

**Manhattan Med. Leasing, Inc. v Massachusetts
Mut. Life Ins. Co.**

2009 NY Slip Op 30565(U)

March 16, 2009

Supreme Court, New York County

Docket Number: 111593/2006

Judge: O. Peter Sherwood

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

PRESENT: O. PETER SHERWOOD
Justice

PART 61

MANHATTAN MEDICAL LEASING, INC. and
STAND-UP MRI OF MANHATTAN, INC.,

Plaintiffs,

-against-

MASSACHUSETTS MUTUAL LIFE
INSURANCE COMPANY,

Defendant.

INDEX NO. 111593/06

MOTION DATE Jan, 7, 2009

MOTION SEQ. NO. 005

MOTION CAL. NO. _____

The following papers, numbered 1 to 4 were read on this motion for an order, *Inter alia*, vacating a
Yellowstone injunction

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-2

3

4

Cross-Motion: Yes No

Upon the foregoing papers, the defendant's motion, by Order to Show Cause, for an order, *inter alia*, vacating a *Yellowstone* injunction and granting judgment in its favor for overdue rent/use and occupancy is decided in accordance with the accompanying decision and order.

FILED

MAR 17 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/16/09

O.P. Sherwood
O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 61

-----X
MANHATTAN MEDICAL LEASING, INC. and,
STAND-UP MRI OF MANHATTAN, INC.,

DECISION AND
ORDER

-against-

Plaintiffs,

Index No. 111593/2006

MASSACHUSETTS MUTUAL LIFE
INSURANCE COMPANY,

Defendants.

FILED
MAR 17 2006
COUNTY CLERK'S OFFICE
NEW YORK

-----X
O. PETER SHERWOOD, J.:

Defendant Massachusetts Mutual Life Insurance Company (“defendant”) moves, by Order to Show Cause, for an order vacating the *Yellowstone* injunction granted pursuant to a “so-ordered” stipulation dated March 1, 2007¹, granting judgment in its favor in the sum of \$63,795.37 for past due rent and a judgment of ejectment as against plaintiff Stand-Up MRI of Manhattan, LLC (“plaintiff” or “Stand-Up”), and directing a hearing to determine the amount of defendant’s reasonable attorney’s fees.

In or about April 2004, Stand-Up entered into a 15-year lease with defendant for a portion of the ground floor of its premises, located at 555 West 42nd Street in Manhattan, where plaintiff intended to operate an MRI imaging facility. On or about July 17, 2006, defendant served a Notice to Cure on plaintiff asserting that it had violated the terms of the lease by, among other things, failing to pay for electricity used or consumed at the premises, failing to make an application in its own name for electricity services to the premises, failing to install electricity submetering equipment and failing to cease use of equipment or fixtures which exceeded the safe and lawful capacity of electrical utility equipment and lines serving the same. Defendant gave plaintiff until August 21, 2006 to cure the defaults. A Supplemental Notice to Cure was served on or about September 18, 2006, giving a thirty-day cure period (*i.e.*, until October 28, 2006) with respect to additional

¹This action was previously assigned to the Honorable Roland T. Acosta before whom the “so-ordered” stipulation was executed. Judge Acosta was subsequently appointed to the Appellate Division of the Supreme Court, First Judicial Department. Upon the filing of the Order to Show Cause, this matter was randomly reassigned to this Part 61.

violations of the lease concerning alterations made to the premises that were allegedly not in accordance with plans filed with the New York City Department of Buildings and operating the MRI facility without having first obtained an amendment to the Certificate of Occupancy. In response, plaintiff commenced the instant action seeking a declaratory judgment that it was not in default under the lease. Immediately upon commencing the action, plaintiff sought and obtained a *Yellowstone* injunction (*First Natl. Stores v Yellowstone Shopping Ctr.*, 21 NY2d 630 [1968]) which prohibited defendant from terminating the lease pending the outcome of the action and tolled the cure period in the default notices.

