

**Parker 24 Commercial Assoc. v 305 East 24th
Owners Corp.**

2008 NY Slip Op 33638(U)

February 4, 2008

Sup Ct, NY County

Docket Number: 116433/07

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE
Justice

PART 10

Parker 24 Commercial Associates

INDEX NO.

116433/07

MOTION DATE

- v -

305 East 24th Owners Corp

MOTION SEQ. NO.

001

MOTION CAL. NO.

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

(Cross reference 60401/07)

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED

FEB 11 2008

NEW YORK COUNTY CLERK'S OFFICE

Dated: Feb 4, 2008

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

Supreme Court of the State of New York
County of New York: Part 10

-----X
Parker 24 Commercial Associates,

Plaintiff,

-against-

305 East 24th Owners Corp.

Defendant.

Decision/Order

Action #1
Index # 116433/07
Mot. Seq. # 001

-----X
Greenberg/Ibbott d/b/a OLE Restaurant,

Plaintiff,

-against-

Parker 24 Commercial Associates,

Defendant.

Action #2
Index #604101/07
Mot. Seq. #001

-----X
Recitation, as required by CPLR 2219 [a], of the papers considered in the review
of this (these) motion(s):

PAPERS

NUMBERED

Action #1

OSC index # 116433, JD affd., EAF affirm., exhibits.....1
RMV affirm. In Opp., exhibits.....2
LD affd.....3

Action #2

OSC index # 604101/07, SG affd., DMB affirm., exhibits.....4
Order dated 1/23/07 [sic].....5

Upon the foregoing papers the decision and order of the court is as follows:

305 East 24th Owners Corp. ("East 24th Owners) is a cooperative corporation that owns a multi family residential dwelling located at 305 East 24th Street in Manhattan ("building"). The building also has nine commercial stores, which are rented to Parker 24 Commercial Associates ("Parker 24") pursuant to a written lease made on October 16, 1984 with a stated expiration in 2024 ("prime lease"). One of the stores is subleased by Parker 24 to Greenber/Ibbott d/b/a Ole Restaurant ("Ole") pursuant to a written sublease made on October 1, 1997 with a stated expiration date of October 31, 2010 ("Ole sublease").

On or about December 4, 2007, East 24th Owners served a five day Notice to Cure Default on Parker 24. Under such Notice the cure date was set to expire on December 12, 2007. The claimed defaults are summarized as follows: Parker 24 Associates permitted: [1] Ole to create a nuisance by excessive and unreasonable noise, including loud music; [2] stores numbered 1, 2, 4 and 7 to be used in violation of the use clause of the prime lease.

On November 26, 2007 Parker 24 Associates served a Notice of Defaults on Ole with a demand that the defaults be cured on or before December 17, 2007. The claimed defaults are that Ole was creating a nuisance through excessive and unreasonable noise, including loud music.

Parker 24th Associates commenced action #1 against East 24th Owners seeking declaratory and injunctive relief regarding the prime lease. Presently before the court is Parker 24th Associates motion for a Yellowstone injunction. East 24th Owners opposes the motion.

Ole commenced action #2 against Parker 24th Associates seeking declaratory and injunctive relief regarding the sublease. Presently before the court is Ole's motion for a Yellowstone injunction. There is no opposition to Ole's motion.

By order dated January 3, 2007 (sic) this court consolidated the interrelated applications for Yellowstone relief for determination in a single decision.

In order to obtain a Yellowstone injunction, the moving party must prove four elements: [1] that it hold a commercial lease; [2] that it received a Notice of default, a Notice to Cure or a threat of termination of that lease; [3] that it requested injunctive relief before the termination of the lease and [4] that it is prepared and it maintains the ability to cure the claimed default without vacating the premises. First National Stores, Inc. v. Yellowstone Shopping Center, Inc., 21 NY2d 630 (1968).

There is no dispute that Parker 24 Associates can satisfy the first three requirements for a Yellowstone injunction; it holds a commercial lease, it has received a Notice to Cure and that it sought injunctive relief before the cure period in the Notice ran out. Parker 24 Associates denies that it is default of the lease, but claims alternatively that if this court should disagree, it stands ready, willing and able to cure. In particular it claims that it has already set in motion efforts to evict Ole if they are creating a nuisance through excessive noise. It has indicated its willingness to commence eviction proceedings against its other

subtenants if it is determined that they are occupying the premises in violation of the use provisions of the prime lease.

Although East 24th Owners disputes whether Parker 24 Associates is willing and able to cure the claimed defaults, the fact that Parker 24 Associates has already taken steps against Ole to have them cure any noise nuisance or face eviction, belies East 24th Owners contentions. Significantly Parker 24 Associates acted to correct any noise problem its subtenant before East 24th Owners even served its Notice to Cure.

The court, therefore, grants Parker 24 Associates motion for a Yellowstone injunction pending determination of underlying action #1. The court conditions the injunction on the continued payment of monthly use and occupancy in the amount reserved as monthly rent under the prime lease.

There is no dispute that Ole can satisfy the first three requirements for a Yellowstone injunction; it holds a commercial lease, it has received a Notice of Default and that it sought injunctive relief before the cure period under such Notice ran out. With respect to its willingness to cure, although Ole denies that music at the premises ever constituted a nuisance, it has ceased to have musicians at the premises. In this regard Ole claims that the only musicians at the premises were a piano player and a singer. Ole denies that its sound system plays music at excessive levels. It explains that it has already soundproofed its restaurant and that it has never been issued any violation due to noise. It indicates a willingness to reduce the sound level, however, should it be found to have violated its sublease.

* 6]

The court, therefore, grants ole's motion for a Yellowstone injunction pending determination of underlying action #2. The court conditions the injunction on the continued payment of monthly use and occupancy in the amount reserved as monthly rent under the sublease.

Conclusion

In accordance herewith,

It is hereby

ORDERED that pending determination of the underlying action under index # 116443/07, 305 East 24th Owners Corp. is restrained and enjoined from taking any action to terminate the prime lease with Parker 24 Commercial Associates or commencing any action or proceeding to recover possession of the premises defined in the prime lease, and it is further

ORDERED that pending determination of the underlying action under index # 116443/07, the cure period contained in the Notice to Cure dated December 4, 2007 is hereby tolled, and it is further

ORDERED the injunctive relief granted in the action brought under index # 116443/07 is conditioned upon the payment of monthly use and occupancy in the same amount reserved as rent under the prime lease, and it is further

ORDERED that pending determination of the underlying action under index # 604101/07, Parker 24 Commercial Associates is restrained and enjoined from taking any action to terminate the sublease with Greenberg/Ibbott, Inc. d/b/a Ole Restaurant or commencing any action or proceeding to recover possession of the premises defined in the sublease, and it is further


ORDERED that pending determination of the underlying action under index # 604101/07, the cure period contained in the Notice of Default dated November 26, 2007 is hereby tolled, and it is further

ORDERED that the injunctive relief granted in the action brought under index 3 604101/07 is conditioned upon the payment of monthly use and occupancy in the same amount reserved as rent under the sublease, and it is further

ORDERED that any requested relief not expressly granted herein is denied and that this constitutes the decision and order of the court.

Dated: New York, New York
February 4, 2008

SO ORDERED:



J.G. J.S.C.

FILED
FEB 11 2008
NEW YORK
COUNTY CLERK'S OFFICE