1815 Victory Blvd. Ltd. v Valfan Realty, LLC
2009 NY Slip Op 30762(U)
March 26, 2009
Supreme Court, Richmond County
Docket Number: 103702/08
Judge: Joseph J. Maltese
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3

Index No.:103702/08
Motion No.:001, 002 & 003

1815 VICTORY BLVD. LTD.,
d/b/a DANNY BOY,

Plaintiff

against

VALFAN REALTY, LLC,

Defendant

DECISION & ORDER

HON. JOSEPH J. MALTESE

The following items were considered in the review of this motion to show cause for a permanent injunction and temporary restraining order

Papers	Numbered
Notice of Motion and Affidavits Annexed	4
Order to Show Cause and Affidavits Annexed	1
Notice of Cross Motion and Affidavits Annexed	2
Replying Affidavits	3
Exhibits	Attached to Papers

Plaintiff 1815 Victory Blvd. Ltd. ("Danny Boy") moves by order to show cause for a permanent injunction and temporary restraining order against defendant ValFan Realty LLC ("ValFan") prohibiting ValFan from restricting access and use of the plaintiff to the parking lot located at 1795 Victory Blvd., Staten Island, New York. ValFan cross-moves to dismiss the plaintiff's complaint. ValFan also moves to direct the plaintiff to comply with and respond to outstanding discovery demands, or alternatively, preclude the plaintiff from entering any evidence concerning the alleged financial losses.

Facts

Since August 25, 1988 Jay Realty Company ("Jay-Ray") had been the owner of the property and adjacent parking lot ("The Parking Lot") at 1795 Victory Blvd. Jay-Ray's predecessor in interest had leased the property and the Parking Lot to the Great Atlantic & Pacific Tea Company, Inc. ("A&P"). On February 15, 1990, Jay-Ray extended the leasing

agreement with A&P to 2025. On January 10, 2001, A&P subleased the property, including the Parking Lot, to Duane Reade through 2025.

On December 4, 2002, Danny Boy entered into a Stipulation of Settlement in the Matter of *Duane Reade v. the Great Atlantic & Pacific Tea Company, Inc. et al.*, where Duane Reade permitted the plaintiff and E&S Restaurant Group, Ltd. to use ten parking spots in the Parking Lot. The signatories to the stipulation agreement were the attorneys for Duane Reade, E&S Restaurant Group, Ltd., and Danny Boy.[1] The stipulation was not filed against the subject property.[2]

In March 2007, A&P and Duane Reade surrendered and cancelled their lease and sublease of the property at 1795 Victory Boulevard. On December 17, 2007, defendant ValFan purchased the property, including the Parking Lot, from Jay-Ray. John Vander Neut, Jay-Ray's attorney, submits a statement affirming that the plaintiff's access to the Parking Lot was never mentioned during the sale negotiations of 1795 Victory Blvd. Furthermore, he states that he was never aware of the stipulation signed by the plaintiff and Duane Reade. Vander Neut also attests that a condition before the sale to ValFan was that the property be clear of any encumbrances.

On January 7, 2008, W.F. van den Houten, ValFan's attorney, sent a letter to six businesses on Victory Blvd. announcing ValFan's recent purchase of the 1795 Victory Blvd. property, including the Parking Lot. The letter explained that ValFan planned to perform an extensive renovation of the property, requiring the closing of the Parking Lot and the removal of the businesses' garbage containers. Danny Boy was among those notified. In a letter dated February 21, 2008 to Flagg Container Services, Inc., van den Houten again requested that garbage containers be removed from the parking area. On March 12, 2008, van den Houten reiterated his request to Flagg. On June 23, 2008, ValFan cordoned off the entire Parking Lot,

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[1] Plaintiff's exhibit A.

[2] Supplemental affirmation of W.T. van den Houten, ¶ 8.

restricting access to outsiders. Danny Boy alleges that the removal of the garbage containers will cause irreparable loss, harm, and damage to its business. To prove such harm, Danny Boy says that it can produce accounting records to show the loss of business and revenue during the time period that it has been denied access to the Parking Lot. Danny Boy is also willing to seek alternative ways where both Danny Boy and ValFan can use the Parking Lot without interfering with each other's business and renovations.

Discussion

ValFan is not required to follow the stipulation agreement because it did not sign it. "A stipulation is an independent contract which is subject to the principles of contract interpretation."[3] Because a stipulation mirrors a contract, only parties that sign it are bound to it. As such, a breach of contract action cannot be brought against a non-party to a stipulation agreement.[4] The copy of the stipulation form submitted by the plaintiff does not show that the defendant's predecessor in title, Jay-Ray, was a signatory to the agreement. Hence, neither Jay-Ray nor ValFan can be subject to the provisions of the stipulation. Counsel for the defendant has correctly stated that the plaintiff does not have a legal connection or privity with the defendant, nor can it be said that either Jay-Ray or ValFan are third party beneficiaries of the agreement. There is no evidence that Jay-Ray or ValFan benefitted from the stipulation agreement, and the case did not involve any rights regarding the property at issue.

Even if ValFan was bound by the stipulation agreement, the permission to use the defendant's parking lot constitutes a revocable license. A license is in the nature of a privilege, entitling the licensee to do something it would not be entitled to do without the license. Revocation is one of the licensor's inherent powers. A license may be revoked when the

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[3] *Dreiss v. Dreiss*, 258 AD2d 499 [2d Dept 1999].

[4] *Black Car and Livery Ins. v. H & W Brokerage, Inc.*, 28 AD3d 585 [2d Dept 2006].

property is conveyed to subsequent owners who do not ratify the license.[5] The plaintiff's access to the defendant's parking lot was a license granted by Duane Reade. The license was revoked when Duane Reade cancelled its sub-lease and surrendered the property to the landlord. Given that the license was not ratified by ValFan, ValFan is not bound by it. A license is not a right that "runs with the land."

The plaintiff has had ample time to prove its alleged financial losses. It has failed to produce the defendants' first demand for production of documents dated October 28, 2008 and the defendant's first set of interrogatories dated October 28, 2008. Although the plaintiff now shows its willingness to produce such records, there is no indication that ValFan engaged in any inequitable conduct. Three separate letters were sent to the plaintiff announcing ValFan's purchase of the property, including the subject parking lot. Throughout this time, the plaintiff could have sought other ways or places to dispose of its garbage.

Accordingly, it is hereby:

ORDERED, that the plaintiff Danny Boy's motion by order to show cause seeking a permanent injunction and temporary restraining order to prevent defendant ValFan Realty LLC. from restricting the plaintiff's access to the Parking Lot at 1795 Victory Blvd. is denied with prejudice; and it is further

ORDERED, that the defendant's motion to dismiss the plaintiff's complaint is granted in its entirety.

ENTER,

DATED: March 26, 2009

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Joseph J. Maltese
Justice of the Supreme Court

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[5] *Poughkeepsie-Highland R.R. Bridge Co. v. Central Gas & Elec.Corp.*, 278 AD2d 468 [2d Dept 2000].

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