



B199-- Summons without notice, Supreme Court. personal or substituted service. 12 pt. type, 4-94

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09603900

Supreme Court of the State of New York  
County of New York

Index No.  
Date purchased 12/30/09

CHRISTIAN CASEY LLC,

Plaintiff(s) designate(s)  
NEW YORK  
County as the place of trial.

The basis of the venue is  
Plaintiff's principal office.

against Plaintiff(s)

Summons

475 FIFTH 09, LLC,

Plaintiff(s) reside(s) at  
1710 Broadway  
New York, New York 10019  
County of New York

FILED  
DEC 30 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

To the above named Defendant(s)

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney(s) within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated, December 30, 2009

JONATHAN D. DAVIS, P.C.  
Attorney(s) for Plaintiff

Defendant's address:  
475 FIFTH 09, LLC  
c/o The Corporation Trust Company  
Corporation Trust Center  
1209 Orange Street  
Wilmington, Delaware 19801  
(Registered Agent)

Office and Post Office Address  
99 Park Avenue, Suite 1600  
New York, New York 10016  
(212) 687-5464

AFFIDAVIT OF SERVICE

STATE OF NEW YORK, COUNTY OF
party herein, is over 18 years of age and resides at
That on at M., at
deponent served the within summons,

SS: The undersigned, being duly sworn, deposes and says; deponent is not a

defendant,

INDIVIDUAL

1. [ ]

by delivering a true copy of each to said defendant personally; deponent knew the person so served to be the person described as said defendant therein.

CORPORATION

2. [ ]

a corporation, by delivering thereat a true copy of each to personally, deponent knew said corporation so served to be the corporation described in said summons as said defendant and knew said individual to be thereof.

SUITABLE AGE PERSON

3. [ ]

by delivering thereat a true copy of each to a person of suitable age and discretion. Said premises is defendant's—actual place of business—dwelling place—usual place of abode—within the state.

AFFIXING TO DOOR, ETC.

4. [ ]

by affixing a true copy of each to the door of said premises, which is defendant's—actual place of business—dwelling place—usual place of abode—within the state. Deponent was unable, with due diligence to find defendant or a person of suitable age and discretion thereat, having called there

MAILING TO RESIDENCE USE WITH 3 OR 4

5A. [ ]

Within 20 days of such delivery or affixing, deponent enclosed a copy of same in a postpaid envelope properly addressed to defendant at defendant's last known residence, at and deposited said envelope in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State.

MAILING TO BUSINESS USE WITH 3 OR 4

5B. [ ]

Within 20 days of such delivery or affixing, deponent enclosed a copy of same in a first class postpaid envelope properly addressed to defendant at defendant's actual place of business, at in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State.

The envelope bore the legend "Personal and Confidential" and did not indicate on the outside thereof, by return address or otherwise, that the communication was from an attorney or concerned an action against the defendant.

DESCRIPTION USE WITH 1, 2, OR 3

[ ]

- Male, White Skin, Black Hair, White Hair, 14-20 Yrs., Under 5', Under 100 Lbs.
Female, Black Skin, Brown Hair, Balding, 21-35 Yrs., 5'0"-5'3", 100-130 Lbs.
Yellow Skin, Blonde Hair, Mustache, 36-50 Yrs., 5'4"-5'8", 131-160 Lbs.
Brown Skin, Gray Hair, Beard, 51-65 Yrs., 5'9"-6'0", 161-200 Lbs.
Red Skin, Red Hair, Glasses, Over 65 Yrs., Over 6', Over 200 Lbs.

Other identifying features:

Sworn to before me on

Print name beneath signature.

LICENSE NO.

Index-No.
Supreme Court of the State of New York
County of

Plaintiff(s)

against

Defendant(s)

Summons
ACTION NOT BASED UPON A
CONSUMER CREDIT TRANSACTION

Attorney(s) for Plaintiff(s)

Office, Post Office Address and Tel. No.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X  
CHRISTIAN CASEY LLC, :  
 : Index No.  
 : (Purchased: 12/30/09)  
 :  
 Plaintiff, :  
 :  
 -against- : COMPLAINT 09603900  
 :  
 475 FIFTH 09, LLC, :  
 :  
 Defendant. :  
-----X

Plaintiff Christian Casey LLC, by its attorneys, Jonathan D. Day, P.C., alleges for its complaint against Defendant 475 Fifth 09, LLC, as follows:

**PARTIES, JURISDICTION AND VENUE**

1. Plaintiff Christian Casey LLC ("CCL") is a limited liability company which is organized and existing under the laws of the State of New York. CCL maintains its principal office at 1710 Broadway, New York, New York.

