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SHORT FORM ORDER

INDEX No. 14-25059
CAL No. _____

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 1-15-15
SUBMIT DATE 1-22-15
Mot. Seq. # 01 - Mot D

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CANZ SUFFOLK ONE, INC.,

Plantiff,

-against-

CANNON ROCK GROUP, LLC, DESMOND REA, TONY CARNEY, and AIDAN DOWNEY,

Defendants.

THE LAW OFFICES OF VINCENT J. TRIMARCO, JR., PC
Attorneys for Plaintiff
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Upon the following papers numbered 1 to 38 read on this motion for a preliminary injunction ; Notice of Motion/ Order to Show Cause and supporting papers 1-20 ; ~~Notice of Cross Motion and supporting papers__~~; Answering Affidavits and supporting papers 21-38 ; ~~Replying Affidavits and supporting papers__~~; ~~Other__~~; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

In this proceeding, plaintiff seeks (1) an order restraining the defendants from selling, moving, destroying, leasing or otherwise encumbering the property, fixtures and equipment located at 40-11 30th avenue, Astoria, New York; (2) an order that the defendants must pay all past due sales tax, rent, liquor bills, liability insurance, and other vendor bills within two days of the date of this order; (3) an order that defendants place the sum of ten thousand dollars ($10,000.00) in escrow, to be held by The Law Offices Of Vincent J. Trimarco, Jr, PC; (4) an order directing defendants to immediately pay to plaintiff the amount of twenty seven thousand one hundred thirty six dollars and thirty eight cents ($27,136.38) for promissory note payments, or alternatively, to turn the keys to the premises over to the plaintiff; (5) an order entering a money judgment against defendants; and (6) an order awarding the plaintiff seven thousand five hundred dollars ($7,500.00) for attorney fees.

The plaintiff claims that he entered into several agreements with the defendants regarding the purchase of a restaurant located at 40-11 30th Avenue, Astoria, New York, named "Front Toward Enemy NYC". The agreements include (1) a Sales Agreement; (2) a Management Agreement; (3) an Assignment and Assumption of Lease; (4) a Reassignment and Assumption of Lease; (5) a Security Agreement; (6) a Promissory Note; and (7) a Personal Guaranty. Plaintiff alleges that defendants are in default on payments under the Promissory Note and that they are unable to financially remedy the default. Therefore the plaintiff alleges that its only remedy would be to reenter the premises and takeover operations and management.

Defendants oppose the application in all respects and argue, *inter alia*, that service was not completed as directed in the Order to Show Cause and that venue in this County is improper.

In support of motion, plaintiff has submitted, *inter alia*, an attorney's affirmation; affidavit of Timothy Lorito; copies of the Sales Agreement; copies of the Management Contract; copies of the Assignment and Assumption of Lease; copies of the Reassignment and Assumption of Lease; copies of the Security Agreement; copies of the Promissory Note; copies of the Personal Guaranty; and four affidavits of service. In opposition, defendants have submitted, *inter alia*, an attorney's affirmation; affidavit of Tony Carney; affidavit of Desmond Rea; affidavit of Aidan Downey; copies of the Security Agreement; copies of a letter to Mr. Trimarco dated January 6, 2015; copies of a Certificate of Occupancy; copies of the floor plan for Front Toward Enemy; and a memorandum of law.

SERVICE OF PROCESS

The Order to Show Cause was signed on December 30, 2014 by Acting Justice Joseph Farneti and required service to be completed "by personal service on or before the 6th day of January, 2015". The affidavit of service signed by Albert Hall and dated January 5, 2015 indicates that Tony Carney was personally served on January 3rd at approximately 10:45 a.m. "at 51-136 63rd St., Maspeth, NY 11378 by delivering a true copy of each to Tony Carney." The affidavit of service signed by Albert Hall and dated January 5, 2015 indicates that Desmond Rea was personally served on January 3rd, 2015 at approximately 10:05 a.m. "at 41-04 31st Ave, Astoria NY 11103 by delivering a true copy of each to James Moore, a person of suitable age and discretion... James Moore stated that Desmond was not at the residence at that point in time, that he was Desmond's friend, and accepted service on Desmond Rea's behalf... said location is the defendant's actual dwelling within the state," and by mailing the documents "in a First Class postpaid sealed envelope, properly addressed to defendant... in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State." The affidavit of service signed by Mike Heitzner and dated January 7, 2015 indicates that Aidan Downey was personally served on January 3rd, 2015 at approximately 4:15 pm

