

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

2023 NY Slip Op 30723(U)

March 14, 2023

Supreme Court, New York County

Docket Number: Index No. 110073/2006

Judge: Joel M. Cohen

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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

-----X

43RD STREET DELI, INC.

Plaintiff,

- v -

PARAMOUNT LEASEHOLD, L.P.,

Defendant.

INDEX NO. 110073/2006

MOTION DATE 09/05/2019,
01/17/2020

MOTION SEQ. NO. 026 027

**DECISION + ORDER ON
MOTION**

-----X

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 026) 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 245, 246, 247, 248, 264, 266, 267, 268, 303, 304, 305

were read on this motion for CONTEMPT.

The following e-filed documents, listed by NYSCEF document number (Motion 027) 253, 254, 255, 256, 257, 258, 259, 260, 261, 263, 265, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 303, 304, 306

were read on this motion for RENEWAL.

Defendant Paramount Leasehold, L.P.’s (“Paramount” or “Defendant”) post-judgment motion for contempt and other relief (Mot. Seq. No. 26) is GRANTED IN PART. Paramount’s motion for renewal as well as other relief and Plaintiff 43rd Street Deli, Inc.’s (“43rd Street” or “Plaintiff”) cross-motion to vacate the judgment (Mot. Seq. No. 27) are DENIED.

This case, now post-judgment, has a tortured procedural history made more complicated by numerous post-judgment motions seeking the same relief and relief against a non-party. In 2006, 43rd Street sued its landlord, Paramount, seeking a declaration that 43rd Street was entitled to renew its lease. Paramount counter-claimed for damages including but not limited to claims for unpaid water bills, late fees and attorneys’ fees. Motion practice and trips to the First

Department followed (*43rd St. Deli v Paramount Leasehold, L.P.*, 89 AD3d 573, 574 [1st Dept 2011] [consolidating holdover proceeding with this case]; *43rd St. Deli, Inc. v Paramount Leasehold, L.P.*, 107 AD3d 501, 501 [1st Dept 2013] [awarding use and occupancy pendent lite to Paramount to the extent of referring issue of rental payments from 43rd Street to a referee]).

A four-day bench trial was held in August of 2018. In its Decision After Trial, the Court held, among other things, that Plaintiff was not entitled to exercise a right to renew the lease; that certain water bills tendered by Paramount of 43rd Street were inflated; that 43rd Street owed Paramount for unpaid water bills; and that 43rd Street owed Paramount reasonable attorney's fees (NYSCEF 117). The calculations of any amount owed were referred to a Special Referee (*id.*). A hearing was commenced before Judicial Hearing Officer ("JHO") Philip S. Straniere but ultimately not concluded due to the COVID-19 pandemic and JHO Straniere's retirement (NYSCEF 303).

Post-trial motions to modify by both parties were denied (NYSCEF 160). Paramount's subsequent motion for entry of a money judgment, judgment of possession and contempt were granted as to the first two prongs and denied with leave to renew as to contempt (NYSCEF 219). Judgment was entered on August 27, 2019 (NYSCEF 223). The First Department affirmed the Court's order after trial on December 3, 2019 (*43rd St. Deli, Inc. v Paramount Leasehold, L.P.*, 178 AD3d 411 [1st Dept 2019]).

Prior to the First Department's affirmance, in September of 2019, Paramount moved for contempt against 43rd Street for violating the Judgment and for other relief including payments for use and occupancy, water and electric for August and September 2019 (NYSCEF 234 [Mot. Seq. No. 026]). Following oral argument on October 23, 2019, the Court awarded Paramount use and occupancy, associated costs and fees (i.e. water and electric) for August and September

of 2019 and attorney's fees to be calculated by JHO Straniere and stated that the Court would "hold off on issuing any other contempt orders or penalties" (Tr. 35:20 – 36:23 [NYSCEF 255]). The Court directed Paramount "to submit an order that just summarizes where we are as of now" (Tr. 36:6-7) indicating that additional proceedings would be necessary, and counsel agreed to meet-and-confer on a proposed order and submit the transcript (Tr. 37:10-14).

On December 6, 2019, despite the Court's request for a proposed order only, Paramount unilaterally submitted a proposed Order and Judgment (NYSCEF 249). However, before any action could be taken, in January of 2020, Paramount moved to renew its contempt application and for additional relief, including a request for monetary relief against 43rd Street's principal, John Pappas ("Pappas") (NYSCEF 253 [Mot. Seq. No. 27]). 43rd Street cross-moved for relief, including vacatur of the Judgment (NYSCEF 270).

