

<b>ASRR Suzer 218, LLC v Barbes Rest. Inc.</b>
2018 NY Slip Op 32395(U)
September 26, 2018
Supreme Court, New York County
Docket Number: 650154/17
Judge: Manuel J. Mendez
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**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY**

**PRESENT: MANUEL J. MENDEZ**  
*Justice*

**PART 13**

ASRR SUZER 218, LLC,  
Plaintiff,  
-against-  
BARBES RESTAURANT INC.,  
Defendant.

INDEX NO. 650154/17  
MOTION DATE 08-25-18  
MOTION SEQ. NO. 005  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 13 were read on this motion pursuant to CPLR §2201 for a stay of referee hearing, pursuant to CPLR 5015[a][3] to vacate decision order and judgment, and pursuant to 22 NYCRR 130.1 for costs and sanctions, and cross-motion to award plaintiff reasonable attorney fees, costs and expenses:

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_ cross motion \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED	
1 - 4	_____
5 - 9, 10	_____
11 - 13	_____

**Cross-Motion: X Yes No**

Upon a reading of the foregoing cited papers, it is ordered that defendant's motion for an Order pursuant to CPLR §2201 and this Court's equitable powers to stay the referee's hearing as stated in the April 6, 2018 Decision and Order of this Court, pursuant to CPLR §5015[a][3] to vacate the July 11, 2017 Decision, Order and Judgment of this Court on the grounds it was procured by fraud, and pursuant to 22 NYCRR 130-1.1 for costs and sanctions, is granted as stated herein. Plaintiff's cross-motion for an Order pursuant to 22 NYCRR 130-1.1 granting reasonable attorneys' fees, costs and expenses incurred in opposing this motion, is denied without prejudice.

Defendant was a commercial tenant running a restaurant at "the store" located 218 Madison Avenue a/k/a 19-21 East 36<sup>th</sup> Street (hereinafter referred to as "the building"). On November 17, 2003, defendant entered into a ten year lease for "the store" and basement space located in the building (See NYSCEF Doc. # 10). The rider to the lease at paragraph 79 permits the landlord to elect to demolish or alter the building. On March 18, 2009 the defendant entered into a Lease Modification Agreement with the landlord extending the term of the lease to March 31, 2019. The building was sold to the plaintiff by deed dated February 26, 2015. Approximately two months after the building was sold, on April 27, 2015, a demolition notice ("first demolition notice") was served on defendant terminating the tenancy effective October 31, 2015.

Defendant in this action commenced a declaratory judgment action under Index #161108/2015, seeking a declaration that the first demolition notice was defective, without force or effect, and declaring paragraph 79(C) of the lease invalid and unenforceable.

On November 6, 2015 this Court, in the action filed under Index #161108/2015, granted Barbes Restaurant Inc. a preliminary injunction, tolling the expiration of the first demolition notice. On June 7, 2016 the Supreme Court Appellate Division First Department, affirmed the November 6, 2015 Decision and Order of this Court (See Barbes Restaurant v. ASRR Suzer 218, LLC, 140 A.D. 3d 430, 33 N.Y.S. 3d 43 [1<sup>st</sup> Dept., 2016]).

On December 10, 2015, while the appeal was pending in the action commenced under Index #161108/2015, a "second demolition notice" was prepared and served on Barbes Restaurant Inc.. The "second demolition notice" states that it is independent of the "first demolition notice," and sought to terminate Barbes Restaurant Inc.'s lease on June 20, 2016.

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

**Barbes Restaurant Inc. commenced a second declaratory judgment action under Index # 154892/2016 seeking a preliminary injunction. On August 15, 2016 this Court, under Index #154892/2016, granted a second preliminary injunction. It was determined that ASRR Suzer 218 LLC did not have revised plans to reflect the redevelopment option until January of 2016, after service of the “second demolition notice.”**

**Plaintiff served a “third demolition notice” on September 28, 2016 and subsequently commenced this action seeking declaratory relief that the “third notice” is valid and enforceable and to evict the defendant from the premises. Plaintiff under Motion Sequence 001 sought summary judgment and defendant cross-moved for summary judgment together with an order establishing that the damages provision set forth in Paragraph 79 (C) of the Rider to the Lease constitutes a penalty and is unenforceable. On July 11, 2017 this Court granted plaintiff’s motion in its entirety, and dismissed the actions commenced under Index #161108/2015 and Index # 154892/2016. Defendant’s cross-motion was partially granted, to the extent of finding the damages provision set forth in Paragraph 79 (C) of the Rider to the Lease dated November 17, 2003 constitutes a legally unenforceable penalty (See NYSCEF Doc. # 127). Defendant claims it was evicted and vacated the premises as of October of 2017.**

**Defendant sought an Order cancelling and discharging the undertaking posted in the action entitled Barbes Restaurant Inc. v. ASRR Suzer 2018, LLC in Supreme Court, New York County under Index No.161108/2015. Plaintiff cross-moved under Motion Sequence 003 for an Order granting reasonable attorneys fees, costs and expenses as the “prevailing party,” pursuant to the terms of the lease between plaintiff and defendant, and awarding plaintiff the \$100,000.00 bond posted by defendant under Index No.161108/2015 as partial payment of the attorney fees and costs.**

**On April 6, 2018 this Court denied defendant’s motion and partially granted plaintiff’s motion, as to reasonable attorney fees, costs and expenses. The determination of whether plaintiff was entitled to the discharge and award of all or part of the \$100,000.00 bond posted by the defendant in this action, was stayed pending a hearing (See NYSCEF Doc. # 69). A hearing to determine attorneys fees, costs and expenses was scheduled to commence before Judicial Hearing Officer Ira Gammerman on June 28, 2018. It was subsequently adjourned to September 27, 2018.**

**Defendant’s motion seeks an Order pursuant to CPLR §2201, and this Court’s equitable powers, staying the referee’s hearing to determine the reasonable amount of attorney’s fees plaintiff is entitled to as prevailing party as stated in the April 6, 2018 Decision and Order (NYSCEF Doc. # 127), pursuant to CPLR §5015[a][3] vacating this Court’s July 11, 2017 Decision, Order and Judgment that granted plaintiff summary judgment and a judgment of ejectment (NYSCEF Doc. # 69) on the grounds it was procured by fraud, and pursuant to 22 NYCRR 130-1.1 for costs and sanctions.**

**Defendant argues that the July 11, 2017 Decision and Order was obtained by plaintiff’s intentionally false representations of a good faith intention to imminently demolish the building. Defendant, pursuant to CPLR §2001, seeks a stay of the attorney’s fee hearing. It is further argued by defendant that the plaintiff’s fraud and misrepresentations warrant vacatur, pursuant to CPLR § 5015[a][3], of the July 11, 2017 Decision and Order, and a finding that plaintiff was a “prevailing party” in the April 6, 2018 Decision and Order filed under Motion Sequence 003.**

**Plaintiff opposes defendant’s motion and cross-moves for an Order granting reasonable attorneys’ fees, costs and expenses pursuant to 22 NYCRR 130-1.1, alleging that defendant’s motion is meritless and only an attempt to delay the attorney fees hearing. Plaintiff argues that defendant’s motion is untimely, any alleged falsity in the application process could have been raised by the defendant in opposition to Motion Sequence 001, and that plaintiff had the intent to demolish the premises from the time DOB granted preliminary approval of the plans in September 2016.**

CPLR §5015[a][3] permits the court which rendered a judgment or order to relieve a party from it upon such terms as may be just, “upon the grounds of fraud, misrepresentation, or other misconduct of an adverse party.... and these factors are applicable to what has occurred prior to the judgment or was the means by which the judgment was obtained” (See CPLR §5015[a][3] and *Nachman v. Nachman*, 274 A.D. 2d 313, 710 N.Y.S. 2d 357 [1<sup>st</sup> Dept., 2000]). The remedy for fraud allegedly committed during the course of a legal proceeding must be exercised in that lawsuit by moving to vacate the civil judgment (*St. Clement v. Londa*, 8 A.D. 3d 89, 779 N.Y.S. 2d 460 [1<sup>st</sup> Dept., 2004]). The CPLR §5015[a][3] motion is required to be made “within a reasonable time.” (*Country Wide Home Loans, Inc. v. Harris*, 136 A.D. 3d 570, 26 N.Y.S. 3d 33 [1<sup>st</sup> Dept., 2016]).

Defendant has shown that this motion is timely because there was no way of anticipating, when the July 11, 2017 Decision and Order was issued, that plaintiff would take no action until July 12, 2018 - approximately a year later and over eight (8) months after the October 2017 eviction - to obtain a DOB permit to demolish only the nonstructural interior of the building in the space occupied by Barbes Restaurant (hereinafter “the premises”)(See Mot. Exhs. D and E, and DeSimone Aff. in Reply, Exh. B). Defendant did not become aware of plaintiff’s delay in seeking a DOB permit until after signs were posted indicating the intent to lease the premises to another entity. The signage posted at the premises stated, “Kings Electronics Ltd., World’s Largest Direct Distributor, Wholesale to the Public, We will beat any price guaranteed, Coming soon” (Mot. Exh. C).

In issuing the July 11, 2017 Decision and Order this Court relied on plaintiff’s “good faith” assertions that demolition of the premises was imminent. The affidavit of Nathan Feldman, plaintiff’s General Manager and the “Statement of Undisputed Material Facts” submitted in support of Motion Sequence 001 stated that the New York City Department of Building’s (DOB) had approved the application for a permit to demolish the interior premises and the intent to have the defendant’s premises demolished and “initially redeveloped into a sales office for the new building” (Mot. Exh. D, paras. 28,30 and Exh. E para. 38). This Court also relied on exhibits annexed to plaintiff’s papers noting that an applicant can only demolish the exterior of a structure once the structure is vacant (Mot. Seq. 001, Reply, Exh. A, NYSCEF Doc. #65).

Plaintiff’s Affiant makes statements that are not supported by proof. Hussein Sonara, Executive Developer, states in his affidavit supporting the cross-motion that his “predecessor oversaw demolition of the premises” and that the failure to obtain a demolition permit from the DOB was “merely an oversight.” (Sonara Aff., pg. 3, para. 16). Mr. Sonara does not state the name of his “predecessor” and there is no affidavit from anyone in charge providing details of the alleged oversight.

Mr. Sonara, and the Affirmation in support of the cross-motion, states that plaintiff has not leased the premises. Mr. Sonara states that the signs were “wrongfully” posted on the premises and were intended to be posted on the adjacent building. He further states, “We did not authorize the signage to be posted on the premises, but rather on vacant space in the Adjacent Building.” (Cross-Mot. Sonara Aff., pg. 2, paras. 5 - 8). There is no proof provided in support of this statement, such as the lease showing the rental in the adjacent building. Plaintiff relies on photographs annexed to defendant’s papers showing the signs were removed (See Reply Exh. E).

Mr. Sonara’s Affidavit dated August 9, 2018, alleges that the interior space has been demolished and “is now in a position to be refitted as a sales office.” In support of this statement plaintiff provides four photographs allegedly depicting the demolished interior space (Cross-Mot. Sonara Aff., Exh. 3). Defendant correctly argues that Mr. Sonara does not state when this alleged demolition took place, especially since the DOB permit was not granted until July 12, 2018. Plaintiff also failed to provide authenticating details to verify the photographs depicting the interior demolition of the premises or other proof verifying the process of refitting the space as a sales office.

The lack of evidence in support of the assertions made in plaintiff's cross-motion, and plaintiff's history of seeking eviction without sufficient proof of imminent demolition, warrants a hearing to determine defendant's application to vacate this Court's July 11, 2017 Decision, Order and Judgment filed under Motion Sequence 001 pursuant to CPLR §5015[a][3] and the April 6, 2018 Decision and Order filed under Motion Sequence 003.

Defendant is entitled to obtain proof of the alleged interior demolition. Plaintiff shall be required to provide defendant with the opportunity to obtain a video inspection of the premises, to be brought to Court as evidence on the date of the hearing.

CPLR §2201 grants the court discretion under circumstances in which an action is pending to grant a stay of proceedings, "in a proper case, upon such terms as may be just" (Morreale v. Morreale, 84 A.D. 3d 1187, 923 N.Y.S. 2d 876 [2<sup>nd</sup> Dept., 2011]). The broad discretion stated in the statute is limited to a determination that will dispose of all related controversies (Hope's Windos v. Albro Metal Products Corp., 93 A.D. 2d 711, 460 N.Y.S. 2d 580 [1<sup>st</sup> Dept., 1983]).

Defendants correctly seek to stay the attorneys fee hearing currently scheduled for September 27, 2018, pending a hearing and determination of the relief sought in this motion, pursuant to CPLR §5015[a][3], which would affect the final determination and judgment in this action, and dispose of all related controversies.

Pursuant to 22 NYCRR 130-1.1, sanctions are applied to conduct which is continued when its lack of legal or factual basis should have been apparent to counsel or the party (Emery v. Parker, 107 A.D. 3d 635, 968 N.Y.S. 2d 480 [1<sup>st</sup> Dept. 2013]). A party's actions are required to be found frivolous, harassing or lacking in merit, such that sanctions are warranted (See Highland Captial Management, L.P. v. Stern, 157 A.D. 3d 501, 66 N.Y.S .3d 603 [1<sup>st</sup> Dept. 2018]).

The 22 NYCRR 130-1.1 relief sought by both parties to this action on the motion and cross-motion is premature at this time, there has been an insufficient showing of frivolity or misconduct. The 22 NYCRR 130-1.1 relief is denied without prejudice to either party seeking it after a final determination on this motion.

Accordingly, it is ORDERED that defendant's motion for an Order pursuant to CPLR §2201 and this Court's equitable powers to stay the referee's hearing as stated in the April 6, 2018 Decision and Order of this Court, pursuant to CPLR §5015[a][3] to vacate the July 11, 2017 Decision, Order and Judgment of this Court on the grounds it was procured by fraud and misrepresentation, and pursuant to 22 NYCRR 130-1.1 for costs and sanctions, is granted, and it is further,

ORDERED that the parties shall appear in IAS Part 13, Room 210 at 71 Thomas Street, New York, New York on November 5, 2018 at 9:30a.m., for a hearing to determine whether pursuant to CPLR §5015[a][3] this Court's July 11, 2017 Decision, Order and Judgment filed under Motion Sequence 001 should be vacated, and it is further,

ORDERED that within fifteen (15) days of the date of this Order, plaintiff shall allow the defendant into the premises previously occupied by Barbes Restaurant Inc., located at 218 Madison Avenue a/k/a 19-21 East 36<sup>th</sup> Street, New York, New York, to conduct a video inspection, and the video shall be used as evidence at the November 5, 2018 hearing, and it is further,

ORDERED that the Special Referee Hearing currently scheduled for September 27, 2018 before Judicial Hearing Officer Ira Gammerman, is stayed pending a final determination of this motion, and it is further,

ORDERED that the relief sought in this motion pursuant to 22 NYCRR 130-1.1 for costs and sanctions is denied without prejudice to the defendant seeking this relief after a final determination of this motion, and it is further,

**ORDERED** that the defendant shall serve a copy of this Order with Notice of Entry pursuant to e-filing protocol on the plaintiff, the General Clerk's Office (Room 119), and separately on the Special Referee Clerk's Office (Room 119M), who are directed to mark their records accordingly, and it is further,

**ORDERED**, that plaintiff's cross-motion for an Order pursuant to 22 NYCRR 130-1.1 granting reasonable attorneys' fees, costs and expenses incurred in opposing this motion, is denied without prejudice to the plaintiff seeking this relief after a final determination on this motion.

**ENTER:**

  
\_\_\_\_\_  
**MANUEL J. MENDEZ,**  
*J.S.C.*

**Dated: September 26, 2018**

**Check one:**     **FINAL DISPOSITION**     **NON-FINAL DISPOSITION**  
**Check if appropriate:**     **DO NOT POST**     **REFERENCE**