45th Street BLT Rest. LLC v Waterscape Resort II, LLC
2015 NY Slip Op 31694(U)
September 4, 2015
Supreme Court, New York County
Docket Number: 156841/15
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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45th STREET BLT RESTAURANT LLC,

Plaintiff,

-against-

WATERSCAPE RESORT II, LLC,

Defendant.

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Index No. 156841/15

Motion seq. no. 001

DECISION AND ORDER

BARBARA JAFFE, J.S.C.:

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By order to show cause, plaintiff-tenant moves for a temporary restraining order and preliminary injunction tolling and enjoining the running of the cure period set forth in a notice to cure dated June 25, 2015, and enjoining defendant-landlord from terminating the lease based on the notice and/or otherwise commencing eviction proceedings pending the determination of the action, and permitting tenant to amend the complaint. Landlord opposes.

I. BACKGROUND

By lease dated January 1, 2011, tenant leased from landlord commercial unit 3 in the building located at 70 West 45th Street in Manhattan, to be operated as a restaurant; the building also contains a hotel and condominium residences. The lease commenced on March 1, 2011 for a 15-year term with tenant having the option of two additional five-year extensions. (NYSCEF 3).

Pursuant to Article 53A of the lease, tenant agreed that neither the lease nor the premises

would be assigned, transferred, or permitted to be used or occupied by anyone other than tenant, or be sublet, without the landlord's prior written consent. However, landlord's consent to an assignment or sublet is not required if the premises are sublet to an "affiliate controlled by, under common control with or controlling tenant." (*Id.*).

Article 43.A of the lease requires tenant to use a portion of the premises solely for the operation of a restaurant with a bar. Articles 6 and 54 require tenant to comply with all laws, orders, and regulations, and to give landlord notice of any notices tenant receives of the violation of any law or requirement of any public authority with respect to the premises. (*Id.*).

By notice dated June 25, 2015, landlord notified tenant that it had violated and continues to violate the lease as follows:

(1) by entering into a sublease on April 25, 2013 with an entity called "Restaurant at Cassa NY LLC" (Restaurant at Cassa) without landlord's consent as required by Article 53A of the lease; and

(2) by causing or permitting the operation of a bar at the premises by an entity whose liquor license has apparently expired in violation of Articles 6, 43.A, and 54 of the lease.

Landlord gave tenant 15 days to cure its defaults. (NYSCEF 3).

By affidavit dated July 7, 2015, Salim Chakalo, a member of tenant, denies that tenant has violated the lease, and asserts that "Cassa NY Restaurant LLC" (Cassa) is an affiliate owned by tenant which, among other things, handles insurance, payroll, and other business aspects of tenant's restaurant, Butter, and that in any event, tenant can and is able to transfer anything in Cassa's name into tenant's name. He submits a copy of an Amended and Restated Operating Agreement for Cassa dated April 26, 2013, in which Cassa's purpose is defined as being organized to "acquire, invest in, develop, own, operate, rent, lease, assign, transfer, dispose of,

develop or purchase, construct or renovate, maintain and operate a food restaurant and bar" at the premises to be operated under a trade name as set forth in a forthcoming license agreement. Cassa was to be jointly managed by Carlton Hospitality Management LLC and Butter Management LLC (BM), and its members were Restaurant Service America LLC (RSA) with a 77.68 percent interest and BM with a 22.32 percent interest, as set forth on Exhibit A. (NYSCEF 7).

Chakalo also submits an Amended and Restated Operating Agreement for RSA, which states that RSA was organized pursuant to Articles of Organization filed with the New York Department of State on April 17, 2013, and that its purpose is to acquire, report on, invest in, develop, construct, own, operate, rent, lease, assign, transfer and sell restaurants and various entities and interests in restaurants, including the restaurant to be located at the premises. Chakalo was appointed manager of RSA, and tenant was listed as the sole member of RSA with a 100 percent interest. (*Id.*).

