

**Best Souvenirs, Inc. v 516 Fifth Ave. Partners LLC**

2009 NY Slip Op 32992(U)

December 14, 2009

Supreme Court, New York County

Docket Number: 113764/08

Judge: Joan A. Madden

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

HON. JOAN A. MADDEN

PRESENT: \_\_\_\_\_ J.S.C. Justice

PART 11

*Bear Stearns, Inc.*

INDEX NO.

*113764/08*

MOTION DATE

*516 Fifth Avenue Putnam's*

MOTION SEQ. NO.

*007*

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 determined in accordance with the annexed decision and order.*

**FILED**

DEC 21 2009

NEW YORK  
CRIMINAL JUSTICE OFFICE

Dated: *December 14, 2009*

*[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: PART 11

-----X  
BEST SOUVENIRS, INC.

Plaintiff,

INDEX NO. 113764/08

-against-

516 FIFTH AVENUE PARTNERS LLC,

Defendant.

-----X  
516 FIFTH AVENUE PARTNERS LLC,

Plaintiff,

-against-

HERZEL OVADYA,

Additional Counterclaim Defendant.

-----X

JOAN A. MADDEN, J.:

Plaintiff Best Souvenirs, Inc. (“Best Souvenirs”) and additional counterclaim defendant Herzel Ovadya move for an order pursuant to CPLR 2221 granting leave to reargue the portion of the court’s prior decision and order of this court dated July 16, 2009, which indicated that Ovadya was tenant of the premises. Best Souvenirs and Ovadya state that “Best Souvenirs vacated the Premises as the Court ordered and is not seeking to regain possession of the Premises by this motion,” but the “Court’s determination in the Order that Ovadya was the tenant of the Premises has significant financial consequences for Ovadya.”

Reargument is granted to limited extent of clarifying and determining that Best Souvenirs LLC was the tenant of the premises, and that Ovadya acted in his capacity as a principal of that

corporation in executing the lease documents, which included the original lease, the confirmation agreement and the first amendment to the lease. The August 15, 2002 lease is clear in stating that it is between the landlord, 518 Fifth Avenue, and the tenant, "Herzel Ovadya, as Sponsor for a New York Corporation to be formed. That lease is also signed by Ovadya "as Sponsor for a New York corporation to be formed." The August 15, 2002 Confirmation of Expiration Dates is likewise clear in stating that the "Tenant" is "Herzel Ovadya, as Sponsor for a New York corporation to be formed." Notably, the Confirmation agreement includes the name "Best Souvenirs, Inc." as handwritten after the typewritten word "Tenant," and is signed by Ovadya with his name and the title "President" handwritten beneath the signature line. It is also undisputed that during the term of the lease, checks for rent were drawn on the account of Best Souvenirs, and signed by Ovadya in his capacity as an officer of that corporation.

Shortly before the original lease was signed, Ovadya provided the landlord with a personal guaranty dated July 29, 2002. The guaranty references the lease between 518 Fifth Avenue, the "landlord," and "Herzel Ovadya, as sponsor for a New York corporation to be formed," the "tenant," and states that "Landlord has requested Principal [Ovadya] to guaranty to Landlord that if Tenant defaults under the Lease, to personally guaranty the payment of all rent and additional rent owed by Tenant until Tenant has surrendered the Demised Premises."

The only arguable ambiguity in this case arises from the First Amendment of Lease ("First Amendment"), which refers to Ovadya as the "tenant" with no mention of Best Souvenirs or Ovadya in his capacity as an officer or principal of that corporation. However, the First Amendment explicitly references the original lease, by stating that the "the Landlord and Tenant

have previously entered into a Lease, dated August 13, 2002 (the "Lease"), pursuant to which Landlord leased to Tenant and Tenant did hire from Landlord certain retail premises (the "Premises"), as more particularly described in the Lease, in the building known as 518 Fifth Avenue." The First Amendment further states that "[t]he Term of the Lease is hereby extended for a period of eight (8) months, so as to terminate on April 30, 2008," and that "[e]xcept as modified by this First Amendment, the Lease and all covenants, agreements, terms and conditions thereof shall remain in full force and effect and are hereby in all respects ratified and confirmed." Reading the First Amendment as a whole and in light of the undisputed fact that Best Souvenirs continued to pay rent during the term of the First Amendment, the record establishes that Ovadya signed the First Amendment in his capacity as an officer or principal of Best Souvenirs, and as a result, Best Souvenirs was the tenant from the commencement of original lease in 2002 through the expiration of the First Amendment in April 2008.

From the outset of this action, Best Souvenirs has insisted that a month-to-month tenancy was created after the original lease expired, which was not properly terminated, in an attempt to establish that it had a legal right to remain in possession of the premises. Initially, Best Souvenirs took the position (in support of its motion for a preliminary injunction) that the First Amendment was invalid because it was signed by Ovadya individually, and as a result a month-to-month tenancy was created when the landlord accepted rent from Best Souvenirs after the original lease expired on August 30, 2007. Later, when the parties each moved for summary judgment, Best Souvenirs abandoned that theory altogether and argued that a month-to-month tenancy was created by the landlord's "failure to promptly reject rent tendered by Best for May

2008 and thereafter.” The court previously rejected the former theory by finding that “when the lease and First Amendment of the Lease are viewed in light of the course of conduct of the parties, the evidence suggests that the First Amendment to the lease was valid and governed the parties’ relationship until April 30, 2008.” The court likewise rejected the latter theory by finding that while the landlord acknowledged receiving three rent checks from Best Souvenirs after the expiration of the First Amendment on April 30, 2008, “it is undisputed that two of the checks were returned and one was retained for back rent due and owing.” The court’s additional indication that “even if a month-to-month tenancy were created, such tenancy was properly terminated pursuant to the 30-day notice of termination . . . properly served on Ovadya as the tenant,” was not necessary to the ultimate and dispositive determination that a month-to-month tenancy was never created.

Nevertheless, the court has reconsidered the statement in its prior decision that Ovadya was the tenant, and now determines that Best Souvenirs, LLC was the tenant under the original lease and the First Amendment. In all other respects, reargument is denied, and with the exception of the limited issue reconsidered, the court adheres to its July 16, 2009 determination denying plaintiff’s motion for summary judgment, and granting defendant’s motion and cross-motion for summary judgment.

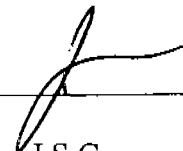
Accordingly, it is hereby

ORDERED the motion to reargue is granted only to the extent of the limited issue reconsidered above, and in all other respects the motion is denied and the court adheres to its July 16, 2009 determination denying plaintiff’s motion for summary judgment and granting defendant’s motion and cross-motion for summary judgment; and it is further

[\* 6]  
ORDERED that the parties are directed to appear for the status conference previously scheduled for January 14, 2010 at 10:00 am, in Part 11, Room 351, 60 Centre Street.

DATED: December *M*, 2009

ENTER:

  
\_\_\_\_\_  
J.S.C.