Rosen-Paramounty Glass Co., Inc. v Abner Props. Co.
2014 NY Slip Op 30133(U)
January 6, 2014
Supreme Court, New York County
Docket Number: 103142/2012
Judge: Lucy Billings
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LUCY BILLINGS J.S.C. PART 46
Justice

Index Number : 103142/2012
ROSEN-PARAMOUNT GLASS
vs.
ABNER PROPERTIES COMPANY
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to/for Summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1
Answering Affidavits — Exhibits _____ | No(s). 2
Replying Affidavits _____ | No(s). 3

Upon the foregoing papers, it is ordered that ~~this motion is~~ :

The court denies defendant's motion for summary judgment pursuant to the accompanying decision. C.P.L.R. §§ 3001, 3212(b), 5015(a).

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

Dated: 1/6/14

Lucy Billings, J.S.C.
LUCY BILLINGS J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
----------x

ROSEN-PARAMOUNT GLASS CO., INC., Index No. 103142/2012

Plaintiff

- against - DECISION AND ORDER

ABNER PROPERTIES COMPANY,

Defendant

----------x

LUCY BILLINGS, J.S.C.:

Defendant landlord moves (1) for summary judgment dismissing plaintiff tenant's first claim for injunctive relief and (2) for a declaratory judgment on plaintiff's second claim for declaratory relief. C.P.L.R. §§ 3001, 3212(b). In the second claim, plaintiff seeks a declaratory judgment that use of the leased premises for storage of food and beverages by plaintiff's subtenant does not violate the use provision in the parties' lease. Defendant seeks a declaratory judgment that use of the premises for storage of food and beverages does violate that lease provision.

I. INJUNCTIVE RELIEF

In a decision dated July 18, 2012, the court granted plaintiff's motion for a preliminary injunction to the extent of staying the expiration of the cure period specified in defendant's notice dated June 12, 2012, and restraining defendant from taking any action based on plaintiff's failure to cure this violation alleged by defendant and specified in the notice.

C.P.L.R. §§ 6301, 6312(a). Since that decision, no disclosure has revealed new facts, nor has defendant presented any further admissible evidence or authority that would change that decision. Although the Property Manager employed by defendant's managing agent attests to other tenants' complaints regarding the subtenant's transportation of food and beverages through the building lobby, these complaints are hearsay. In any event, neither the subtenant's excessive use of the lobby, nor its excessive use of the freight elevator or creation of vermin infestation to which the Property Manager also attests is the ground for the alleged default under the lease. Defendant has not acted on the July 2012 decision's invitation to claim that the subtenant's use violates another lease provision.

Nor has defendant shown that plaintiff no longer needs the limited injunctive relief previously sought and granted or no longer is entitled to that relief. Plaintiff has shown it is ready, willing, and able to cure the alleged lease violation if the court determines that the premises' use does violate the lease's use provision, as plaintiff has prepared a notice to cure that mirrors defendant's notice, for service on the subtenant, to be followed by a summary eviction proceeding if the subtenant fails to cure its offending conduct. Plaintiff has provided an undertaking of $75,000, which defendant agreed was adequate to secure it for potential damages it might incur due to this injunction. C.P.L.R. § 6312(b).

While the more permanent injunction sought by the

complaint's first claim may be unnecessary as long as the current injunction remains in place, since the current injunction is temporary, plaintiff's claim for permanent relief is not moot. Upon defendant's motion for summary judgment, defendant bears the burden to show that damages would provide an adequate remedy if defendant were to proceed to evict plaintiff based on its failure to cure the alleged lease violation. See Regini v. Board of Mgrs. of Loft Space Condominium, 107 A.D.3d 496, 497 (1st Dep't 2013); Yetnikoff v. Mascardo, 63 A.D.3d 473, 475 (1st Dep't 2009); 91st St. Co. v. Robinson, 242 A.D.2d 502 (1997). Although defendant points out that plaintiff would have the opportunity to defend against the alleged violation in an eviction proceeding in the New York City Civil Court, the lease does not provide for the tenant's recovery of its attorneys' fees and expenses for such a successful defense. In the meantime, moreover, the Civil Court is not empowered to grant the injunctive relief sought here, against defendant acting on plaintiff's failure to cure the lease violation alleged in defendant's notice. N.Y.C. Civ. Ct. Act §§ 203-204. Tener v. Cremer, 89 A.D.3d 75, 83 (1st Dep't 2011); Bury v. CIGNA Healthcare of N.Y., 254 A.D.2d 229 (1st Dep't 1998); W.H.P. 20 v. Oktagon Corp., 251 A.D.2d 58, 59 (1st Dep't 1998).

II. DECLARATORY RELIEF

Most significantly, as plaintiff claims, its subtenant's use of the leased premises that defendant claims violates the lease does not violate the lease provision defendant relies on. As the

July 2012 decision articulates, the lease allows the leased premises to be used "for office, showroom, warehouse and polishing and installing glass mirrors and related work and items." Aff. of Debbie Freeman Ex. A ¶ 2. "Warehouse," "polishing and installing," and "related work and items" are separate nouns and objects of the preposition "for." None of the words preceding or following "warehouse" qualifies that term to limit how the premises are used for a warehouse, such as what may be stored in the premises if used as a warehouse. If only glass mirrors and related items were permitted to be stored in the premises, the lease would provide, for example, "for . . . warehousing, polishing, and installing glass mirrors and related items."

Defendant insists that in construing this unambiguous lease provision the court consider the parties' intention not to allow storage of food or beverages in the premises in view of plaintiff's business relating to glass mirrors. Parol evidence is not admissible to vary the terms of the parties' unambiguous written contract, Schron v. Troutman Sanders LLP, 20 N.Y.3d 430, 436 (2013); South Rd. Assoc., LLC v. International Bus. Machs. Corp., 4 N.Y.3d 272, 278 (2005); R/S Assoc. v. New York Job Dev. Auth., 98 N.Y.2d 29, 32-33 (2002); Unclaimed Prop. Recovery Serv., Inc. v. UBS Paine Webber, Inc., 58 A.D.3d 526 (1st Dep't 2009), nor to imply provisions not stated in that contract. Reiss v. Financial Performance Corp., 97 N.Y.2d 195, 199 (2001); Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P., 60

A.D.3d 61, 66 (1st Dep't 2008). Were the court to consider such parol evidence as defendant suggests, however, the only further evidence is from plaintiff's witness that, when defendant undisputedly consented to the subtenant, defendant was fully aware that the subtenant planned to use the basement as storage space for the subtenant's nearby restaurant. Thus, insofar as defendant urges the court, in interpreting the lease, to look at the parties' intent, plaintiff's evidence weighs in favor of the lease's provision for use of the premises as a warehouse.

Consequently, defendant has not carried its burden to show that plaintiff has violated the lease terms on which defendant relies and that plaintiff is not entitled to the declaratory relief sought by the second claim. Were the court to deny plaintiff relief on this claim, then defendant might be entitled to a declaratory judgment declaring the parties' rights and obligations in defendant's favor. C.P.L.R. § 3001; 200 Genesee St. Corp. v. City of Utica, 6 N.Y.3d 761, 762 (2006); Savik, Murray & Aurora Constr. Mgt. Co., LLC v. ITT Hartford Ins. Group, 86 A.D.3d 490, 494 (1st Dep't 2011). Here, that relief is not warranted, because, as set forth above, the lease unambiguously provides for the leased premises' use as a warehouse, without limitation on what may be warehoused or stored, except insofar as the use may violate lease provisions other than the use provision at ¶ 2 of the lease.

III. CONCLUSION

For all these reasons, the court denies defendant's motion for summary judgment dismissing plaintiff's first claim for injunctive relief and vacating the injunction granted in the order dated July 18, 2012. C.P.L.R. §§ 3212(b), 5015(a). The court also denies defendant's motion for a declaratory judgment on plaintiff's second claim in defendant's favor, that plaintiff is violating the parties' lease through a subtenant's use of the leased premises to store food and beverages. C.P.L.R. § 3001. In sum, the lease permits that use of the premises, as a warehouse for storage, without limitation on the materials that may be stored, unless the storage violates a lease provision other than the use provision. The court will determine plaintiff's entitlement to attorney's fees and expenses depending on which party prevails at the conclusion of this action.

DATED: January 6, 2014

LUCY BILLINGS, J.S.C.