

**Paramount Leasehold, L.P. v 43rd St. Deli, Inc.**

2012 NY Slip Op 31612(U)

June 8, 2012

Sup Ct, New York County

Docket Number: 653668/2011

Judge: Shlomo S. Hagler

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

SELOMO S. HAGLER, J.S.C.

PRESENT: [Signature]  
Justice

PART 17

PARAMOUNT LEASEHOLD  
- v -  
YBS DELS INC

INDEX NO. 653668/11  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 4 were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Cross-Motion  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED	
1	_____
2	_____
3, 4	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

FILED

JUN 18 2012

NEW YORK COUNTY CLERK

THIS MOTION/ORDER TO SHOW CAUSE  
IS DECIDED IN ACCORDANCE WITH  
THE ATTACHED ORDER.

FILED

SELOMO S. HAGLER, J.S.C.  
JUN 18 2012

Dated: 6/8/12

EMILY JANE GOODMAN J.S.C.  
NEW YORK

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: PART 17

-----X  
PARAMOUNT LEASEHOLD, L.P.,

Plaintiff,

Index No. 653668/2011

-against-

**DECISION/ORDER**

43<sup>RD</sup> STREET DELI, INC.,

Defendant.

-----X

FILED

HON. SILOMO S. HAGLER, J.S.C.:

JUN 18 2012

**Procedural History**

Plaintiff Paramount Leasehold, L.P.'s ("plaintiff" or "Paramount") predecessor-in-interest entered into a lease dated December 1, 1990 and "First Amendment to Lease" dated November 19, 1993 ("Lease") with defendant 43<sup>rd</sup> Street Deli, Inc., ("defendant" or "43<sup>rd</sup> Street Deli") for the rental of a commercial ground floor retail premises located at 1501 Broadway, New York, New York ("subject premises"). See Exhibit "B" to the motion. The Lease called for an initial expiration date of January 31, 2011, and two successive five year renewal options provided that the tenant is not in default of the terms of the Lease. *Id.* at ¶ 39. Defendant allegedly exercised its first option to renew the Lease and the plaintiff rejected the renewal option alleging that defendant was in default of the terms of the Lease. Defendant asserted a cause of action in a related Supreme Court action under Index No. 110073/2006 ("Related Supreme Court Action"), seeking a declaration under an amended complaint that the Lease was properly renewed which is currently pending before this Court.

In January, 2012, plaintiff commenced this action by order to show cause together with a summons and complaint asserting three causes of action seeking a judgment permitting

plaintiff and its accountants to conduct an audit required pursuant to Article 38 of the Lease, ordering an accounting and inspection of all defendant's books and records to calculate the "percentage rent" and "gross sales" in accordance with Article 38 of the Lease, enjoining defendant from disposing or destroying any of the records required be to be kept under Article 38 of the Lease, awarding plaintiff a money judgment against defendant for any sums found to be due upon completion of the accounting and reasonable attorney's fees, costs and disbursements as a result of defendant's alleged default under Article 38 of the Lease. See Exhibit "A" to the motion.

In the instant order to show cause, plaintiff moved for an order as follows: 1) enjoining and restraining defendant 43<sup>rd</sup> Street Deli, Inc. from destroying certain documents and records which are required to be maintained pursuant to Article 38 the lease relating to the computation of "percentage rent" based on the amount of the defendant's "gross sales"; 2) directing defendant to collect said records and make them available to plaintiff, and its agents including an accountant, for examination to determine the computation of "percentage rent" based on the amount of the defendant's "gross sales"; and 3) declaring that plaintiff is entitled to an "accounting" of defendant's "gross sales" and an audit of said records to be conducted at an appropriate location. Instead of interposing an answer to the complaint, defendant opposed the motion and cross-moved for an order pursuant to CPLR § 3211 (a)(1), (5) and (7), dismissing the complaint or alternatively, dismissing the portion of the complaint that seeks relief for any period prior to January 1, 2009, and pursuant to CPLR § 2304, quashing plaintiff's non-party subpoena duces tecum on Kirkiles & Kotiadis, LLP, annexed as Exhibit "D" thereto. Plaintiff opposes the cross-motion. Both the motion and cross-motion are consolidated herein for disposition.

