

**Ada Dining Corp. v 208 E. 58th St., LLC**

2008 NY Slip Op 32813(U)

October 3, 2008

Supreme Court, New York County

Docket Number: 102255/06

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD  
*Justice*

PART 35

Index Number : 102255/2006

ADA DINING CORP.

vs

208 EAST 58TH STREET

Sequence Number : 005

DISMISS

INDEX NO. \_\_\_\_\_

MOTION DATE 7/16/08

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

Based on the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of defendants' motion for an order dismissing the Amended Complaint as against Patel for lack of jurisdiction is granted, without prejudice; and it is further

ORDERED that the branch of defendants' motion for an order dismissing the Amended Complaint for failure to obtain leave to serve same is denied; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 10/13/08

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):

PAPERS NUMBERED  
**FILED**  
OCT 06 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

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

-----X  
ADA DINING CORP.,

Plaintiff,

Index No. 102255/06

-against-

208 EAST 58<sup>TH</sup> STREET, LLC and KIRAN C.  
PATEL,

Defendants.

-----X  
HION. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

DECISION/ORDER  
**FILED**  
OCT 06 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Defendants 208 East 58<sup>th</sup> Street, LLC (the "LLC") and Kiran C. Patel ("Patel") (collectively "defendants") move to dismiss the Amended Complaint of the plaintiff, ADA Dining Corp., ("plaintiff") on the ground that (1) the Court lacks jurisdiction over Patel and (2) plaintiff failed to obtain leave to serve the Amended Complaint.

Factual Background

This action concerns a commercial property owned by the LLC located at 208 East 58<sup>th</sup> Street, New York, New York (the "property"). Plaintiff, along with Darshan R. Shaw (collectively, "plaintiffs") initially commenced this action in 2006 after the LLC served a notice of default upon plaintiff. Plaintiffs then sought *Yellowstone* injunctive relief and asserted two causes of action against Patel for, *inter alia*, based on his failure to make required contributions to the LLC.

The LLC moved for summary judgment and plaintiff's cross-moved for, *inter alia*, leave to amend the Complaint. Attached to plaintiffs' cross-motion was a "First Amended Complaint," which alleged that in or about August 2007, the parties met in Florida and agreed that plaintiff

would continue to lease the property for \$25,000 per month for six months, with an option to purchase the property for \$5.5 million. These terms were memorialized on a check stub. Plaintiff later prepared a formal lease and purchase option agreement (the "formal lease agreement") and served same with a rent check for the month of September 2007. However, the LLC failed to execute the formal lease and returned the September check. Plaintiff also exercised its option to purchase to the property. However, the LLC failed to recognize plaintiff's right to purchase. Thus, plaintiff sought specific performance of the formal lease agreement and damages for the LLC's repudiation of said agreement.

By Order dated May 5, 2008, the Court (1) granted summary judgment dismissing the Complaint as against the LLC, (2) dismissed the causes of action for *Yellowstone* and permanent injunctive relief, (3) severed the third and fourth causes of action against Patel and dismissed same against him, and (4) granted plaintiffs leave to "amend the Complaint to allege new causes of action against the LLC . . . on the condition that the plaintiffs withdraw or discontinue with prejudice, the Florida Action."

Thereafter, and based on conference call with counsel, the Court amended its order to set a time frame within which plaintiff could amend its Complaint, stating:

ORDERED that the order of this Court dated May 5, 2008 is amended solely to the extent that plaintiffs' cross-motion for leave pursuant to CPLR 3025(b) to amend the complaint is granted on the condition that plaintiffs withdraw or discontinue the Florida Action, without prejudice to *assert the claims therein in the Amended Complaint, within 14 days of the date of this order . . .*  
(Order dated May 22, 2008).

Consequently, plaintiff ADA Dining Corp. served an "Amended Complaint" dated June 8, 2008, which included the claim for specific performance of the formal lease agreement.

damages for the LLC's repudiation of said agreement, *and* an accounting. The Amended Complaint also includes an allegation of accord and satisfaction.

#### Defendants' Motion

Defendants argue that plaintiff's service of the "Second" Amended Complaint should be deemed a nullity as violative of this Court's orders. The Court's orders were keyed to the First Amended Complaint and the Complaint in the Florida Action. The First Amended Complaint annexed to plaintiff's cross-motion contains two causes of action, is only directed to the LLC, and did not allege an accord and satisfaction. And, the Complaint in the Florida Action, dated October 19, 2007, contained essentially the same allegations as the First Amended Complaint, and did not contain allegations of accord and satisfaction. However, the "Second" Amended Complaint served by plaintiff now alleges an accord and satisfaction, a claim not presented in the First Amended Complaint. This new claim of accord and satisfaction is wholly conclusory and its not supported by any document which would demonstrate an accord and satisfaction as required by General Obligations Law § 15-501(2).

