

**Eastside Exhibition Corp. v 210 E. 86th St.
Corp.**

2008 NY Slip Op 33241(U)

December 1, 2008

Supreme Court, New York County

Docket Number: 118246/02

Judge: Michael D. Stallman

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

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 7

Index Number : 118246/2002
EASTSIDE EXHIBITION CORP
VS.
210 EAST 86TH STREET CORP.
SEQUENCE NUMBER : 001
AMEND

INDEX NO. 118246/2002
MOTION DATE 9/11/08
MOTION SEQ. NO. 001
MOTION CAL. NO. 41

The following papers, numbered 1 to _____ were read on this motion for

Notice of Motion— Affidavits — Exhibits A-H _____
Answering Affidavits — Exhibits _____
Replying Affidavits — Exhibits _____

PAPERS NUMBERED
1-2
NONE (Memo only)

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

Copies to be sent by mail

COUNTY CLERKS OFFICE
NEW YORK

DEC 05 2008

FILED

Dated: 12/1/08
New York, New York

[Signature]

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: IAS PART 7

-----X
EASTSIDE EXHIBITION CORP.,

Index No. 118246/02

Plaintiff,

Decision and Order

-against-

210 EAST 86TH STREET CORP.,

Defendant.

-----X
HON. MICHAEL D. STALLMAN, J.:

Plaintiff EastSide Exhibition Corp. (EastSide) moves for an order scheduling a hearing as to damages in a related case, bearing index No. 604492/02, which is before Justice Edward Lehner (the Tried Action). That portion of this motion was denied by an earlier interim decision, without prejudice to a motion before Justice Lehner. EastSide also moves for leave to amend the complaint, and to schedule a joint trial of this action with the Tried Action. Defendant 210 East 86th Street Corp. (Landlord) opposes the inclusion of the proposed seventh, eighth and ninth causes of action, contending that they are barred by the statute of limitations.

FACTS

This action arises out of a dispute between EastSide and Landlord regarding the manner in which Landlord replaced an existing two-screen theatre in its building at 210 East 86th Street, in New York, New York, with a four-screen, two-story movie theatre (the Quad Theatre). The 1998 lease that the two parties entered into provided that the project would be a "turnkey development"

excluding EastSide's trade fixtures, seats, carpeting and wall coverings. Any changes in the plans, other than those required by law or government agencies, required EastSide's written approval and consent.

Landlord did not seek EastSide's approval or objection to Landlord's proposal for \$322,000.00 in revisions to the work until November 6, 1998. EastSide objected to those proposed revisions on the ground that it was not responsible for the additional expense. Thereafter, Landlord did not complete its portion of the work, which prevented EastSide from commencing its work. EastSide had booked "Star Wars Episode 1: The Phantom Menace," which was scheduled to open for its premiere exhibition on May 19, 1999. Thus, completing the theatre became urgent. In order to allow for the completion, EastSide advanced \$400,000.00 to Landlord, without prejudice to either party's rights to contest the amount actually due to Landlord. Although the Quad Theatre opened to exhibit "Star Wars," the construction work had not been completed.

EastSide was further dissatisfied with Landlord's alleged failure to comply with the Americans with Disabilities Act (ADA), which resulted in EastSide being sued by a class of disabled people. EastSide contends that, not only did Landlord fail to construct the theatre in accordance with the regulations, but it also prevented EastSide from complying, resulting in increased costs. Landlord also failed to get a certificate of occupancy,

which prevented EastSide from obtaining the necessary Public Assembly Permit. This situation continues to exist, although the Department of Buildings has otherwise approved the issuance of a Public Assembly Permit. EastSide has received summonses and notices of violation from the City of New York for failure to maintain a Public Assembly Permit, and has incurred legal fees, expenses, and the costs of fines and penalties as a result.

EastSide alleges that in or about 2003-2004, Landlord constructed two additional floors of rental space on top of the previously existing seven-story building, which has increased the real estate taxes imposed on the building. EastSide contends that it has been forced to pay for that increase, despite the fact that it is solely for Landlord's benefit.

The original complaint in this action asserts six causes of action, seeking: (1) a declaratory judgment that the full rent commencement date under the parties' lease is May 19, 1999, rather than February 13, 1999, as claimed by defendant; (2) an accounting of all rent payments from the commencement of the lease to date; (3) a refund of \$400,000.00 that was demanded by landlord, and paid in order to obtain possession of the Quad Theatre in time for the exhibition of "Star Wars: Episode I"; (4) a declaration that landlord was unjustly enriched by the \$400,000.00 payment; (5) a money judgment for \$400,000.00; and (6) \$1 million in punitive and exemplary damages, as well as attorneys' fees, costs and

disbursements.

In the Tried Action, EastSide sought a determination that Landlord's installation of steel cross bracing, which deprived EastSide of the use of approximately 12 square feet of space in the lobby of the movie theatre, constituted an actual partial eviction so as to deprive Landlord of the right to collect any rent. The Appellate Division determined that the de minimus taking did not warrant the draconian sanction of total abatement of rent, but that EastSide should be compensated by money damages proportionate to the injury involved. Thus, the Appellate Division held that EastSide was entitled to a partial rent abatement.