2. Upon information and belief, Defendant 475 Fifth 09, LLC ("Defendant") is a foreign limited liability company, which is organized and existing under the laws of the State of Delaware.

3. Jurisdiction and venue are proper in this Court based on Plaintiff's principal office and because the acts and occurrences complained of herein occurred in the County of New York.

**Preliminary Statement**

4. By this action, Plaintiff seeks a declaratory judgment declaring that the commercial lease agreement, dated as of August 22, 2003, between Plaintiff and Defendant (as the successor-in-interest to 475 Fifth Avenue Limited Partnership) (the "Lease") was materially

**FILED**  
DEC 30 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

breached by Defendant, such that its purpose was defeated, entitling Plaintiff to rescission and discharge from any further liability or responsibility thereunder. Plaintiff also seeks damages for Defendant's breach of contract and breach of the duty of good faith and fair dealing of the Lease.

5. The subject of the Lease is a part of the ground floor of the multiple-story commercial building located at 475 Fifth Avenue, New York, New York (the "Building").

6. Plaintiff leases a portion of the Building's ground floor (the "Leasehold") for the purpose of operating its flagship store for the internationally-known apparel brand "Sean John," which was created by and is the signature clothing line of Sean "Diddy" Combs, the well-known music and entertainment impresario.

7. Since its establishment in 1998, the Sean John clothing line has grown from a street-smart solution to urban style to a world-class designer-level alternative, which includes suits, outerwear, fragrances and other popular wardrobe staples for men.

8. After four consecutive nominations, Mr. Combs was presented with the coveted CFDA Menswear Designer of the Year Award in 2004, beating out prominent designers Michael Kors and Ralph Lauren.

9. During the past several years, the Building has lost approximately 90% of its tenants and fallen into a state of disrepair. Upon information and belief, the previous Building's owner, 475 Fifth Avenue Limited Partnership, lost the Building in foreclosure to Defendant, which is an affiliate of Barclays Bank.

10. At Defendant's direction, in or about August 2006, sidewalk scaffolding was erected on two exposures of the Building, Fifth Avenue and East 41<sup>st</sup> Street. The scaffolding has remained intact to the present day, which is approximately three and one-half years since its erection.

11. Notwithstanding Plaintiff's repeated complaints to the prior owner and, more recently Defendant, concerning the scaffolding and its detrimental impact on Plaintiff's business, Defendant has failed to remove the scaffolding or to make any adjustments to mitigate the substantial harm Plaintiff has suffered and continues to suffer under the circumstances.

**FACTS COMMON TO ALL CAUSES OF ACTION**

12. On or about August 22, 2003, Plaintiff and Defendant's predecessor entered into the Lease for the Leasehold for a term of approximately twelve (12) years and nine (9) months. By its terms, the Lease terminates in May 2016.

13. The fixed annual rent for the Leasehold started at \$660,000.00 and has increased over the years. In the final term of the Lease, the fixed annual rent rises to \$913,594.16. In addition to fixed rent, Plaintiff is responsible for, among other things, the payment of utilities and real estate taxes.

14. After taking possession of the Leasehold, Plaintiff made substantial improvements to the Leasehold in order to operate its flagship store (the "Sean John Store") on Fifth Avenue, one of the most celebrated shopping destinations in the world.

15. In or about August 2004, Plaintiff began operations at the Sean John Store. A majority, if not all, of the store's business was expected to be derived from daily traffic on Fifth Avenue and its environs.

16. Situated across the street from the Sean John Store are the iconoclastic New York Public Library and highly populated Bryant Park, which is situated immediately behind the library. Both sites are popular New York City destinations. The Sean John Store is also central to numerous luxury brand shops and department stores along Fifth Avenue.

