

**City of New York v 74 84 O'Henry Inc.**

2011 NY Slip Op 32745(U)

August 9, 2011

Supreme Court, New York County

Docket Number: 400762/2010

Judge: Joan A. Madden

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.

SCANNED ON 8/24/2011  
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
HON. JOAN A. MADDEN

PRESENT:

J.S.C.

PART 11

Index Number : 400762/2010

CITY OF NEW YORK

vs

74 84 O'HENRY INC.

Sequence Number : 002

SUMMARY JUDGMENT

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

*is determined in accordance with the annexed memorandum decision. Settle order on notice, including a copy of the court's decision.*

**FILED**

AUG 24 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: August 9, 2011

*[Signature]*  
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  
THE CITY OF NEW YORK,

INDEX NO. 400762/10

Plaintiff,

-against-

74 84 O'HENRY INC, 74-84 THIRD AVENUE CORP.;  
THE LAND AND BUILDING KNOWN AS 74 THIRD  
AVENUE, TAX BLOCK 556, TAX LOT 59, COUNTY  
OF NEW YORK, CITY and STATE OF NEW YORK;  
THE NEW YORK STATE LIQUOR AUTHORITY;  
"JOHN DOE" and "JANE DOE," fictitiously named  
parties, true names unknown, the parties intended being  
the owners, lessees, operators, or occupants of the  
commercial establishment operating as "Nevada Smith's"  
located at 74 Third Avenue, New York, New York; and  
any person claiming any right, title or interest in the real  
property which is the subject of this action,

**FILED**

**AUG 24 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

Defendants.

-----X  
JOAN A. MADDEN, J.:

In this nuisance abatement proceeding, plaintiff City of New York moves for an order pursuant to CPLR 3212 granting summary judgment against defendants 74-84 Third Avenue Corp. and The Land and Buildings known as 74 Third Avenue, Tax Block 556, Tax Lot 59, County of New York, City and State of New York (collectively the "74-84 Third Avenue defendants" or "defendant owner"), striking their answer and : 1) permanently enjoining the illegal sale of alcoholic beverages or for any other activity as defined within section 123 of the New York State Alcoholic Beverage Control Law; 2) taxing and allowing plaintiff's costs and disbursements against defendants pursuant to the CPLR, and allowing execution therefore; and 3) taxing and allowing plaintiff's actual costs, expenses and disbursements in investigating,

bringing and maintaining this action, pursuant to New York City Administrative Code §7-714(g), and directing that plaintiff have execution therefore. The 74-84 Third Avenue defendants oppose the motion and cross-move for an order pursuant to CPLR 3211 and 3212 granting them summary judgment dismissing the complaint for failure to state a cause of action.

The following facts are not disputed unless otherwise noted. Defendant 74-84 Third Avenue is the owner of the premises known as 74 Third Avenue. By a written lease dated July 1, 1992, defendant 74-84 O'Henry, Inc. ("defendant tenant") leased the store and the basement in the building for use as a "cafe/restaurant with the right to sell alcoholic beverages as permitted by law." The lease expired on June 30, 2007 and was extended through June 30, 2012. Defendant tenant operates a bar known as "Nevada Smith's" at the premises.

On March 22, 2010, plaintiff City commenced this action seeking a judgment pursuant to New York City Administrative Code §7-706, permanently enjoining public nuisances at the premises, permanently enjoining the person or persons conducting, maintaining or permitting public nuisances at the premises, and imposing civil penalties of up to \$1,000 per day. The verified complaint alleges that on three separate occasions, October, 21, 2009, November 17, 2009 and December 1, 2009, underage auxiliary police officers purchased alcoholic beverages from a bartender at the premises, "in violation of New York State Alcoholic Beverage Control Law section 65.1, Prohibited Sales – Any person under the age of twenty-one years." The complaint also alleges that on November 21, 2009, a 19-year old female patron was allegedly raped by a male patron in the bathroom inside the premises.

