

Boucan NYC Cafe LLC v 467 Rogers LLC
2017 NY Slip Op 32313(U)
October 25, 2017
Supreme Court, Kings County
Docket Number: 513856/2017
Judge: Sylvia G. Ash
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At an IAS Term, Comm-11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 25th day of October, 2017.

P R E S E N T:

HON. SYLVIA G. ASH,

Justice.

BOUCAN NYC CAFÉ LLC,

Plaintiff,

- against -

467 ROGERS LLC,

Defendant,

DECISION AND ORDER

Index # 513856/2017

Mot. Seq. 2, 3

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The following papers numbered 1 to 6 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed_____

1 - 3

Opposing Affidavits (Affirmations)_____

4, 5

Reply Affidavits (Affirmations)_____

6

Upon the foregoing papers, Plaintiff's motion seeking an order adjudging Defendant of contempt for Defendant's alleged violation of this Court's Order dated August 16, 2017, is hereby granted as set forth below. Defendant's cross-motion to dismiss is denied.

On July 18, 2017, Plaintiff commenced this action against Defendant seeking damages for, among other things, partial eviction and breach of contract. According to Plaintiff, it entered into a lease with Defendant on or around May 1, 2016 and ending on April 30, 2026, for the commercial premises known as 467 Rogers Avenue, first floor, in Brooklyn, New York ("Premises"). In its complaint, Plaintiff alleges that Defendant refused Plaintiff access to the basement in violation of the lease agreement, thereby impeding the process for Plaintiff to obtain a liquor license to operate its café. Defendant is the owner of the Premises.

On August 8, 2017, Plaintiff filed an emergency application seeking a preliminary injunction and temporary restraining order enjoining Defendant and its agent from "removing any property of the tenants," "taking any further action to change the locks" and compelling Defendant "to provide keys to the new locks that were put onto the property...." According to Plaintiff, the application was necessitated when, on August 1, 2017, Defendant changed the locks to the Premises and refused Plaintiff access to the café. According to Plaintiff's Emergency Affirmation, on August 8, 2017, notice of the temporary restraining order application was given to Defendant by email to Vineth Barnes, the property manager. On August 9, 2017, the application for a temporary restraining order was granted by the Hon. Debra Silber by order dated same. Said order directed personal service of the order to show cause upon Defendant by the next day, August 10, 2017. The motion was made returnable on August 16, 2017. It is not clear whether Defendant appeared before Justice Silber to argue against the temporary restraining order on August 9, 2017.

On August 16, 2017, after oral argument, this Court granted Plaintiff's order to show cause for a preliminary injunction by short form order dated same (hereinafter referred to as the "Restraining Order"). The Restraining Order directed Defendant to provide Plaintiff the key to the Premises by 7:00 p.m. on August 17, 2017, and enjoined Defendant from taking any further action to change the locks or to remove property. The Restraining Order further directed the parties to return on September 20, 2017, for further argument.

On August 23, 2017, Plaintiff filed the instant motion seeking to punish Defendant for contempt for willful disobedience of the Restraining Order. According to Plaintiff, Defendant failed to turn over the keys on August 17, 2017 or at any time thereafter. Plaintiff contends that Defendant's failure to comply with the Restraining Order has aggravated its ability to conduct business, adding to the business's demise.

On September 7, 2017, Defendant filed a motion to dismiss the action or, in the alternative, for leave to file a late answer. Defendant contends that it never evicted Plaintiff from the Premises but, rather, that the parties executed a mutual termination of the lease agreement on or around June 19, 2017, when Robert Aime ("Aime") signed the lease termination and surrendered possession of the Premises to Defendant. It is Defendant's position that Aime is the sole member of Plaintiff and

that, accordingly, Plaintiff by Arnaud Cherry ("Cherry") lacks standing to commence this action. Defendant also states that Aime and Cherry entered into an agreement dated February 24, 2017 whereby Cherry agreed to pay Aime \$2,000.00 as a down payment towards the buy-out of Aime's interest but that Cherry only paid \$1,400.00 and further failed to pay the balance of the purchase price. According to Defendant, business began to fail after Cherry failed to obtain a liquor license or pay the purchase price for the business and, as a result, Aime needed to relinquish the subject ten-year lease.