Chakalo also asserts that landlord has prevented tenant from renewing its liquor license by failing to obtain a new certificate of occupancy for the building after June 9, 2015 when the prior certificate expired. Nonetheless, tenant submitted an application for a new liquor license and was issued a new license in July 2015. (*Id.*).

In response to a subpoena issued by landlord to BM in August 2015, by affidavit dated August 14, 2015, Jaqueline Akiva states that she is a member of BM, that BM is a trade name licensed to Cassa and Restaurant at Cassa and used in connection with the operation of a restaurant in landlord's premises. She attests to the authenticity of the following:

(1) A sublease dated April 25, 2013 between plaintiff as sublandlord and Restaurant

at Cassa as subtenant, in which the leased premises is defined as all of the premises demised by the overlease between tenant and landlord, and provides that the sublease is subject to overlandlord's consent and that sublandlord shall request the same;

(2) The same Amended and Restated Operating Agreement for Cassa, dated April 16, 2013, as submitted by tenant, except that Exhibit A, which contains the list of members, shows RSA and BM as each being 50 percent members;

(3) A 2014 tax Partnership Form 1065, Schedule K-1, from Cassa to Butter, showing that Cassa and BM are 50 percent partners in Cassa;

(4) An unsigned and undated Option Agreement with Warranties, between BM, RSA, and Cassa, which provides that BM owns a membership, capital and profits interest in Cassa, and that BM is assigning all right, title and interest it has in its entire member interest to the other member, RSA,

(3) A Restaurant Managing Agreement dated February 2013 between BM and Carlton collectively as manager and Cassa as owner/operator/manager, whereby Cassa transferred its right to manage the restaurant on the premises to Butter and Carlton;

(4) An unsigned letter dated December 12, 2013, from China Grill Management, Inc. and Butter, confirming that China Grill agrees that it has consulted and will continue to consult on the operation of the restaurant on behalf of Butter; and

(5) An undated Trademark License Agreement granting Cassa a license to use the name "Butter" in connection with the operation of the restaurant.

(NYSCEF 63).

According to Jennifer Villanueva, an employee of Viceroy Hotel Group, an independent managing agent for the Hotel, who has the been the hotel's General Manager since August 2014, tenant has never asked landlord to consent to its sublease, but if asked to do so, landlord would not consent, given the difficult relationship between the parties related to the operation of Butter. She also submits copies of records received from the State Liquor Authority, including:

(1) An application for a liquor license, from October 2013, by Cassa, which provides that the LLC members of Cassa are, with 50 percent membership each, Carlton

(with Solly Assa as its 100 percent member) and BM (with Scott Sartiano and Richard Akiva each as 50 percent members); and

(2) An Asset Purchase Agreement, dated September 10, 2013, by which Restaurant at Cassa sold to Cassa for $25,000 all right, title and interest to its cooking supplies and inventory at the premises and good will of the business.

(NYSCEF 63).

II. CONTENTIONS

Based on Chakalo's affidavit, tenant contends that it has either cured, is in the process of curing, or is ready, willing, and able to cure the purported violations set forth in landlord's notice to cure. (NYSCEF 12).

Landlord observes that tenant admits in the sublease that landlord's consent to the subletting is required, and that the Option Agreement and related documents given to BM by RSA are not signed by BM, and that Chakalo's Exhibit A to the Cassa Operating Agreement is a forged or fake document as the Exhibit A submitted by BM reflects that BM and RSA are each 50 percent members in Cassa. Landlord thus argues that Cassa is not a permitted transferee under the lease because tenant does not control or is not under common control with or by Cassa. Landlord also denies that tenant obtained a new liquor license and asserts that it is the sponsor of the building, not landlord, that has a duty to obtain a valid certificate of occupancy for the building. For these reasons, landlord maintains that tenant is not entitled to a *Yellowstone* injunction for failing to demonstrate a good faith willingness to cure the breach, and also lacks the ability to cure it as landlord will not consent to the sublease and there is no evidence that BM has agreed or will agree to tenant's proposed option agreement. (NYSCEF 65).

