

525 NOSTRAND LLC,

Index No. 064807/2015

Petitioner ,

-against-

**DECISION and
ORDER**

WAZI ULLAH and JANNATUL KAWSER,

Date(s) of Trial/Hearing:

Respondent.

June 19, 2015, July 21,
2015, August 4, 2015,
August 31, 2015,
September 9, 2015,
October 5, 2015,
October 6, 2015,
October 7, 2015 and
October 13, 2015.

This is a commercial holdover summary proceeding. On April 7, 2015, the Petitioner had served the notice of petition and petition to recover possession of the premises known as 525 Nostrand Avenue, Commercial Store, Brooklyn, New York 11218.

In or about April 23, 2015, WAZI ULLAH, by his attorney, Dipo Akinola, P.C., served and filed an answer which contained various affirmative defenses in this matter.

The verified answer denied service of a termination notice; it also alleged that the notice of petition and petition were not served on the Respondent. The only notice that the Respondent allegedly received was notice from the Court. The Respondent alleged the right to a traverse hearing. The answer asserts that the petition fails to state a cause of action (first affirmative defense); the Respondents have an option to extend the terms of the lease for an additional five years and the Respondent, in writing, extended the subject lease for an additional five years (second affirmative defense); the court lacked subject matter jurisdiction over the petition based on the lack of an adequate description of the subject premises sought to be recovered (third affirmative defense); the petition failed to plead the Multiple Dwelling Registration Number for this building (fourth affirmative

defense); the petition is defective and fails to comply with the applicable laws, therefore requiring dismissal of the action (fifth affirmative defense); the Petitioner is barred by the doctrine of laches, estoppel and/or equitable estoppel, from the commencement of this proceeding (sixth affirmative defense); and the Petitioner's conduct constitutes waiver which is a complete bar to this proceeding (seventh affirmative defense). For these above claims, the Respondent asserted that the proceeding should be dismissed as a matter of fact and law.

The petition was noticed to be heard on April 23, 2015 at 10 o'clock a.m. in Commercial Part 52. On that day, the case was adjourned to June 17, 2015. The undersigned judge ordered a traverse hearing and if required, a trial, on June 17, 2015 at 10 o'clock a.m. The Respondent was required to pay use and occupancy in the sum of \$3,150.00 for May and June 2015 by the fifth day of each month and on default in payment, pursuant to RPAPL §745(2)(C)(i), the Court would enter a judgment of possession and a monetary judgment thereunder.

On June 17, 2015, the case was adjourned to June 19, 2015 for traverse and trial to be referred to the undersigned.

On June 19, 2015, after a court conference, the traverse defense was waived and the case was scheduled to proceed to trial on July 21, 2015 at 2:30 p.m.

On July 21, 2015, the case was adjourned to August 4, 2015 for trial.

On August 4, 2015, the case was adjourned to August 31, 2015 and then again to September 7, 2015 for a continued trial. The court ordered use and occupancy to be paid *pendente lite* until a final determination by this Court.

On September 7, 2015, the Court was informed that use and occupancy was not paid as ordered and as a condition to the continuance of the trial and in an effort to bring the Respondent in compliance with the court order, payment was required to be made by September 9, 2015 by hand delivery.

The case was then adjourned for a continued trial to October 5, 2015, October 6, 2015 and October 7, 2015.

Subsequently, the case was adjourned to October 13, 2015 for a continued trial and for summation.

TRIAL HISTORY

On June 19, 2015, after a conference and traverse was waived, the case proceeded to trial.

For the record, the trial proceeded on the following dates: June 19, 2015, July 21, 2015, August 4, 2015, August 31, 2015, September 9, 2015, October 5, 2015, October 6, 2015, October 7, 2015 and October 13, 2015.

The Petitioner called **SEAN SINNREICH** of Woodmere, New York as the first witness in its *case-in-chief*. He testified that he was a manager of this mixed-use building that contains three residential apartments and one commercial store. The store is occupied by the Respondent restaurant and is used for business purposes only. Notwithstanding the fact that the building contained three apartments, the witness testified that it was not a multiple dwelling. The witness further testified that the restaurant specialized in "Indian cuisine."

