

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
BARBARA R. KAPNICK

PRESENT:

Index Number : 116530/2004

ZONI LANGUAGE CENTER

vs

22 WEST 34TH STREET LLC

Sequence Number : 003

PARTIAL SUMMARY JUDGMENT

PART 12

INDEX NO. 116530/04

MOTION DATE _____

MOTION SEQ. NO. 003

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

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

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

FILED

OCT 04 2006

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9/29/06

**BARBARA R. KAPNICK S.C.
J.J.C.**

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

**Supreme Court
60 Centre Street, New York, New York 10007**

Special Referee Clerk, Room 119

Information Sheet

To be attached to a copy of order and filed in Room 119
Special Referee Selection Program

Date: Sept 29 , 2006

Title of Action: Zoni Language Center, Inc. v. 22 West 34th Street, LLC.

Index No. 116530/04

Issues: See order dated: Sept 29, 2006

Estimated Length of Time Needed for Hearing: 1 day

Attorneys

Names, Address and Telephone Numbers

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 12

-----X
ZONI LANGUAGE CENTER, INC.,

Plaintiff,

-against-

22 WEST 34th STREET LLC,

Defendant.
-----X

BARBARA R. KAPNICK, J.:

DECISION/ORDER

Index No. 116530/04

Motion Seq. No. 003

In this action, the parties seek a determination from this Court on the issue of whether or not an 'awning' can constitute a 'marquee'.

Plaintiff Zoni Language Center, Inc. is the tenant of the third and sixth floors of commercial premises located at 22 West 34th Street, which is owned by the defendant 22 West 34th Street LLC.

The fourth cause of action of plaintiff's Amended Complaint alleges that defendant has refused and neglected to execute and return an owner's authorization to enable plaintiff to obtain a permit from the New York City Department of Buildings to install and maintain an "awning, marquee and banner" on the 33rd Street side of the building, and that said refusal and neglect is "unjustified, unreasonable and in violation of its obligations, express and implied, under the Third Floor Lease."

Plaintiff claims it has sent copies of the application and an engineer's drawing of the proposed awning to defendant and requested defendant to sign and return the application, but that defendant has ignored its requests.

Plaintiff now moves for an order granting partial summary judgment on its fourth cause of action and directing an immediate trial to determine the amount of its damages.

Plaintiff's Lease for the third floor provides, in relevant part, as follows:

It is understood and agreed that the tenant shall have the right to install a BANNER and marquee on 33th [sic.] Street side provided that such installation complies with any and all rules, laws and regulations of any and all governmental agencies or other entities having jurisdiction thereof.¹

Defendant thus does not dispute that plaintiff has a right under the Lease to install a 'banner' on the 33rd Street side of the building. However, defendant contends that plaintiff is seeking instead to install an 'awning' over the first and/or second floors of the 33rd Street side of the building which plaintiff does not rent from defendant. Defendant argues that plaintiff does not have a right under its Lease to install such an 'awning'.

¹ This text is found on a page of the Lease which also includes photographs of the existing banner and structure which the parties intended to be covered by said provision.

Plaintiff contends that its proposed structure falls under the definition of a 'marquee', which the Lease expressly authorizes plaintiff to install.²

An "awning" is defined as "a rooflike shelter of canvas or other material extending over a doorway, from the top of a window, over a deck, etc., in order to provide protection, as from the sun" or "a shelter" (*Dictionary.com Unabridged [v 1.0.1]*); "[a] rooflike structure, often made of canvas or plastic, that serves as a shelter, as over a storefront, window, door, or deck" (*The American Heritage Dictionary of the English Language, Fourth Edition*); or "a canopy made of canvas to shelter people or things from rain or sun" (*WordNet 2.0*).

A "marquee" is defined as "a tall rooflike projection above a theater entrance, usually containing the name of a currently featured play or film and its stars" or a "rooflike shelter, as of glass, projecting above an outer door and over a sidewalk or a terrace" (*Dictionary.com Unabridged [v 1.0.1]*); "[a] rooflike structure, often bearing a signboard projecting over an entrance, as to a theater or hotel" (*The American Heritage Dictionary of the English Language, Fourth Edition*); or a "permanent canopy over an entrance of a hotel etc." (*WordNet 2.0*).

² Plaintiff allegedly maintained an awning on the 33rd Street side of the building for a number of years. Plaintiff contends that defendant never objected to the existence of the awning, but merely to the fact that the awning had been installed without the required permit.

This Court finds that the proposed shelter or structure which plaintiff seeks to install over the 33rd Street side entrance could meet the definition of either an "awning" or a "marquee". . . .

In fact, at least one authoritative source lists "marquee" as a synonym of "awning" (*Roget's New Millenium Thesaurus*, First Edition [v. 1.3.1]).

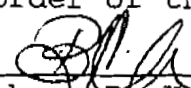
Accordingly, based on the papers submitted and the oral argument held on the record on May 3, 2006, this Court finds that defendant wrongfully withheld its consent to the installation of the proposed awning.

Plaintiff's motion for partial summary judgment on its fourth cause of action is, therefore, granted. The issue of the amount of plaintiff's damages is referred to a Special Referee to hear and report (or, upon Stipulation of Counsel, to hear and determine).

Plaintiff's counsel is directed to serve a copy of this order with notice of entry upon the Special Referee Clerk, who shall place this matter on the Part 50R calendar for referral to a Special Referee.

This constitutes the decision and order of this Court.

Date: September 29, 2006


Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK

FILED
09/04/2006
COUNTY CLERK'S OFFICE
NEW YORK