17. A critical feature of the Leasehold's layout is its expansive floor to ceiling ground floor display windows bounding Fifth Avenue and East 41<sup>st</sup> Street. Unobstructed views of the window displays was and continues to be a central component to enticing potential shoppers off the street and into the store to browse and buy merchandise.

18. The Fifth Avenue presence, coupled with compelling advertising and marketing campaigns, yielded promising results in the first two years of Plaintiff's operations at the Sean John Store, which revenues more than doubled during that period.

19. When the sidewalk scaffolding was erected it materially altered both exterior facades of the Sean John Store's corner location and substantially obstructed the view of the clothing and furnishings displayed in the ground floor windows. The materials used to construct the scaffolding criss-cross the windows in various places in order to support the overhead bridge. The scaffolding materially impairs a window shopper's view of the windows when standing in front of either window or at a distance. Only in the last four months, after repeated requests, did Defendant deign to permit Plaintiff to post signage on the scaffolding to enable passersby to know what business was occupying the corner location of the Building.

20. Since the erection of the scaffolding, the Sean John Store has experienced a steady decline in revenues that continues through the present day. Revenues have been cut approximately in half at the flagship store.

21. Paramount to the dramatic drop in sales is the drop in walk-in customers since the erection of the scaffolding, which substantially impaired the store's visibility.

22. Although the Lease permits the erection of scaffolding, it is subject to conditions and restrictions.

23. For example, Paragraph 13 of the Lease, which is contained in the Standard Form of Store Lease, as supplemented by Paragraph 13.3 of the Inserts, provides, in pertinent part, as follows:

Owner shall have the right at any time, without the same constituting an eviction and without incurring liability to Tenant therefore to change the arrangement and/or location of public entrances, passageways, doors, doorways, corridors, elevators, stairs, toilets, *or other public parts* of the building . . . so long as (upon completion upon any such change) Tenant's access to the demised premises, *or the visibility of the demised premises from the street is not materially impaired*. In connection with any work to be performed in the demised premises pursuant to this Article 13, *Landlord shall use commercially reasonable efforts to minimize the interference with the operation of Tenant's business in the demised premises* provided however, that nothing contained herein shall be deemed to require Landlord to perform such work on an overtime or premium pay basis . . . . (Italics added).

24. Furthermore, Paragraph 50(b) of the Rider to the Lease expressly provides as follows:

In the event Landlord, in connection with the performance of any work to the exterior of the Building, shall erect scaffolding along the exterior of the demised premises, Landlord agrees that:

\* \* \*

(iii) Subject to the applicable Legal Requirements, *Landlord will agree to allow Tenant to install on the portion of the scaffolding directly in front of the demised premises, temporary signage*, the design, color and appearance of which shall be subject to Landlord's approval, which approval shall not be unreasonably withheld or delayed; and

(iv) *such scaffolding shall be removed promptly* following completion of such work. (Italics added).

25. Defendant has failed and refused to undertake “commercially reasonable efforts to minimize the interference with the operation of” Plaintiff’s business, as required under the Lease, or to provide Plaintiff with information concerning the nature of the work pursued or the estimated date of its completion.

26. For the sixty-five (65) months that Plaintiff has occupied the Leasehold, it has endured approximately forty-one (41) months with the scaffolding present, which is more than 63% of Plaintiff’s tenancy in the Building.

27. Defendant has failed and refused to comply with the express lease condition that scaffolding shall be removed “promptly,” as Defendant has blatantly failed to either initiate or otherwise pursue to completion the alleged building work in a commercially reasonable manner.

**FIRST CAUSE OF ACTION**  
**(Declaratory Judgment)**

28. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 27 as if fully set forth at length herein.

29. An actual and justiciable controversy presently exists between Plaintiff, on the one hand, and Defendant, on the other hand, such that Plaintiff requests that this Court declare that Defendant has materially breached the Lease substantially defeating the purpose of the Lease, entitling Plaintiff to rescind the Lease and be discharged from any and all further obligations or responsibilities thereunder.

30. Such a declaration by this Court is necessary so that Plaintiff’s rights and responsibilities under the Lease can be determined.

31. Plaintiff has no adequate remedy at law.

**SECOND CAUSE OF ACTION**  
**(Rescission)**

32. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 31 as if fully set forth at length herein.

33. Defendant substantially breached the Lease by, among other things, failing and refusing to engage in “commercially reasonable efforts to minimize the interference with the operation of” Plaintiff’s business, having constructed scaffolding that has become a permanent fixture to the Building, which materially impairs Plaintiff’s ability to conduct business at the Sean John Store.

34. Since the erection of the scaffolding approximately three and one-half years ago, Plaintiff’s business has suffered substantial business injury, including, without limitation, lost revenue and a dramatic decline in store traffic and sales.

35. Defendant has willfully failed and refused to honor the terms of the Lease, despite having the ability and power to do so.

36. Defendant has deprived and continues to deprive Plaintiff of its rights and benefits under the Lease.

37. Defendant’s material breaches of the Lease substantially defeat the purpose of the Lease, excusing Plaintiff from any further performance thereunder, and entitling Defendant to rescind the Lease and be discharged from any liability thereunder.

38. Plaintiff has no adequate remedy at law.

39. By reason of the foregoing, the Lease should be rescinded and Plaintiff should be discharged from any further obligations or responsibilities thereunder.

**THIRD CAUSE OF ACTION**  
**(Breach of Contract)**

40. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 39 as if fully set forth at length herein.

41. Defendant has materially breached the Lease.

42. By reason of Defendants' breaches of the Lease, Plaintiff has sustained damages in an amount to be determined at trial, but not less than \$2,500,000.

**FOURTH CAUSE OF ACTION**  
**(Breach of Duty of Good Faith and Fair Dealing)**

43. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 42 as if fully set forth at length herein.

44. Defendant has breached the duty of good faith and fair dealing under the Lease by, among other things, failing to perform whatever work prompted the erection of the scaffolding in a commercially reasonable manner.

45. Instead, Defendant has permitted the scaffolding to persist at the Building for approximately three and one-half years, constituting more than 63% of Plaintiff's tenancy in the Building.

46. Defendant has unreasonably refused to provide Plaintiff with information that would inform Plaintiff when the scaffolding will be removed, if at all, and what work is being performed or will be performed on the Building.

47. Defendant's breach of the covenant of good faith and fair dealing has directly caused Plaintiff substantial business losses and injuries, including, without limitation, lost revenue and a dramatic decline in store traffic and sales.

48. By reason of the foregoing, Plaintiff has sustained damages in an amount to be determined at trial, but not less than \$2,500,000.

WHEREFORE, Plaintiff respectfully requests that the Court grant the following relief:

(a) On the First Cause of Action, a declaratory judgment in Plaintiff's favor declaring Defendant in material breach of the Lease, substantially defeating the purpose of the Lease, and entitling Plaintiff to rescind the Lease and be discharged from any and all further obligations or responsibilities thereunder;

(b) On the Second Cause of Action, rescission of the Lease and Plaintiff's discharge from any further obligations or responsibilities thereunder;

(c) On the Third Cause of Action, damages in favor of Plaintiff in an amount to be determined at trial, but not less than \$2,500,000.

(d) On the Fourth Cause of Action, damages in favor of Plaintiff in an amount to be determined at trial, but not less than \$2,500,000.

(e) Interest, costs and expenses of this action, including reasonable attorney's fees, as provided by contract, statute or otherwise; and

(f) Such other and further relief as this Court deems just and proper.

Dated: December 29, 2009  
New York, New York

JONATHAN D. DAVIS, P.C.

By: 

Jonathan D. Davis  
99 Park Avenue, Suite 1600  
New York, New York 10016  
(212) 687-5464  
Attorneys for Plaintiff Christian Casey LLC

INDEX NO.

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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CHRISTIAN CASEY LLC,

Plaintiff,

- against -

475 FIFTH 09, LLC,

Defendant.

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## COMPLAINT

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**JONATHAN D. DAVIS, P.C.**

Attorneys for Plaintiff  
99 PARK AVENUE  
SUITE 1600  
NEW YORK, N.Y. 10016-1503  
Telephone (212) 687-5464

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Service of a copy of the within

is hereby admitted

Attorney(s) for Plaintiff