The Petitioner admitted into evidence, Petitioner's Exhibit "1", a certified copy of the deed of ownership, which shows that on October 3, 2014, Right On Nostrand Avenue LLC transferred all rights, title and interests in the premises known as 525, 527 and 529 Nostrand Avenue, Brooklyn, New York (Block 1867, Lots 12, 13 and 14) to 525 NOSTRAND LLC for valuable consideration. The purchase price for the subject premises was \$2,925,00.00 and it was an on-length transaction. The deed showed that filing fees and real estate transfer taxes were paid to the City of New York and the State of New York.

Additionally, the Petitioner admitted Petitioner's Exhibit "2", a lease agreement between the Promenade Development LLC, as landlord, and the Respondents, WAZI ULLAH and JANNATUL KAWSER, as tenants, that commenced on March 15, 2010 and terminated on March 30, 2015. Notwithstanding questions on *voir dire*, the document was admitted into evidence.

Additionally, the Petitioner admitted Petitioner's Exhibit "3," an estoppel certificate which contained material terms at the closing. The estoppel certificate stated that the former landlord and the Respondent had a lease that commenced on March 15, 2010 and terminated on March 30, 2015 at a monthly rent of \$3,646.52. The document also represented that the landlord had a security deposit of \$9,000.00 in conformity with the lease and the Respondent was current in monthly rent payments. The witness stated that he recognized the

Respondent's signature on the document, namely WAZI ULLAH, based on receipt of business checks with his signature and the estoppel certificate. He further testified that WAZI ULLAH signed checks in front of him, and he was familiar with his signature.

The witness further testified that the estoppel certificate was given to him by the seller of the property, Jeremy Feit. He also indicated that the estoppel certificate was in a file that was given to him along with other original documents at the closing on October 3, 2010. Of relevance to this case, the witness further testified that as of the date of the estoppel certificate, no written option to renew or to extend the lease was ever received by the former owner or by himself. The witness also referred the Court to the second page of the estoppel certificate which provides that the assignment and assumption of the lease were assumed by the Petitioner.

He further stated that on October 3, 2014, a written notice had been sent to the Respondents about the change in ownership of the building. The Petitioner testified that the notice was signed by Bennat Berger, a member of Right On Nostrand Avenue LLC, giving the tenants notice that effective October 3, 2014 there was a change in ownership and provided the tenants with a new address to mail the monthly rent. The witness testified that this notice was given to all tenants in the building by hand (personal) delivery and was also posted in the lobby of the demised property. A copy of the notice was admitted into evidence as Petitioner's Exhibit "4".

The Petitioner subsequently admitted Petitioner's Exhibit "5," a rent ledger, with no objection after *voir dire*. The witness testified that he prepared the document on June 11, 2015 by printing it from his computer and it reflected the monthly rent of this tenant as \$3,646.52. The witness also testified that there was an additional amount of \$1,823.26 due which he called the "holdover rent"; \$114.87 which reflected the Respondent's share of the real estate property tax and \$85.90 for the Respondents proportionate share of insurance reimbursement. The total amount that was due and owing including the rent for the month of June was \$14,830.92.

After this first date of trial, Petitioner's Exhibits "1" through "5" were admitted into evidence.

On July 21, 2015, **SEAN SINNREICH** continued his testimony on behalf of the Petitioner. Notwithstanding additional questions regarding Petitioner's Exhibit "3," the document was still admitted into evidence.

Additionally, on this trial date, Petitioner's Exhibit "6," assignment and assumption of leases, rent and security deposits and Petitioner's Exhibit "6A," also an assignment and assumption of leases and security deposits were admitted into evidence.

The first assignment was dated October 3, 2014, assigned all leases in existence and all of the security deposits between Right On Nostrand Avenue LLC and 525 NOSTRAND LLC (Petitioner's Exhibit "6").

Additionally, on March 10, 2014, a similar assignment and assumption of leases, rent and security deposits were signed. The witness testified that although he was aware of the lease option, the Respondent must give written notice of the option. He points to paragraph 28 which describes the method that must be used to extend the lease. He asserted that despite the fact that the lease does not explicitly state a time period to exercise the extension, it nonetheless requires the lease extension to be exercised before the lease ended. He relies on paragraph 26, which states that the tenant needed to exercise the extension before the lease terminated by its terms.

The witness believed that the lease ended by its terms since neither he or the prior owner received any written notice from the tenant of their exercise of the option. The witness knew the lease and relied on Article 26 and 28 of the lease agreement. The witness further testified that the lease option had to be sent by certified mail and in this instance, no mail, either by regular mail or by certified mail was ever received by the Petitioner.