In response and in opposition to Defendant's motion, Cherry, by way of affidavit, states that Plaintiff was formed in February 2016 as a shell corporation with no assets or debts. That Aime set up the LLC but that it was never meant to be a single member LLC. According to Cherry, after the lease was signed, the LLC began incurring expenses for construction of the café and paying rent to Defendant. That Cherry sought outside investors to help with expenses and by November 2016, the LLC added additional members. At that time, the LLC consisted of Aime with a 50% membership interest and himself (Cherry), Yvette Sampson-Henriquez, and June Persaud held the remaining 50% interest. Thereafter, the LLC still remained unprofitable and that, as a result, Aime no longer wanted to be a part of the project. Cherry states that, in February 2017, Aime agreed to sell his 50% interest to the remaining 50% interest holders in exchange for a \$2,000.00 down payment and a monthly stipend for consulting with the State Liquor Authority. In addition, Cherry states that Aime would receive a final payout of \$16,000.00 upon the LLC's receipt of a liquor license. According to Cherry, Aime did not have any authority within the LLC after February 2017 and was not authorized to terminate the lease. Further, Cherry alleges that Defendant was aware of Aime's removal from the LLC from emails exchanged between the landlord and the managing member of the LLC.

In opposition to Plaintiff's motion for contempt, Defendant submits that it is not in contempt because it tendered the keys to Aime, the sole member of Plaintiff. Defendant also argues that the Restraining Order is "jurisdictionally defective" because Plaintiff, by Cherry, improperly resorted to conspicuous service under CPLR 308[4] after only one attempt at personal service of the underlying order to show cause. Based on the relevant affidavit of service, Plaintiff served the signed

order to show cause upon Defendant by conspicuous service at the Premises on August 9th at 7:40 p.m. and by Fedex overnight express mail.

Discussion

As a preliminary matter, the Court finds that Plaintiff complied with the service requirements set forth in the order to show cause dated August 9, 2017. The Court afforded Plaintiff only until the next business day to serve the signed order to show cause upon Defendant. Thus, the resort to conspicuous service after one attempt at personal service cannot be deemed to be defective. Moreover, Defendant received actual notice of the application and appeared on August 16, 2017 to argue against Plaintiff's motion for a preliminary injunction.

Turning then to Plaintiff's application seeking contempt against Defendant for failing to comply with the Restraining Order, "[t]o sustain a finding of civil contempt, a court must find that the alleged contemnor violated a lawful order of the court, clearly expressing an unequivocal mandate, of which that party had knowledge, and that as a result of the violation a right of a party to the litigation was prejudiced" (*Casavecchia v Mizrahi*, 57 AD3d 702, 703 [2d Dept 2008]). The contempt must be proven by clear and convincing evidence (*Vujovic v Vujovic*, 16 AD3d 490, 491 [2d Dept 2005]). "In order to sustain a finding of civil contempt, it is not necessary that the disobedience be deliberate or willful; rather, the mere act of disobedience, regardless of its motive, is sufficient if such disobedience defeats, impairs, impedes or prejudices the rights of a party" (*Hinkson v Daughtry-Hinkson*, 31 AD3d 608, 608 [2d Dept 2006]).

Here, the Court finds that Defendant willfully disobeyed a lawful and unequivocal mandate commanding Defendant to turn over the keys to Plaintiff by 7:00 p.m. on August 17, 2017. Defendant's claim that it complied with the Restraining Order by giving the keys to Aime is completely disingenuous and smacks of bad-faith. Having appeared and argued before this Court against the preliminary injunction which was undisputedly brought by Plaintiff vis-à-vis Cherry, and having been served with a summons and complaint by Plaintiff vis-à-vis Cherry in July 2017, Defendant cannot pretend that it intended to comply with this Court's Restraining Order by turning

the keys over to Aime. Plaintiff is therefore entitled to a judgment holding Defendant in contempt for willful disobedience of the Restraining Order.

Secondly, Defendant's motion to dismiss this action is denied. Defendant's motion to dismiss relies solely on its position that Aime is the sole owner of Plaintiff. However, that issue is in dispute among the relevant alleged shareholders of Plaintiff. With regards to Defendant's application to file and serve a late answer, Defendant fails to explain why it was unable to timely file an answer. Defendant's application is therefore denied with leave to renew.

Accordingly, it is hereby

ORDERED that Defendant 467 ROGERS LLC is deemed in civil contempt for failing and neglecting to comply with the Restraining Order; it is further

ORDERED that Defendant 467 ROGERS LLC may purge itself of the finding of contempt by turning over the keys to the Premises to Plaintiff within forty-eight (48) hours after service upon it of a copy of this Order with written notice of its entry; and it is further

ORDERED that Defendant 467 ROGERS LLC is advised that should it fail to purge the finding of contempt within forty-eight (48) hours after service upon him of a copy of this Order with written notice of its entry, Defendant shall be fined pursuant to Judiciary Law §773 and/or a warrant may be issued for the arrest of its principal upon an affirmation and proposed order submitted to the Court by Plaintiff's counsel.

This constitutes the Decision and Order of the Court.

E N T E R,

A handwritten signature in black ink, appearing to read 'S.A.H.', is written over a horizontal line.

Sylvia G. Ash, J.S.C.