

Cherry Hill Gourmet, Inc. v Lundy's Mgt. Corp.

2022 NY Slip Op 33830(U)

October 31, 2022

Supreme Court, Kings County

Docket Number: Index No. 510844/16

Judge: Karen B. Rothenberg

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 35 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 31st day of October 2022.

P R E S E N T:

HON. KAREN B. ROTHENBERG,
Justice.
-----X
CHERRY HILL GOURMET, INC.,

Plaintiff,

-against-

LUNDY’S MANAGEMENT CORP.,
Defendant.
-----X
LUNDY’S MANAGEMENT CORP.,

Third-Party Plaintiff,

-against-

SHEEPSHEAD RESTAURANT ASSOCIATES INC.,
Third-Party Defendant.
-----X

DECISION AND ORDER

Index No. 510844/16

Mot. Seq. No. 15-17

The following e-filed papers read herein:

NYSCEF Doc. No.:

Notice of Motion/Cross Motion/Order to Show Cause,
Affirmations (Affidavits), Memoranda of Law, and
Exhibits Annexed _____

621-726; 728-766; 825-852, 854-855

Opposing Affirmations (Affidavits) in Opposition
and in Reply, Memoranda of Law, and Exhibits Annexed _____

767-816; 817-821; 858-876; 877-880

In this action to recover damages for breach of a commercial lease, the following motions and cross motion, all served pre-Note of Issue, have been consolidated for disposition:

In Seq. No. 15, third-party defendant Sheepshead Restaurant Associates Inc. (“SRA”) moves for summary judgment dismissing the second cause of action in the second

amended third-party complaint of defendant/third party plaintiff Lundy's Management Corp. ("Lundy"), which second cause of action alleges that certain certificate of occupancy ("COO") payment terms constitute unenforceable penalties, and that the COO-related payments, to the extent received by SRA from Lundy, must be refunded to Lundy (collectively, the "COO-payment terms" and the "COO-related payments," respectively);

In Seq. No. 16, Lundy cross-moves for: (1) summary judgment on its defense that the COO-payment terms have been superseded (and the underlying COO-related payments have been waived and released) by a global Settlement Agreement, dated December, 2020, between Lundy's principal Steve Pappas, and SRA's majority (and since-deceased) shareholder George Kaloidis (the "global settlement agreement"); (2) summary judgment on the aforementioned second cause of action in the second third-party complaint for a declaration that the COO-payment terms constitute unenforceable penalties, and that the COO-related payments, to the extent received by SRA from Lundy, must be refunded to Lundy; and (3) leave to further amend its third-party complaint to add certain claims and defenses; and

In Seq. No. 17, Lundy moves, by order to show cause, dated May 19, 2022, for an order: (1) pursuant to CPLR 326 (a), staying the commercial non-payment proceeding entitled *Sheepshead Restaurant Associates Inc. v Lundy's Management Corp.*, index No. LT-306592-22/KI (Civ Ct, Kings County) (the "non-payment proceeding"); (2) pursuant to CPLR 602 (b), removing the non-payment proceeding to this Court and consolidating it with this action; or, alternatively (3) pursuant to CPLR 2201 and/or 6301,

staying the non-payment proceeding for all purposes pending the full and final resolution of this action.

Discussion

After a thorough review of the foregoing papers and upon taking judicial notice of the pending action commenced by the Estate of George Kaloidis (the majority shareholder of SRA) against George Pantelidis and two other minority shareholders of SRA, entitled *James Kaloidis as Executor of Estate of George Kaloidis v George Pantelidis, et al.*, index No. 652342/22 (Sup Ct, NY County) (the “corporate governance action”),¹ it is the decision and order of this Court that:

(1)

All relief requested by SRA in its motion in Seq. No. 15 and *the majority of relief* requested by Lundy in the latter’s cross motion in Seq. No. 16 are *denied* as premature and incapable of final resolution at this stage of litigation, *with leave to renew* after completion of discovery and the filing of a note of issue/certificate of readiness. Without pretrial depositions and other discovery, the Court is unable, *at this time*, to pass on the validity (or

¹ The immediacy of the filing of the corporate governance action (and the ensuing judicial notice thereof) was suggested by counsel to George Kaloidis (now acting as counsel to the estate) in ¶ 13 of his affirmation in opposition to SRA’s motion and in further support of Lundy’s cross motion (*see* Alex I. Kleyman’s affirmation, dated July 11, 2021) (NYSCEF Doc. No. 819) (“As the attorney for Mr. Kaloidis [now the Estate of Mr. Kaloidis], *I can assure this Court that an action against Mr. Pantelidis . . . , alleging amongst many other wrongdoings, fraud by Mr. Pantelidis . . . , will be filed shortly.*”) (emphasis added). The corporate governance action was commenced on July 6, 2022.

