POSSESSION AND FOR SUMMARY JUDGMENT

Order to Show Cause and supporting papers 1-3; Notice of Motion and supporting papers 4-6; Affirmation in Opposition and Support and supporting papers 7, 8; Replying Affidavit and supporting papers 9; it is,

**ORDERED** that this motion by defendants for an Order, pursuant to RPAPL 853, immediately restoring defendants to possession of the demised premises, and awarding defendants treble damages as plaintiff allegedly unlawfully ejected defendants from the demised premises, is hereby **DENIED** for the reasons set forth hereinafter; and it is further

**ORDERED** that this motion by plaintiff for an Order, pursuant to CPLR 3212, granting plaintiff summary judgment in this matter for the relief demanded in the complaint, is hereby **DENIED** for the reasons set forth hereinafter.

The Court has consolidated these applications for the purpose of rendering the within decision and Order.

By contract of sale dated February 19, 2007, plaintiff sold to defendant BSY ENTERPRISES, INC. ("BSY") certain business assets of a delicatessen known as "GEMINI DELI," located at 1198 Walt Whitman Road, Melville, New York ("premises"). The closing was conducted on March 30, 2007. At closing, plaintiff, as the owner of the premises, entered into a lease agreement with BSY, the tenant recited therein ("Lease"). In addition, at the closing, BSY executed and delivered to plaintiff, the following:

(a) a secured promissory note in the principal amount of \$778,000.00, with interest thereupon at the rate of 7% per annum, amortized over eight (8) years, with monthly interest and principal payments, commencing on July 1, 2007, and monthly thereafter on the 1<sup>st</sup> of each exceeding month, in the amount of \$10,607.00 ("Note");

(b) the unconditional personal guarantees of the defendants KENNETH YEVIN and JUDITH YEVIN, ("Guarantees");

(c) a security agreement (chattel mortgage) pledging as security for the payment of the Note all of the furniture, fixtures, equipment, supplies, inventory and receivables of BSY Enterprises located at the premises, including all after-acquired items and/or substitutions of same and/or the proceeds of same ("Security Agreement"); and

(d) a conditional assignment of lease as collateral, assigning the Lease to plaintiff as additional security for the payment of the Note ("Assignment of Lease").

Plaintiff alleges the Security Agreement was “perfected” pursuant to Article 9 of the Uniform Commercial Code, by the filing of Form UCC-1 with the appropriate authorities.

On or about November 16, 2007, plaintiff commenced this action seeking, among other things, a judgment of possession/warrant of eviction, a judgment declaring that plaintiff is entitled to possess and dispose of the pledged collateral, and money judgments against BSY and the individual defendants, as a result of defendants’ alleged breach of the Note and Lease.

Plaintiff alleges that BSY failed to make timely payments due to plaintiff under the Note. As such, plaintiff has elected to accelerate the balance due and owing plaintiff on the Note, to wit: \$759,687.50, and seeks a money judgment against BSY in that amount, as well as a money judgment against the individual defendants based upon their Guarantees. In addition, plaintiff alleges that BSY defaulted in the payment of rent under the Lease. The “basic rent” due under the Lease is \$10,000.00 per month, due on the first day of the month, with a payment deemed late if not received by the tenth day of the month. Plaintiff claims that BSY has been late or delinquent in the payment of rent, which resulted in a “5-day Notice” being served upon BSY on or about October 13, 2007, seeking rents due from September and October of 2007, along with a late charge of 5% of the overdue amount, plus an administrative fee of \$100.00. The 5-day Notice provided that BSY must cure its default and make payment within five days. Plaintiff alleges that BSY paid the rent for September and October of 2007, but failed to pay the late charge of 5%, or the administrative fee. Further, plaintiff alleges that BSY failed to pay rent for November of 2007. Plaintiff alleges that pursuant to the Assignment, upon a default by defendants which remains uncured after five days, the escrow agent, plaintiff’s counsel, shall release the original Lease to plaintiff.

