G&P 418 Corp. v Meilman Mgt. & Dev., LLC

2005 NY Slip Op 30473(U)

July 7, 2005

Supreme Court, New York County

Docket Number: 600653/04

Judge: Marcy S. Friedman

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SCANNED ON 7/25/2005

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MARCY S. FRIEDMAN, Justice

PART 57

G+P 418 Corp

INDEX NO. 600653/04

MOTION DATE

- v -

MOTION SEQ. NO. 002

Meilman Management

MOTION CAL. NO.

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2, 3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER.

FILED JUL 22 2005

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ______ FOR THE FOLLOWING REASON(S):

Dated: 7/7/05

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

x

G&P 418 CORP.,

Plaintiff,

- against -

MEILMAN MANAGEMENT &
DEVELOPMENT, LLC,

Defendant.

x

Index No.: 600653/04
Action No. 1

DECISION/ORDER

x

G&P 418 CORP.,

Plaintiff,

- against -

MEILMAN MANAGEMENT &
DEVELOPMENT, LLC,

Defendant.

x

Index No. 102375/05
Action No. 2

In these consolidated actions, plaintiff, the tenant of a commercial premises in the Meat Market district of Manhattan, seeks a declaration that plaintiff has not violated the terms of its lease. Plaintiff previously moved for Yellowstone injunctions enjoining defendant/landlord from terminating plaintiff's tenancy and tolling the times to cure defaults alleged in Notices to Cure dated January 7, 2004 ("Action No. 1 Notice") and January 26, 2005 ("Action No. 2 Notice"). By decision dated March 17, 2005, the court granted plaintiff's motion in Action No. 1 and

conditioned the injunction on plaintiff's payment of rent and on the posting of an undertaking in the amount of $50,000. The same decision denied plaintiff's motion in Action No. 2. Plaintiff now moves to reargue and renew the motions determined by this decision.

It is well settled that a motion for reargument "is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law." (Foley v Roche, 68 AD2d 558, 567 [1st Dept 1979].) A motion for leave to renew must ordinarily "be based upon additional material facts which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew, and, therefore, not made known to the court. Renewal should be denied where the party fails to offer a valid excuse for not submitting the additional facts upon the original application." (Id. at 568.) However, the court may, in its discretion, grant renewal "in the interests of justice, upon facts which were known to the movant at the time the original motion was made." * * * [E]ven if the vigorous requirements for renewal are not met, such relief may be properly granted so as not to defeat substantive fairness." Tishman Constr. Corp. v City of New York, 280 AD2d 374, 376-377 [1st Dept 2001][internal citations and quotation marks omitted].)

Here, plaintiff seeks renewal of the motion for a Yellowstone injunction regarding the January 26, 2005 Notice to Cure which enumerates alleged violations of lease requirements concerning the permissible use of the premises. These asserted violations include: use of the premises for "playing of 'live music' in front of 'standing audiences'"; use of the premises for dancing and as a "cabaret" in violation of the lease and certificate of occupancy; failure to file a valid public assembly permit; permitting the premises to be used as an "adult establishment featuring the naked display of breasts * * * and permitting activities including fetish nights that

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are 'adult entertainment' oriented"; permitting and advertising fetish and adult entertainment nights; and operating the premises in a manner that deviates from the manner of use and occupancy set forth in the tenant's liquor license application.

Plaintiff claims that defendant submitted perjured evidence in opposition to the original motion. In particular, plaintiff contends that the premises was closed on January 6, 2005, but that, in opposition to the original motion, defendant submitted a false affidavit from a Maria Baez, stating that she visited the premises on January 6 and saw it being used as a dance floor without tables. Plaintiff also contends that defendant submitted advertisements for fetish parties at the premises which contained photographs that appeared to have been taken at the premises but were in fact taken at other locations. Further, plaintiff submits an affidavit in which she asserts that there has never been nudity or adult entertainment at the premises, and that plaintiff never advertised nor authorized anyone to advertise fetish parties at the premises. Plaintiff also, for the first time, addresses a City of New York, Department of Buildings ("DOB") violation, dated February 1, 2005, which defendant submitted in opposition to the original motion, and which cites, among other violations, occupancy of the premises as a "cabaret with live entertainment." Plaintiff now asserts that these alleged violations have been cured.

Plaintiff fails to make any showing as to why it did not submit the evidence now proffered in reply to defendants' opposition to the original motion. Rather, as noted in the decision of the original motion, plaintiff instead relied on the wholly conclusory assertions in its moving papers that it was not in default of its lease in any respects enumerated in the notice to cure. Plaintiff thus took the position that there were no violations to cure. The court accordingly held that this position, in the face of the documentary evidence produced by defendant, was

insufficient to demonstrate the requisite willingness to cure.

While plaintiff now apparently recognizes the need to address defendant's evidence of plaintiff's ongoing uses of the premises, the evidence that plaintiff submits is patently insufficient to warrant renewal of the decision denying the Yellowstone injunction. Significantly, plaintiff does not make any showing that it is willing to cure its use of the premises as a cabaret with live music. A cabaret is defined as "[a]ny room, place or space in the city in which any musical entertainment, singing, dancing or other form of amusement is permitted in connection with the restaurant business or the business of directly or indirectly selling to the public food or drink, except eating or drinking places, which provide incidental musical entertainment, without dancing* * *." (NYC Admin Code § 20-359[3].) Plaintiff merely asserts, without any evidentiary support, that it does not run a cabaret, and that the DOB violation for cabaret use has been cured. (See Sardinas Aff. In Support, ¶¶ 15, 16.) While plaintiff represents that it has now cancelled fetish parties (Sardinas Aff. In Support, ¶ 12), plaintiff does not make any showing that it is willing to discontinue other events that use the premises as a cabaret by permitting dancing and playing of music before standing audiences.

Instead, plaintiff argues that the court may not act as a moral arbiter of the uses of the premises. This contention mischaracterizes the legal issue determined by this court's prior decision -- namely, whether plaintiff is willing to cure uses of the premises that violate or may violate the bargained-for provision in the parties' lease setting forth use restrictions. In both the prior and instant motions, plaintiff simply fails to address facts tending to show that plaintiff is using the premises as a cabaret and for other events that are not permitted by the lease. Plaintiff accordingly continues to fail to show that it has the willingness to cure requisite to the grant of a

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Yellowstone injunction. (See American Airlines, Inc. v Rolex Realty Co., 165 AD2d 701 [1st Dept 1990].) Plaintiff's assertion, for the first time on its reply, that it has cured defendant's objection to dancing at the premises (Sardinas Reply Aff., ¶ 3) is too little too late.

The court further notes that the allegedly false evidence submitted by defendant in response to the prior motion does not warrant renewal or modification of the court's prior decision. The court does not find that the advertisements were misleading. In any event, as held above, the issue on the Yellowstone motion was not merely whether the fetish parties violated the lease, but whether petitioner is willing to cure use of the premises as a cabaret for events other than such parties. Further, even if the Baez affidavit were false or incorrect that the premises was used for dancing on January 6, plaintiff, as held above, does not adequately address the use of the premises for dancing on other occasions.

Leave to renew the motion regarding the January 26, 2005 notice is therefore denied. Leave to reargue with respect to this notice is also denied based on plaintiff's failure to make any showing that the court misapprehended applicable facts or law.

Plaintiff also seeks reargument of the motion concerning the January 7, 2004 notice, to the extent that the decision determining this motion conditioned the grant of a Yellowstone injunction on plaintiff's posting of a $50,000 undertaking. Leave to reargue is denied. On the prior motion, plaintiff offered no opposition to defendant's request that the undertaking be set in the amount of $50,000. Plaintiff does not offer any explanation for its failure on the prior motion to set forth its position on this issue. Nor does plaintiff now show that the amount of the undertaking is not "rationally related to the damages sustainable by defendant in the event of a subsequent determination that preliminary injunctive relief had been erroneously granted." (See

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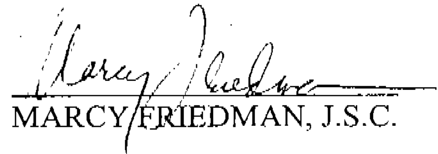
Metropolis Seaport Assocs., L.P. v South St. Seaport Corp., 253 AD2d 663, 664 [1st Dept 1998].) In so holding, the court notes that on the prior motion, defendant demonstrated that it had incurred $16,000 in expenses in retaining a sound expert in connection with the parties' dispute over soundproofing of the premises – a major issue in the Notice to Cure in Action No. 1 (See Supp. Aff. of Richard Meilman, sworn to on Feb. 1, 2005, In Opp.To Prior Motion, ¶ 62.) As defendant also pointed out on the prior motion, it remains subject to fines and penalties as a result of the DOB violation.

It is accordingly hereby ORDERED that plaintiff's motion for leave to renew and reargue is denied in its entirety.

This constitutes the decision and order of the court.

Dated: New York, New York
July 7, 2005



MARCY FRIEDMAN, J.S.C.

FILED