Thereafter, the parties resolved the action by “so-ordered” stipulation dated March 1, 2007 (“the Stipulation”) which provided, *inter alia*, for the payment of the sum of \$220,000.00 “[i]n satisfaction of any and all claims for electric charges, switchover costs and attorneys fees” (Stipulation ¶ 6) in connection with the proceeding and the execution of a confession of judgment in that amount to be held in escrow by plaintiff’s attorney and released only in the event of a default as defined therein upon service of a five-day Notice of Default (Stipulation ¶ 14). The payments were to be made by eight (8) equal monthly installments commencing May 21, 2007 and continuing through December 15, 2007. The Stipulation further detailed work plaintiff was required to have performed at the premises and associated documentation plaintiff was to prepare to cure defaults alleged in the Supplemental Notice to Cure. In the event plaintiff complied with the terms and conditions provided in the Stipulation, the defendant was to withdraw the Notice to Cure and the Supplemental Notice to Cure and the parties were to file a notice of discontinuance of this action (Stipulation ¶ 12).

On or about November 11, 2008, defendant served a five-day Notice of Default claiming that plaintiff was in default under paragraph 4 of the Stipulation in having failed to remit the sum of \$87,355.25 representing rent and additional rent due through November 30, 2008, and that such violation constituted a material default under paragraph 16 of the Stipulation.

Defendant now seeks to vacate the *Yellowstone* injunction granted in the Stipulation and to enforce the terms of the stipulation by entry of a judgment in the sum of \$63,795.37, representing outstanding rent/use and occupancy. In support of its application, defendant submits the affirmation of its attorney David R. Brody, a member of the law firm Borah, Goldstein, Atschuler, Nahins &

Goidel, P.C.. Mr. Brody acknowledges that after the Notice of Default was served defendant learned of a payment of \$6,238.49, which had not been properly credited, and a second payment of \$17,321.39, that was made by an entity known as "Network MRI". Network MRI is alleged to be operating Stand-Up's MRI facility and paying rent on its behalf.

Stand-Up opposes defendant's application on the ground that non-party MRI Enterprises Leasing, LLC ("MRI Enterprises")² is currently the prime tenant pursuant to a Consent and Waiver Agreement, dated January 12, 2005, and has assumed the rights and obligations under the lease. Plaintiff argues that, as such, MRI Enterprises is a necessary party to this proceeding. Plaintiff further avers that the parties' Stipulation has been irredeemably altered by MRI Enterprise taking over possession of the premises and its assuming the principal responsibility for paying rent. Thus, any rights as against plaintiff derived thereby must be deemed to have been extinguished. At the very least, the Stipulation, even if deemed to be an enforceable contract, must be reinterpreted in light of developments subsequent to its execution. Stand-Up also contends, citing paragraph 14 of the Stipulation, that defendant is not entitled to seek ejectment in this action, but must seek such relief in a separate proceeding. Lastly, Stand-Up avers that the settlement amount of \$220,000.00 set forth in the Stipulation has been fully paid.

The Consent and Waiver to which plaintiff refers stemmed from Stand-Up's default in an agreement with MRI Enterprises for the lease of MRI equipment located at the premises. The Consent and Waiver provides that if Stand-Up vacated the premises or the lease was terminated defendant may "upon written notice to MRI Enterprises ('Landlord Notice') request that MRI Enterprises remove the Equipment from the Leased Premises". Paragraph 7 of the Consent and Waiver provides that if MRI Enterprises received such "Landlord Notice" or MRI Enterprises notified defendant that Stand-Up had defaulted in its obligations to MRI Enterprises, then MRI Enterprises, upon giving written notice, had the right to find within a 180-day period of giving or receiving such notice a substitute tenant, reasonably acceptable to defendant, who would take over the leased premises on the same terms and conditions that Stand-Up was subject to.

²The parties do not dispute that MRI Enterprises is the same entity referred to by Mr. Brody as Network MRI

By letter dated October 29, 2008, MRI Enterprises notified defendant that plaintiff had defaulted under the equipment leasing agreement, MRI Enterprises was taking over occupancy of the leased premises and that it was exercising its option under the Consent and Waiver Agreement to find a substitute tenant.