> at 789 Bogert Road River Edge, NJ 07661 to an unidentified female white, a person of suitable age and discretion. The female refused to provide her name and stated that Aidan is not home at the moment. The female stated she would accept the papers on Aidan's behalf but was unable to open the door and requested the papers be placed in mailbox adjacent to the front door. Said location is defendants actual dwelling within the state.
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> On January 7th, at approx. 10:00am, deponent enclosed copies... in a First Class postpaid sealed envelope, properly addressed to defendant... in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State.

A process server's affidavit constitutes *prima facie* evidence of proper service. (***Reich v Redley,*** 96 AD3d 1038, 2012 NY Slip Op 5160 [2d Dept 2012]) Defendant Carney admits personal service of the

Order to Show Cause in his affidavit. Defendant Rea states "I was never personally served with the Order to Show Cause... I became aware of the OTSC when a roommate informed me some papers were left for me on Saturday January 3, 2014 and never received any further papers at work or at home." Defendant Downey states "[i]t is now January 13, 2015 and I still have not been served, personally or otherwise with the OTSC." CPLR § 308 indicates what "personal service" is and states

> Personal service upon a natural person shall be made by any of the following methods: 1. by delivering the summons within the state to the person to be served; or 2. by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such delivery and mailing to be effected within twenty days of each other; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing, whichever is effected later; service shall be complete ten days after such filing; proof of service shall identify such person of suitable age and discretion and state the date, time and place of service, except in matrimonial actions where service hereunder may be made pursuant to an order made in accordance with the provisions of subdivision a of section two hundred thirty-two of the domestic relations law.

Pursuant to CPLR 308, defendants Carney and Rea were personally served with the Order to Show Cause as was directed. However, this motion by plaintiff for an order granting the requested relief as to defendant Aidan Downey is denied, without prejudice, as plaintiff failed to effect service upon that defendant in the manner directed in the order to show cause (Farneti, J.), by failing to mail a copy of the Order to Show Cause on or before January 6, 2015. (*see* ***U.S. Bank National Assn. v Hickey,*** 53 AD3d 544, 862 NYS2d 87 [2d Dept 2008]).

VENUE

The Court in ***A.C.E. Elevator Co. v. V.J.B. Constr. Corp.***, 192 Misc2d 258, 260-261, 746 NYS2d 361 (S Ct Kings 2002), examined the interrelationship between CPLR 501 and 507. In that case the Court opined that

> Pursuant to CPLR 507, "The place of trial of an action in which the judgment demanded would affect the title to, or the possession, use

or enjoyment of, real property *shall* be in the county in which any part of the subject of the action is situated" (emphasis added).

CPLR 501, in turn, provides that: "Subject to the provisions of subdivision two of section 510, written agreement fixing place of trial, made before an action is commenced, shall be enforced upon a motion for change of place of trial."

Notwithstanding that CPLR 501 authorizes the enforcement of forum selection clauses generally, Ace initially argues that this statute is inoperative when the cause of action, such as here, is governed by CPLR 507. This, it is urged, flows from the mandatory language of CPLR 507, which allegedly creates an inviolable rule requiring an action affecting real property to be commenced only in the county where the property is situated. I disagree.

First, pursuant to the express terms of CPLR 501, a contractual forum selection clause is enforceable except in a situation governed by CPLR 510 (2), which is not relevant here. Hence, applying the interpretive canon of inclusio unius est exclusio alterius, the Legislature's failure to exempt CPLR 507 from the grasp of CPLR 501 necessarily demonstrates that the statutory scheme does not preclude parties from contractually fixing venue in a foreclosure action. Stated otherwise, had the Legislature intended that a written agreement fixing venue could not be enforced in an action affecting real property, it would have necessarily included a reference to CPLR 507 within the body of CPLR 501 as it did with section 510 (2) (cf., ***Pajak v Pajak***, 56 NY2d 394, 397).

