

Pizzanini, Inc. v 133 Second Ave., LLC

2009 NY Slip Op 32629(U)

November 4, 2009

Supreme Court, New York County

Docket Number: 600670/07

Judge: Edward H. Lehner

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

PRESENT: EDWARD H. LEHNER

PART 19

Index Number : 600670/2007

PIZZANINI, INC.

vs

133 SECOND AVENUE, LLC

Sequence Number : 003

PARTIAL SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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 _____

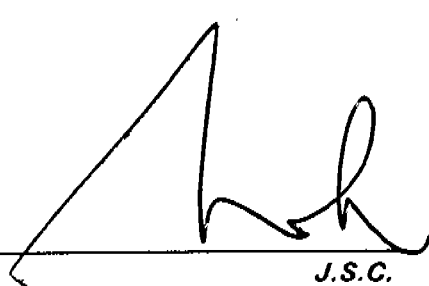
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM

Dated: NOV 04, 2009


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):

FILED
NOV 10 2009
NEW YORK COUNTY CLERK'S OFFICE

PAPERS NUMBERED

* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : 1AS PART 19

-----X
PIZZANINI, INC.,

Plaintiff,

Index No.
600670/07

- against -

133 SECOND AVENUE, LLC,

Defendant.

-----X
EDWARD H. LEHNER, J.;

FILED
NOV 10 2009
NEW YORK
COUNTY CLERK'S OFFICE

The issue before the court on this motion by defendant for summary judgment dismissing the third, fifth and sixth causes of action of the complaint is whether the exculpatory provisions of paragraph 43(B) of the lease between the parties (the "Lease") bar plaintiff's claims for monetary damages.

In this action the plaintiff-tenant seeks, in addition to injunctive and declaratory relief, monetary damages due to the defendant-landlord's refusal to execute an affidavit of consent to the City issuing a permit to plaintiff for a sidewalk café annex to the premises it leases from defendant.

Defendant maintains that the said causes of action for money damages are barred by paragraph 43(B) of the Lease, which reads:

With respect to any provision of this Lease which provide, in effect, that Landlord should not unreasonable withhold or unreasonable delay any consent or any approval, Tenant in no event, shall be entitled to make, nor shall Tenant make any claim and Tenant hereby waives any claim

for money damages; nor shall Tenant claim money damages by way of set-off, counterclaim or defense, based upon any claim or assertion by Tenant that Landlord has unreasonable withheld or delayed any consent or approval; but Tenant's sole remedy shall be an action or proceeding to enforce any such provision or for specific performance, injunction or declaratory judgment.

Plaintiff contends that said provision does not bar the monetary claims as paragraph 83 of the Lease, in effect, mandates that the landlord sign the City consent form as therein the landlord has approved the addition of the sidewalk café. Said paragraph provides:

Notwithstanding anything to the contrary contained herein, the Landlord allows the Tenant to have outside sitting providing same is permitted by law and does not interfere with other tenants in the Building of which the Demised Premises are a part.

There are several clauses in the Lease wherein the landlord's consent to action by the tenant is required, but where the landlord covenanted to not unreasonable withhold such consent. With respect to such provisions, plaintiff acknowledges that the waiver of monetary damages may be enforceable. In contrast, here the landlord has consented in paragraph 83 to the installation proposed by the tenant, the only consent required being the statutory mandate of the City Administrative Code that the landlord execute a document approving the permit application.

While paragraph 83 does require that the outdoor café "not interfere with other tenants of the building," it appears that the provision obligates the landlord to permit

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the café (absent such interference) even if it had other valid “reasonable” grounds, such as how it affects the ambience of the building, to object to the café. Thus, the difference between the City statutory consent required to obtain the permit and that to which paragraph 43(B) applies, is that in the former the landlord may not object to the tenant obtaining the permit even if it has reasonable grounds to do so (other than said interference), whereas in the latter the landlord may contractually refuse consent to tenant action if there exists reasonable grounds to object.

In determining whether paragraph 43(b) is applicable to the statutory consent required herein, the court must bear in mind the traditional rule that any ambiguity in a contract is interpreted against the drafter thereof (herein the landlord), [see, *Uribe v. Merchants Bank of New York*, 91 NY2d 336, 341 (1998); *151 West Associates v. Printsiplis Fabric Corp.*, 61 NY2d 732, 734 (1984); *Kass v. Grais*, __ AD3d __, NYLJ, Oct. 29, 2009 (1st Dept.)], as well as the principle that the “common business practice of limiting liability by restricting or barring recovery by means of an exculpatory provision (is) disfavored by the law and closely scrutinized by the courts” [*Banc of America Securities LLC v. Solow Building Company II, LLC*, 47 AD3d 239, 244 (1st Dept. 2007)]. In the latter case, the majority rejected the dissents’ position that the tenant had an adequate remedy in specific performance, finding that “without the prospect of monetary damages (the landlord) will have no incentive to honor its obligations under the lease” (p. 246). The same can be said with respect to

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the case at bar. See also, Elmira Teachers' Association v. Elmira City School District, 53 AD3d 757, 760 (3rd Dept. 2008).

Finally, even if it could be validly argued that the material after the initial semicolon of paragraph 43(B) provides broader exculpatory language than the material preceding it, it would appear that such language would only be applicable to a claim for "money damages by way of set-off, counterclaim, or defense," and not the claim of a plaintiff as herein.

Here, the wording of the two aforesaid paragraphs of the Lease raise a triable issue as to the intent of the parties with respect to the applicability of the exculpatory provisions. Accordingly, defendant's motion for summary judgment is denied.

This decision constitutes the order of the court.

Dated: November 4, 2009



J.S.C.

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