Plaintiff filed the summons and complaint with an Order to Show Cause for a preliminary injunction seeking to enjoin the public nuisances and to close Nevada Smith's for one year. On

March 23, 2010, the Hon. Martin Schoenfeld signed plaintiff's Order to Show Cause and issued a temporary restraining order closing Nevada Smith's pending a hearing on the motion. Prior to the return date, the City and defendant tenant entered in to a stipulation of settlement in which the tenant consented to a permanent injunction enjoining it from violating Alcoholic Beverage Control Law § 123. The tenant also agreed to pay the City a \$10,000 "settlement payment," and agreed to implement certain procedures to ensure compliance with the stipulation, including the use of an electronic age-verification and recording system, the use of a digital video surveillance system, posting "course of conduct" signs inside and outside the premises, maintaining security officers during specified hours, consenting to unannounced inspections by the New York City Police Department, and consenting to the payment of fines if the stipulation is violated.

On March 25, 2010, defendant owner interposed an answer asserting general denials and the affirmative defenses of failure to state a cause of action, and lack of jurisdiction based on improper service and failure to file proof of service in accordance with Administrative Code §7-706©. Plaintiff City is now moving for summary judgment on its claim for a permanent injunction against defendant owner.<sup>1</sup> Defendant owner opposes the motion and cross-moves for summary judgment dismissing the complaint.

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 852 (1985). Once the proponent satisfies this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that

---

<sup>1</sup>The City is not seeking summary judgment on its claim for civil penalties.

material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986). Both parties are required to lay bare their proof, and “mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient.” Zuckerman v City of New York, 49 NY2d 557, 562 (1980).

In support of its motion for summary judgment, plaintiff City submits affidavits from three separate police officers as to each of the three incidents in which a bartender at Nevada Smith’s served alcohol to an underage auxiliary police officer. Plaintiff also submits copies of the summonses issued to the bartenders for violating section 65.1 of the Alcoholic Beverage Control Law (sale of alcohol to minor), as well an attorney’s affirmation, the pleadings, and the deed for the property showing defendant 74-84 Third Avenue Corp. as the owner of the premises. Based on the foregoing affidavits and documents, plaintiff has made a sufficient prima facie showing to be entitled to judgment as a matter of law on its claim for a permanent injunction against defendant owner pursuant to the Nuisance Abatement Law, Administrative Code § 7-706.

Defendant owner, on the other hand, has failed to establish a genuine issue of material fact requiring a trial, or that it is entitled to summary judgment dismissing the complaint. Contrary to defendant’s argument, the affidavits from the three police officers are all based on personal observations and first-hand knowledge, and are sufficient to constitute competent evidentiary proof. In each affidavit, the police officer states that he was assigned to work in an undercover capacity along with an underage auxiliary police officer, and prior to entering Nevada Smith’s, he examined the underage auxiliary police officer’s identification and “verified that the information contained on his/her identification indicated that he/she was under twenty-one years old.” The police officers also state that they observed the underage auxiliary police officer enter

the premises, they “then observed the underage auxiliary police officer order two (2) Corona beers from a bartender within the establishment in exchange for a sum of United States currency,” and the “bartender accepted the payment tendered by the underage auxiliary police officer.” The police officers further state that “[a]t no time did this individual or anyone else within the subject premises, ask the underage auxiliary police officer for any identification regarding proof of his/her age.”

Defendant owner also argues that the City is not entitled to a permanent injunction absent a showing of actual knowledge on the part of the owner. Defendant’s argument is without merit. Administrative Code § 7-706(a) provides that a court may grant a permanent injunction “to permanently enjoin a public nuisance within the scope of this subchapter, and the person or persons conducting, maintaining or permitting the public nuisance from further conducting, maintaining or permitting the public nuisance.” Section 7-706(a) also provides that the “owner, lessor and lessee of a building, erection or place wherein the public nuisance is being conducted, maintained or permitted shall be made defendants in the action.” Section 7-706(b) mandates that the “corporation counsel shall name as defendants the building, erection or place wherein the public nuisance is being conducted, maintained or permitted, by describing it by block, lot number and street address and at least one of the owners of some part of or interest in the property.” Under section 7-706 (c), “[i]n rem jurisdiction shall be complete over the building . . . by affixing the summons to the door of the building. . . and by mailing the summons by certified or registered mail return receipt requested, to one of the owners of some or part of or interest in the property.” Based on these provisions of the Administrative Code, on an application for a preliminary or a permanent injunction, the court’s jurisdiction is “invoked by the existence of the