Provisions of the Stipulation upon which the defendant predicates the instant application to recover a judgment against the plaintiff for outstanding rent and/or use and occupancy are as follows:

4. The parties shall continue to comply with all of their obligations under the Lease, and Plaintiff shall pay and Defendant shall accept rent/use and occupancy *pendente lite* in the amounts and at the times required by the Lease for the payment of rent and additional rent, except as otherwise set forth in this Stipulation, without prejudice.
- * * *
16. If Plaintiff fails to comply with any one or more terms and conditions hereof (including but not limited to, the timely payment of use and occupancy *pendente lite*), the same shall constitute a material default for which Defendant shall be entitled to move to vacate the *Yellowstone* preliminary injunction and for entry of a money judgment against Plaintiff for any unpaid use and occupancy plus legal fees and disbursements incurred by Defendant in connection with this action, without prejudice to Defendant's request to a possessory judgment, in addition to the remedies set forth in ¶¶ 13 and 14, above.
- * * *
23. The parties agree that this Stipulation shall be "So Ordered" and that the Court shall retain continuing jurisdiction to ensure the enforcement of the terms hereof.

Discussion

At the outset, the Court credits plaintiff's argument that the relief of a judgment of ejectment may not properly be sought by means of the instant application to enforce the terms of the Stipulation. In executing the Stipulation, the parties appear to have contemplated that the defendant would commence a separate holdover or ejectment proceeding to recover possession of the premises in the event of a default under the terms of the Stipulation. Specifically, paragraph 14 of the Stipulation states, in the event of plaintiff's failure to cure its default within five (5) days of service of a Notice of Default, the "Defendant shall be entitled to enter judgment against the Plaintiff for the

amount of the Settlement outstanding at the time of default, plus statutory interest and costs and attorney's fees associated with collection of the outstanding portion of the Settlement, and Defendant shall be entitled to serve a notice of termination and commence an appropriate holdover proceeding or action in ejectment." In addition, paragraph 16, reproduced above, in making reference to a request for a possessory judgment, appears to contemplate such application as separate from an application for a judgment awarding outstanding use and occupancy.

In addition, defendant makes no claim that the settlement amount of \$220,000.00 set forth in the stipulation or the other conditions thereof, other than the payment of rent and/or use and occupancy, have not been satisfied. Accordingly, defendant's application reduced to its simplest terms is to recover overdue rent and/or use and occupancy under the terms of the lease. The Notice of Default states the overdue amount through November 30, 2008 to be \$87,355.25. A computer printout of defendant's accounts receivable ledger, which was attached to the November 11, 2008 Notice of Default, indicates that the monthly rent is \$17,030.41 and that of the total alleged to be due \$2,203.20 represents late charges and real estate taxes. The remaining \$85,152.05 represents five months rent and or use and occupancy for a period roughly from July 1, 2008 through November 30, 2008. That amount was further reduced by payments credited after the Notice of Default was served. One of those payments made by MRI Enterprises in the amount of \$17,321.39 appears to have covered the rent for November 2008 plus real estate taxes of \$290.98.

Since MRI Enterprises did not exercise its rights to "step into the shoes" of plaintiff and take over occupancy of the premises under the provisions of the Consent and Waiver until October 29, 2008, the amounts sought in this proceeding predate any alleged possessory interest of MRI Enterprises or any associated rental obligations. Viewed in this context, plaintiff's argument that MRI Enterprises is a necessary party to this action must fail since MRI Enterprises rights would not be inequitably affected by a judgment in this action nor is its presence indispensable to according of complete relief between plaintiff and defendant on this motion (*see*, CPLR § 1001; *Kronish Lieb Weiner & Hellman, LLP v Tahari, Ltd.*, 35 AD3d 317, 318 [1st Dept. 2006]; *Triborough Bridge & Tunnel Auth. v Wimpfheimer*, 165 Misc2d 584, 586 [App. Term, 1st Dept. 1995]; *cf.*, *Vicario v Raymond*, 44 AD2d 863 [3d Dept. 1974]). Moreover, defendant in its reply emphasizes that it is simply seeking to terminate plaintiff's right in the premises and to recover the overdue rent, but not to interfere with MRI Enterprise's occupancy of the premises pursuant to the Waiver and Consent.