### **Failure to State a Cause of Action**

In determining a motion to dismiss a pleading for failure to state a cause of action the court must “accept the facts as alleged in the Complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory.” Leon v Martinez, 84 NY2d 83, 87-88 (1994). See also Nonnon v City of New York, 9 NY3d 825 (2007). Affidavits may be used freely to preserve inartfully pleaded, but potentially meritorious claims. Rovello v Orofino Realty Co., 40 NY2d 633 (1976).

In contrast to a motion to dismiss under CPLR § 3211, the standard of review for a summary judgment motion pursuant to CPLR § 3212 is very different. The movant under CPLR § 3212 has the initial burden of proving entitlement to summary judgment (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]) and once the movant has provided such proof, the opposing party must “show facts sufficient to require a trial of any issue of fact” in order to defend the summary judgment motion. CPLR § 3212(b); Zuckerman v City of New York, 49 NY2d 557 (1980); Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065 (1979); Freedman v Chemical Constr. Corp., 43 NY2d 260 (1977); Spearmon v Times Sq. Stores Corp., 96 AD2d 552 (2d Dept 1983). If the opposing party fails to submit evidentiary facts to controvert the facts set forth in the movant’s papers, the movant’s facts may be deemed admitted and summary judgment granted since no triable issue of fact exists. Kuehne & Nagel v Baiden, 36 NY2d 539 (1975).

### Exculpatory Clause- Article 51 (b) of the Lease

Defendant primarily argues that Article 51 (b) of the Lease precludes plaintiff from obtaining a judgment for the amount of “percentage rent” owed in accordance with Article 38 of the Lease. Article 51 (b), entitled “Exculpatory Clause,” reads as follows:

If the Tenant or any permitted successor in interest be an individual, joint venture, tenancy in common, co-partnership, unincorporated association, or other unincorporated aggregate of individuals or a corporation, then anything elsewhere to the contrary notwithstanding, Landlord shall look solely to the Leasehold estate of Tenant in the land and Building of which the Demised Premises are a part, or the proceeds therefrom, for the satisfaction of Landlord’s remedies for the collection of a judgment (or other judicial process) requiring the payment of money by Tenant in the event of any default or breach by Tenant with respect to any of the terms, covenants and conditions of the Lease to be observed and/or performed by Tenant, and no other property or assets of Tenant shall be subject to levy, execution or other enforcement procedure for the satisfaction of Landlord’s remedies.

Specifically, defendant cites the language that the “Landlord shall look solely to the Leasehold estate of Tenant” as a contractual limitation to prevent plaintiff from collecting a judgment against defendant in excess of the value of expired Lease. In other words, inasmuch as the expired Lease allegedly has no current value, defendant asserts that plaintiff would have no cognizable claim for money damages. Matter of City of New York, 19 AD2d 44 (1st Dept 1963), Dennis’ Natural Mini-Meals v 91 Fifth Ave. Corp., 209 AD2d 262 (1st Dept 1994).

In this case, this Court must employ the more liberal standard of review under CPLR § 3211. Assuming *arguendo* that defendant’s interpretation of Article 51(b) of the Lease is correct, this Court may accept as true that defendant duly exercised its first option to renew the Lease as it had vigorously argued in the earlier Related Supreme Court Action. Under said circumstances, defendant would concede that Article 51(b) of the Lease would be inapplicable as

the defendant's leasehold estate would be valuable. Even under the more stringent standard of CPLR § 3212, there would be a clear and material issue of fact as to whether the defendant duly exercised its option to renew the Lease or defendant was not entitled to a renewal option as it was in default of the terms of the Lease at the time of the renewal period. After answering this question, this Court may determine the applicability of Article 51(b) of the Lease in relation to the value of the leasehold estate. Therefore, under either standard of review, it could not be said that there is no cognizable legal theory for plaintiff to assert that it is entitled to an audit to determine the amount "percentage rent" owed, if any, in accordance with Article 38 of the Lease.

