

**Jem Caterers of Woodbury, Ltd. v Woodbury Jewish  
Ctr., Inc.**

2012 NY Slip Op 31747(U)

June 19, 2012

Sup Ct, Nassau County

Docket Number: 2317-12

Judge: Vito M. DeStefano

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SUPREME COURT - STATE OF NEW YORK

Present:

**HON. VITO M. DESTEFANO,**  
Justice

TRIAL/IAS, PART 15

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**JEM CATERERS OF WOODBURY, LTD., doing  
business as MORRELL OF WOODBURY AND  
SCOTT MORRELL,**

NASSAU COUNTY

**Plaintiffs,**

**MOTION SUBMITTED:  
May 29, 2012  
MOTION SEQUENCE: 03  
INDEX NO.: 2317-12**

**-against-**

**WOODBURY JEWISH CENTER, INC., CYNTHIA  
MATTE AND RAPHAEL C. ADLER,**

**Defendants.**

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**The following papers and the attachments and exhibits thereto have been read on the motion:**

<b>Order to Show Cause</b>	<b>1</b>
<b>Affirmation in Opposition</b>	<b>2</b>
<b>Memorandum of Law in Opposition</b>	<b>3</b>

Jem Caterers of Woodbury, Ltd, d/b/a Morrell of Woodbury (“Jem”) and Scott Morrell move pursuant to CPLR 2221 to renew and reargue: a prior motion by them seeking a preliminary injunction, and; a cross motion by Defendants Woodbury Jewish Center, Inc. (“Temple”), Cynthia Matte and Raphael Adler, seeking an order vacating the temporary restraining order (“TRO”) granted on March 15, 2012. Both the motion and cross motion were resolved by order of this court dated April 26, 2012.

For the reasons that follow, the motion is granted in part and denied in part.

*Underlying Motions*

In the underlying motion, Plaintiffs sought a preliminary injunction enjoining the Defendants from, *inter alia*: taking any action to enforce the notice of termination and ten-day notice to quit served upon Jem; terminating the License Agreement (“the Agreement”) between

Jem and the Woodbury Jewish Center, Inc.; instituting any summary proceedings to recover possession of the premises, and; interfering with Jem's use and occupancy of the premises and Jem's business operations.

In support of the underlying motion, Plaintiffs argued that the termination notice served upon Jem was "fatally defective" and unenforceable because the Agreement did not provide the Temple with a right of termination, even if Jem did breach the Agreement by failing to pay contributions to maintenance. Plaintiffs also argued that they would suffer irreparable harm if the injunction was not granted.

The Defendants' underlying cross motion sought an order vacating the TRO that had been granted on March 15, 2012 or, in the alternative, requiring that Plaintiffs pay the Temple \$611,607 for past-due maintenance fees and \$25,000 per month during the pendency of the litigation or, in the alternative, increasing the undertaking to one million dollars.

#### *The Prior Order*

In a decision and order dated April 26, 2012, the court, *inter alia*, denied Plaintiffs' motion for a preliminary injunction and granted the cross motion for an order vacating the TRO.

Notwithstanding that the Agreement failed to set forth a termination provision in the event of Jem's breach, the court concluded that the Agreement was a license revocable at the will of the licensor and, given the well-settled law on licenses, the Temple, as licensor, was "permitted to revoke the license subject to any remedies available to Jem, as licensee for breach of the license agreement and, moreover, Jem, as licensee, is not entitled to an injunction restraining the Temple from exercising its rights to revoke the license" (Ex. "A" at p 14). The court also found that if a preliminary injunction was granted thus permitting Jem to continue catering on the premises, the "reputation of the Temple's Rabbi and its congregation will be 'irreparably harmed' and 'will continue to be doubted'" (Ex. "A" at p15).

#### *The Instant Motion*

The Plaintiffs move, *inter alia*, pursuant to CPLR 2221 to reargue the prior motion and cross motion on the following grounds: the court improperly considered the Agreement to be a revocable license rather than an irrevocable license or lease; the court improperly considered the irreparable harm to the Temple if the injunction was granted rather than the irreparable harm to

the Plaintiffs if the preliminary injunction was not granted.<sup>1</sup>

The branch of the motion seeking renewal is based upon the occurrence of two events: 1) since the date of the court's order, the Temple has commenced a summary holdover proceeding in District Court, which seeks to evict Jem; and 2) the order denying the preliminary injunction "is indeed causing [Jem] to suffer not only 'irreparable' but catastrophic harm" (Affirmation in Support at ¶ 3).