nuisance at the premises” and “[t]hus its jurisdiction is in rem, and its orders are enforced against the premises. The personal fault of the owner is not a material consideration upon such an application.” City of New York v. Castro, 160 AD2d 651, 652 (1<sup>st</sup> Dept 1990). In other words the court’s jurisdiction is in rem and its authority to abate the nuisance arises from its in rem jurisdiction over the premises located in New York County. See id. As quoted above, the nuisance abatement law requires that building where the public nuisance is being maintained be named as a defendant, together with the owner, as a way of providing the court with jurisdiction to abate the nuisance. See City of New York v. Dana, 165 Misc2d 409, 416 (Sup Ct, NY Co 1995).

Defendant’s reliance on the decision in City of New York v. Dorrian, NYLJ October 3, 2006 (Sup Ct, NY Co), is misplaced, as the issue as to the owner’s knowledge arose in the context of the City’s claim for civil damages, not with respect to the claim for a permanent injunction. Notably, Administrative Code § 7-706(h), provides for the imposition of a civil penalty of not more than \$1,000 per day, but requires a “finding” that the “defendant *intentionally* conducted, maintained or permitted the public nuisance” (emphasis added). As noted above, plaintiff City is not pursuing its claim for civil damages against defendant owner.

Defendant owner further argues that the City has already obtained a permanent injunction on consent from the tenant, the operator of the bar. The fact, however, does not preclude the City from also obtaining a permanent injunction against the owner, nor does it render the City’s claim moot. See City of New York v. Phillips, 272 AD2d 568 (2<sup>nd</sup> Dept), lv app den 95 NY2d 262 (2000); City of New York v. Mor, 261 AD2d 185 (1<sup>st</sup> Dept), app dism 93 NY2d 1041 (1999). As the First Department explains in City of New York v. Mor, the “issuance of an

injunction against the landlord as well as the tenants . . . will ensure that neither the tenants nor the landlord will be able to arrange a subsequent renting of the premises to the tenants, under any name.” Id at 187.

Finally, defendant owner argues that summary judgment is premature since it is entitled to conduct discovery. That argument is without merit, as defendant has failed to show that facts essential to oppose the motion are in plaintiff’s exclusive knowledge, or that discovery might lead to facts relevant to the issues. See Silverstein v. Westminster House Owners, Inc., 50 AD3d 257 (1<sup>st</sup> Dept 2008); Woods v. 126 Riverside Drive Corp, 64 AD3d 422, 423 (1<sup>st</sup> Dept 2009).

Based on the foregoing, plaintiff is entitled to summary judgment on its claim for a permanent injunction against defendant owner.

Plaintiff also seeks summary judgment against defendant owner as to its actual costs, expenses and disbursements in investigating, bringing and maintaining this action, pursuant to New York City Administrative Code §7-714(g). Section 7-714(g) requires the City to submit “satisfactory proof by affidavit or such other evidence.” Plaintiff has not submitted any such affidavit or other evidence as to the actual costs it has incurred in investigating, bringing and maintaining this action. Moreover, in the absence of exigent circumstances, costs are expenses not recoverable under section 7-714(g) for the abatement of a nuisance for which the owner had no notice. See City of New York v. Basil Company, 182 AD2d 307 (1<sup>st</sup> Dept 1992); see also City of New York v. Laing, 236 AD2d 504 (2<sup>nd</sup> Dept 1997). Although the complaint alleges that the owner “knew of the alleged activity being conducted in the subject premises,” the City has not produced any competent evidentiary proof to support its bare and conclusory allegation that as to the owner’s knowledge. Thus, the City’s claim to recover the costs and expenses of this


action pursuant to section 7-714(g) must be dismissed. The City, however, is still entitled to statutory costs and disbursements pursuant to the CPLR.

In light of the determination herein above, the cross-motion is denied.

Settle order and judgment on notice, including a copy of this decision.

DATED: August 9, 2011

ENTER:

  
\_\_\_\_\_  
J.S.C.

**FILED**

**AUG 24 2011**

NEW YORK  
COUNTY CLERK'S OFFICE