Monetti's Food Corp. v 400 W. 42 St. Realty, LLC
2009 NY Slip Op 32640(U)
November 10, 2009
Supreme Court, New York County
Docket Number: 112127/2009
Judge: Walter B. Tolub
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SCANNED ON 11/12/2009

[* 1]

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

PRESENT: WALTER B. TOLUB, Justice

PART 15

MONETTI'S FOOD CORP.,

Plaintiff,

-v-

400 WEST 42nd REALTY, LLC

Defendant.

INDEX NO. 112127/2009

MOTION DATE 10/16/09

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the underlying memorandum decision.

FILED

NOV 12 2009

COUNTY CLERK'S OFFICE

Dated: 11/10/09

WALTER B. TOLUB, J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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MONETTI's FOOD CORP.,

Plaintiff,

Index No.112127/2009
Mtn. Seq.001

-against-

400 WEST 42nd STREET REALTY, LLC,

Defendant.

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WALTER B. TOLUB, J.:

This is Plaintiff's motion for a preliminary injunction enjoining Defendant from beginning summary proceedings to evict Plaintiff (CPLR §6311).

Facts

On or about August 31, 2005, Plaintiff entered into a 10 year lease (Lease), commencing on September 1, 2005, with non-party 400 West 42nd Street Realty Associates, LP [Defendant's predecessor in interest "Landlord" or "Defendant"] for commercial space[1] at 400 West 42nd Street, New York, New York (Premises) (Plaintiff's Ex. A).

Paragraph 68 of the Lease provides:

> Demolition The Owner reserves the right to terminate this lease and the term thereof at anytime in the event the Owner shall decide to demolish the entire Building or rebuild and construct a new building. The Owner shall give no less than twelve (12) months notice in writing to the Tenant by certified mail addressed to the Tenant at the demised premises of the Owner's intention to so

[1]Plaintiff opened a Pizza Restaurant at the Premises.

> terminate this Lease and the term thereof shall cause, terminate and end at the expiration of twelve (12) months from the day when such notice shall have been mailed as if such date was the date originally fixed in this Lease for termination of the term. The date on the receipt issued by the United States Postal Service for such Certified mailing shall be conclusive evidence of the date of such mailing. In the event such notice of intent to demolish is delivered, Owner may give notice of extension of not less than sixty (60) days in the same manner as notice of termination. In the event Owner exercises the right to terminate pursuant to this paragraph, Owner shall pay Tenant Tenant's remaining unamortized cost of construction of the store facility as of the date of termination. For the purpose of this paragraph, tenant's cost of construction shall not exceed $125,000 and shall be amortized on a straight line basis over a period of five (5) years from the date of this Lease. The Owner may take possession of th demised premises and every part thereof either by force, by summary or other legal proceedings, or otherwise, and have and enjoy the said premises as the Owner's former estate, free, clear and discharged of this Lease and of all rights of the Tenant hereunder. In the event that Tenant holds over beyond the date on which the Lease shall terminate by operation of this paragraph, the daily use and occupancy tp be paid by the occupant during such period o holdover shall equal $1,000.00.

(Plaintiff's Ex. 1).

Pursuant to the terms of the Lease, on August 25, 2009, Landlord served a notice of termination upon the Tenant (Notice). Plaintiff argues that the Notice is defective for reasons including; (1) the Notice state that payment owed is $27,083.33 but the check accompanying the Notice was $24,999.99; (2) the

calculation for the amount owed to Plaintiff is not included in the Notice; (3) the amount owed to Plaintiff is $50,342.46; (4) the Landlord did not provide plans for what will be done with the property; (5) Landlord fails to set forth the financial ability to complete a project on the property; (6) the notice was signed by entities that are not authorized to do business in New York; and (7) the property sought to be recovered is not sufficiently described in the Notice.

Plaintiff then commenced the underlying action seeking a declaratory judgment that the Notice is void and seeking a permanent injunction enjoining the Landlord from commencing proceedings to recover the premises.

By this motion, Plaintiff seeks an order preliminarily enjoining the Landlord from taking any action to recover the Premises until the underlying action is decided.