As Motion Sequence 027 was being briefed, Paramount submitted additional letters and proposed orders with respect to Motion Sequence 026 (NYSCEF 264-268). The Court advised that parties on February 6, 2020 that Judgment had been entered – that only one final judgment would be entered – and that no further proposed judgments would be accepted by the Clerk (NYSCEF 266). On February 10, 2020, counsel for Paramount suggested that the Court simply "so order" the transcript to resolve Motion Sequence 026 so that it could proceed to decide Motion Sequence 027 – which seeks to renew issues raised in and therefore implicates Motion Sequence 26 (NYSCEF 267).

Oral argument on Motion Sequence 027 – which necessarily involves Motion Sequence 026 – was heard immediately before the onset of the COVID-19 pandemic in March 2020 (NYSCEF 305, 306). During oral argument, Paramount represented that 43rd Street had vacated the premises "as of September 30" of 2019 (Tr. 5:20 – 6:19 [NYSCEF 306]). The Court

inquired of counsel as to why post-Judgment claims were being raised in motion practice as opposed to a plenary action and advised that further enforcement efforts should be brought separately (Tr. 16:4-10). The Court requested that the transcript be filed before a decision was rendered (Tr. 61:2-5). However, as explained below, the transcript was not filed until November 10, 2022.

More than ten months after oral argument, on January 25, 2021, counsel for 43rd Street submitted a subpoena to the New York City Department of Finance to be “so ordered” (NYSCEF 301, 302). Following more than a year-and-a-half of inactivity, in September 2022, the Court reached out to the parties via email to determine the status of Motions 026 and 027. On October 18, 2022, counsel for Paramount filed a letter requesting that the Court enter a decision on the two motions (NYSCEF 303).

In its letter, Paramount confirmed that “43rd Street Deli has vacated the Premises and, as far as we believe, is out of business and without assets” and indicated that “[a]t present, Paramount is seeking a determination on its request for relief on Motion Sequence 27 as against Mr. Pappas and whatever relief may be viable against 43rd Street Deli on Motions 26 and 27” (*id.*). Paramount also represented that the hearing before JHO Straniere was terminated as a result of the COVID-19 pandemic and that it is believed that JHO Straniere has retired (*id.*).

No response was received from 43rd Street. However, according to the NYSCEF docket, 43rd Street is still represented by counsel. The Court directed that Paramount file the transcript of the March 11, 2020 hearing (NYSCEF 304), which was filed on November 10, 2022. No further filings have been made.

* * * *

Accordingly, it is

ORDERED that Defendant Paramount’s motion for contempt and other relief (Mot. Seq. No. 26) is **GRANTED** to the limited extent that Paramount is entitled to use and occupancy, water and electric charges for August and September of 2019 along with an award of attorney’s fees and is otherwise **DENIED**; it is further

ORDERED that, in light of JHO Straniere’s retirement, the Court shall determine the amounts due. Absent an agreement between the parties, Defendant Paramount may apply for an award, supported by affidavit, within twenty-one (21) days of filing of this decision and order. Any opposition shall be submitted within ten (10) days. **Failure to timely apply for an award shall constitute an abandonment of Motion Sequence No. 26**; it is further

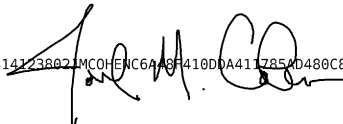
ORDERED that Defendant Paramount’s motion for renewal and other relief (Mot. Seq. No. 027) is **DENIED** as to renewal on the grounds that there was no order on Mot. Seq No. 026 upon which to seek renewal (CPLR 2221[e]) and otherwise **DENIED** without prejudice to Paramount asserting its post-Judgment claims against Plaintiff and/or its principal, Mr. Pappas, in a plenary action; it is further

ORDERED that Plaintiff 43rd Street’s cross-motion to vacate and for other relief is **DENIED**; it is further

ORDERED that any future judgment enforcement proceedings be addressed in a plenary action unless they are required by law to be addressed to this Court.

This constitutes the decision and order of the Court.

20230314123802 JMC0HENC6A48F410DDA411785AD480C8B95A861



JOEL M. COHEN, J.S.C.

3/14/2023

DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE