

**Ahe Rest. Inc. v 1374 Third Ave. Inc.**

2010 NY Slip Op 33239(U)

November 9, 2010

Supreme Court, New York County

Docket Number: 600806/10

Judge: Emily Jane Goodman

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

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

PRESENT: Hon. EMILY JANE GOODMAN, Justice

PART 17

AHE RESTAURANT INC.

d/b/a CARPE DIEM

v.

1374 THIRD AVENUE INC.

INDEX NO. 600806/10

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

FOR THE

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Papers Numbered

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_

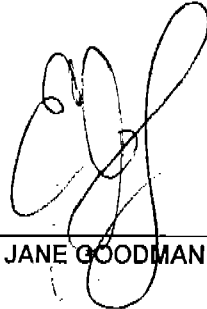
Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion *is decided per attached*

**FILED**  
NOV 17 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 11/9/10  
New York, ~~New York~~

  
\_\_\_\_\_  
EMILY JANE GOODMAN, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  SETTLE/SUBMIT ORDER/JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: I.A.S. PART 17

-----X  
AHE RESTAURANT INC., doing business as  
CARPE DIEM

Plaintiff(s),

Index No. 600806/10

-against-

1374 THIRD AVENUE INC.,

Defendants.

-----  
EMILY JANE GOODMAN, J.S.C.:

**FILED**  
NOV 17 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that Plaintiff's Order to Show Cause to (1) remove and consolidate Defendant's Non-Payment<sup>1</sup> proceeding commenced in Civil Court, New York County, Index No. 71251/10 (the "Non-Payment Proceeding"), with this action, and (2) to stay the Non-Payment Proceeding so that it can be consolidated, is denied.

**Background**

On October 5, 2009, Plaintiff and Defendant entered into a 10 year lease for the entire ground floor and basement of a building located at 181 E 78 Street, New York, NY (the "Premises"). Plaintiff operates an Italian restaurant on the Premises.

On March 8, 2010, a fire occurred on the upper floor of the apartment building. Plaintiff alleges such fire caused smoke and water damage in excess of \$110,000.00 making the restaurant wholly unusable. On the same day, Plaintiff notified the Defendant

-----  
<sup>1</sup> Sometimes improperly referred to in the moving papers as the "Holdover Proceeding."

of the fire and the damage it caused to the restaurant via letter sent by certified mail. Plaintiff also ceased further rent payments, citing Section 8.1 of the Lease, providing that if the premises is "totally damaged or rendered wholly unusable by fire...then the rent... shall cease until the date when the Premises shall have been repaired and restored by Owner..." On March 9, 2010, Defendant responded to Plaintiff by letter stating that "the premises is completely in tact and fully functional" and Plaintiff is in breach of the lease for failure to pay timely rent.

On March 30, 2010, Plaintiff instituted the instant action for damages. The Plaintiff claims to have spent over \$80,000.00 to restore the premises. Thereafter, Defendant served a 3 Day Notice to pay rent dated May 24, 2010. On June 7, 2010, the Defendant commenced the Non-Payment Proceeding. Plaintiff defaulted in the Non-Payment Proceeding and Defendant states "the action was marked off the calender."

### **Arguments**

Plaintiff argues, *inter alia*, that the Non-Payment proceeding and the instant action should be consolidated pursuant to CPLR 602 (b) because (1) the cases involve common questions of law and fact, (2) this action was commenced before the Non-Payment Proceeding, and (3) there is no prejudice to a substantial right of Defendant. Plaintiff also argues that Defendants commenced the Civil Court action for retaliatory reasons as a result of Plaintiff instituting the instant action. Plaintiff further asserts that its claim for damages cannot be adjudicated in the Non-Payment proceeding because of the

counterclaim waiver clause in paragraph 14.5 of the Lease which states “If Landlord commences any proceedings for non-payment of rent (minimum annual rent or additional rent) or for recovery of possession of the lease premises, Tenant will not interpose any counterclaim of any nature in such proceedings or seek to consolidate such proceeding with any other proceedings. This shall not, however, be construed as a waiver of Tenant’s right to assert such claims in a separate action brought by Tenant” (hereafter referred to as the “no counterclaims/consolidation clause”).

Defendant counters, *inter alia*, by arguing (1) consolidation of an action in which a party has defaulted is inappropriate, (2) the Civil Court is the proper forum for resolving landlord and tenant proceedings, (3) the “no counterclaims/consolidation clause” cannot be circumvented by initiating an action in Supreme Court, and (4) the ability of the Civil Court to order payment of rent is a substantial right that will be prejudiced if the court grants consolidation.

### **Discussion**

Defendant’s argument that Plaintiff defaulted in the Non-Payment Proceeding and therefore, there is no action to consolidate, is unpersuasive. Defendant cites no case law to support the contention that there is no proceeding, merely because a party has defaulted. Further, Plaintiff has moved to vacate the default judgment.

While this is a court of general jurisdiction, that has the power to consolidate and stay a landlord/tenant matter (see Reynolds v. DHCR, 199 AD2d 15 [1st Dept.

1993][nonpayment consolidated with Supreme Court action and stayed for final determination by DHCR on a overcharge complaint]) no basis exists for consolidation here. Although Plaintiff initiated the instant proceeding before the Defendant commenced the Non-Payment Proceeding, Plaintiff has not explained why the Housing Court, which is the preferred forum to adjudicate landlord-tenant disputes, does not afford adequate relief. Plaintiff can defend the Non-Payment proceeding (see Kanter v. E67th Street Assoc., 111 AD2d 26 [1st Dept. 1986]) and assert, as an affirmative defense, that payment is not due under Section 8.1 of the Lease.<sup>2</sup> Defendant's position, that Plaintiff may not seek to circumvent the "no counterclaims/consolidation clause" by bringing the instant action, may be meritorious. However, the Court will not address that argument (which Plaintiff fails to address), as consolidation is not warranted for the reasons stated above.

It is hereby

ORDERED that Plaintiff's motion is denied; and it is further

ORDERED that the parties appear for a preliminary conference on December 16, 2010, 10 a.m. in Room 422 at 60 Centre Street.

---

<sup>2</sup> In any event, it appears that this Order to Show Cause is moot. After submission of the motion, Plaintiff entered into a Stipulation with Defendant in the Non-Payment Proceeding providing for payment of rent.

This constitutes the Decision and Order of the Court.

Dated: November 9, 2010

ENTER:



J.S.C.  
**EMILY JANE GOODMAN**

**FILED**  
NOV 17 2010  
NEW YORK  
COUNTY CLERK'S OFFICE