On or about November 20, 2007, plaintiff filed an application, by Order to Show Cause, seeking the following relief:

- (a) Directing plaintiff’s counsel to release the original Lease to plaintiff, pursuant to the Assignment of Lease, on account of defendants’ default in the payment of certain Note and Lease payments (and other fees);

(b) Directing that plaintiff be put back into possession of the premises, and directing that defendants vacate same; and

(c) Directing that plaintiff be put back into possession of defendants' business assets, which were formally of plaintiff, and located at the premises and being used in the business known as "Gemini Deli".

By "Stipulation of Settlement," So-Ordered by this Court on December 7, 2007 ("Stipulation"), plaintiff's application was resolved and withdrawn, upon the following terms and conditions, among others:

(a) Defendants were to pay to plaintiff, by certified check on or before December 10, 2007, the sum of \$55,212.05, representing payment of all sums due under the Note for the months of October, November and December, 2007 (including late charges); and "basic rent," late charges and administrative fees under the Lease through and including December, 2007;

(b) Defendants were to pay, by certified check on or before January 10, 2008, to Scalzi & Nofi, PLLC, the sum of \$11,113.00, (plus any other fees/expenses incurred beyond the date thereof to the date of payment) in full payment of plaintiff's collection costs and attorney's fees;

(c) Defendants were to pay real estate taxes when due, pursuant to the terms of the Lease, upon ten (10) days' written demand; and

(d) Defendants were to produce evidence of payment of insurance premiums for any insurance policy required under the Lease, and evidence that said policies are in full force and effect.

Defendants have now filed the instant application, by Order to Show Cause, seeking an Order, pursuant to RPAPL 853, immediately restoring

defendants to possession of the premises, and awarding defendants treble damages as plaintiff allegedly unlawfully ejected defendants from the premises. Defendants allege that plaintiff violated the 5-day notice provision contained in the Stipulation, when plaintiff locked out BSY from the premises on January 19, 2008, only four days after plaintiff allegedly served defendant Mr. Yevin with a 5-day notice. Defendants claim that the only service of the 5-day notice was via facsimile to defendants' counsel on January 16, 2008. In addition, defendants argue that plaintiff's use of self-help in changing the locks at the premises was in violation of defendants' rights under the parties' various contracts, as well as in violation of prevailing case law.

Plaintiff has subsequently filed a motion for summary judgment, pursuant to CPLR 3212, seeking an Order granting plaintiff the ultimate relief sought in the complaint. Although not denominated a "cross-motion," or served in compliance with CPLR 2215, plaintiff has proffered opposition to defendants' motion within its moving papers. Plaintiff alerts the Court that all of the closing documents were cross-referenced, such that a default under one document was deemed a default under all others, thereby triggering any remedies available to plaintiff contained in the closing documents.

Plaintiff alleges that defendants regularly paid the rent and monthly payments under the Note late, and six months into the Lease, defendants were behind in the amount of \$32,867.70. Plaintiff argues that pursuant to the terms of the Lease, if the tenant is late in the payment of rent four times in any twelve month period, the landlord could terminate the Lease. As discussed hereinabove, a default letter was hand-delivered to BSY on October 13, 2007. Thereafter, BSY delivered a check in the amount of \$10,807.00 to plaintiff, dated October 25, 2007, which plaintiff alleges was returned by the bank for insufficient funds. At the time of commencement of the instant action in November of 2007, plaintiff alleges that the accumulated arrears under the Lease and Note totaled \$34,605.05.

Notwithstanding the provisions of the Stipulation, plaintiff alleges that defendants failed to pay its attorneys' fees in the amount of \$11,113.00 by January 10, 2008. On that date, plaintiff claims it had only received a check in the amount of \$17,000.00 from defendants, leaving a balance then due and owing of \$39,673.11. As such, plaintiff alleges that on the following day, January 11, 2008, it hand-delivered a "5-day notice" to Mr. Yevin, at the delicatessen.

After the 5-day period expired without full payment from defendants, on January 19, 2008, plaintiff re-entered the premises, changed the locks therein, and re-took possession of the business assets which were pledged as collateral. Plaintiff alleges that its principal, DAVID GANGE, gained access with his own key; that defendants were not present at the time of the changing of the locks; that no force or violence was used; and that the re-entry was entirely peaceful. Plaintiff argues that the Note, Lease, Assignment, and other closing documents gave plaintiff the right to re-enter the premises and to re-possess the collateral. Moreover, plaintiff argues that the Stipulation expressly gave plaintiff the right to resort to self-help in the event of a default by defendants in January of 2008.