In view of the outcome of the Tried Action, and the evidence that was presented during that action regarding Landlord's failure to comply with the ADA, EastSide contends that the complaint in this action should be amended. The proposed amended complaint asserts 13 causes of action, seeking: (1) a judgment declaring that EastSide is entitled to the return of the \$400,000.00 payment and directing Landlord to repay that amount with interest. This cause of action would replace the third and fifth causes of action in the original complaint; (2) a judgment for \$400,000.00 based upon breach of contract, money had and received, or unjust enrichment. This would replace the second and fourth causes of action in the original complaint; (3) and (4) damages for Landlord's tortious interference with EastSide's contractual and business relations;

(5) a declaration that Landlord is not entitled to retain the \$400,000.00 and that Landlord has no right to the additional \$253,661.00 that Landlord seeks; (6) a declaration that the full rent commencement date under the lease is no earlier than May 19, 1999. This replaces the first cause of action in the original complaint; (7) monetary damages based upon Landlord's alleged breach of its lease obligation to construct the Quad Theatre in compliance with applicable law; (8) a judgment declaring that Landlord must obtain a certificate of occupancy for the building, and indemnify EastSide for all claims and expenses resulting from its failure to do so; (9) money damages for the continuing expenses EastSide has been forced to incur due to the failure to obtain a certificate of occupancy; (10) a declaration adjusting EastSide's portion of tax increases to exclude the increase resulting from the two additional floors that Landlord added to the top of the prior existing seven-story building; (11) a money judgment for the excess tax charges billed by and paid to Landlord; (12) a declaration that Landlord must fund the security deposit, rather than EastSide; and (13) damages resulting from Landlord's failure to fund the cash security deposit and rejection of the tender of a letter of credit for the cash security deposit.

DISCUSSION

Landlord opposes EastSide's motion to the extent that it seeks to assert the seventh, eighth and nine causes of action. Landlord

maintains that they are all barred by the statute of limitations.

The seventh proposed cause of action seeks damages based upon Landlord's failure to construct the Quad Theatre in accordance with the requirements of the ADA. Landlord maintains that the cause of action accrued upon the completion of the construction in 1999, when EastSide commenced occupancy of the theatre. At the very latest, Landlord maintains that the cause of action accrued in 2000, when Eastside was sued under the ADA in federal court. The statute of limitations is six years for breach of contract. Thus, Landlord concludes that it ran out in 2006, and no cause of action can be brought at this time.

EastSide maintains that the relation back doctrine allows the seventh cause of action to stand. That doctrine allows a claim that would otherwise be barred to continue if the new cause of action relates back to the facts, circumstances and proof underlying the original complaint. *See Pendleton v City of New York*, 44 AD3d 733 (2d Dept. 2007); *39 Coll. Point Corp. v Transpac Capital Corp.*, 27 AD3d 454 (2d Dept. 2006). EastSide contends that the proposed cause of action relates back because it involves Landlord's construction of the Quad Theatre, which was the dispute involved in the original complaint. It further maintains that Landlord placed the issue before the court in the Tried Action by claiming that EastSide violated the lease in acting to comply with the ADA, which Landlord argued entitled it to eject EastSide.

Although leave to amend is freely given, the party seeking to amend must demonstrate that there is merit to the amendment. Here, while EastSide may have a legitimate grievance against Landlord, it has not demonstrated that the seventh cause of action is timely. The fact that it involves the construction under the lease is not sufficient to allow the new claim to relate back to the original complaint. The original complaint was based upon Landlord's allegedly extracting \$400,000.00 from EastSide, and setting a date for full rent prior to when the premises were actually completed. Those issues are not related to Landlord's failure to comply with the ADA, nor does the original complaint give notice of the facts and occurrences giving rise to any claim for failure to comply with the ADA. *Pendleton v City of New York*, 44 AD3d at 736.

The fact that Landlord may have raised this issue in the related action does not enable EastSide to raise this claim in this action. The Court does not reach the question of whether this issue could properly be raised in the related action, or whether any actions of Landlord that may have interfered with EastSide's efforts to comply with the ADA subsequently can be redressed.

Consequently, EastSide has failed to demonstrate that the seventh cause of action is timely.

The eighth and ninth causes of action involve Landlord's alleged continuing failure to obtain a certificate of occupancy for the building, as it was required to do. Landlord maintains that

these claims, too, are barred by the statute of limitations, because they arose when the construction of the building was completed and plaintiff took possession of the theater, in 1999.

While EastSide could have sought legal redress as early as 1999, that does not mean that its claim is now barred by the statute of limitations. Landlord has a continuing obligation to have a valid certificate of occupancy on the premises. See *1050 Tenants Corp. v Lapidus*, 289 AD2d 145 (1st Dept 2001). Thus, while any damages arising more than six years ago cannot be recovered at this time, EastSide can seek to have Landlord obtain a certificate of occupancy, and to recover damages for the failure to have one for the past six years.

CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiff's motion to amend its complaint is granted in part, to the extent that leave shall be granted to amend the first, second, third, fourth, fifth, sixth, eighth, ninth, tenth, eleventh, twelfth, and thirteenth causes of action and to this extent, the complaint is deemed amended in the form proposed as annexed to the moving papers, and it shall be deemed served upon service of a copy of this order with notice of entry; and it is further

ORDERED that leave to amend the complaint is denied with respect to the proposed seventh cause of action and that cause of

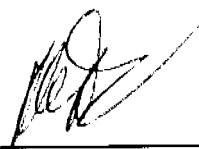
action is stricken; and it is further

ORDERED that the defendant shall answer the amended complaint within 30 days from the date of said service; and it is further

ORDERED that counsel shall appear for a status and disclosure conference on Friday, January 16, 2009 at 9:30 AM at IAS Part 7, 111 Centre Street, Room 949, New York City, New York.

Date: December 1, 2008
New York, New York

E N T E R:



J.S.C.