III. ANALYSIS

A. *Yellowstone* injunction

The purpose of a *Yellowstone* injunction is to maintain the status quo so that a commercial tenant, when threatened with the termination of its lease, may protect itself by obtaining a stay tolling the cure period so that upon determination of the merits of the alleged defaults, it may cure the default and avoid a forfeiture. (*Graubard Mollen et al. v 600 Third Ave. Assocs.*, 93 NY2d 508 [1999]). A party seeking a *Yellowstone* injunction must demonstrate that: (1) it holds a commercial lease; (2) it received from the landlord either a notice of default, a notice to cure, or a threat to terminate its lease; (3) it requested injunctive relief prior to the termination of the lease; and (4) it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises. (*Id.* at 514). The limited purpose of the injunction is to toll the running of the applicable cure period while a determination is made on the merits of the alleged default. (*Id.*). It is undisputed that the first three elements are not in issue here.

In *225 E. 36th St. Garage Corp. v 221 E. 36th Owners Corp.*, the Appellate Division, First Department, found that a *Yellowstone* injunction should have been granted where the tenant contended that it had made efforts and cured some purported breaches and was continuing to take various steps to remedy the other alleged defaults, which, the Court found, satisfied the requirement that the tenant have the desire and ability to cure. (211 AD2d 420 [1st Dept 1995]).

Here, the documents show that at a minimum, tenant is a 50 percent member of subtenant through its 100 percent membership in RSA, and thus tenant may be able to establish that the subtenant is controlled by, under common control with, or controlling tenant, and thereby that landlord's consent to the sublease was or is not required. Moreover, tenant has already

communicated with BM in an attempt to acquire BM's membership in Cassa, in which case it would then be the 100 percent member of subtenant. (*See eg BRT Realty Trust v Preferred Entity Advancement*, 233 AD2d 200 [1st Dept 1996] [*Yellowstone* injunction granted as movant demonstrated facially valid assignment of lease, and parties' contentions regarding validity of assignment to be determined at trial]; *see also East Best Food Corp. v N.Y. 46th LLC*, 56 AD3d 302 [1st Dept 2008], *lv denied* 12 NY3d 710 [2009] [tenant established willingness to cure alleged breach related to prohibition on assignment of lease by being willing to undo share swap transaction at issue]). Even if the sublease was not authorized absent landlord's consent, tenant can cure the breach by terminating it. (*See eg Reade v Highpoint Assocs. IX, LLC*, 36 AD3d 496 [1st Dept 2007] [tenant timely cured default while *Yellowstone* injunction was in effect by terminating sublease at issue, and thus owner had no remaining viable claim to terminate lease under notice to cure]).

Tenant has already also applied for a new liquor license. Tenant has thus established that it has both the desire and ability to cure the alleged defaults. (*See 109th and First Ave. Corp. v 2113 First Ave., LLC*, 51 AD3d 487 [1st Dept 2008] [plaintiff showed desire and ability to cure alleged default by making effort to comply with lease obligation to obtain certificate of occupancy]; *Manhattan Parking System-Svce. Corp. v Murray House Owners Corp.*, 211 AD2d 534 [1st Dept 1995] [tenant timely commended necessary steps to obtain amendment of certificate of occupancy]).

As the law does not favor the forfeiture of a valuable leasehold, especially here where many years remain on the lease (*Vill. Ctr. for Care v Sligo Realty and Svce. Corp.*, 95 AD3d 219 [1st Dept 2012]; *Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352 [1st Dept 2005]), and under

all of the circumstances, tenant has established its right to the issuance of a *Yellowstone* injunction.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion seeking a *Yellowstone* injunction related to the Notice to Cure dated June 25, 2015 is granted; and it is further

ORDERED, that defendant, its agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of defendant, are enjoined and restrained, during the pendency of this action, from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under the supervision or control of defendant or otherwise, any of the following acts: terminating the Lease with plaintiff and/or otherwise commencing eviction proceedings pending the determination of the within action and plaintiff's right to the use and quiet enjoyment of the premises.

ENTER:

Barbara Jaffe, JSC

DATED: September 4, 2015
New York, New York