

**151 Mulberry St. Corp. v Italian Am. Museum**

2010 NY Slip Op 33923(U)

November 19, 2010

Sup Ct, New York County

Docket Number: 651017/10

Judge: Barbara R. Kapnick

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

PRESENT B Kapnick  
Justice

PART 3m

151 Mulberry Street

INDEX NO. 651017/10

- v -

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

MOTION SEQ. NO. 001

Italian American Museum

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

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 in accordance with the accompanying memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

RECEIVED

NOV 23 2010

MOTION SUPPORT OFFICE  
NYS SUPREME COURT - CIVIL

Dated: 11/19/10

[Signature]  
BARBARA R. KAPNICK J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IA PART 39

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151 MULBERRY STREET CORP. d/b/a  
IL PALAZZO,

Plaintiff,

-against-

**DECISION/ORDER**  
Index No. 651017/10  
Motion Seq. No. 001

ITALIAN AMERICAN MUSEUM, ITALIAN AMERICAN  
REAL ESTATE HOLDINGS, LLC, JEROME G.  
STABILE, III REALTY, L.L.C. f/k/a STABILE  
BROTHERS, L.L.C., JOSEPH V. SCELSA,  
RONALD MANNINO, and MICHAEL RICATTO,

Defendants.

-----x  
**BARBARA R. KAPNICK, J.:**

Plaintiff 151 Mulberry Street Corp. d/b/a Il Palazzo ("Mulberry Corp.") operates the Il Palazzo restaurant at the subject premises located at 151 Mulberry Street, New York, New York (the "premises").

Defendant Jerome G. Stabile, III Realty, L.L.C., formerly known as Stabile Brothers, L.L.C., ("Stabile") was the owner of the contiguous properties located at 185 Grand Street, 187 Grand Street, 189 Grand Street and 151 Mulberry Street (the "properties").

Plaintiff claims that Stabile orally agreed to grant Mulberry Corp. a right of first refusal to purchase the premises if the properties were sold, in exchange for Mulberry Corp. developing and building the property located at 151 Mulberry Street (the

"Covenant"), and that Stabile intended the Covenant to run with the land and to bind the title of that property.

Plaintiff claims to have constructed, built and maintained the building at 151 Mulberry Street, and the basements beneath the premises, at a cost in excess of \$1,000,000, in alleged reliance upon the Covenant.

Stabile thereafter sold the properties, on or about March 26, 2008, to the individual defendants Dr. Joseph V. Scelsa ("Scelsa"), Ronald Mannino ("Mannino") and Michael Ricatto ("Ricatto") (collectively, the "Buyers"). Plaintiff claims that the sale constituted a breach of the Covenant, and that the Buyers knew about the Covenant prior to their purchase of the properties.

On or about December 31, 2008, the Buyers sold the properties to defendant Italian American Real Estate Holdings, LLC ("Holdings"). Plaintiff claims that Dr. Scelsa was a member of Holdings when title was transferred from the Buyers to Holdings. Defendant Italian American Museum ("IAM"), a non-profit educational corporation, claims to be the net lessee of the properties. Dr. Scelsa is the President of IAM.

IAM previously commenced a series of proceedings against Mulberry Corp. in the Civil Court of the City of New York regarding the premises. The first two cases were dismissed on procedural grounds, the first by Decision and Order of the Hon. Jeffrey K. Oing dated April 28, 2009 (L&T Index/No. 052753/09) and the second by Decision and Order of the Hon. Anil C. Singh dated August 18, 2009 (L&T Index No. 064346/09).

IAM and the plaintiff then attempted to negotiate a lease, or sub-lease, for the premises, which culminated in the drafting of a proposed Lease, which was executed by Mulberry Corp. on or about December 17, 2009. Plaintiff claims that Dr. Scelsa actually signed the Lease on behalf of IAM, but it appears that a fully executed copy of the Lease was never delivered to Mulberry Corp.

Section 10.7 of the Lease provides as follows:

This Lease is conditioned upon Landlord's obtaining M&T Bank's approval hereof. If M&T Bank does not approve this Lease by January 31, 2010, this Lease shall be deemed null and void and of no further force and effect and all monies paid by Tenant on account of this Lease shall be returned to Tenant.

