

**Morris v 702 E. 5th St. Hous. Dev. Fund Corp.**

2011 NY Slip Op 30054(U)

January 6, 2011

Supreme Court, New York County

Docket Number: 116533/95

Judge: Saliann Scarpulla

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

PRESENT.

SALIANN SCARPULLA

PART 19

Index Number : 116533/1995

MORRIS, BRUCE

vs

702 EAST FIFTH STREET

Sequence Number : 022

DISMISS

INDEX NO. \_\_\_\_\_

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

MOTION SEQ. NO. \_\_\_\_\_

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

motion and cross-motion are decided in accordance with accompanying memorandum decision.

*and order of the Court.*  
*This constitutes the decision.*

**FILED**

JAN 11 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 1/6/11

Saliann Scarpulla  
**SALIANN SCARPULLA** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE-STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X  
BRUCE MORRIS,

Plaintiff,

Index Number 116533/95  
Submission Date 10/10/2010  
Mot. Seq. No. 022

-against-

**DECISION & ORDER**

702 EAST 5<sup>TH</sup> STREET HOUSING DEVELOPMENT  
FUND CORP.,

Defendant.  
----- X

**Appearances:**

**For Plaintiff :**

Jerome Greenberg, Esq.  
209 Clinton Avenue #9B  
Brooklyn, New York 11205  
917-548-8797

**For Defendant:**

James Briscoe West, PLLC  
By James Briscoe, Esq.  
100 Lafayette St., #601  
212-343-1000

Papers considered in review of this motion for a default judgment.

**Papers**

Affirm. in Supp. with Exhib. Attached.....  
Notice of Cross-Mot. and Affirm. in Supp.....  
Memo. of Law in Supp. of Cross-Mot.....  
Def. Affirm in Further Supp. and Opp. to Cross-Mot.....

**FILED**  
Numbered  
JAN 11 2011  
NEW YORK  
COUNTY CLERK'S OFFICE

**HON SALIANN SCARPULLA, J.:**

Defendant 702 East 5<sup>th</sup> Street Housing Development Fund Corp. ("702 East 5<sup>th</sup> Street") brings this motion to dismiss the first cause of action in the supplemental complaint on the ground of statute of limitations under CPLR 203(f), for summary judgment pursuant to CPLR 3212 on the first and third causes of action in the supplemental complaint,<sup>1</sup> arguing that there are no triable issues of fact, and to strike

<sup>1</sup>Plaintiff consented to dismiss the second cause of action by stipulation, dated February 5, 2007.

plaintiff's demand for jury trial included with the May 14, 2010 note of issue on the basis of contractual waiver of jury trial. Plaintiff Bruce Morris ("Morris") opposes 702 East 5<sup>th</sup> Street's motion entirely and cross-moves for partial summary judgment on the third cause of action in the supplemental complaint for breach of the partial settlement agreement dated March 22, 2000.

This action traces its roots to a commercial lease the parties entered into on March 30, 1988. This fifteen-year-old proceeding has resulted in numerous decisions by this Court and the First Department. See *Morris v 702 East Fifth Street HDFC*, 8 A.D.3d 27 (1<sup>st</sup> Dep't 2004) ("Morris I") and *Morris v 702 East Fifth Street HDFC*, 46 A.D.3d 478 (1<sup>st</sup> Dep't 2007) ("Morris II").

In *Morris II*, the First Department rejected 702 East 5<sup>th</sup> Street's argument that Morris' first cause of action, for breach of the lease arising out of 702 East 5<sup>th</sup> Street's refusal to sign requests for the Department of Buildings permits, was barred by the statute of limitations. The First Department ruled that the supplemental complaint related back to the original complaint, and Morris' first cause of action was timely. The First Department also ruled that Morris sufficiently pled the third cause of action for breach of the March 22, 2000 settlement agreement. The First Department did not consider 702 East 5<sup>th</sup> Street's argument that Morris would not be able to establish entitlement to damages in the form of lost profits, deferring this issue to the summary judgment motion.