Second, while CPLR 507 does speak in mandatory terms, i.e., it provides that an action affecting real property "shall" be commenced in the county where the property is situated, this is of little significance in determining the interrelationship between CPLR 507 and 501. In this vein, CPLR 503 (a), the statute governing transitory causes of action, similarly speaks in [261] mandatory language, providing that the trial of such an action "shall be in the county in which one of the parties resided when it was commenced." (Emphasis added.) It is settled law, however, that this mandatory language is trumped by a written agreement fixing venue as authorized by CPLR 501 (see, ***Callanan Indus. v Sovereign Constr. Co.***, 44 AD2d 292; see also, ***Brooke Group v JCH Syndicate*** 488, 87 NY2d 530; ***Premium Risk Group v***

> ***Legion Ins. Co.***, 294 AD2d 345; ***Buhler v French Woods Festival of Performing Arts***, 154 AD2d 303). By a parity of reasoning, therefore, it is apparent that CPLR 507 does not, because of its use of mandatory language, conflict with the provisions of CPLR 501.

(A.C.E. Elevator Co. v. V.J.B. Constr. Corp., supra at 260-261). The other venue rules of Article 5 of the CPLR are "trumped" by an agreement fixing venue as authorized in CPLR 501. (***Sabo v. Candero***, 7 Misc3d 1013(A), 801 NYS2d 242 (S Ct Rockland 2005); ***A.C.E. Elevator Co. Inc. v V.J.B. Construction Corp.***, *supra*).

The Agreement between CANZ Suffolk One Inc. and Cannon Rock Group, LLC dated June, 2014, under the heading of "15. Governing Law" states "the parties agree that any action arising as a result of this agreement shall be brought in Supreme Court Suffolk County New York." Additionally, in the Management Contract between CANZ Suffolk One Inc. and Cannon Rock Group, LLC dated July 15, 2014, under the heading "Section 10. Miscellaneous" paragraph E, states "the parties hereto agree that any legal action arising out of this agreement shall be subject to the jurisdiction of the courts of the State of New York and venue shall be Supreme Court Suffolk County." This Court agrees with the conclusions set forth by the other courts confronted with this same issue and finds that the forum selection clause in the agreements are valid, thereby conferring venue upon Suffolk County.

THE MOTION FOR A PRELIMINARY INJUNCTION

In order to prevail on a motion for a preliminary injunction, the movant must demonstrate, by clear and convincing evidence, (1) a likelihood of ultimate success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) that a balancing of the equities favors the movant's position (*see, generally,* ***Blinds and Carpet Gallery, Inc. v E.E.M. Realty, Inc.,*** 82 AD3d 691, 917 NYS2d 680 [2d Dept 2011]). The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual (see ***Dixon v Malouf***, 61 AD3d 630, 875 NYS2d 918 [2d Dept 2009]; ***Ruiz v Meloney***, 26 AD3d 485 [2d Dept 2006]; ***Ying Fung Moy v Hohi Umeki***, 10 AD3d 604 [2d Dept 2004]). The decision to grant or deny a preliminary injunction rests in the sound discretion of the Court (see ***Dixon v Malouf***, supra; ***Ruiz v Meloney***, supra). Further, preliminary injunctive relief is a drastic remedy that will not be granted unless the movant establishes a clear right to such relief which is plain from the undisputed facts (***Blueberries Gourmet v Aris Realty Corp.***, 255 AD2d 348 [2d Dept 1998]; see ***Hoeffner v John F. Frank, Inc.***, 302 AD2d 428 [2d Dept 2000]; ***Peterson v Corbin***, 275 AD2d 35 [2d Dept 2000]; ***Nalitt v City of New York***, 138 AD2d 580 [2d Dept 1988]).

At this stage of the proceeding the plaintiff has demonstrated what can be construed as a likelihood of success on the merits. Further, it cannot be gainsaid that the plaintiff would suffer irreparable injury absent the granting of the preliminary injunction. Finally, a balancing of the equities is in favor of the plaintiff to maintain the status quo pending resolution of this matter. Therefore the motion for a preliminary injunction is granted to the extent that pending the resolution of this action the defendants and all of their agents are restrained from selling, moving, destroying, leasing, or otherwise

encumbering the property, fixtures, and equipment located at 40-11 30th Avenue, Astoria, New York, other than in the ordinary course of doing business.

The Court has considered defendant's remaining contentions and finds them to be without merit.

All other relief sought by plaintiff is denied.

The foregoing shall constitute the decision and Order of this Court.

Dated: January 26, 2015

HON. JOSEPH A. SANTORELLI
J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**