Discussion

At the outset, the Court notes that"[l]ease interpretation is subject to the same rules of construction as are applicable to other agreements" (George Backer Management Corp. v. Acme Quilting Co., Inc. 46 N.Y.2d 211 [1978]). Unless grounds exist to rescind or reform the lease, the rights and obligations of the parties are determined by reference to the instrument (id.).

Here, it is clear that the Lease permits the Landlord to terminate the tenancy with 12 months notice, when the termination

is because of demolition or rebuilding (Plaintiff's Ex. 1 ¶68). Along with termination, the Lease provides that the landlord will compensate Plaintiff by paying the cost of construction which "shall not exceed $125,000 and shall be amortized on a straight line basis over a period of five (5) years from the date of this Lease." (Id.).

Plaintiff argues that despite this provision in the Lease, the Landlord may not terminate the tenancy and should be enjoined from doing so because the Notice was defective.

To succeed on a preliminary injunction motion, plaintiff must show; (1) a probability of success on the merits of an underlying action; (2) a danger of irreparable injury if an injunction is not issued; and (3) a balancing of the equities in the plaintiff's favor (Barr, Atlman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing 2006] §17:111 *citing* Aetna Ins. Co. v. Capasso, 75 NY2d 860 [1990]).

"To the extent that notice is a material issue in this or similar matters, this Court takes the position that the appropriate standard for assessment of the adequacy of notice is one of reasonableness in view of all attendant circumstances." (Hughes v. Lennox Hill Hospital, 226 AD2d 6, 17 [1st Dept 1996]).

Here, the Notice as a whole, sufficiently and adequately advises Plaintiff of the circumstances and enables Plaintiff to frame a defense [i.e. that the amount Landlord paid Plaintiff is

insufficient pursuant to the Lease] (Rascoff/Zsyblat Organization, Inc., et al., v. Directors Guild of America, Inc., 297 A.D.2d 241 [1st dept 2002]; Jewish Theol. Seminary of Am. v Fitzer, 258 AD2d 337, 338).

Landlord's twelve month Notice provides that the Premises occupied by Monetti's Food Corp., is being terminated pursuant to Article 68 of the Lease because the Landlord intends to demolish or rebuild the building. (Plaintiff's Ex. 3). The Notice further provides that a check in the amount of $27,083.33 is enclosed pursuant to calculations based on Article 68 of the Lease (id.). The Court does note that the amount stated in the Notice is not the amount the check was made for.

The Lease provides that "[i]n the event Owner exercises the right to terminate pursuant to this paragraph, Owner shall pay Tenant Tenant's remaining unamortized cost of construction of the store facility as of the date of termination. For the purpose of this paragraph, tenant's cost of construction shall not exceed $125,000 and shall be amortized on a straight line basis over a period of five (5) years from the date of this Lease." (Plaintiff's Ex. 1). Although plaintiff argues that the calculation should be based on the time it received the Notice to terminate, Defendant is only obligated to pay from the date of the termination of the Lease.

The lease was entered into on August 31, 2005 but the Lease

term commenced on September 1, 2005. The Lease terminated on August 31, 2009, a period of 48 months.

Taking the maximum compensable costs of construction under the Lease [$125,000] and amortizing it over five years [60 months] yield a maximum monthly payment of $2,083.33 [125,000/60]. From the new termination date of the lease [August 31, 2009], 12 months would remain on the first five years on the original termination date of the Lease [August 31, 2010]. As such, Plaintiff is entitled to $24,999.99 [$2,083.33 X 12 = 24,999.99].

The subject termination clause is not ambiguous. The plain language of the Demolition provision of the governing termination clause entitles the Landlord to issue a notice of termination once "the Owner shall decide to demolish the entire Building or rebuild and construct a new building" (Plaintiff's Ex. 1 ¶68) and requires nothing more [contrary to Plaintiff's argument that notice was defective, in part because no financing documentation or proofs of intent to demolish were included in the Notice].

Plaintiff has stated no basis why the notice served by Landlord should be regarded as unreasonable or, alternatively, should be subject to strict construction as a matter of equity. Therefore, there is no merit to Plaintiff's allegation that it has not been given reasonable notice of the grounds upon which the proceeding is based and no reason to grant injunctive relief.

Accordingly, it is

ORDERED that Plaintiff's motion for a preliminary injunction is denied.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 11/10/09

HON. WALTER B. TOLUB, J.S.C.

FILED