

Peach Parking Corp. v 346 W. 40th St., LLC

2009 NY Slip Op 30405(U)

February 19, 2009

Supreme Court, New York County

Docket Number: 103096/04

Judge: Walter B. Tolub

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

PRESENT: TOLUB
Justice

PART 15

PETRA PARKING CORP
346 WEST 40th

INDEX NO. 103096/04
MOTION DATE 1.16.2009
MOTION SEQ. NO. 16
MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits
Answering Affidavits - Exhibits
Replying Affidavits

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is consolidated with motion sequence 001 of index no 60356/2008 and is resolved in accordance with the accompanying memorandum decision.

FILED

FEB 25 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 2/19/09

WALTER B. TOLUB

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 — NEW YORK COUNTY

PRESENT: TOLUB
Justice

PART 15

PEACH PARKING CORP
- v -
KIMMAY SYSTEM INC

INDEX NO. 603561/08
MOTION DATE 12.19.2008
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this 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 is consolidated with motion sequence 016 of index no. 163096/2004 and is resolved in accordance with the accompanying memorandum decision.

FILED
FEB 25 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 2/19/09 Walter B. Tolub

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 15

-----X
PEACH PARKING CORP.,

Plaintiff,

-against-
346 WEST 40TH STREET, LLC, KINNEY SYSTEMS,
INC., and THE HERTZ CORPORATION,

Index No. 103096/04
Action No. 1

Defendants.

-----X
PEACH PARKING CORP.,

Plaintiff,

-against-
KINNEY SYSTEM, INC., 346 WEST 40TH STREET, LLC,
and THE HERTZ CORPORATION,

Index No. 603561/08
Action No. 2

Defendants.

FILED
FEB 20 2008

-----X
WALTER B. TOLUB, J.:

Motion sequence number 016 in action number one above, and motion sequence number 001 in action number two above, are consolidated for disposition.

In action number one, the defendant Kinney Systems, Inc. (Kinney) moves for an order striking the action from the trial calender pending the completion of discovery in action number two, staying the trial of action number one, and permitting Kinney to amend its answer in action number one to include a counterclaim for possession. The plaintiff Peach Parking Corp. (Peach) cross-moves, pursuant to CPLR 602, for an order consolidating actions number one and two.

[4]

In action number two, the plaintiff Peach moves, pursuant to CPLR 6301 for an order preliminarily enjoining the defendant Kinney System, Inc. (Kinney) from terminating or interfering with Peach's sublease of the parking garage located at 346 West 40th Street, Manhattan.

Action number one concerns which of the above-captioned parties is responsible for the cost of repairing water damage to a building that is being used as a parking garage. In 1978, the defendant West 40th Street, LLC (West 40th Street), as successor owner, leased the property (prime lease) to the defendant Kinney. The prime lease entitles Kinney to two options to renew, extending the lease term to 2013. In March 1978, one month after executing the prime lease with West 40th Street, and without ever having occupied the building, Kinney subleased the premises (first sublease) to the plaintiff Peach. After occupying the premises from March 1978 to November 26, 2001, Peach sub-subleased the building (sub-sublease) to the defendant The Hertz Corporation (Hertz). Hertz operated a parking garage in the building. In 2006, after an incident where some concrete fell, Hertz vacated the building. Currently, Peach is again operating a parking garage in the building. Unbeknownst to the other parties, on January 29, 2002, Peach and West 40th Street executed a side agreement (side agreement) whereby, in exchange for a third renewal term commencing after the expiration of Kinney's second renewal term in 2013, Peach paid additional rent to West 40th Street, bypassing Kinney.

In action number one, Peach's amended complaint sets forth a total of three causes of action. The first cause of action seeks a judicial determination of the dispute. The second cause of action seeks a judgment declaring that Peach is entitled to reimbursement of its structural repair costs from West 40th Street. The third cause of action seeks a judgment declaring that

Peach is entitled to reimbursement of its non-structural repair costs from its sub-sublessee Hertz.

The defendant West 40th Street in its amended answer, counterclaims against Peach, and cross-claims against Kinney and Hertz, alleging that Peach, Kinney and Hertz all failed to keep the premises in good repair.

The defendant Kinney pleads a combined counterclaim and cross claim against Peach, Hertz, and West 40th Street, alleging that if Kinney is found liable for any repairs, whether structural or non-structural, then Kinney is entitled to full indemnification pursuant to the subject agreements.

The defendant Hertz's second amended answer pleads waiver and laches, and alleges that Peach's claims are barred by the express terms of the agreements. The first counterclaim against Peach seeks an abatement of rent and alleges that Peach breached its agreement to seek the cost of structural repairs from West 40th Street. Hertz also cross-claims against West 40th Street, alleging that as a result of a consent agreement, it is a third-party beneficiary of the prime lease, and that the prime lease requires West 40th Street to pay to repair the structural defects in the building. Finally, Hertz asserts a fraud/rescission claim against Peach, Kinney and West 40th Street, alleging that the prime lease, the first sublease, the sub-sublease and the consent agreement all misrepresented that there were no defaults. In addition to the foregoing, each party seeks to recover its attorney's fees.

In prior motion practice this court denied motions for summary judgment, finding triable issues of fact including (1) whether or not the lessees allowed the premises to become structurally unsound by failing to perform the maintenance required by their respective leases, (2) whether the structural damage arose from normal wear and tear in an old building, (3) whether

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the structural repair costs were ever expended, (4) whether the failure to perform routine maintenance was reckless, (5) whether the introduction of water into the building by washing cars was reckless, and (6) what damage is structural in nature and what damage is not structural. This Court also found that the various lease agreements did not exonerate the tenants from a reckless or intentional failure to perform maintenance. Although each party contemplated by their repair covenant that the premises should be kept in the same repair that they were in when the premises were leased to that party, it was not possible to see which repairs any one tenant should have made and those which it was not called on to make.

A note of issue and statement of readiness is on file in action number one.

Action number two was triggered by Kinney's serving a notice alleging that Peach breached its sublease with Kinney by failing to make repairs. On November 25, 2008, the defendant Kinney served the plaintiff Peach with a ten-day notice of default, allowing Peach until December 5, 2008, to cure. The notice alleged breaches of substantial obligations of the lease including: the failure to eliminate Building's Department violations and expending repair money instead of looking to the owner as required by the sublease. Peach waited until the last day of the cure period to apply for a Yellowstone injunction.

Peach's complaint in action number one claims that, despite occupying the space for a period of 23 years, and presently, Peach is not responsible for the lack of maintenance. Peach moves for a *Yellowstone* injunction (*First Natl. Stores v Yellowstone Shopping Ctr.*, 21 NY2d 630 [1968]).

The court will first dispose of Kinney's motion to strike action number one from the trial calendar and for a stay of the trial of action number one, and Peach's cross motion to consolidate

actions number one and two, before turning to Kinney's motion to amend its answer in action number one, and Peach's motion for a *Yellowstone* injunction in action number two.

In action number one, Kinney argues in support of its motion that the commencement of action number two by Peach, requires that the original action be struck from the trial calendar. In support of its motion to amend its answer in action number one, Kinney argues that Peach's failure to maintain the premises requires that Kinney counterclaim for possession. Peach argues in support of its cross motion that the two actions should be consolidated for trial.

Action number two is still in the early stages of discovery, while action number one, commenced five years ago, is ready for trial. The fact that the two actions are at completely different stages of discovery, means that consolidation would result in undue delay in the resolution of action number one (*Cronin v Sordoni Skanska Constr. Corp.*, 36 AD3d 448 [1st Dept 2007]). In *Abrams v Port Auth. Trans-Hudson Corp.* (1 AD3d 118, 119 [1st Dept 2003]) the First Department held that consolidation was properly denied even though common issues of law or fact existed where the matters are at "markedly different procedural stages and consolidation would result in undue delay in the resolution of either matter." Moreover, there is no showing that the imminent trial in action number one would impair or prejudice any right of the parties in action number two (*Biederman v Yorks*, 9 AD2d 764, 765 [2d Dept 1959]).

Therefore, the motion by Kinney to strike the note of issue, and to stay the trial in action number one, and Peach's cross motion to consolidate actions number one and two, must be denied.

Kinney's motion to amend its answer in action number one, to include a counterclaim against Peach for possession, must also be denied. Whether or not Kinney is entitled to

possession will be litigated in action number two between Kinney and Peach, and does not affect the claims for money damages in action number one.

Turning to Peach's motion for a preliminary injunction in action number two, in *Graubard Mollen Horowitz Pomerantz & Shapiro v 600 Third Avenue Assoc.* (93 NY2d 508, 514 [1999]) the Court of Appeals held that:

A Yellowstone injunction maintains the status quo so that a commercial tenant, when confronted by a threat of termination of its lease, may protect its investment in the leasehold by obtaining a stay tolling the cure period so that upon an adverse determination on the merits the tenant may cure the default and avoid a forfeiture. The party requesting a *Yellowstone* injunction must demonstrate that: '(1) it holds a commercial lease; (2) it received from the landlord either a notice of default, a notice to cure or a threat of termination of the lease; (3) it requested injunctive relief prior to the termination of the lease; and (4) it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises.' (quoting *225 E. 36th St. Garage Corp. v 221 E. 36th Owners Corp.*, 211 AD2d 420, 421 [1st Dept 1995]).

Peach argues that it has satisfied the four criteria for the entry of a *Yellowstone* injunction. In opposition to the motion for a *Yellowstone* injunction, the defendant Kinney makes the following arguments. The order to show cause was not properly served in accordance with the Court's directive. The notice of lease cancellation had been sent on December 5, 2008, when Peach appeared on the application for a *Yellowstone* injunction. Peach has not made a good faith effort to cure.

Motions brought on by order to show cause must be served "at a time and in a manner specified therein" (CPLR 2214 [d]). The instant order directed personal service thereof upon the defendant Kinney at its counsel's address.

In an action for Yellowstone relief, the order to show cause initiating it must be served in accordance with the order's directive (*Jubilee, Inc. v Haslacha, Inc.*, 270 AD2d 34 [1st Dept

2000]). In emergency cases, the notice to be given may, in the exercise of the court's discretion, be fixed by the judge without adherence to the prescribed methods for service of a summons or other notice, provided reasonable notice is given under the circumstances (NY Jur Injunctions § 146). Although notice received by means other than those authorized by statute cannot serve to bring a defendant within the jurisdiction of the court (*Macchia v Russo*, 67 NY2d 592 [1986]; *Markoff v South Nassau Community Hosp.*, 61 NY2d 283 [1984]; *Feinstein v Bergner*, 48 NY2d 234, 241 [1979]; *Matter of Country Side Sand & Gravel, Inc. v Town of Pomfret Zoning Bd. of Appeals* 57 AD3d 1501 [4th Dept 2008]), in an order to show cause, permission is routinely granted to resort to substituted service (*Hornok v Hornok*, 121 AD2d 937 [1st Dept 1986]).

Kinney, as Peach's over-tenant, is clearly subject to the jurisdiction of our courts (CPLR 302 [a] [1]) and it is clear that Kinney had actual notice of the order to show cause. In addition, it is uncontroverted that subsequent to the service of the order to show cause, the action was properly commenced, and personal jurisdiction over Kinney was obtained by valid service of the summons and complaint. Furthermore, the order to show cause does not include a directive that it be hand delivered to Kinney (*Jubilee, Inc. v Haslacha, Inc.*, 270 AD2d 34 [supra]). Under the circumstances, Peach did all that could be expected to do to see that Kinney was properly served (*Sloan's Supermarkets, Inc. v Barbellens Props Corp.*, 184 AD2d 337 [1st Dept 1992]) and the service of the order to show cause, in a manner directed by the court at counsel's office, may be validated nunc pro tunc (*Bleecker St. Corp. v Souto Geffen Co.*, 277 AD2d 133 [1st Dept 2000]; *Bianco v Coles*, 131 AD2d 10 [3d Dept 1987]). Therefore, the order to show cause was properly served.

In addition, the motion was timely made, and the order to show cause was timely served

on the last day to cure December 5, 2008. The fact that Kinney prematurely sent the notice of termination on the tenth day after service of the notice to cure, does not shorten the cure period.

Turning to the merits, in granting *Yellowstone* relief, courts require far less than the showing normally required for obtaining preliminary injunctive relief (*TSI W. 14, Inc. v Samson Assoc., LLC*, 8 AD3d 51 [1st Dept 2004]). In this case the plaintiff Peach holds a commercial lease and it received a 10 day notice of default. In addition, Peach contends that it made efforts and cured some of the purported breaches, and that it is continuing to take various steps to remedy the other alleged defaults. Peach shows its willingness and ability to cure its alleged defaults by alleging that it has cleared all the Building Department violations of record. The foregoing satisfies the requirement that the plaintiff has the desire and ability to cure.

Accordingly, it is

ORDERED that in action number one (Index No. 103096/04), the defendant Kinney Systems, Inc.'s motion for an order striking action number one from the trial calender, staying the trial of action number one, and permitting Kinney to amend its answer in action number one, and the plaintiff Peach Parking Corp.'s (Peach) cross motion for an order consolidating actions number one and two, are all denied; and it is further

ORDERED that due deliberation having been had, and it appearing to this Court that a cause of action exists in favor of the plaintiff Peach Parking Corp. and against the defendant Kinney Systems, Inc. and that the plaintiff is entitled to a preliminary injunction on the ground that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual, as set forth in the aforesaid decision, it is

ORDERED that the undertaking is fixed in the sum of \$ 10,000 conditioned that the plaintiff, if it is finally determined that it was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of this injunction; and it is further

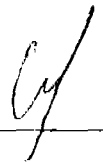
ORDERED that defendant, its agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of defendant, are enjoined and restrained, during the pendency of this action, from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under the supervision or control of defendant or otherwise, any of the following acts:

from cancelling and terminating, based on a notice of default dated November 24, 2008, Peach's sublease of the parking garage located at 346 West 40th Street, Manhattan.

Counsel for the parties in the first action are directed to appear for a Pre-Trial Conference in IA Part 15, Room 335, 60 Centre Street, New York, New York, at 11:00 a.m. on March 6, 2009.

This constitutes the decision and order of the court.

Dated: 2/19/20

Enter: 

Hon. Walter B. Tolub, J.S.C.