Plaintiff now seeks summary judgment declaring that plaintiff is entitled to sole possession of the premises; that the Lease has been terminated; and that plaintiff is entitled to sole possession of the collateral and may dispose of same pursuant to UCC 9-610. Plaintiff further seeks a money judgment against BSY for the full outstanding balance due under the Note; a money judgment for the full unpaid monthly rent under the Lease to the date of judgment, with leave to periodically seek future money judgments for remaining rents due; and a money judgment against the individual defendants pursuant to their Guarantees.

With respect to defendants' motion pursuant to RPAPL 853, the law permits a commercial landlord to reserve the right in a lease to re-enter the property upon nonpayment of rent if the reentry can be effected peaceably; forcible entries are not permissible (*Drapaniotis v 36-08 33rd St. Corp.*, 48 AD3d 736 [2008]; *Visken v Oriole Realty Corp.*, 305 AD2d 493 [2003]; *Bozewicz v Nash Metalware Co.*, 284 AD2d 288 [2001]; *Matter of 110-45 Queens Blvd. Garage v Park Briar Owners*, 265 AD2d 415 [1999]). Here, there is no indication in the record that plaintiff used force to gain access to the premises, or that the re-entry was anything other than peaceable. Further, the Lease, Note, and Security Agreement give plaintiff the right to resort to self-help in the event of a default by defendants, and plaintiff specifically reserved its rights in the parties' Stipulation. Accordingly, defendants' motion for an Order immediately restoring defendants to possession of the demised premises, and awarding defendants treble damages, is **DENIED**. Furthermore, although defendants seek to disqualify plaintiff's counsel based upon the lawyer-as-witness rule (22 NYCRR § 1200.21 [DR 5-102]), this request must be **DENIED**, as defendants failed to seek this affirmative relief in their notice of motion (CPLR 2214[a]).

With respect to plaintiff's motion for summary judgment, the test to be applied is whether or not triable issues of fact exist or whether on the proof submitted a court may grant judgment to a party as a matter of law (CPLR 3212[b]; *Andre v Pomeroy*, 35 NY2d 361 [1974]; *Akseizer v Kramer*, 265 AD2d 356 [1999]). It has been held that "the remedy of summary judgment is a drastic one, which should not be granted where there is any doubt as to the existence of a triable issue . . . or where the issue is even arguable" (*Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65 [1987] [citations omitted]; see also *Andre v Pomeroy*, 35 NY2d 361, *supra*; *Henderson v New York*, 178 AD2d 129 [1991]). It is well-settled that a proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Dempster v Overview Equities, Inc.*, 4 AD3d 495 [2004]; *Washington v Community Mut. Sav. Bank*, 308 AD2d 444 [2003]; *Tessier v N.Y. City Health and Hosps. Corp.*, 177 AD2d 626 [1991]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Gong v Joni*, 294 AD2d 648 [2002]; *Romano v St. Vincent's Med. Ctr.*, 178 AD2d 467 [1991]; *Commrs. of the State Ins. Fund v Photocircuits Corp.*, 2 Misc 3d 300 [Sup Ct, NY County 2003]).

Here, the Court finds that questions of fact exist which preclude the granting of summary judgment to plaintiff. Specifically, the Court finds that questions of fact exist with respect to the service of the 5-day notice dated January 11, 2008. Plaintiff alleges that it served this notice on even date, while defendants allege that they only "received" this notice when it was faxed to defendants' prior counsel on January 16, 2008. As such, defendants argue that plaintiff failed to comply with the notice provisions contained in the Lease and Stipulation, and failed to give defendants an opportunity to cure their default. Defendants contend that they were willing and able to pay all sums due and owing plaintiff, but that plaintiff refused payment of such sums on January 19, 2008, within the 5-day cure period as calculated by defendants. In view of the foregoing, plaintiff's motion for summary judgment is **DENIED**.

The foregoing constitutes the decision and Order of the Court.

Dated: July 11, 2008

  
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HON. JOSEPH FARNETI  
Acting Justice Supreme Court