The witness reiterated that Petitioner's Exhibit "4," the written notice, was posted in the public hallways, sent by regular mail and was put under all the tenant's door. Therefore, the Respondent had notice of the proper place to send the monthly rent and the lease extension.

The witness further testified that in November 2014, he received a telephone call from the tenant herself about the rent in or about November 1, 2014. He believed that since he got the rent, the tenants knew where to send the extension request.

On further examination of the witness, he stated that the superintendent placed the written notice on the door of all the tenants about the transfer in ownership and address for rent payments.

After this testimony, the case was adjourned to August 4, 2015 for a continued trial on the merits.

On August 4, 2015, the Respondent's attorney moved for a directed verdict, specifically alleging that the Petitioner failed to sustain a *prima facie* case on the grounds that the Respondent exercised the option to extend the lease for another five years and the lack of any evidence of any notice to the tenants of the change in ownership.

After oral argument, the motion for a directed verdict was denied.

The Respondent then went forward with their *case-in-chief*. The Respondent called JANNATUL KAWSER one of the named Respondents in the proceeding. She testified that she has been in occupancy of the premises for about six years. She and her husband signed the lease agreement with the former landlord.

Prior to her taking occupancy of the property, it was a meat market from at least 2010 to 2013 and was not in good condition. There was plenty of garbage and other trash in the property; it looked like a junk yard. Many people in the neighborhood used to dump all kinds of things on the property. The property required substantial rehabilitation.

She testified that the construction began with changing all the beams on the floors. They did a complete gut rehabilitation. They also did a complete renovation of the backyard, the basement and the bathrooms. She stated that she retained an architect, and floor plans were prepared for the job.

She acknowledged that she assumed all responsibility for the property since she took it in "as is" condition as prescribed in Articles 5 and 6 of the lease. She also acknowledged that she was responsible for the repairs to the property.

After she and her husband retained the architect and the construction company to perform the renovations, the renovations started between January 2010 and March 2010. It took about seven to eight months for the work to be completed. Respondent's Exhibit "A," although produced, was not admitted into evidence. The Respondent stated that the cost of the work was \$35,917.00 and included plumbing and electrical

work, and cleaning of the entire property. Respondent's Exhibits "A," "B" and "C", although marked, were not admitted into evidence.

The witness changed her renovation costs and clean up to \$250,000.00. She further testified that she signed the lease about March 2010 before the renovations were completed which effectively changed the premises from a meat market into an Indian restaurant. She claims that she continues to operate the restaurant there today.

When she first opened the restaurant it was a buffet style restaurant and it opened for lunch and dinner. She stated that they started losing in the business, and she believed it was because of the type of décor at the property and the food delivery system. She then changed the entire décor and the name of the restaurant. The name of the restaurant was Ulah Restaurant, and it was changed to Bombay Canay. The changes in the restaurant took place about a year and a half after the initial renovation, and was finalized in 2011. She was confident in the location; she said it was a good community and their location was very close to the subway.

On the next trial date, September 2, 2015, JANNATUL KAWSER, testified that Petitioner's Exhibit "2" was their lease and she was aware that the lease would end and wanted to extend the terms for an additional five years. She stated that she verbally told the prior landlord and also the Petitioner's agent that she wanted to extend the lease.

She also stated that she submitted that request to the Petitioner, in writing, and proffered Respondent's Exhibit "D," a letter dated September 10, 2014, in which the tenants extended the terms of the lease. She affirmed that her signature is on the bottom of the letter and her husband's signature is above hers. They mailed the document to the P.O. Box that was stated in the lease. She stated that she put Respondent's Exhibit "D" in an envelope, purchased the stamps, put the stamps on the envelope and put it into the mail to her old landlord. The old landlord's address was BCB Properties Management in Manhattan and although she exercised the extension before that time, when she was notified of the change in ownership, she got a bank check and the landlord picked that up from her on September 8, 2015.

She also testified that she purchased the stamps at Atlantic and Nostrand but did not send the letter by certified mail but by regular mail. She was adamant that the purpose of sending the letter was to extend the lease for another five years and wanted another five years after that.

She also stated that prior to writing and sending out the lease extension letter she had a conversation with the prior landlord about the lease extension. She said she spoke to Alicia and Mrs. Kendra and she was assured that there would be no problem with the extension and they would extend the lease.

She was told to pay \$3,150.00 in the future. The first conversation that she had regarding the lease with the owner was between September and October 2014. She testified that she had this discussion with the old landlord as well as the new landlord at their first meeting in which she gave two month's rent. She stated that even the new owner, after discussion with her, agreed to give her a new lease. Both her and her husband knew about the lease; they spoke with him at the store.

The witness continued to assert that they changed the name of the restaurant from Ulah Restaurant to Bombay Canay; the work was done in March 2010; and then by 2011, everything was changed and made new again.

After the initial investment, the business was not good so they did a new renovation and the new renovation which commenced 2010, she spent \$250,000.00 for the construction. This renovation that costs the sum of \$250,000.00 was done in 2010 and involved new construction, including electrical and plumbing work. She stated that she made this investment because she had an additional five years left on the lease.

The witness indicated that she did not understand all the language in the lease. She talked about her background in terms of education; she had graduated from college. She indicated that seven other people worked in the restaurant, as did she. She employed three families and a few single individuals. Her income was derived from the restaurant; she stated "there is no other source of income because presently her husband is ill and the restaurant is their only source of income."

On cross-examination, the witness testified she served the notice by regular mail and no proof of mailing, she acknowledging that there was no proof that the landlord had ever received the letter.

The witness testified that she did not understand the requirements under the lease terms, Article 28 and 26 of the lease, to extend the lease or that the notice be sent out by registered or certified mail. She stated that she did not understand the mailing requirements that the notice be sent out by registered mail, return receipt. There were no additional documents submitted to prove compliance with the lease. The notice was sent to the address of the landlord in the lease; Attn: Accounting Office.

On the next day of trial, October 5, 2015, the Petitioner continued with his cross-examination. The witness repeated and reiterated her claims about the mailing. The witness continued to state that she had no knowledge of the mailing address for the new owner, notwithstanding testimony to the contrary that all tenants in the building were notified by hand delivery under the door, affixed to the door and also by regular mail.

She also stated that she did not pay her monthly rent by mail because the manager had always picked up the rent from the store, and collection of the rent had never been an issue with prior management nor with this landlord.

She testified that the renovations cost in excess of \$250,000.00; she claimed that she had checks to prove the payments for the renovations but she did not have the checks available in court because they were with her architect. In addition to the above sum, she also testified that it cost her \$16,900.00 to change the décor from the buffet style to the restaurant bar style.

During the time that she has occupied the property, there have been water leaks from the hood in the kitchen and in the bathroom and had informed the manager about these leaks. In addition, there were broken tiles in the property on the floor and walls. She testified that she did the renovations in 2012 and at that time the water was still leaking into the kitchen area and the floors were broken up. The improvements that she concluded in 2012 involve the replacement of the electrical system, the replacement of floor tiles, and new lighting. In addition, they installed a new counter and changed the chairs and tables throughout the restaurant. There were no improvements that have been conducted within the year prior to the date of the trial. The witness also stated that at another time there were broken floor tiles and broken ceiling tiles and she had to sheetrock to cover the leaks in or about November or December of 2014.

On redirect, the witness further testified that her rent was not \$3,646.52 as proffered by the Petitioner, but was \$3,150.00. The witness denied having seen Petitioner's Exhibit "6", a copy of the assignment and assumption of lease, rent and security deposit. She also denied ever seeing Petitioner's Exhibit "4," the notice to the tenants of the change in ownership of the property, dated October 3, 2014. There was no further relevant testimony from this witness and the case was adjourned to October 6 for a continued trial.

On October 6, 2015, the Respondent called **OLABANJI AWOSIKA** as a witness in their *case-in-chief*. The witness is a licensed architect and obtained his license in 1991.

The witness testified that he was retained by the Respondents about five years ago to convert the commercial space to a restaurant and he submitted plans to the Department of Buildings on their behalf. His described the property as an abandoned vacant commercial space in bad condition.