IAM claims that M&T Bank rejected the proposed Lease, and argues that the Lease should thus be deemed null and void and of no further force and effect.

There is no dispute that Mulberry Corp. paid \$165,000 to IAM as well as an additional \$15,000, allegedly for rent, in January, 2010. There is also no dispute that these monies, which plaintiff claims were paid on account of the Lease, were not returned to Mulberry Corp., even though plaintiff's counsel requested the return of the \$165,000 and the alleged January rent check in e-mails sent on January 14, 2010.

IAM contends that Mulberry Corp. thereafter stopped paying rent, and claims to have terminated what IAM contends was Mulberry Corp.'s month-to-month tenancy by service of a 30-day notice of termination. IAM subsequently brought another holdover proceeding in the Civil Court, under L&T Index No. 65580/10.<sup>1</sup>

Mulberry Corp. then served an Answer with counterclaims against IAM for breach of contract, declaratory relief, money had and received, and unjust enrichment based on IAM's retention of the \$180,000, a third-party claim against Stabile for breach of contract, and a counterclaim/second third-party claim for rescission of the deed from Stabile to the Buyers and the deed from the Buyers to IAM.

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<sup>1</sup> A motion to dismiss that proceeding was denied by Decision/Order of the Hon. Arlene P. Bluth dated June 9, 2010.

Plaintiff now moves by Order to Show Cause for an order removing the current holdover proceeding from Civil Court and consolidating it with the instant action or staying the Civil Court action.

After hearing oral argument on the record on August 5, 2010 from counsel for both parties, this Court granted a temporary restraining order ("TRO") staying the holdover proceeding in the Civil Court pending the hearing of the Order to Show Cause, and directed plaintiff to pay use and occupancy in the amount of \$10,000.00 per month on the first day of each month pending further Order of this Court.

Plaintiff's Amended Verified Complaint in this action dated August 30, 2010, which was filed just prior to oral argument on this Order to Show Cause, and apparently in partial response to defendants' arguments in its papers and during oral argument on the TRO, seeks:

(a) a judgment declaring that the Lease is in full force and effect, and that IAM is estopped from taking the position that Mulberry Corp. is not a tenant of the premises pursuant to the Lease because it accepted Mulberry Corp.'s payment of \$180,000 pursuant to the Lease (first cause of action);

(b) to recover damages for breach of the Lease based on IAM's failure and refusal to repay the \$180,000 (second cause of action), money had and received (third cause of action), unjust enrichment (fourth cause of action), and breach of the Covenant (fifth cause of action);

(c) rescission of the deed from Stabile to the Buyers on the ground that it was inequitably granted and was a breach of the Covenant (sixth cause of action);

(d) rescission of the deed from the Buyers to Holdings on the ground that it was inequitably granted and was a breach of the Covenant (seventh cause of action);

(e) to recover damages for tortious interference with contract, on the ground that the Buyers knew of the Covenant between plaintiff and Stabile before any transfer of the premises to the Buyers and Buyers intentionally, and without legal justification, caused Stabile to breach the Covenant and to sell the premises to Buyers (eighth cause of action);

(f) an order requiring Stabile to complete all necessary measures to sever the premises from the property so that the premises is an independent tax lot, and requiring the premises to be offered for sale to Mulberry Corp. for the agreed upon sale price of \$6,000,000 (ninth cause of action); and

(g) rescission of the net lease (tenth cause of action).

Defendants IAM, Holdings, and the Buyers (collectively, "defendants"),<sup>2</sup> argue in opposition to the Order to Show Cause that IAM will be prejudiced by the consolidation, since the holdover proceeding in Civil Court is ready (or will soon be ready) for trial. See, *Ahmed v C.D. Kobsons, Inc.*, 73 AD3d 440 (1<sup>st</sup> Dep't 2010), which held that the Court properly exercised its discretion in denying a motion to consolidate a Civil Court action with an action pending in the Supreme Court where the actions were at different procedural stages.

Defendants further argue that the Civil Court, which is the preferred forum for resolving landlord/tenant disputes, is in a position to address all the issues raised herein with regard to the validity of the Lease, since the counterclaims and third-party claims asserted by Mulberry Corp. in the holdover proceeding mirror the first through fourth causes of action asserted in the original Complaint.

Plaintiff, however, argues that consolidation is appropriate in this case because the actions clearly involve common questions of law and fact, and the Civil Court lacks the power to adjudicate all aspects of the dispute, including plaintiff's claims for

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<sup>2</sup> Counsel for Stabile appeared for the oral argument held before this Court on September 2, 2010, but did not submit any papers or take any position in connection with the motion.

declaratory relief and rescission.<sup>3</sup> Moreover, defendants have not established that they will be unduly prejudiced by a minimal delay.

Defendants alternatively argue that consolidation is not appropriate because plaintiff cannot demonstrate a likelihood of success on the merits in this case. Specifically, defendants argue that plaintiff's claims regarding the alleged oral right of first refusal are barred by the Statute of Frauds since the Complaint was never reduced to writing (see, GOL 5-703) and/or the doctrine of laches (see, *Philippine Am. Lace Corp. v 236 W. 40<sup>th</sup> St. Corp.*, 32 AD3d 782 [1<sup>st</sup> Dep't 2006]).

Plaintiff, however, argues that the Statute of Frauds

will not prevent enforcement of an oral contract where there has been part performance "'unequivocally referable'" to the purported agreement and nonenforcement will result in injustice (*Club Chain v Christopher & Seventh Gourmet*, 74 AD2d 277, 282 [1<sup>st</sup> Dep't 1980], *appeal dismissed* 53 NY2d 703 [1981]; additional citations omitted).

*Elizabeth Street Inc. v 217 Elizabeth Street Corp.*, 276 AD2d 295, 296 (1<sup>st</sup> Dep't 2000). See also, *Panetta v Kelly*, 17 AD3d 163 (1<sup>st</sup> Dep't 2005), *app. disp'd* 5 NY3d 783 (2005).

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<sup>3</sup> Plaintiff's counsel indicated on the record that it is likely that he will withdraw all or at least some of the third-party claims and counterclaims asserted by Mulberry Corp. in the Civil Court on the ground that, as IAM argued in its motion to dismiss those claims which was marked off the calendar pending this decision, the Civil Court lacks jurisdiction to adjudicate Mulberry Corp.'s requests for equitable relief.

Based on the papers submitted and the oral argument held on the record on September 2, 2010, it appears that there are questions of fact as to whether Mulberry Corp.'s building out of the restaurant at the premises, is unequivocally referable to the Covenant granting Mulberry Corp. the right of first refusal to purchase the property. In addition, defendants have not established that any of plaintiff's causes of action are barred, as a matter of law, by laches.

Marc S. Friedlander, Esq., who represented IAM in the two prior summary proceedings but who has since been discharged, has submitted an affirmation in limited opposition to the motion, requesting that if the holdover proceeding is removed from the Civil Court, that this Court except his application seeking the imposition of a charging lien from such removal. Mr. Friedlander's claim against IAM is severed and Mr. Friedlander may pursue his remedies in the Civil Court.

Accordingly, plaintiff's motion for an order of consolidation is granted, except as to Mr. Friedlander's application, and it is hereby

ORDERED that the Clerk of the Civil Court, New York County, upon receipt of a certified copy of this order and upon payment of the proper fees, if any, shall transfer to the Clerk of the Supreme Court, New York County, all of the papers on file in the proceeding

captioned, Italian American Museum v. 151 Mulberry Street Corp.  
a/k/a Il Palazzo, L&T Index No. 65580/10; and it is further

ORDERED that the Clerk of the Supreme Court, New York County, upon receipt of a copy of this order with notice of entry, shall, without further fee, assign an index number to the file transferred pursuant to this order, and shall assign the case to IA Part 39 for joint discovery and trial with the above-captioned action; and it is further

ORDERED that plaintiff shall continue to pay use and occupancy to IAM in the amount of \$10,000.00 per month on the first day of each month, without prejudice to the rights of either party, pending the resolution of this action or further Order of this Court; and it is further

ORDERED that counsel for all parties shall appear in IA Part 39, 60 Centre Street, Room 208 on December 22, 2010 at 10:00 a.m. in order to coordinate discovery on an expedited basis.

This constitutes the decision and order of this Court.

Date: November 19, 2010

  
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Barbara R. Kapnick  
J.S.C.  
**BARBARA R. KAPNICK**  
**J.S.C.**