

**Coast Equities, LLC v JCC Ventures, Inc.**

2008 NY Slip Op 32883(U)

October 17, 2008

Supreme Court, New York County

Docket Number: 603942/06

Judge: Barbara R. Kapnick

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

PRESENT: **BARBARA R. KAPNICK**

PART 12

Justice

Index Number : 603942/2006

COAST EQUITIES, LLC.

vs

JCC VENTURES

Sequence Number : 002

REARGUMENT/RECONSIDERATION

INDEX NO. 603942/dp

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 002

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

his motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

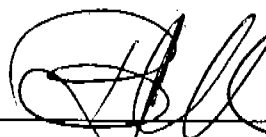
**FILED**

OCT 21 2008

COUNTY CLERK'S OFFICE  
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE WITH  
ACCOMPANYING MEMORANDUM DECISION**

Dated: 10/17/08



**BARBARA R. KAPNICK** *L.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 12

-----X  
COAST EQUITIES, LLC,

Plaintiff,

-against-

JCC VENTURES, INC., YOUNG WHITE BROKE,  
LLC and SERGIO ZHERKA a/k/a NAIM  
SERGIO ZHERKA,

Defendants.

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BARBARA R. KAPNICK, J.:

DECISION/ORDER  
Index No. 603942/06  
Motion Seq. No. 002

**FILED**  
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NEW YORK

In this action, plaintiff Coast Equities, LLC, the owner of the premises located at 330 West 38th Street, New York, New York, seeks to recover rent in the sum of \$115,230.92, for the period of October 1, 2005 through August 31, 2006, together with interest, pursuant to a Lease executed by the prior owner, 330 West 38th Street, LLC, and defendant JCC Ventures, Inc. ("JCC"), as Tenant, and a guarantee executed by defendant Sergio Zherka a/k/a Naim Sergio Zherka ("Zherka") (first cause of action) and legal fees in the sum of \$33,400.00 (second cause of action).

The Lease provided, in relevant part, that

2. Tenant shall use and occupy the demised premises for a first class restaurant and/or bar and/or lounge and/or cabaret which may offer for sale food, beer, wine and spirits for on-site consumption, and for no other purposes.

JCC assigned the Lease to defendant Young White Broke, LLC ("YWB") on or about July 18, 2005 pursuant to YWB's purchase of JCC's business. Although YWB intended to operate a cabaret at the premises, JCC was informed by its architect shortly after the purchase and reassignment that it had received a notice from the New York City Department of Buildings stating that it would be revoking its permit on the ground that use of the premises as a cabaret was prohibited by law.

According to plaintiff, no rent was subsequently paid by either JCC or YWB.

Plaintiff previously moved for summary judgment against all the defendants on the ground that there are no genuine issues of fact.

Defendants JCC and Zherka opposed the motion as premature on the ground that they had not yet had the opportunity to conduct discovery. They further argued that there were triable issues of fact as to (i) whether plaintiff had knowledge that the 'occupancy' for the premises as stated in the Lease - i.e., the use of the premises for a cabaret - was illegal; (ii) whether plaintiff waited an inordinate amount of time prior to notifying them that YWB had failed to pay rent and that they were in breach of the Lease; (iii) whether plaintiff failed to comply with the re-assignment

provisions of the agreement between JCC and YWB; (iv) whether plaintiff allowed defendant YWB to commence work in the premises without first obtaining the required permits; and (v) whether any money is owed by defendant Zherka under the guaranty.

Defendants JCC and Zherka contended, through an attorney's affirmation without a supporting affidavit from the clients, that they would not have signed the Lease and the accompanying guaranty if they were not specifically informed that the location was suitable for a cabaret permit.

In reply, plaintiff denied that it knew that the occupancy for the premises as a cabaret was illegal when the Lease was executed since it was not a party to the original Lease.

In a Decision/Order dated January 7, 2008 on mot. seq. no. 001, this Court:

(i) noted that the prior landlord represented in paragraph 49 of the Lease that it had "no actual knowledge of any condition or circumstance at the Building, of which Tenant is unaware, which would prohibit Tenant from using the Premises for the uses permitted under this Lease";

(ii) determined that there was no evidence that plaintiff was required to comply with any provisions of the assignment agreement

between JCC and YWB since plaintiff was not a party to that agreement;

(iii) held that defendants failed to raise a material issue of fact with respect to work allegedly conducted by YWB without a permit since paragraph 50 of the Lease required the tenant, not the owner, to apply for and obtain all required licenses and permits; and

(iv) found that defendants had produced no evidence refuting the accuracy of the rent ledger annexed to the moving papers and have not otherwise raised an issue of fact with respect to the enforceability of the guaranty executed by Zherka.

Therefore, this Court granted plaintiff's motion for summary judgment, and directed the Clerk to enter judgment in favor of plaintiff and against defendants in the sum of \$115,230.92, together with interest to be calculated by the Clerk from October 1, 2005, and costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs. Plaintiff's claim for attorney's fees was severed and continued and this Court directed an assessment thereof.

