

**Marina Caffè LLC v Gazit Horizons (Edge) Fee
Owner LLC**

2023 NY Slip Op 33655(U)

October 17, 2023

Supreme Court, Kings County

Docket Number: Index No. 518574/2023

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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MARINA CAFFE LLC,

Plaintiff,

Decision and order

- against -

Index No. 518574/2023

GAZIT HORIZONS (EDGE) FEE OWNER LLC,

Defendant,

October 17, 2023

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PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #1

The plaintiff has moved seeking to enjoin the defendant from terminating a lease entered into between the parties. The defendant opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

On February 7, 2012 the plaintiff leased from the defendant premises located at 34 North 6th Street Condominium in Kings County. The premises was utilized as an Italian restaurant named Fabbrica and earlier this year the plaintiff entered into an agreement with another entity called Medium Rare Williamsburg LLC to sell them the restaurant to continue thereafter as a steakhouse. The plaintiff sought the defendant's permission to assign the lease to the purchaser and the defendant refused and sought to terminate the lease. This lawsuit followed and now the plaintiff has moved seeking an injunction enjoining the defendant from terminating the lease. As noted the motion is opposed.

Conclusions of Law

In relevant part, CPLR §6301 allows the court to issue a preliminary injunction "in any action...where the plaintiff has demanded and would be entitled to a judgment restraining defendant from the commission or the continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff" (id).

It is well established that "the party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of the injunction and a balance of the equities in its favor" (Nobu Next Door, LLC v. Fine Arts Housing, Inc., 4 NY3d 839, 800 NYS2d 48 [2005], see also, Alexandru v. Pappas, 68 AD3d 690, 890 NYS2d 593 [2d Dept., 2009]). The Second Department has noted that "the remedy of granting a preliminary injunction is a drastic one which should be used sparingly" (Town of Smithtown v. Carlson, 204 AD2d 537, 614 NYS2d 18 [2d Dept., 1994]). Thus, the Second Department has been clear that the party seeking the drastic remedy of a preliminary injunction has the burden of proving each of the above noted elements "by clear and convincing evidence" (Liotta v. Mattone, 71 AD3d 741, 900 NYS2d 62 [2d Dept., 2010]).

Considering the first prong, establishing a likelihood of success on the merits, the plaintiff must prima facie establish a reasonable probability of success (Barbes Restaurant Inc., v.

Seuzer 218 LLC, 140 AD3d 430, 33 NYS3d 43 [2d Dept., 2016]). In this case the basis for the injunction is the fact the plaintiff is entitled to assign the lease to Medium Rare Williamsburg LLC and the defendant's refusal to agree to the assignment is unreasonable.

Thus, an examination of the relevant lease provisions is necessary. The lease provides that if the tenant requests to assign the lease the landlord may thereafter elect to terminate the lease upon written thirty day notice. However, that provision "shall not be applicable to an assignment of this Lease in connection with a sale of Tenant's business as an ongoing business" (see, Lease, ¶18.01(g) [NYSCEF Doc. No. 7]). The defendant argues that the proposed sale to the steakhouse was not the sale of an ongoing business. The defendant argues that "a sale of an ongoing business should be essentially invisible to the public, with Plaintiff owning and operating Fabbrica one day and a new owner owning and operating Fabbrica the following day. The proposed transaction with Medium Rare is anything but that, as there will be a change in name, menu, employees, and potentially the physical appearance of the space" (see, Memorandum of Law in Opposition, page 11 [NYSCEF Doc. No. 29]). Thus, the question that must be addressed is whether the change of the business from an Italian style restaurant to a steakhouse means the purchaser is maintaining an ongoing business of the tenant.