Attached to the reply affirmation is an affidavit of service demonstrating that defendant served the instant Order to Show Cause and supporting papers upon counsel for MRI Enterprises providing it with notice of this proceeding and an opportunity to be heard. Despite having been notified of defendant's application, MRI Enterprises made no appearance and submitted no papers in opposition to the Order to Show Cause.

Turning then to whether the defendant is entitled to the relief of vacatur of the *Yellowstone* injunction and entry of a monetary judgment based upon the Stipulation, it is well settled that absent a showing of good cause such as fraud, collusion, mistake or duress, a valid stipulation should be regarded as a binding contract subject to settled principles of contractual interpretation (*see, McCoy v Feinman*, 99 NY2d 295, 302 [2002]; *In re Estate of Stravinsky*, 4 AD3d 75, 81 [1st Dept. 2003]; *see also, Rabinovich v Womack*, 57 AD3d 866 [2d Dept. 2008]; *JP Morgan Chase Bank, N.A. v Cellpoint, Inc.*, 54 AD3d 366 [2d Dept. 2008]).

Here, the stipulation clearly expresses the parties' intention that as a condition to the continuation of the *Yellowstone* injunction plaintiff was not only to pay the settlement amount, but was also to remain current in payments of rent and/or use and occupancy as they became due. What remains unclear from the record is the reason defendant did not seek to withdraw the Notice to Cure and the Supplemental Notice to Cure upon plaintiff's cure of its defaults as specified therein or why the parties' did not execute and file a stipulation of discontinuance based upon such compliance pursuant to paragraph 12 of the Stipulation. The time frame for such compliance had expired by July 2008, which is the first month for which defendant seeks to recover overdue rent. Nevertheless, the parties do not contend that the Stipulation was self-executing, expired by operation of its terms and is unenforceable. Nor does plaintiff dispute the amount of overdue rent sought. Accordingly, defendant has succeeded in demonstrating that plaintiff is in default of the terms of the Stipulation, that the *Yellowstone* injunction should therefore be vacated and that a judgment in the amount of the overdue rent should be entered.

As to attorney's fees, generally in a breach of contract case a prevailing party may collect attorneys' fees from a non-prevailing party provided such award is authorized by agreement between the parties, statute or court rule (*see, Tag 380, LLC v Commet 380, Inc.*, 10 NY3d 507, 515 [2008]; *Siamos v 36-02 35th Avenue Development, LLC*, 54 AD3d 842 [2d Dept. 2008]). Here, the

Stipulation entitles defendant to an award of attorney's fees and disbursements incurred in this action. The application for attorney's fees will, therefore, be referred to a Special Referee for a hearing.

Conclusion

Based upon the foregoing discussion, it is hereby

ORDERED, that defendant's motion is granted to the extent that the *Yellowstone* injunction previously granted pursuant to the terms of the parties' Stipulation dated March 1, 2007, is hereby vacated, and the Clerk of the Court is directed to enter judgment in favor of defendant MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY and against plaintiff STAND-UP MRI OF MANHATTAN, LLC in the sum of \$63,795.97, together with costs and disbursements as taxed by the Clerk; and it is further

ORDERED, that that portion of defendant's motion as seeks the recovery of attorney's fees is severed and that issue is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as Referee, shall determine the aforesaid issue; and it is further

ORDERED, that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part, Room 119M at 60 Centre Street, New York, N.Y. to arrange a date for reference to a Special Referee and the Clerk shall notify the parties of the date of the hearing.

This constitutes the decision and order of the court.

DATED: 3/16/09

ENTER,


PETER SHERWOOD
J.S.C.

FILED
MAR 17 2009
COUNTY CLERK'S OFFICE
NEW YORK