\* 4]

Morris argues that 702 East 5<sup>th</sup> Street's breach of its obligations under the lease and breach of the settlement agreement resulted in distressing the profitability of his jazz club or cafeteria featuring live music. At the heart of Morris' argument lies a March 1, 1996 preliminary injunction enjoining Morris from producing live music except on string instruments between the hours of 4:00 p.m. and 9:00 p.m. on Friday, Saturday and Sunday and piano lessons between 11:00 a.m. and 7:00 p.m. The March 22, 2000 settlement agreement provided for 702 East 5<sup>th</sup> Street to withdraw this preliminary injunction once Morris installed adequate soundproofing. After Morris expended about ten thousand dollars soundproofing the premises, 702 East 5<sup>th</sup> Street failed to cooperate in sound testing, and instead insisted on maintaining the injunction by corporate resolution, dated February 10, 2001.

Eventually, on June 3, 2004, the First Department in *Morris I* found that Morris fully complied with the settlement agreement and that 507 East 5<sup>th</sup> Street breached the settlement agreement. *Morris v 702 East Fifth Street HDFC*, 8 A.D.3d 27, 29 (1<sup>st</sup> Dep't 2004). The First Department also ruled that the preliminary injunction violated Morris' First Amendment rights, because the preliminary injunction was premised on the type of instruments used, instead of the maximum volume of audible sound produced, as required under the New York City noise control regulations. The First Department ordered that the case be remanded and the sound tests performed as required by the settlement agreement.

On January 12, 2007, after reviewing the sound test results, this Court (Lehner, J.) fully lifted the preliminary injunction. In the period between March 22, 2000 and January 12, 2007, Morris alleges that he incurred lost profits, because the injunction placed his jazz club or cafeteria at a competitive disadvantage to the competing establishments in the area, which were not burdened by any restrictions on live music entertainment. To determine the amount of alleged lost profit, Morris offers copies of sales tax returns that show increase in sales at his cafeteria to coincide with the lifting of the restrictions on the type of instruments played.

The increase became more marked following the January 2007 lifting of the time-of-day restrictions on musical performance after the definitive sound tests established Morris' compliance with New York City noise control regulations. Morris argues that his losses are also augmented by the fact that when he opened the cafeteria, there were almost no similar establishments in the neighborhood, and by the time the injunction was lifted, numerous coffee shops and jazz clubs had opened up in the immediate vicinity. Morris, however, does not furnish an expert affidavit by an economist to support his claim.

In response, 702 East 5<sup>th</sup> Street argues that Morris had no experience in running either a jazz club, a night club or any other food and entertainment establishment for that matter, with no proven track record of profit to ascertain prospective earnings. 702 East 5<sup>th</sup> Street also points out that during the relevant time frame, Morris did not possess a

liquor license and in no event could have been successful in running his jazz club or cafeteria.

**Decision**

Under CPLR 3212(b), summary judgment “shall be granted if, upon all papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” The motion must be supported by (1) an affidavit, (2) by a copy of the pleadings and (3) by other available proof, such as depositions and written admissions. CPLR 3212 (b). To warrant a court’s directing judgment as a matter of law, it must clearly appear that no material issue is presented for trial. *Epstein v Scally*, 99 A.D.2d 713 (1<sup>st</sup> Dep’t 1984). When a party has made a prima facie showing to entitle it to summary judgment, the burden shifts to the opposing party to show by evidentiary facts that the defense is real and can be established at trial. *See Indig v Finkelstein*, 23 N.Y.2d 728 (1968); *see also Vogel v Blade Contr. Inc.*, 293 A.D.2d 376, 377 (1<sup>st</sup> Dep’t 2002). Conclusory allegations or denials are insufficient to either warrant or defeat summary judgment. *McGahee v Kennedy*, 48 N.Y.2d 832, 834 (1979).

While 702 East 5<sup>th</sup> Street’s application is couched in the form of a summary judgment motion under CPLR 3212, its submissions contain the same record and the same arguments that were available before the Appellate Division, First Department in *Morris II*. The First Department conclusively ruled in *Morris II* that Morris’ first cause of

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action in the supplemental complaint was timely under the statute of limitations.<sup>2</sup> To the extent this motion is mostly an attempt to reargue Morris II, it must be denied.<sup>3</sup>

702 East 5<sup>th</sup> Street also argues that Morris' claims should be dismissed because he cannot prove lost profit damages as a matter of law. In a breach of contract context, lost profits are recoverable if they naturally flow from the breach. *See Levine v American Federal Group, Ltd.*, 180 A.D.2d 575, 577 (1<sup>st</sup> Dep't 1992). "To recover damages for lost profits, a plaintiff must show that damages were caused by the breach, that lost profits were contemplated by the parties when the contract was executed and that the alleged loss can be measured with reasonable certainty and are not speculative." *Jambetta Music, Inc. v Nugent*, 2008 N.Y. Slip. Op. 30363U, \*14 (Sup. Ct., New York County 2008), citing *Ashland Mgmt. Inc. v Janien*, 82 N.Y.2d 395, 404 (1993). If the contract is silent as to recoverable damages, including lost profits, the courts inquire into the relevant circumstance surrounding execution of the contract to determine "the nature, purpose and

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<sup>2</sup> 702 East 5<sup>th</sup> Street appears to be arguing in its papers for the first time that Morris' third cause of action was also untimely. This Court may not consider this argument, because it could have and should have been placed before the First Department at the same time 702 East 5<sup>th</sup> Street argued that the first cause of action was untimely. Further, 702 East 5<sup>th</sup> Street argues that the Court should dismiss Morris' claim of tortious interference, but no such claim was ever raised in the supplemental complaint, and Morris never raised this issue in any of his submissions.

<sup>3</sup>In its briefing, 702 East 5<sup>th</sup> Street argues that the lease agreement does not permit Morris to maintain an entertainment establishment open into an unspecified time during the night or early morning. This Court may not consider this argument as it was rejected by the First Department in Morris I and by this Court (Lehner, J.) in a subsequent decision lifting the preliminary injunction on January 12, 2007. In any event, the March 22, 2000 settlement agreement specifically permitted Morris such use after adequate soundproofing.

particular circumstances known by the parties. . . as well as ‘what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it had assumed, when the contract was made.’” *Awards.com v. Kinko’s, Inc.*, 42 A.D.3d 178, 183-84 (1<sup>st</sup> Dep’t 2007) (citations omitted).

The requirement of establishing damages with reasonable certainty is not absolute. “Damages resulting from the loss of future profits are often an approximation. The law does not require that they be determined with mathematical precision. It requires only that damages be capable of measurement based upon known reliable factors without undue speculation.” *Ashland Mgmt. Inc. v Janien*, 82 N.Y.2d 395, 403 (1993), citing Restatement (Second) § 352.

The court must implement a stricter evidentiary standard when damages for lost profit derive from the failure of a new business venture, because there does not exist a reasonable basis of experience upon which to estimate lost profits with the required degree of certainty. *See Zink v Mark Goodson Productions, Inc.*, 261 A.D.2d 105, 106 (1<sup>st</sup> Dep’t 1999) (citation omitted). However, “‘there is no per se rule precluding a new business from recovering lost profits.’” *Cifone v City of Poughkeepsie*, 234 A.D.2d 331, 331-32 (2<sup>nd</sup> Dep’t 1996) (citations omitted). “A claim based on the loss of anticipated profits in connection with a thwarted business venture may be proved by methods other than by reference to the actual past profit-making ‘experience’ . . .” *Cifone*, 234 A.D.2d at 332, citing *Ashland Mgmt. Inc. v Janien*, 82 N.Y.2d 395, 404 (1993). Further, this stricter

standard is applied by courts most often in the context of entertainment and entrepreneurship in recently developed industries and markets. *See Zink v Mark Goodson Productions, Inc.*, 261 A.D.2d 105, 106 (1<sup>st</sup> Dep't 1999)(applying a stricter standard in a case involving a proposed television game show featuring a host not well known to American audiences); *see also Awards.com v. Kinko's, Inc.*, 42 A.D.3d 178, 185 (1<sup>st</sup> Dep't 2007) (applying a stricter standard to a failed venture to distribute personalized corporate awards and promotional items).