### The Court's Determination

#### *Reargument*

A party seeking moving for a preliminary injunction must demonstrate by clear and convincing evidence, a likelihood of ultimate success on the merits, irreparable injury if the injunction was not granted, and a balancing of equities in favor of the moving party (*Family-Friendly Media, Inc. v Recorder Television Network*, 74 AD3d 738 [2d Dept 2010]). An injunction is a provisional remedy to maintain the status quo until a full hearing can be held on the merits, not to determine the ultimate rights of the parties. As such, the decision whether to grant or deny a preliminary injunction is within the sound discretion of the court (*Id.*; *Masjid Usman, Inc. v Beech 140, LLC*, 68 AD3d 942 [2d Dept 2009]).

#### 1. Likelihood of Success on the Merits

Plaintiffs argue that the court misapplied the law by considering the Agreement to be a revocable license rather than "a written irrevocable license or lease" and, because of this, the court mistakenly concluded that the Defendants had an "absolute right to terminate the license

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<sup>1</sup> Plaintiffs also assert that the court rewrote the parties' contract when it included a termination provision in the License Agreement where none was explicitly stated therein. However, the License Agreement provides that the failure to make the minimum guaranteed payments "shall be deemed a material breach of the Agreement" (Ex. "B" at Tab 11, ¶ 9). In this regard, the court notes the well-settled principle that when one party commits a material breach of a contract, the other party to the contract is relieved, or excused, from further performance under the contract (*Grace v Nappa*, 46 NY2d 560 [1979]; *Unloading Corp. v State of NY*, 132 A2d 543 [2d Dept 1987]; see also *Roberts v Borg*, 35 AD3d 617 [2d Dept 2006]). The non-breaching party is discharged from performing any further obligations under the contract and may elect to terminate the contract and sue for damages or continue the contract (*Awards.com v Kinko's, Inc.*, 42 AD3d 178 [1<sup>st</sup> Dept 2007]; *Albany Medical College v Lobel*, 296 Ad2d 701 [3d Dept 2002]).

whenever they wished”.<sup>2</sup> According to the Plaintiffs, “the Agreement before the Court was, at minimum, an irrevocable license because the Agreement was founded on consideration, [Jem] expended substantial funds and made capital improvements to the Premises of over \$11 million dollars, [Jem] had exclusive use of the premises described in the Agreement, and [Jem] altered \* \* [its] position in reliance thereon” (Affirmation in Support at ¶ 13). On this point, Scott Morrell, a principal of Jem, asserts that Jem made an initial investment exceeding \$3.5 million in capital improvements at the time the Temple was being built, an additional \$2 million for further improvements, and an additional \$6.2 million for the exclusive right to use the facility (Morrell Affidavit in Support at ¶ 7, fn 2).<sup>3</sup>

A license may be irrevocable if, in reliance on that license, the licensee made substantial improvements to the property such that it would be inequitable to revoke the license (*see Miller v Seibt*, 13 AD3d 496 [2d Dept 2004] [99-year Agreement to use and occupy barn adjacent to property constituted an irrevocable license based upon the expenditure of funds to renovate the structure, and the fact that there was a change of position in reliance on the agreement]).

At bar, the revocability of the Agreement remains, at present, an unresolved issue, considering, *inter alia*: the extent of improvements made by Jem; when the improvements were

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<sup>2</sup> The court rejects Plaintiffs’ contentions that the Agreement “had every indicia of a lease”, that the “mere fact that the Agreement was labeled a ‘License Agreement’ was not determinative of its true nature or the parties’ rights”, and that the “parties’ characterization of an Agreement is not dispositive” (Affirmation in Support at ¶¶ 16-17). Significantly, in Article 23 of the Agreement, the parties did:

[A]cknowledge that the terminology of the exclusivity as used for purposes of this Agreement is not intended to exclude the Temple from exercising its dominion. The Agreement herein is a license for purposes of dispensing food and beverage in connection with catered affairs of a religious nature. The parties acknowledge that said Agreement will reflect the foregoing solely and *under no circumstances is it intended that such Agreement be construed as a lease agreement* nor is it a conveyance of all or any portion of realty (emphasis added).