The lease provides the permitted use of the premises. It

states that the only permitted use is to "use, occupy, maintain and operate the Premises during the Term solely for the operation of a high-quality restaurant/café selling food and beverages for on-premises consumption and take-out but in no event may Tenant conduct a "fast-food" operation. In no event shall Tenant be permitted to sell bottled wine for off-premises consumption" (see, Lease, ¶1.01(m) [NYSCEF Doc. No. 7]). Again, Section 4.05 of the lease states that the "tenant agrees to use, occupy, operate and maintain the Premises throughout the Term of this Lease as dignified first-class restaurant/cafe, in a high grade and reputable manner and in a manner which shall not detract from the character, appearance or dignity of the Project" (see, id). These provisions do not require a specific menu or cuisine, as long as it is a high grade and reputable establishment. Thus, there is nothing that would prevent the plaintiff itself from expanding the menu to include an other non-Italian offerings or to change the menu entirely and abandon the Italian style restaurant altogether. The only requirement pursuant to the lease is that the space remain a dignified and first-class restaurant. Thus, clearly, the plaintiff would not be able to convert the restaurant to any other type of retail establishment such as a bookseller or a massage parlor. Moreover, Section 4.08 of the lease does not require otherwise. That section states that "so long as Tenant shall be in actual occupancy of the Premises and shall be conducting business

therein as a high quality restaurant/cafe with predominantly Italian cuisine...Landlord shall not lease other premises in the Project to a tenant...who shall use such premises for the operation of a sit-down restaurant/café with waiter service serving predominantly Italian cuisine" (id). The section continues and explains that "in the event that, notwithstanding Landlord's adherence to the restrictions set forth in the immediately preceding sentence, another tenant in the Project shall conduct business primarily as a restaurant serving predominantly Italian cuisine, Landlord agrees to enforce (in a commercially reasonable manner) such restrictions as are contained in such tenant's lease against such other tenant. The foregoing shall not be deemed to obligate Landlord to prevent other tenants in the Project from offering the same or similar menu items as are offered for sale by Tenant (including items of Italian cuisine), provided such other restaurant is not operating primarily as a waiter-service restaurant serving predominantly Italian cuisine" (id).

While that section is designed to protect the tenant from competition where the tenant maintains a restaurant that only serves Italian cuisine, that does not preclude the tenant from offering any other type of cuisine. Rather, should the tenant offer such other cuisine it would, perhaps, lose the enumerated protections of the landlord. In any event, surely, there are questions whether the change of cuisine, as long as the new

restaurant maintains the same high standards, is an expression of the sale of the tenant's business as an ongoing business. Indeed, according to the landlord's analysis, the tenant itself would be unable to ever change its cuisine. There is no support for such an argument within the terms of the lease. Indeed, Section 18.01 of the lease expressly contemplated a "sale" of the plaintiff's business. Further discovery will necessarily narrow these issues and provide guidance regarding the scope of the ongoing business clause.

In any event, concerning the preliminary injunction, even if issues of fact exist, the court can still conclude the moving party has demonstrated a likelihood of success on the merits (see, Ruiz v. Meloney, 26 AD3d 485, 810 NYS2d 216 [2d Dept., 2006]). Indeed, "the mere existence of an issue of fact will not itself be grounds for the denial of the motion" (Arcamone-Makinano v. Britton Property Inc., 83 AD3d 623, 920 NYS2d 362 [2d Dept., 2011]). This is especially true where the denial of an injunction would disturb the status quo and render the continuation of the lawsuit ineffectual (Masjid Usman, Inc., v. Beech 140, LLC, 68 AD3d 942, 892 NYS2d 430 [2d Dept., 2009]). Thus, the moving party is not required to present "conclusive proof" of its entitlement to an injunction and "the mere fact that there indeed may be questions of fact for trial does not preclude a court from exercising its discretion in granting an injunction" (Ying Fung Moy v. Hoho Umeki,

10 AD3d 604, 781 NYS2d 684 [2d Dept., 2004]). Of course, issues of fact will necessarily prevent the issuance of any injunction only where the factual issues "subvert[s] the plaintiff's likelihood of success on the merits in this case to such a degree that it cannot be said that the plaintiff established a clear right to relief" (County of Westchester v. United Water New Rochelle, 32 AD3d 979, 822 NYS2d 287 [2d Dept., 2006]).

In this case, as noted, notwithstanding the questions regarding the interpretation of the clause contained in the lease the plaintiff has sufficiently presented evidence warranting an injunction. This is especially true where without an injunction the lawsuit is essentially rendered ineffectual.

Therefore, based on the foregoing, the motion seeking an injunction is granted.

So ordered.

ENTER:

DATED: October 17, 2023
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC

