

At a Special Term of the Supreme Court of the State of New York, held in and for the County of Erie at Part 22, 25 Delaware Avenue, Buffalo, New York on the 18th day of September, 2012 at 2:00 p.m.

PRESENT: HON. TIMOTHY J. WALKER, J.C.C.

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

UNIVEST I CORP., individually as a member of 470 PEARL STREET, LLC, and derivatively on behalf of Nominal Defendant 470 PEARL STREET, LLC,

Plaintiffs,

v.

Index No.: 809598-2014

BUFFALO DEVELOPMENT CORPORATION,
SKYDECK CORPORATION d/b/a PAY2PARK, and
470 PEARL STREET, LLC,

and

MARK D. CROCE, individually and as President
of BUFFALO DEVELOPMENT CORPORATION,

Defendants.

ORDER

On August 22, 2014, by Order to Show Cause, Plaintiffs moved for a temporary restraining order, preliminary injunction, and declaratory relief. In support of their motion, plaintiffs submitted the Summons and Verified Complaint, dated August 22, 2014, with exhibits, the affirmation of David R. Pfalzgraf, Jr., Esq., with exhibits, sworn to August 22, 2014, and a Memorandum of Law, dated August 22, 2014.

In opposition to plaintiffs' temporary restraining order application, defendant Buffalo Development Corporation submitted the Affidavit of Mark D. Croce, sworn to August 25, 2014. No appearance was made on behalf of Skydeck Corporation d/b/a Pay2Park or Mark Croce, individually.

On August 25, 2014, plaintiffs (by and through Matthew D. Miller, Esq.) and defendant Buffalo Development Corporation (by and through Robert E. Knoer, Esq.) appeared for oral argument on plaintiffs' application for a temporary restraining order. This Court denied plaintiffs' application for a temporary restraining order on August 25, 2014.

On September 5, 2014, in opposition to plaintiffs' application for a preliminary injunction and for declaratory relief, defendant, Buffalo Development Corporation, submitted the Affidavit of Mark D. Croce, sworn to September 5, 2014, the Declaration of Robert E. Knoer, Esq., sworn to September 5, 2014, a Memorandum of Law, dated September 5, 2014, and several separately-filed exhibits. On September 8, 2014, defendant Buffalo Development Corporation filed a "corrected" Memorandum of Law.

On September 18, 2014, upon consent of the parties in lieu of an evidentiary hearing, plaintiffs (by and through Matthew D. Miller, Esq.) and defendant Buffalo Development Corporation (by and through Robert E. Knoer, Esq.) appeared for oral argument on plaintiffs' application for a preliminary injunction and for declaratory relief.

NOW, upon reading the papers submitted and the Court having heard oral argument on September 18, 2014 (Matthew D. Miller, Esq., on behalf of plaintiffs, and Robert E. Knoer, Esq., on behalf of Buffalo Development Corporation), and due deliberation having been had thereon, it is hereby

ORDERED, that plaintiffs' motion for a declaration that the lease between 470 Pearl Street, LLC and Skydeck Corporation d/b/a Pay2Park was properly terminated is **GRANTED**, and the subject lease was terminated effective July 27, 2014; and it is further


ORDERED, that Skydeck Corporation d/b/a Pay2Park increase its monthly rental payment to 470 Pearl Street, LLC to Nine Thousand Two Hundred and ⁰⁰/₁₀₀ dollars (\$9,200.00), effective August 1, 2014; and it is further

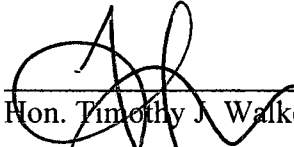
pending further order of this Court;

ORDERED, that Skydeck Corporation d/b/a Pay2Park continue to pay such rent and otherwise abide by the remaining terms of the lease agreement pending further order of this Court; and it is further

ORDERED, that the remaining portions of plaintiffs' motion for injunctive and declaratory relief are **DENIED**.

Copies of the relevant portions of the transcript of this Court's decision are attached hereto as **Exhibit A**.

Dated: Buffalo, New York
9/26, 2014 



Hon. Timothy J. Walker, J.C.C.

ENTER:

HON. TIMOTHY J. WALKER, J.C.C.
Acting Supreme Court Justice
Presiding Justice, Commercial Division
8th Judicial District

GRANTED

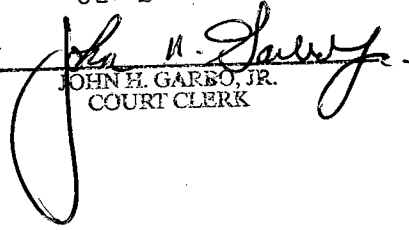
SEP 26 2014
BY 
JOHN H. GARBO, JR.
COURT CLERK

Exhibit A

STATE OF NEW YORK : SUPREME COURT
COUNTY OF ERIE : PART 22

UNIVEST I CORP., individually as a member of
470 PEARL STREET, LLC, and derivatively
on behalf of Nominal Defendant
470 PEARL STREET, LLC,

Plaintiff,

- vs -

INDEX # 809598/2014

BUFFALO DEVELOPMENT CORPORATION,
SKYDECK CORPORATION d/b/a PAY2PARK, and
470 PEARL STREET, LLC,

ORAL ARGUMENT

and

MARK D. CROCE, individually and as President
Of BUFFALO DEVELOPMENT CORPORATION,

Defendants.

25 Delaware Avenue
Buffalo, New York
September 18, 2014

B e f o r e:

HONORABLE TIMOTHY J. WALKER, JCC
Acting Supreme Court Justice
Presiding Justice, Commercial Division
Eighth Judicial District.

A p p e a r a n c e s:

RUPP, BAASE, PFALZGRAF,
CUNNINGHAM & COPPOLA, LLC,
BY: MATTHEW D. MILLER, ESQ.
Appearing for the Plaintiff.

THE KNOER GROUP
BY: ROBERT E. KNOER, ESQ.
Appearing for the Defendant
Buffalo Development Corporation.

LYNN S. DULAK, RPR, CRR
Official Court Reporter

1 without due process, without complete due process, I'm
2 arguing that you should deny this application. Let the
3 parties answer, let discovery proceed, or let them make a
4 motion for summary judgment if they think their case is
5 that clear.

6 THE COURT: But they don't need to make a
7 separate motion on whether the lease was terminated
8 because, as you conceded, that proof's already in the
9 record before the court.

10 MR. KNOER: The proof's in the record, but that
11 doesn't trigger the need for the court to make a decision
12 now. The proof is in, the proof is in the record.

13 THE COURT: They've asked me to make that
14 determination.

15 MR. KNOER: We did not.

16 THE COURT: But you've agreed there's nothing
17 else the court needs to consider in order to make that
18 ruling. That's why I asked what I asked.

19 MR. KNOER: That's right. And I agree that it's
20 in the record. I don't deny that.

21 THE COURT: Let me do this, let me save
22 everybody the trouble. The lease was properly terminated,
23 step one. Now what?

24 MR. KNOER: I will move on then. And I'll
25 answer that back with the same question. Now what?

1 Skydeck is still in possession as a holdover, no one's
2 brought a proceeding to evict them. There's no self-help
3 in New York. Let us proceed to answer, discovery, do it
4 up. There's just no need for the relief they're
5 requesting here today. I just end on that point because I
6 think that is over-encompassed, that's where we are.
7 Unless the court has questions, I'll leave it there.

8 THE COURT: Thank you, Mr. Knoer. Mr. Miller?

9 MR. MILLER: Very briefly, Judge. On the burden
10 of proof, a couple things Mr. Knoer pointed out I don't
11 think are entirely true.

12 THE COURT: Clear and convincing proof.

13 MR. MILLER: Is it clear and convincing
14 evidence? We got to show a likelihood of success.

15 THE COURT: A reasonable likelihood of success
16 on the merits.

17 MR. MILLER: On the merits, right, Judge. I
18 completely agree.

19 THE COURT: Merits of which prong of the relief
20 you request, though? The only one that I am ruling on,
21 the only one on the declaratory aspect, is the lease. It
22 was properly terminated, period. Now move on to okay,
23 Judge, once you've decided that, we still have an
24 application for a preliminary injunction.

25 MR. MILLER: We do, Judge. And the problem is

1 if this lease had been recognized by the managing member
2 as being properly terminated in the first place, we
3 wouldn't be here. We would have brought a summary
4 proceeding to remove Skydeck which -- which from all
5 representations sounds like, you know, it's just
6 intentionally being a holdover, which is fine. But we
7 would have brought that proceeding, you know, a month and
8 a half ago, two months ago, to have them out of there. We
9 wouldn't be at this step. So we could commence that
10 action tomorrow if necessary.

11 THE COURT: I don't know that it has to be done,
12 it's a commercial lease. You're in the commercial
13 division, you've invoked the jurisdiction of the court.
14 Neither side has challenged the jurisdiction of the court
15 to deal with the tenancy issue. In fact, one side's
16 seeking relief and the other side merely says you're not
17 entitled to it. Not that you, Judge, don't have the
18 authority, but the other side's not entitled to it. So
19 I'd reserve on that one for another day.

20 MR. MILLER: Okay. Very well. I don't have a
21 lot to add, Judge. I'm not -- I think -- I think the
22 proof is before the court, unless the court has any
23 specific questions.

24 THE COURT: I do not.

25 MR. MILLER: Thank you, Your Honor.

1 THE COURT: You're welcome. Having already
2 ruled on the application insofar as it seeks a declaration
3 that the May letter properly terminated the lease, the
4 court's already done that.

5 There are other aspects of the relief requested.
6 Even if the court would determine a reasonable likelihood
7 of success on the merits on the remaining claims, if
8 plaintiff cannot establish irreparable harm, even if
9 irreparable harm were not a necessary element based on the
10 nature of the totality of claims asserted and associated
11 relief requested, on this record, it would clearly be
12 detrimental to 470 Pearl Street, LLC to grant that aspect
13 of the provisional relief requested relating to the 2005
14 lease and defendant Skydeck's standing as a tenant.
15 Instead, and on the condition that defendant Skydeck agree
16 to increase its monthly rental payment to 470 Pearl
17 Street, LLC in the amount of \$9,200 per month, effective
18 August 1, 2014, and that Skydeck continues to pay such
19 rent and otherwise abide by the remaining terms of the
20 2005 lease agreement pending further order of this court,
21 that aspect of the application is denied as are the
22 remaining aspects of the application for preliminary
23 injunction. Any questions?

24 MR. KNOER: No, Your Honor.

25 MR. MILLER: No, Your Honor.

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THE COURT: Reduce it to an order, attach a copy of the transcript.

This is Anne Rutland's case. Contact chambers either before you leave today or tomorrow or next week and obtain a date for a preliminary conference at which time the court will, after consulting with counsel and obtaining their agreement thereto, issue a scheduling order through trial. All right?

MR. KNOER: Thank you, Your Honor.

MR. MILLER: Thank you, Judge.

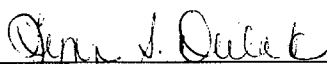
THE COURT: Thank you. Off the record.

(Discussion off the record.)

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C E R T I F I C A T I O N

I certify that the foregoing 41 pages are a correct transcription of the proceedings recorded by me in this matter.


LYNN S. DULAK, RPR, CRR,
Official Court Reporter.