

**Gangi Foods, Inc. v BSY Enters., Inc.**

2010 NY Slip Op 30708(U)

April 4, 2010

Supreme Court, Suffolk County

Docket Number: 35529/2007

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

## PRESENT:

**HON. JOSEPH FARNETI**  
**Acting Justice Supreme Court**

\_\_\_\_\_  
 GANGI FOODS, INC.,

Plaintiff,

-against-

BSY ENTERPRISES, INC., KENNETH  
 YEVIN and JUDITH YEVIN,

Defendants.  
 \_\_\_\_\_

ORIG. RETURN DATE: JUNE 25, 2009  
 FINAL SUBMISSION DATE: JUNE 25, 2009  
 MTN. SEQ. #: 004  
 MOTION: MG RRH

**PLTF'S/PET'S ATTORNEY:**  
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**DEFT'S/RESP ATTORNEY:**  
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 MINEOLA, NEW YORK 11501  
 516-747-6461

Upon the following papers numbered 1 to   3   read on this motion \_\_\_\_\_  
 \_\_\_\_\_  
 FOR A FACT-FINDING HEARING

Notice of Motion and supporting papers   1-3  ; it is,

**ORDERED** that this motion by defendants for an Order, pursuant to CPLR 2218 and 3211 (c), setting this matter down for a fact-finding hearing to determine the issue of service of a 5-day notice to cure, is hereby **GRANTED** as provided hereinafter. By correspondence dated July 10, 2009, counsel for plaintiff indicated that plaintiff does not oppose the instant application and consents to the relief sought herein.

By contract of sale dated February 19, 2007, plaintiff sold to defendant BSY ENTERPRISES, INC. ("BSY") certain business assets of a delicatessen known as "GEMINI DELI," located at 1198 Walt Whitman Road, Melville, New York ("premises"). At the closing, plaintiff, as the owner of the premises, entered into a lease agreement with BSY, as tenant ("Lease"), and in addition, BSY executed and delivered to plaintiff the following documents: (1) a

secured promissory note in the principal amount of \$778,000.00, with monthly payments commencing on July 1, 2007, in the amount of \$10,607.00 ("Note"); (2) unconditional personal guarantees of the defendants KENNETH YEVIN and JUDITH YEVIN ("Guarantees"); (3) a security agreement (chattel mortgage) pledging as security for the payment of the Note all of the furniture, fixtures, equipment, supplies, inventory and receivables of BSY Enterprises located at the premises ("Security Agreement"); and (4) a conditional assignment of lease as collateral, assigning the Lease to plaintiff as additional security for the payment of the Note ("Assignment of Lease").

On or about November 16, 2007, plaintiff commenced this action seeking, among other things, a judgment of possession/warrant of eviction, a judgment declaring that plaintiff is entitled to possess and dispose of the pledged collateral, and money judgments against BSY and the individual defendants, as a result of defendants' alleged breach of the Note and Lease.

Plaintiff alleges that BSY failed to make timely payments due to plaintiff under the Note, and as such, plaintiff elected to accelerate the balance due and owing plaintiff on the Note, to wit: \$759,687.50, and seeks a money judgment against BSY in that amount, as well as a money judgment against the individual defendants based upon their Guarantees. In addition, plaintiff alleges that BSY defaulted in the payment of rent under the Lease. Plaintiff claims that BSY had been late or delinquent in the payment of rent, which resulted in a 5-day notice to cure being served upon BSY on or about October 13, 2007, which sought rents due from September and October of 2007, along with a late charge of 5% of the overdue amount, plus an administrative fee of \$100.00. Plaintiff alleges that BSY paid the rent for September and October of 2007, but failed to pay the late charge of 5%, or the administrative fee. Further, plaintiff alleges that BSY failed to pay rent for November of 2007. Plaintiff alleges that pursuant to the Assignment of Lease, upon a default by defendants which remains uncured after five days, the escrow agent, plaintiff's counsel, shall release the original Lease to plaintiff.

Thus, on or about November 20, 2007, plaintiff filed an application, by Order to Show Cause, seeking an Order directing plaintiff's counsel to release the original Lease to plaintiff; directing that plaintiff be put back into possession of the premises and directing that defendants vacate same; and directing that plaintiff be put back into possession of the business assets of the Gemini Deli.

By Stipulation of Settlement, So-Ordered by this Court on December 7, 2007 ("Stipulation"), plaintiff's Order to Show Cause was resolved and withdrawn, upon the following terms and conditions, among others:

- (a) Defendants were to pay to plaintiff, by certified check on or before December 10, 2007, the sum of \$55,212.05, representing payment of all sums due under the Note for the months of October, November and December, 2007 (including late charges); and "basic rent," late charges and administrative fees under the Lease through and including December, 2007;
- (b) Defendants were to pay, by certified check on or before January 10, 2008, to Scalzi & Nofi, PLLC, the sum of \$11,113.00, (plus any other fees/expenses incurred beyond the date thereof to the date of payment) in full payment of plaintiff's collection costs and attorney's fees;
- (c) Defendants were to pay real estate taxes when due, pursuant to the terms of the Lease, upon ten (10) days' written demand; and
- (d) Defendants were to produce evidence of payment of insurance premiums for any insurance policy required under the Lease, and evidence that said policies are in full force and effect.