Further, since the Order dismissed the Complaint as against Patel, and there has been no appeal or motion to reargue such dismissal, the dismissal is final and the Court lacks jurisdiction over him. As the original Complaint against Patel was dismissed, plaintiff is required to commence a new action against him and properly serve him with a Summons and Complaint.

#### Opposition

At the outset, plaintiff contends that the motion is defective pursuant to CPLR 2103, because Finkelstein Newman and Ferrara LLP remains counsel of record for Patel, and attorney.

Thomas Curtis ("Mr. Curtis"), who made the motion, never served a consent to change attorney or serve Finkelstein Newman and Ferrara LLP of his motion.

As to the merits, plaintiff contends that the Amended Complaint is consistent with this Court's amended order and was timely filed and served. At the time the May 5, 2008 order was issued, the Complaint in the Florida Action had been amended to set forth new claims. Thus, after the Court issued its May 5, 2008 order, plaintiff wrote to the Court seeking clarification and brought to the Court's attention that the Complaint in the Florida Action had been amended to assert "wholly different claims, based on the failure of [J] Patel . . .to account to ADA Dining Corp. . . ." Plaintiff also noted that a motion by defendants to dismiss the Florida Action was pending in that court. On an ensuing conference call with the Court and all counsel, plaintiff advised of its willingness to withdraw the Florida Action, without abandoning its claim for an accounting in the Florida Action. Plaintiff argues that the new Complaint in the Florida Action was before this Court prior to its making of the amended order. Therefore, the Court issued its amended order, and plaintiff amended its Complaint to add the third cause of action against the LLC and Patel for an accounting. In the event this Court determines that the Amended Complaint is deficient, plaintiff seeks leave to replead the accounting cause of action.

Further, the allegation concerning accord and satisfaction is consistent with the affidavits in support of the cross-motion to amend, and thus, the LLC cannot claim surprise.

In addition, defendants argue, in the absence of any order or judgment removing Patel as a party in this case, he remains a party-defendant. Since amendment of a complaint supercedes the original pleading, "the effect of the dismissal was limited to the two claims which plaintiffs were willing voluntarily to withdraw (without prejudice). It did not relate to Patel's continued

presence as a defendant in the case.” Patel could be joined as an additional defendant by service of a supplemental summons and the Amended Complaint on his attorney (Mr. Curtis), who has agreed to accept service. However, it would be “ridiculous” to require such extraneous action.

#### Reply

Finkelstein Newman and Ferrara LLP was discharged by Patel after this Court dismissed him from the Complaint since Patel did not have a further need for representation in this action. However, Mr. Curtis now represents Patel, and CPLR 321 uses the term “may” and not “shall” as to the filing of the consent to change attorney with the Clerk. Further, it is disingenuous for defendants to assert that Mr. Curtis agreed to accept service on Patel’s behalf (which Mr. Curtis disputes), but to then claim that he is not Patel’s attorney.

Further, the Order of May 5, 2008 only granted plaintiffs leave to serve the proposed Amended Complaint, and the Order of May 22, 2008 says nothing about the Amended Complaint in the Florida Action; the only Complaint in the Florida Action before the Court on plaintiff’s cross-motion for leave was the original Complaint. Thus, the reference in the Court’s order had to be to the original claims which it said could be asserted within 14 days of the order.

As to Patel, there is no extant complaint to amend and plaintiff is therefore required to start a new action as against him.

#### Analysis

At the outset, the Court finds that the motion by defendants is not procedurally defective. The record does not support a finding that Mr. Curtis is not counsel for Patel.

Further, although a party is not permitted to allege claims in an amended pleading beyond those which were permitted by the Court (*see Taylor v Cowit*, 20 AD2d 699 [1<sup>st</sup> Dept 1964]), it

cannot be said that the allegation of accord and satisfaction and claim for an accounting in the Amended Complaint served by plaintiff herein violated this rule.