Here, Morris raises an issue of fact as to the existence of the lost profits as a result of defendant's violation of the March 22, 2000 settlement agreement by submitting copies of tax returns that show increased sales after the lifting of the time-of-day restrictions on the live music. The nature of Morris' business has a long and established history in the City of New York and does not require application of a stricter standard reserved for new and untried ventures. The fact that Morris' cafeteria or jazz club does not have a long track record of profit making to serve as a base line for determination of damages is not dispositive and may be attributable to this fifteen-year-old protracted litigation, during most of which Morris was subject to injunction restraints not applicable to competing businesses. The lack of a liquor licence until this year is also not dispositive on summary judgement, because this fact addresses the extent of the damages, not the existence of damages.

While Morris does not submit an expert affidavit of an economist, such an affidavit is not an absolute requirement in actions for loss of profit. The strength of Morris' claim should be the subject of a determination on trial, and not on summary judgment.

In addition, Morris is entitled to a jury trial, as requested in the note of issue, on Morris' third cause of action, the claim for lost profits, because that cause of action is predicated upon a breach of the settlement agreement, not the lease. Unlike the lease, the settlement agreement does not contain a jury waiver, and the settlement agreement does not incorporate or reference any lease provisions. *See Cohn v Adler*, 139 A.D.2d 481, 483 (2<sup>nd</sup> Dep't 1988). In contrast, the first cause of action, for failure to sign requests for the Department of Buildings permits, is based on the breach of the lease and is thus subject to the waiver of jury trial.

Therefore, the Court shall bifurcate the trial. The first cause of action shall be tried by the Court on the issue of both liability and damages. The third cause of action shall be separately tried before the jury only on the issue of damages, because Morris has made out a prima facie entitlement to summary judgment on the issue of 702 East 5<sup>th</sup> Street's breach of the March 22, 2000 settlement agreement, and 702 East 5<sup>th</sup> Street did not offer any opposition to this branch of Morris' cross-motion for partial summary judgment.<sup>4</sup>

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<sup>4</sup>Indeed, in *Morris I*, the First Department found that "plaintiff . . . performed in accordance with its [stipulation of settlement's] provisions, whereas defendant did not. . . Thus,

In accordance with the foregoing, it is

ORDERED that the motion for summary judgment under CPLR 3212 brought by defendant 702 East 5<sup>th</sup> Street Housing Development Fund Corp. is denied in its entirety; and it is further

ORDERED that the cross-motion for partial summary judgment under CPLR 3212 brought by plaintiff Bruce Morris on the issue of liability on plaintiff's third cause of action and plaintiff's request for a jury trial is granted; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this decision and order upon all parties and upon the Clerk of Trial Support (60 Centre St., Rm. 158) who shall schedule this matter forthwith for a date in Part 40 for a jury selection and a bifurcated trial in accordance with the above decision.

This constitutes the Decision and Order of the Court.

Dated: New York, New York

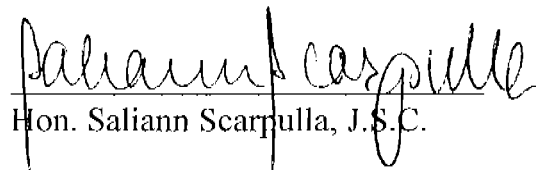
January 6, 2011

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**FILED**

JAN 11 2011

NEW YORK  
COUNTY CLERK'S OFFICE

  
Hon. Saliann Scarpulla, J.S.C.

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the record establishes that defendant's default precluded further performance of the agreement between the parties." *Morris v 702 East Fifth Street HDFC*, 8 A.D.3d 27, 29 (1<sup>st</sup> Dep't 2004).