He had to measure the entire property, draft plans, and design the restaurant. Additionally, he had to draft plans of the equipment location; additionally, he was required to design and plan the installation of the commercial kitchen equipment. Additionally, he was responsible for the plans for the HVAC system, including the ventilation system. He charged and collected \$10,000.00 for his work. The application was for a Type 2 alteration that did not require the issuance of a new certificate of occupancy, but a letter of no objection or conformity. The Respondent admitted into evidence Respondent's Exhibits "E-1" through "E-4," the architectural plans for the subject premises. Additionally, the Respondent admitted into evidence Respondent's Exhibit "F," the seal and signature of the architect and then Respondent's Exhibit "E-1", a specific site plan, the location of the doors and windows, plumbing and gas systems, and new light fixtures.

The witness further testified about the different architectural plans, Respondent's Exhibits "E-1" through "E-4" contained one of three changes to the plumbing and gas risers and was a cross-section of the building. Respondent's Exhibits "E-2", an amendment to the plumbing and gas risers. The architect then went through the respective floor plans starting with the cellar; the cellar was for storage for the commercial store; the first floor including the front entrance door, the seating arrangements, the commercial kitchen, new interior and

exterior doors, countertop space, ventilation, HVAC and a roof system. It was the whole building except the apartments above. The plans also contained a handicap detailed bathroom.

During the completion of the application, the architect is required to provide an estimated cost of the restoration of the property. He acknowledged that the costs are purely speculative, because it depends on the construction company and other factors, he estimated that the costs for this renovation around \$128,000.00 excluding the equipment.

On cross-examination, the most significant testimony by the architect was that the plans were not a final job, and he could not confirm whether the job had ever been signed-off by the DOB. In addition, he was uncertain about whether or not any of the permits on the job were amended and/or updated. He testified that the sign-off is ultimately the responsibility of the contractor and not the architect.

The Respondent next called **WAZI ULLAH**, one of the Respondents in this proceeding.

The witness testified that he is one of the named Respondents and a commercial tenant in the demised premises. He wanted to open an Indian restaurant in 2010 and he went to this property for inspection. He said that the conditions were filthy. The tiles were missing from the floor and the walls, and it had formerly been a meat shop.

He retained an architect, and the architect submitted plans to construct the restaurant. He had to renovate the entire property. He testified that they had to replace all the beams and the girders. He worked with the architect as well as the contractor.

The general contractor was named Hoque. Hoque hired the subcontractors including plumbers and electricians and he coordinated the job at the subject property. Respondent's Exhibit "C" was admitted into evidence which is the contract prepared by Hoque. The contractor performed the services stated in Respondent's Exhibit "C" in 2010 and 2011. The contractor started the work in about March or April of 2010 and completed the work at the end of 2011.

The restaurant was opened in November 2011, and was a buffet. They were only charging \$5.00 for the buffet. Since the buffet was not profitable, he and his wife changed the restaurant to a la carte and the name was changed to Bombay Canay. This second make over took about a month and a half to complete.

On the following day of October 7, 2016, **WAZI ULLAH** continued this testimony. He testified that the following sums had been paid for construction: \$35,917.00 paid in or about May 22, 2010 and an additional \$15,770.00 was paid on an unspecified date, an additional \$6,000.00 was paid on another unspecified date. Those costs included the construction, plumbing and electric and the installation of a filter or a feeder. Three people worked on the job.

He was responsible for getting the contractors and he referred to him as Mr. Jerry. He gutted the place in about March or April 2010, and started right way. Subsequently, in or about May 22, 2010, the plumbing and the filter were installed in the property. Shortly after that, unfortunately, the business sustained damages in Hurricane Sandy and additional work was required in the restaurant. He stated that all his records, contracts, receipts, and other papers were lost due to water damage from the storm. He said that during Hurricane Sandy, one of the water pipes erupted and he had to pump out all the water. The same water pipe broke again. He testified that he lost all his money for the work that had been recently done prior to that time. He also made more improvements, including the installation of a new countertop, new tiles on the floor and made repairs to the roof. At the same time, he purchased new furniture for the restaurant, such as new chairs and new sofas.

The witness also testified that the ceiling required repairs due to water leaks. In addition to the above, the witness testified that the restaurant required painting and plaster-work throughout. The restaurant required electrical work and new lighting fixtures in 2014. It cost between \$8,000.00 to \$10,000.00.

The witness stated that their goal was to improve the store so that they could increase the number of customers. **WAZI ULLAH** also stated that the reason that he and his wife invested so much in the space was because he knew that he had another ten years remaining on the lease. He stated that Respondent's "D" was their notice to the landlord of their intentions to renew the lease.