Thereafter, defendants filed a motion seeking an Order, pursuant to RPAPL 853, immediately restoring defendants to possession of the premises, and awarding defendants treble damages as plaintiff allegedly unlawfully ejected defendants from the premises. Defendants alleged that plaintiff violated the 5-day notice provision contained in the Stipulation, when plaintiff locked out BSY from the premises on January 19, 2008, only four days after plaintiff allegedly served defendant KENNETH YEVIN with a 5-day notice ("5-day notice"). Defendants claimed that the only service of the 5-day notice was via facsimile to defendants' counsel on January 16, 2008. As such, defendants alleged that they were not given an opportunity to cure their default. Moreover, defendants alleged that they were willing and able to pay all sums due and owing plaintiff, but that

plaintiff refused payment of such sums on January 19, 2008, within the 5-day cure period as calculated by defendants. In addition, defendants argued that plaintiff's use of self-help in changing the locks at the premises was in violation of defendants' rights under the parties' various contracts, as well as prevailing case law.

Subsequently, plaintiff filed a motion for summary judgment, pursuant to CPLR 3212, seeking an Order granting plaintiff the ultimate relief sought in the complaint. Plaintiff alleged that all of the closing documents were cross-referenced, such that a default under one document was deemed a default under all others, thereby triggering any remedies available to plaintiff contained in the closing documents. Plaintiff alleged that defendants regularly paid the rent and monthly payments under the Note late, and six months into the Lease, defendants were behind in the amount of \$32,867.70. Plaintiff argued that pursuant to the terms of the Lease, if the tenant is late in the payment of rent four times in any twelve month period, the landlord could terminate the Lease.

Plaintiff further alleged that defendants failed to pay its attorneys' fees in the amount of \$11,113.00 by January 10, 2008 in violation of the Stipulation. By that date, plaintiff claimed it had only received a check in the amount of \$17,000.00 from defendants, leaving a balance then due and owing of \$39,673.11. On the following day, January 11, 2008, plaintiff alleged that it hand-delivered the subject 5-day notice to Mr. Yevin at the delicatessen. After the 5-day period expired without full payment from defendants, on January 19, 2008, plaintiff re-entered the premises, changed the locks thereat, and re-took possession of the business assets which were pledged as collateral. Plaintiff alleged that its principal, DAVID GANGE, gained access with his own key; that defendants were not present at the time of the changing of the locks; that no force or violence was used; and that the re-entry was entirely peaceful. Plaintiff argued that the Note, Lease, Assignment, and other closing documents gave plaintiff the right to re-enter the premises and to re-possess the collateral. Moreover, plaintiff argued that the Stipulation expressly gave plaintiff the right to resort to self-help in the event of a default by defendants in January of 2008.

By Order dated July 11, 2008, the Court denied both defendants' motion pursuant to RPAPL 853 and plaintiff's motion for summary judgment pursuant to CPLR 3212. The Court found that there was no indication that plaintiff used force to gain access to the premises, or that the re-entry was anything other than peaceable. The Court further found that the Lease, Note,

and Security Agreement gave plaintiff the right to resort to self-help in the event of a default by defendants, and that plaintiff specifically reserved its rights in the parties' Stipulation. With respect to plaintiff's motion for summary judgment, the Court held that questions of fact existed which precluded the grant of summary judgment to plaintiff. Specifically, the Court found that questions of fact exist with respect to the service of the 5-day notice dated January 11, 2008. Plaintiff had alleged that it served this notice on even date, while defendants had alleged that they only "received" the 5-day notice when it was faxed to defendants' prior counsel on January 16, 2008.

Defendants have now filed the instant application, pursuant to CPLR 2218 and 3211 (c), seeking a fact-finding hearing to determine the issue of service of the 5-day notice, maintaining that plaintiff failed to properly serve the 5-day notice. Defendants allege that a determination regarding the propriety of service will have a significant impact on the remaining issues in this action and may even bring about the termination of this litigation, thereby promoting judicial economy. As discussed hereinabove, plaintiff does not oppose the instant application and consents to the relief sought herein.

In view of the foregoing, a fact-finding hearing shall be held before this Court on **April 22, 2010, at 11:00 a.m., Part 37, Arthur Cromarty Court Complex, 210 Center Drive, Riverhead, New York**, to determine the propriety of service of the 5-day notice dated January 11, 2008.

The foregoing constitutes the decision and Order of the Court.

Dated: **March 22, 2010**

  
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**HON. JOSEPH FARNETI**  
**Acting Justice Supreme Court**