Defendants now move for an order pursuant to CPLR § 2221(d) granting defendants leave to reargue this Court's prior Decision/Order, and upon reargument, denying plaintiff's motion for

summary judgment and granting summary judgment dismissing plaintiff's Complaint.<sup>1</sup>

In support of their motion for reargument, defendants argue that: (i) plaintiff cannot recover damages for breach of the lease because it was an illegal contract which cannot give rise to a viable cause of action; (ii) plaintiff's breach of the lease precludes its recovery for unpaid rent allegedly accrued subsequent to the breach, i.e., plaintiff breached the lease as of August 2005 when the premises could not be legally used as a cabaret, or a restaurant, bar or lounge; (iii) landlord's fraudulent misrepresentation concerning defendants' ability to operate the premises as a cabaret warrants rescission of the lease; and (iv) the award for unpaid rent is not properly substantiated within the record (i.e., there is no proper business record from plaintiff justifying the sum of \$115,230.92) and erroneously includes legal fees (even though the sum of \$115,230.92 is comprised of \$5,582.13 in legal fees and \$546.91 for 'other').

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<sup>1</sup> By Decision/Order dated April 17, 2008 on mot. seq. no. 004, this Court (i) stayed the hearing on the issue of attorneys' fees pending the determination of defendants' motion for leave to reargue, and (ii) stayed the entry of and/or enforcement of the judgment upon the posting by defendants of an undertaking in the amount of \$120,000.00 and the filing of a copy of the undertaking with this Court.

Although defendants were unable to use the premises as a cabaret, the lease specified other permissive uses which were, in fact, legal, i.e., the use of the premises "for a first class restaurant and/or bar and/or lounge". Thus, there is no basis to conclude that the lease constituted an illegal contract. Moreover, this Court does not find "and/or" to constitute an ambiguous term, as defendants argue herein.

In addition, although it is undisputed that the Department of Buildings revoked the permit in August, 2005 which previously permitted the premises to be used as a 'cabaret', defendants have not submitted any evidence in support of their claim that the premises could not thereafter be used as a restaurant and/or bar and/or lounge.

Moreover, although defendants contend that they had always intended to operate the premises as an eating and drinking establishment with entertainment, the lease agreement does not support defendants' claim that a cabaret constituted a "vital and primary use" (*Thirty-Four Forty Thirtieth St. Corp. v Straub Furniture Delivery Co.*, 41 Misc2d 948, 949 [Civ. Ct., Queens Co. 1963]; *aff'd* 44 Misc.2d 78 [App. Term, 2nd Dep't 1964] over and above the other authorized uses.

Defendants have also failed to offer any evidence in support of their claim that plaintiff fraudulently induced them to enter into the lease.

Moreover, said claim is contradicted by paragraph 49 of the Lease which provides, in relevant part, as follows:

C. ... Tenant acknowledges that Owner shall have no responsibility or liability in connection with the preparation of the Premises for Tenant's initial occupancy and use thereof except as may be provided for herein. Owner's approval of any such plans and specifications shall not constitute or be deemed to be a representation, covenant or warranty by Owner with regard to the adequacy or correctness of said plans or that the plans and specifications or the alterations contemplated therein comply with any law, rule[, ] regulation or code. Owner represents to Tenant that Owner has no actual knowledge of any condition or circumstance at the Building, of which Tenant is unaware, which would prohibit Tenant from using the Premises for the uses permitted under this Lease.

This Court further finds that the judgment directed was properly based on an electronic record of the tenant's payment history which was kept in the ordinary course of business and which was, in fact, annexed to the prior moving papers and supported by an affidavit from Ariel Grunberg, a member of the plaintiff limited liability company.

However, it is not clear from the documents submitted whether or not the \$5,582.13 in legal fees and \$546.91 for 'other' fees

contained in the judgment are duplicative of the fees to be determined at the hearing.

Accordingly, based on the papers submitted and the oral argument held on the record on June 18, 2008, defendants' motion is granted only to the extent of granting reargument on that portion of this Court's prior Decision/Order which granted said fees in favor of plaintiff.

Upon reargument, the Clerk is directed to enter judgment in favor of plaintiff and against defendants in the sum of \$109,101.88, together with interest to be calculated by the Clerk from October 1, 2005, and costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

Plaintiff's claim for attorneys' fees and 'other' fees is severed and continued and an assessment thereof is hereby directed.

Upon filing of a note of issue, the payment of the proper fees, if any, and service of a copy of this order with notice of entry, the Clerk of the Trial Support Office shall place this matter on the appropriate trial calendar for the above-directed assessment.

This constitutes the decision and order of this Court.

Dated: October 17, 2008

**FILED**  
 OCT 21 2008  
 COUNTY CLERK'S OFFICE  
 NEW YORK

*[Signature]*  
 Barbara R. Kapnick  
 J.S.C.

**BARBARA R. KAPNICK**  
 J.S.C.