#### **Article 38- Statute of Limitations**

Defendant argues that the requirement under Article 38 (G) of the Lease that it retains records for a period of three (3) years was intended to reduce the six (6) year statute of limitations applicable to contract claims pursuant to CPLR § 213 to three (3) years. While parties are free to shorten the applicable statute of limitations in a writing, such as the Lease, the intent to do so must be clearly appear from the contract itself. CPLR § 201; Dorff v Taya, 194 App Div 278 (1st Dept 1920); Iurlbut v Christiano, 63AD2d 1116 (4th Dept 1978).

Nowhere in the plain reading of Article 38 does it even suggest that the parties contracted to shorten the applicable six (6) year statute of limitations to three (3) years. It is quite clear that Article 38(G) contains a separate and independent obligation for defendant to retain records for a period of three (3) years for the parties to verify the amount of "gross sales" so as to compute the "percentage rent" owed thereunder, and it does not alter the statute of limitations framework.

### **Attorney's Fees**

Defendant argues that plaintiff is not entitled to recover attorney's fees for commencing this action because "percentage rent" is not covered by Article 19 of the Lease which refers only to a default in the payment of "rent." However, Article 37 defines "fixed rent" and all other charges such as "additional rent" including "percentage rent." Article 37(H) further provides that the landlord may have the same rights and remedies with respect to fixed rent and additional rent. Therefore, the plaintiff may seek to recover attorney's fees for the non-payment of "percentage rent."

### **Cross-Motion to Quash Subpoena**

Defendant argues that plaintiff is not entitled to subpoena documents from its accountant, Kirkiles & Kotiadis, because the subpoena is "defective" and "unduly burdensome." See Exhibit "D" to the Cross-Motion. Procedural defects in a subpoena, such as the failure to give required notice stating the circumstances or reasons for such disclosure was sought or required, can be remedied if the proponent later in its opposition papers articulates the need for the discovery sought were relevant and necessary to the claims of the case. Velez v Hunts Point Multi-Serv. Ctr., Inc., 29 AD3d 104 (1<sup>st</sup> Dep't 2006). Substantively, after the commencement of the action, any party may subpoena non-parties to obtain disclosure of information so long as the material sought is relevant and necessary to the issues raised in the action. Id., CPLR § 3120.

In this action, any procedural defects in the subpoena have been addressed and remedied in plaintiff's opposition papers to defendant's cross-motion to quash. Moreover, many of the documents sought in Schedule "A" of the subpoena track the language of Article 38 (G)

which sets forth the records needed to determine the “gross sales” for the purposes of calculating the amount of “percentage rent” that defendant may owe under the terms of the Lease. Thus, it is quite clear that plaintiff is seeking documents from defendant’s accountants that are relevant and necessary to the issues raised in the action. However, this Court will limit the time period of disclosure to six (6) years prior to the commencement of this action and strike the documents sought in number 6 of Schedule “A” and the portion of number 7, “including all backup information and accountants’ work papers” as being over-broad.

### **Plaintiff’s Motion**

Plaintiff seeks an order restraining defendant from destroying certain records that it is contractually obligated to maintain pursuant to Article 38(G) so as to enable the parties to calculate the “percentage rent” based on the amount of the defendant’s “gross sales.” Other than defendant’s arguments that the complaint must be dismissed based on the exculpatory clause of Article 51(b) discussed above, it has not set forth a reasonable argument to oppose a contractually mandated obligation to maintain said records. Therefore, this Court grants the first branch of plaintiff’s motion, in its entirety. However, the remaining branches of the motion are denied without prejudice, with leave to renew after issue is joined, as the relief sought is in essence summary judgment on plaintiff’s causes of action asserted in the complaint.

### **Conclusion**


The first branch of plaintiff’s motion seeking an order enjoining and restraining defendant, during the pendency of this action, from destroying certain documents and records which are required to be maintained pursuant to Article 38 of the Lease is granted in its entirety. However, the remaining branches of the plaintiff’s motion are denied without prejudice, with leave

to renew after issue is joined. Defendant's cross-motion is denied, except that the subject subpoena shall be limited in accordance with the above directives. Defendant shall interpose an answer within twenty (20) days of notice of entry of this decision and order.

The foregoing constitutes the decision and order of this Court. Courtesy copies of this decision and order have been sent to counsel for the parties.

FILED

Dated: New York, New York  
June 8, 2012

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

JUN 13 2012

**SHLOMO HAGLER**  
J.S.C.