Thus, Plaintiffs’ argument that the exclusive language used in the Agreement renders the Agreement a lease is unpersuasive. Moreover, the record is devoid of any evidence that there was judicial consent to the purported “lease” agreement, which is required for leases that exceed five years in duration (Religious Corporation Law § 12).

<sup>3</sup> According to Scott Morrell, the millions of dollars “poured” into the Temple was “in reliance on its long-term Agreement with the Defendant” (Morrell Affidavit in Support at ¶ 7). Morrell further stated that, “in light of its very substantial financial contributions, customized capital improvements and renovation, the long-term written Agreement, and the nature of Jem’s business - catering life cycle functions often booked a year or more in advance - it makes no sense, much less commercially reasonable sense, that Jem would ever agree to have just a revocable ‘at will’ license agreement, thereby putting its substantial investment at constant risk, and jeopardizing the weddings and other events that it caters” (Morrell Affidavit in Support at ¶ 8).

made; whether the improvements constitute fixtures or are removable; the parties' performance under the Agreement for approximately 20 years, and; that Jem has not paid contributions for maintenance since 2009 which, according to the Agreement, is a material default thereunder.

## 2. Irreparable Harm

As noted, Plaintiffs argue that the court improperly denied injunctive relief by considering the irreparable harm to the Temple if the injunction was granted rather than the irreparable harm to Jem if the injunction was not granted. Specifically, Plaintiffs argue that "the court had no basis for considering the alleged 'irreparable harm' to the Defendants. The only proper inquiry was whether there would be irreparable harm to the Plaintiffs by reason of the imminent termination of its long-term exclusive license/lease". Plaintiffs add that the denial of a preliminary injunction "will create incalculable damages if Plaintiff is ultimately found to be correct on the merits, while granting the injunction merely maintains the status quo that has existed at the Premises since 1989" (Affirmation in Support at ¶ 47) (emphasis in original).

The court concludes that the harm to Plaintiffs would be irreparable if the preliminary injunction is not granted.

## 3. Balancing of the Equities

In the last prong of the preliminary injunction analysis, Plaintiffs must show that the balance of equities weighs in their favor. Plaintiffs are correct that "the effect of an injunction on the [Temple], if any, is properly analyzed under the 'balancing of the equities' prong of the preliminary injunction test." To obtain an injunction, a plaintiff is required to show that the "irreparable injury to be sustained is more burdensome to him than the harm that would be caused to the defendant through the imposition of the injunction" (*Lombard v Station Square Inn Apartments Corp.*, 94 AD3d 717 [2d Dept 2012]).

According to the Plaintiffs, the "irreparable harm to Plaintiffs (loss of its entire business, forfeiture of \$11 million dollars in improvements, cancellation of life cycle events) far exceeds the alleged harm to the Defendants, which consists of alleged embarrassment and harm to their 'reputation' as a congregation, based on nothing more than false, unproven allegations made by former employees concerning events that did not even occur at the Woodbury Jewish Center which has always been, and remains, under strict 24-hour glatt Kosher rabbinic supervision and whose kitchen is locked when not in use" (Affirmation in Support at ¶ 42) (emphasis in original).

The court concludes that the irreparable injury Plaintiffs would sustain if the injunction was not granted is greater than the harm sustained by the Temple through imposition of the injunction. Thus, the balance of equities weighs in Plaintiffs' favor.

**Conclusion**

Based on the foregoing, it is hereby ordered that Plaintiffs' motion to reargue is granted and, upon reargument, Plaintiffs' underlying motion, to the extent that it sought a preliminary injunction, is granted. The instant motion is, in all other respects, denied.

Plaintiff is directed to post an undertaking in the amount of \$750,000 (CPLR 6312[b]).

In a Memorandum of Law, the Temple asks that if the preliminary injunction is granted it "should be conditioned upon the payment of all past monies due and payment of future use and occupancy at the rate of \$25,000 per month" (Memorandum of Law in Opposition at p 20). The court notes that by granting a preliminary injunction it does not alter the parties' rights and obligations under the Agreement nor does the injunction supplant the provisions in the Agreement requiring Jem to make contributions to maintenance (*Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc.*, 93 NY2d 508 [1999]). Such contributions are to be made as required by contract and according to law.

This constitutes the decision and order of the court.

Dated: June 19, 2012



Hon. Vito M. DeStefano, J.S.C.

**ENTERED**

JUN 21 2012

NASSAU COUNTY  
COUNTY CLERK'S OFFICE