As to the allegation of accord and satisfaction, the affidavits submitted by plaintiff in support of the cross-motion to amend contain factual allegations to support this claim, and the Court's order of May 5, 2008 made reference to this claim as well. "As a general rule, the acceptance of a check in full settlement of a disputed, unliquidated claim, without any reservation of rights, operates as an accord and satisfaction discharging the claim" (*Nationwide Registry & Sec., Ltd. v B & R Consultants, Inc.*, 4 A.D.3d 298, 773 N.Y.S.2d 341 [1<sup>st</sup> Dept 2004], citing *Trans World Grocers, Inc. v Sultana Crackers, Inc.*, 257 A.D.2d 616, 617, 684 N.Y.S.2d 284; *Complete Messenger & Trucking Corp. v Merrill Lynch Money Mkts., Inc.*, 169 A.D.2d 609, 610, 565 N.Y.S.2d 794). The theory underlying this common-law rule is that the parties have entered into a new contract discharging all or part of their obligations under the original contract (*Merrill Lynch Rlty./Carll Burr, Inc. v Skinner*, 63 N.Y.2d 590, 596, 483 N.Y.S.2d 979, 473 N.E.2d 229; *Complete Messenger & Trucking Corp. v Merrill Lynch Money Mkts., supra* at 610, 565 N.Y.S.2d 794), but there must be a clear manifestation of intent by the parties that the payment was made, and accepted, in full satisfaction of the claim (*Equitable Tower Assocs. v Asarco Inc.*, 127 A.D.2d 456, 457, 511 N.Y.S.2d 22; *Boyle v American Airlines, Inc.*, 89 A.D.2d 667, 453 N.Y.S.2d 146). The affidavits stated, *inter alia*, that all "arrears in rent and use and occupancy were calculated at the meeting and included in the \$5.5 million purchase price." (Bhadra Shah affidavit). "The additional monies which the I.I.C is claiming here . . . were, by mutual agreement . . . incorporated and subsumed by the agree-upon purchase price . . . ." (Darshan Shah affidavit). The Court's order made reference to such claim of accord and

satisfaction. Therefore, the LLC cannot claim surprise, or that the "Second" Amended Complaint improperly contains such allegation.

Furthermore, the Amended Complaint in the Florida Action, which contained a cause of action for an accounting, was before this Court at the time the Court issued its amended order. The record clearly indicates that the letter from plaintiffs to the Court seeking clarification precipitate the Court's amendment of its May 5, 2008 order. The letter included the Amended Complaint in the Florida Action, and expressly stated that the Amended Complaint included "wholly different claims." Consequently, plaintiff's withdrawal of the Florida Action was a condition to leave to serve an Amended Complaint in this action to assert "the claims *therein*." Therefore, it cannot be said that plaintiff's Amended Complaint, served on June 8, 2008, violated or went beyond this Court's orders, and the third cause of action against the LLC and Patel for an accounting may remain.

However, while plaintiff contends that the amendment of a complaint supercedes the original pleading, the Amended Complaint presented to the Court in support of the cross-motion to amend did not include Patel, and the Order related to that cross-motion dismissed all claims against Patel. In other words, the amended pleading contained no causes of action against Patel, and Patel was not a named party in the amended pleading. Instead, the amended pleading contained two causes of action, directed solely against 208 East 58<sup>th</sup> Street. As the Amended Pleading contained no claims against Patel, and having dismissed the claims against Patel, plaintiff must commence a new action against Patel (*Hummingbird Assoc. v Dix Auto Serv*, 273 AD2d 58 [1st Dept 2000], *lv denied*, 95 NY2d 764).

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of defendants' motion for an order dismissing the Amended Complaint as against Patel for lack of jurisdiction is granted, without prejudice; and it is further

ORDERED that the branch of defendants' motion for an order dismissing the Amended Complaint for failure to obtain leave to serve same is denied.

This constitutes the decision and order of the Court.

Dated: October 3, 2008

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

Conclusion

Based on the foregoing, it is hereby

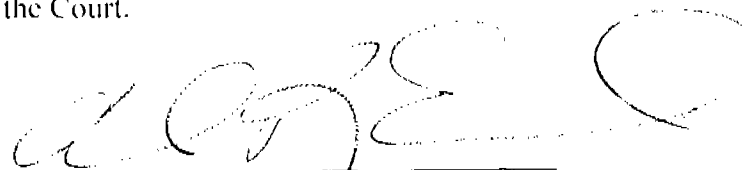
ORDERED that the branch of defendants' motion for an order dismissing the Amended Complaint as against Patel for lack of jurisdiction is granted, without prejudice; and it is further

ORDERED that the branch of defendants' motion for an order dismissing the Amended Complaint for failure to obtain leave to serve same is denied; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: October 3, 2008

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

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