not) of the COO-payment terms.² The Court's determination of this matter, *at this stage of litigation*, is made more difficult by the fact that the bankruptcy court presiding over Lundy's chapter 11 case declined to assess the fairness of the COO-payment terms under Bankruptcy Rule 9019 in connection with that court's approval, over the objection of plaintiff Cherry Hill Gourmet Inc. ("Cherry Hill"), of the stipulated dismissal of Lundy's chapter 11 case.³ Even assuming that the COO-payment terms were either valid to begin with or were ratified by the subsequent lease amendments, their continued validity depends on the fundamental - but yet - unexplored - proposition that the global settlement agreement is *not* valid. As noted, the global settlement agreement is encompassed in the pending corporate governance action. Additionally, the global settlement agreement (in and of itself) presents a significant – but likewise unexplored – issue of the apparent authority which it allegedly conferred on *Lundy* (as opposed to SRA) to excuse the former from making the subsequent COO-related payments to the latter.

² As Lundy's counsel, Brett B. Theis, Esq., correctly noted in his June 1, 2021 affirmation, "the parties herein have yet to conduct *any* discovery in this action, including tak[ing] party depositions" (NYSCEF 730, ¶ 29 [emphasis in the original]).

³ Initially, the bankruptcy court's so-ordered stipulation of dismissal of Lundy's chapter 11 case, dated December 30, 2015 (NYSCEF Doc. No. 700), did not recite any of the four-factor criteria for assessing the fairness of a proposed settlement under Bankruptcy Rule 9019, which are: "(1) the probability of success in litigation; (2) the likely difficulties in collection; (3) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (4) the paramount interest of the creditors" (*In re Martin*, 91 F3d 389, 393 [3d Cir 1996]). In that regard, Bankruptcy Rule 9019 (a) provides that "[o]n motion by the trustee [or the debtor-in-possession where no trustee has been appointed] and after notice and a hearing, the court may approve a compromise or settlement" (emphasis added).

Subsequently, the bankruptcy court abstained from considering (and remanded to this Court for consideration) the issue of the fairness and enforceability of the COO-payment terms, relying principally on the fact that Lundy's chapter 11 case had long been dismissed (*see* Order Granting Motion to Remand and for Abstention, dated July 10, 2019) (NYSCEF Doc. No. 776).

(2)

The remaining branch of Lundy's cross motion in Seq. No. 16 which is for leave to further amend its third-party complaint to allege, among other things, that SRA breached the Stipulation of Partial Settlement of Pending Motion Seq. Nos. 11, 12, and 13, dated December 21, 2020 (Martin, J.) (NYSCEF Doc. No. 758), is *granted* in the Court's discretion, as the proposed amendments are neither palpably insufficient, nor devoid of merit, and demonstrate no surprise or prejudice to SRA (*see e.g. Munoz Trucking Corp. v Darcon Const., Inc.*, 153 AD3d 838, 839 [2d Dept 2017]). Accordingly, Lundy shall electronically file/serve its third amended third-party complaint (in the form of Exhibit EE to its cross motion) (NYSCEF Doc. No. 761) within ten days after electronic service of this decision and order with notice of entry. SRA shall answer the third amended third-party complaint, or otherwise respond thereto, within twenty days from the date of Lundy's service.

(3)

Lastly, the branches of Lundy's motion in Seq. No. 17 for stay of the non-payment proceeding in the Civil Court and for removal of that proceeding to this Court for consolidation with this action are *granted* in the interests of justice and judicial economy; and the remaining branch of its motion for alternative relief is denied as academic (*see* CPLR 602 [b]; *Barkagan v S&L Star Realty, LLC*, 185 AD3d 643, 645 [2d Dept 2020]; *Robinson v 47 Thames Realty, LLC*, 158 AD3d 780, 781 [2d Dept 2018]; *W.H.P. 20. Inc. v Oktagon Corp.*, 251 AD2d 58, 59 [1st Dept 1998]).

The Clerk of the Civil Court, Kings County, is directed to deliver to the Clerk of the Supreme Court, Kings County, all papers filed in the proceeding entitled *Sheepshead Restaurant Associates Inc. v Lundy's Management Corp.* under index No. LT-306592-22/KI, together with certified copies of all minutes and entries.


* * *

Lundy's counsel is directed to electronically serve a copy of this decision and order with notice of entry on the other parties' respective counsel (as well as on Attorney Kleyman at alexk@klgnylaw.com) and to electronically serve an affidavit of service thereof with the Kings County Clerk.

The parties' respective counsels (as well as Attorney Kleyman) are directed to appear in the Intake Part on November 16, 2022, for a preliminary conference. Any further inquiries regarding the preliminary conference should be directed to the Intake Part.

This constitutes the decision and order of the Court.

E N T E R,


Hon. Karen B. Rothenberg
J. S. C.