

Chintpurni Devi, Inc. v UES de LLC

2010 NY Slip Op 31278(U)

May 18, 2010

Sup Ct, NY County

Docket Number: 602272/2009

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

Index Number : 602272/2009
CHINTPURNI DEVI, INC.
VS.
UES DE LLC
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

_____ on this motion to/for _____

PAPERS NUMBERED

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 is determined in accordance with the annexed decision, order and declaratory judgment.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: May 18, 2010

HON. JOAN A. MADDEN 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
Chintpurni Devi, Inc. d/b/a
Dakshin Restaurant,

Plaintiff,

Index
Number
602272/2009

-against-

UES de LLC and Uri Foxbruner,
Defendants.

-----X
Joan A. Madden, J:

UES de LLC (UES) and Uri Foxbruner (together defendants)
move for summary judgment dismissing plaintiff's complaint and
granting them summary judgment on their counterclaims for
declaratory relief.

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141B).*

Parties' Contentions
Plaintiff alleges that it operates a restaurant in a
building (the building) located at 1713 First Avenue, New York
(complaint, ¶¶ 5-7) on the ground floor of the building. It
contends that, on September 1, 2000, it executed a lease dated
August 2000 (the lease) with Ronald Streigel, defendants'
predecessor in interest and that it operates the restaurant
pursuant to the lease (Bhatnagar affidavit, ¶ 2). It further
contends that defendants orally advised it in May 2009 that they
sought to invoke paragraph 36 of the lease (the demolition
clause) in contemplation of demolition of the building

(complaint, ¶¶ 10, 12) and that defendants have not complied with the demolition clause since there are residential tenants in the building and it has not received the notice required (the termination notice) in the demolition clause (Bhatnagar affidavit, ¶¶ 5, 7). Plaintiff also claims that defendants have blocked access to the backyard which it uses as a garden area for the restaurant (complaint, ¶ 15). On July 24, 2009, plaintiff commenced this action seeking an injunction against construction work in connection with the demolition, and access to the backyard and monetary damages for defendants' purported interference with the backyard area.

Defendants contend that Foxbruner is a member of UES, that they are the owners of the building (Foxbruner affidavit, ¶ 2) and that they sought to exercise their rights under the demolition clause in connection with redevelopment of their property (*id.*, ¶ 6). They further allege that in June 2009, they obtained the necessary permits to merge the building's lot with adjacent lots that they owned and permits for work to commence excavation (*id.*, ¶ 8). They also contend that they arranged for the vacancy of all of the residential units in the building (*id.*, ¶ 14; Foxbruner reply affidavit, ¶¶ 6-7). They also state that on July 21, 2009, the termination notice was served on plaintiff and the other commercial tenant in the building (*id.*, ¶ 4;

Foxbruner affidavit, ¶ 13; Gesualdi affidavits).

Defendants also assert that plaintiff cut a hole into the rear of the building without their consent to gain access to the rear of the building and that plaintiff has no right to access or use of the backyard (Foxbruner affidavit, ¶¶ 9, 10). Defendants have interposed counterclaims seeking a declaration that they properly exercised the demolition clause pursuant to the termination notice and that, consequently, the unexpired portion of the lease is cancelled.

Lease Provisions

The lease provides that the portion of the building leased to plaintiff is "the south store and basement" (the premises). It further provides in paragraph 12 (the notice clause) that notices "shall be given or made by mailing the same by certified or registered mail". The demolition clause provides that the landlord has the right to cancel the unexpired portion of the lease on six months' written notice if it "has a bona fide intent to demolish the Building" and has obtained the necessary permits from the appropriate government agencies, "has served a similar notice of termination ... on any other commercial tenants" and "has obtained or arranged for the vacancy" of at least 50% of the residential tenants.

A party seeking summary judgment must establish entitlement

to judgment as a matter of law by demonstrating the absence of any material issues of fact (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). The party opposing summary judgment must then present evidentiary proof in admissible form that raises a fact dispute as to a material issue (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Contract Interpretation

Generally, "when parties set down their agreement in a clear, complete document, their writing should ... be enforced according to its terms [and extrinsic evidence] is generally inadmissible to add or vary the writing" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). It is improper for the court to rewrite the parties' agreement and the best evidence of the parties' agreement is their written contract (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002]).

Applying these principles to this case, defendants' motion for summary judgment must be granted. Plaintiff's claims for monetary damages arise from claims relating to the backyard. The premises as defined in the lease are the "south store and basement." Since the backyard is not included within the demised premises, plaintiff's claims arising out of access to it cannot stand.

Plaintiff also seeks an injunction to restrain defendants'

demolition of the building pursuant to the demolition clause. A party seeking an injunction must "show a probability of success, danger of irreparable injury ... and a [favorable] balance of the equities" (*Aetna Ins. Co. v Capasso*, 75 NY2d 860, 862 [1990]). While plaintiff asserts that there currently are residential tenants, the demolition clause provides that defendants "obtain or (arrange) for the vacancy (of at least half the residential tenants)." Defendants state that all of the residential units are either vacant or that they have arranged for their vacancy (Foxbruner reply affidavit, ¶¶ 6-7). Plaintiff has not presented evidence controverting either this or that defendants have obtained the necessary government permits.

Service of the Termination Notice

The main objection that plaintiff presents in opposition to enforcement of the termination notice is the adequacy of service. The demolition clause requires six months' prior written notice. Plaintiff asserts that it has "not received" the termination notice and, therefore, the defendants have not properly invoked the demolition clause (Bhatnagar affidavit, ¶ 7).

Generally, "the affidavit of a process server constitutes prima facie evidence of proper service [and] [t]he mere denial of receipt of service is 'insufficient'" (*Matter of Sanchez*, 57 AD3d 452, 454 [1st Dept 2008]; see also *425 East 26th Street Owners*

Corp. v Beaton, 50 AD3d 845 [2nd Dept 2008]).

Defendants have proffered the affidavits of George Gesualdi that the termination notice was served on plaintiff on July 21, 2009 by certified mail, return receipt requested, and on July 22, 2009 by overnight delivery.

The notice clause requires that notice be given "by certified or registered mail." Plaintiff has not controverted defendants' showing that they satisfied the notice clause, and the court cannot rewrite the parties' contract to insert an additional term of receipt in the notice clause. Rather, it must enforce the parties' agreement as they wrote it. Accordingly, plaintiff has failed to raise a material issue of fact as to the adequacy of service of the termination notice. Therefore, defendants' motion for summary judgment dismissing plaintiff's complaint and for summary judgment on their counterclaims for declaratory judgment is granted.

Order

It is therefore

ORDERED that defendants' motion for summary judgment dismissing plaintiff's complaint is granted and the Clerk of the Court is directed to enter judgment, together with costs and disbursements as taxed by the Clerk; and it is further

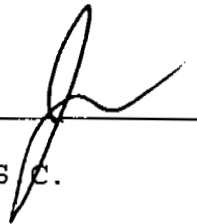
ORDERED that defendants' motion for summary judgment on

their counterclaims for declaratory judgment is granted; and it is further

ORDERED, ADJUDGED and DECLARED that UES de LLC and Uri Foxbruner have complied with paragraph 36 of the lease dated August 2000 between Ronald Striegel and Chint Purni Devi, Inc. and that the unexpired portion of said lease beyond January 31, 2010 is cancelled and that plaintiff vacate the premises.

Dated: *May 18*, 2010

ENTER:



J.S.C.

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