

**538 Morgan Ave. Props. LLC v 538 Morgan Realty
LLC**

2017 NY Slip Op 30906(U)

May 3, 2017

Supreme Court, Kings County

Docket Number: 507788/2015

Judge: Sylvia G. Ash

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Comm-11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3rd day of May, 2017.

PRESENT:

HON. SYLVIA G. ASH,

Justice.

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538 MORGAN AVENUE PROPERTIES LLC
and NY STONE KITCHEN DEPOT, INC.,

Plaintiffs,

- against -

DECISION AND ORDER

Index # 507788/2015

538 MORGAN REALTY LLC, SD INT'L INC.,
DIAN KUI SU, QING MEI ZHAO and TIAN
FANG SU,

Defendants.

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Mot. Seq. 6, 8

538 MORGAN REALTY LLC,

Defendant/Third-Party Plaintiff,

- against -

H Aidong Weng and Shun Kuan Liu,

Third-Party Defendants.

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The following papers numbered 1 to 4 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

1-3

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Upon the foregoing papers, Plaintiffs' motion for a preliminary injunction is GRANTED upon compliance with the conditions set forth herein. Defendants' cross-motion to recover unpaid rent is DENIED without prejudice.

Background

On March 3, 2015, Plaintiff NY STONE KITCHEN DEPOT INC. (“NY Stone”) entered into a business sales contract with Defendant SD INT’L INC. (“SD”) whereby NY Stone purchased SD’s business, including assets, for a total purchase price of \$702,793.00. The “business” refers to the import and sale of stone, marble, tiles and counter tops. In association with the purchase of the business, the parties also entered into a separate real estate contract dated March 3, 2015, whereby Plaintiff 538 MORGAN AVENUE PROPERTIES LLC (“Plaintiff Morgan Avenue”) purchased from Defendant owner 538 MORGAN REALTY LLC (“Defendant Morgan Realty”) real property known as 538 Morgan Avenue in Brooklyn, New York (“Property”), the location of the business at all relevant times. The real estate sales contract reflects a purchase price of \$4,000,000.00.

According to Plaintiffs, on March 3, 2015, NY Stone made a \$500,000.00 payment to SD for the purchase of the business. On the same day, Plaintiff Morgan Avenue made a down payment in the amount of \$100,000.00 for the Property. Plaintiffs claim that, on the next day, March 4, 2015, Plaintiff Morgan Avenue made a second payment of \$1,820,000.00 to Defendant Morgan Realty, all in cash.

By letter dated May 8, 2015, Defendant Morgan Realty cancelled the real estate sales contract asserting a material breach by Plaintiff Morgan Avenue for its “failure to pay the full amount of \$202,793.00 as of date.” The letter further stated that “[s]aid payment should have been made on or before 6:00 pm of April 3, 2015, as provided under the Provision 18 of the Rider to the Premises Sale Contract.”

According to Plaintiffs, the \$202,793.00 figure represented the balance for certain “goods en route” and is referenced in the business sales contract. Plaintiffs also state that on, March 3, 2015, the parties executed a written amendment extending the time to pay for the goods en route to 30 days after the last container arrived, which was on April 9, 2015. Further, that the time to pay for the goods was not made “time of the essence” and thus, Plaintiffs had a reasonable time to tender performance. Plaintiffs contend that, on April 21, 2015, it attempted to tender the full payment of \$202,793.00, but that only \$90,000.00, in the form of a personal check, was accepted. Plaintiffs further contend that on May 11, 2015, they procured^{2 of 5} a certified check for the remaining \$112,793.00

but Defendants refused to accept payment. Based on the foregoing, it is Plaintiffs' position that Defendants were in breach when canceling the contract by letter dated May 8, 2015.

With the instant motion, Plaintiffs seek an injunction enjoining Defendants from interfering with their tenancy at the Property. From March 3, 2015, when the parties entered into the subject contracts, NY Stone had been leasing the Property and paying rent to SD in the amount of \$21,252.00 per month payable until the transfer of ownership of the Property from Defendant Morgan Realty to Plaintiff Morgan Avenue. However, since September 1, 2016, NY Stone has ceased paying rent. On October 7, 2016, SD served a 30-day Termination Notice upon NY Stone advising that its month-to-month tenancy would be terminated on November 30, 2016. Having filed the instant motion before November 30, 2016, Plaintiffs argue that their application is timely if construed as a *Yellowstone* injunction application. Plaintiffs also contend that they are entitled to a preliminary injunction because they would suffer irreparable harm if evicted since they would lose the goodwill built up at the location over the entire history of the business' operation. Further, that NY Stone's business is protected by a restrictive covenant which bans the seller from re-establishing, re-opening or in any way opening a business within a one-mile radius of the Property.

In opposition and by way of cross-motion, Defendants contend that their cancellation of the contract was proper due to Plaintiffs' multiple breaches including its failure to pay for the balance for the goods en route, failure to record the contract with the county, and repeated late rental payments. Further, that based on a retained appraiser's report, the fair market base rent of the Property is \$33,333.33 per month. However, that since September 2016, Plaintiffs have not paid anything for use of the Property to the financial loss of Defendants who have been paying all costs associated with the Property such as mortgages, interest, real estate taxes, etc.

Discussion

The party requesting a *Yellowstone* injunction must demonstrate that: (1) it holds a commercial lease; (2) it received from the landlord either a notice of default, a notice to cure, or a threat of termination of the lease; (3) it requested injunctive relief prior to the termination of the lease; and (4) it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises (*Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. As...*, 93 NY2d 508, 514 [Ct App 1999]). Here, Plaintiffs failed to demonstrate the existence of a valid

commercial lease. The business sales contract relied on by Plaintiffs is not akin to a commercial lease agreement and Plaintiffs do not otherwise provide legal support for their claim that their month-to-month tenancy should be construed as a commercial tenancy subject to *Yellowstone* relief. Thus, Plaintiffs' application for a *Yellowstone* injunction must be denied.

However, the Court finds that Plaintiffs have established their entitlement to a preliminary injunction pursuant to CPLR 6301. A party seeking a preliminary injunction must demonstrate (1) the likelihood of ultimate success on the merits of the underlying pending action, (2) the prospect of irreparable harm if the request for said preliminary injunction is denied, and (3) the balance of equities tipping in the moving party's favor (*Doe v Axelrod*, 73 NY2d 748, 750 [1988]; *1659 Ralph Ave. Laundromat Corp. v Ben David Enters., LLC*, 307 AD2d 288, 289 [2d Dept 2003]). "The purpose of a preliminary injunction is to maintain the status quo pending determination of the action" (*Coinmach Corp. v Alley Pond Owners Corp.*, 25 AD3d 642, 643 [2d Dept 2006]).

Here, it is undisputed that the parties have entered into two contracts concerning the sale of the subject business and associated Property. Although the exact sum paid by Plaintiffs may be in dispute, the evidence submitted on these motions indicates that Defendants have accepted at least \$590,000.00 from Plaintiffs towards the contract price. While there may be some factual issues at this point in litigation, for purposes of granting provisional relief, Plaintiffs' showing is sufficient to satisfy the first prong of likelihood of success on the merits. Moreover, Plaintiffs have amply demonstrated the prospect of irreparable harm if its request for an injunction is denied and that the balance of equities tips in its favor. Not only have Plaintiffs operated the business since March 2015, by entering into the subject agreements, they seek to purchase the goodwill of the business generated from the years of its existence. Certainly, the loss of goodwill constitutes irreparable harm (*see Second on Second Café v Hing Sing Trading*, 66 AD3d 255, 272 [1st Dept 2009]), as does the loss of Plaintiffs' substantial interest in the subject real property (*see Concourse Rehab. & Nursing Ctr., Inc. v Gracon Assocs.*, 64 AD3d 405, 405 [1st Dept 2009]). Finally, any potential prejudice to Defendants as a result of the injunction can be counteracted by a sufficient undertaking and the payment of use and occupancy.

Turning then to the issue of use and occupancy, Plaintiffs are directed to pay monthly use and occupancy in the amount of \$21,252.00 to Defendants. Plaintiffs shall also turn over the monies

escrowed in their attorney's account since September 2016 to Defendants for past due use and occupancy. In the event that Plaintiffs are ultimately successful in proving their causes of action against Defendants, they may receive a credit towards the contract price for the use and occupancy paid pursuant to this Order as adjusted and determined by the Court. In addition, in the event that it is finally determined that Plaintiffs were not entitled to an injunction, an undertaking is necessary to protect Defendants against damages and costs which may be sustained by reason of this injunction (*see Cohn v White Oak Coop. Hous. Corp.*, 243 AD2d 440, 441 [2d Dept 1997]). Plaintiffs must therefore post an undertaking in the amount of \$80,000.00 within 45 days of notice of entry.

Accordingly, it is hereby

ORDERED that Plaintiffs' motion for a preliminary injunction is granted and Defendants are enjoined from encumbering the Property in any way and from terminating or otherwise interfering with Plaintiffs' tenancy upon the condition that Plaintiffs post an undertaking in the amount of \$80,000.00 within 45 days of notice of entry of this Order; it is further

ORDERED that Plaintiffs shall pay use and occupancy for the subject Property and past due use and occupancy in the amount of \$21,252.00 per month; and it is further

ORDERED that Defendant's cross-motion to recover unpaid rents is denied without prejudice.

This constitutes the Decision and Order of the Court.

E N T E R,



Sylvia G. Ash, J.S.C.