Savoy Management Corporation v 151 William Realty, LLC
2005 NY Slip Op 30136(U)
July 13, 2005
Supreme Court, New York County
Docket Number: 0601495/2005
Judge: Rosalyn H. Richter
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SCANNED ON 7/27/2005

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

PRESENT: RICHTER, Justice — PART 24

SAVOY MGMT CORP

- v -

157 WILLIAM REALTY

INDEX NO. 601495/05

MOTION DATE

MOTION SEQ. NO. 1

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

* PC scheduled for 8/10/05 10:00 am

FILED
JUL 27 2005
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 7/13/05

HON. ROSALYN RICHTER, J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 24

SAVOY MANAGEMENT CORPORATION, Plaintiff, -against- 151 WILLIAM REALTY, LLC, Defendant.	DECISION AND ORDER Index No. 601495-05 Motion Sequence No. 1

ROSALYN RICHTER, J.:

In this declaratory judgment action, plaintiff-tenant Savoy Management Corporation ("Savoy") seeks a judgment declaring that it has not breached its lease with defendant-landlord 151 William Realty, LLC ("the landlord") as alleged in an April 19, 2005 Notice of Default. Savoy further maintains that even if it is in default of its lease obligations, the landlord has waived its right to and/or is estopped from declaring any such default. In this motion, Savoy moves for a *Yellowstone* injunction tolling its time to cure the breaches alleged in the Notice of Default. The landlord opposes the issuance of a *Yellowstone* injunction and cross-moves to dismiss the complaint for failure to state a cause of action and based on documentary evidence.

On November 20, 2001, the parties entered into a lease for a term of four years and two months for a portion of the fourth floor of 151 William Street. On January 17, 2005, Savoy sought to exercise its option under the lease to extend the term of the tenancy for an additional five years. On April 19, 2005, after a series of exchanges between the counsel for the parties, the landlord issued a Notice of Default stating that Savoy had breached its lease, and giving Savoy ten days to cure the defaults. In particular, the Notice alleged that Savoy had: (i) permitted all or part of the premises to be used and/or occupied by someone other than the named tenant in the lease, without the prior written consent of the

landlord; (ii) assigned or sublet all or part of the premises to another or others; and (iii) failed to occupy the entire premises and conduct its business therein in the regular and usual manner.

Savoy alleges that at all times pertinent to this action, Savoy and other "affiliates" owned or controlled by Jacob Frydman, Savoy's President, have occupied the premises with Savoy with the landlord's knowledge.[1] Savoy contends that it was created for the purpose of managing these affiliates, who change from time to time, and who exist to facilitate the real estate transactions in which Frydman is involved. According to Frydman, the affiliates perform specific functions, such as collecting rent, maintaining buildings and paying bills. Savoy maintains that the affiliates do not physically occupy any distinct space in the premises, and that all of the affiliates are managed at the premises by Frydman and his staff. Savoy further contends that the entire premises have been continuously occupied by Savoy and the various affiliates from the time Savoy first took occupancy of the premises, which was five years prior to the start of the lease term, until the present. Savoy asserts that it has never sublet the premises or assigned the lease to the affiliates, or to anyone else.

Savoy also alleges that the principals of the landlord have been in the premises occupied by Savoy and the affiliates, and have specifically seen the door signs on the space which list three of the affiliates, but which do not list Savoy. Savoy further states that some of the affiliates have paid rent and other charges to the landlord, and these payments were accepted without protest or reservation of rights. The complaint maintains that Savoy is not in default of its lease obligations and further contends that the landlord has waived its right to terminate the tenancy by failing to object to the presence of the affiliates in a timely manner at the inception of the tenancy, and by accepting rent from the affiliates with

[1] The complaint states "with plaintiff's knowledge", although it is apparent from the context that this is a typographical error.

knowledge of their continuous occupancy.

In the cross-motion, the landlord maintains that Savoy's admission that it has permitted the affiliates to occupy the premises combined with the clear and unambiguous lease provisions prohibiting such occupancy requires dismissal of the complaint as a matter of law. The landlord additionally argues that the nonwaiver provisions of the lease conclusively refute Savoy's factual assertions that the landlord had waived its right to enforce the disputed provisions of the lease. In order to warrant dismissal of a complaint based on documentary evidence, the landlord must show that the documentary evidence resolves all factual issues as a matter of law.[2] *Goldman v. Metropolitan Life Insurance Company*, 13 A.D.3d 289 (1st Dept. 2004). Thus, the landlord must show that the documentary evidence establishes, as a matter of law, both that Savoy is in breach of the lease, and that the landlord has not waived its right to declare a default.

The Court concludes that dismissal at this early stage is inappropriate. There is no question that the lease forbids the tenant from permitting all or part of the premises to be used or occupied by others without the prior written consent of the landlord. *See* Lease, ¶¶ 3, 52. The landlord argues that Savoy's concession in the complaint that it has permitted the affiliates to occupy the premises establishes a breach as a matter of law.[3] However, the Court finds that there is an issue of fact as to whether the affiliates constitute "others" as that term is used in the lease provisions proscribing occupancy by others.

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[2] Although the landlord maintains that the complaint fails to state a cause of action, it does not put forth any legal argument on that issue. It is clear to the Court that, accepting all factual assertions in the complaint, it sets forth a cause of action.

[3] Although not argued by the parties, the Court notes that Frydman's admission in the complaint does not state that the affiliates were present without the prior written consent of the landlord. Thus, his admission alone that the affiliates occupy the space is insufficient to establish a breach, absent proof that the landlord did not provide written consent. The landlord has failed to come forth with any documentary evidence establishing such lack of written consent.

In his affidavit opposing the cross-motion, Frydman maintains that when negotiating the lease, he specifically insisted on and obtained provisions which would make clear that use of the premises by the affiliates was contemplated by the parties. In particular, Frydman points to an addendum which amends Paragraph 1 of the lease to allow for Savoy to use and occupy the premises for "such uses as the premises are presently being used and uses incidental thereto".

Frydman maintains that this provision was included in the lease to ensure that he could conduct his business as it was presently being used, *i.e.*, by having his various affiliates operate out of the premises together with Savoy. In light of this addendum to the lease, the Court concludes that there is a factual issue as to whether the occupation of the premises by the affiliates is a use that was contemplated by the parties when they entered into the lease. If the use of the premises by both Savoy and its affiliates was such an agreed upon contemplated use, then the affiliates cannot be considered "others" as that term in the lease is used. Thus, the cross-motion to dismiss based on documentary evidence must be denied. *See Blue Jeans U.S.A., Inc. v. Basciano*, 286 A.D.2d 274 (1st Dept. 2001)(conflicting credible interpretations of lease provision create a triable issue of fact); *Barbour v. Knecht*, 296 A.D.2d 218 (1st Dept. 2002)("given the conflicting provisions in the [agreements], and the ambiguity presented as a result, the conduct of the parties is the best evidence as to their meaning").[4]

Although not necessary to the Court's denial of the cross-motion, the Court also finds that there are issues of fact as to whether the landlord's actions constitute a waiver of any default by Savoy. The

[4] The landlord's Notice of Default also alleges that Savoy has breached its lease by subletting the space and by assigning the lease. The landlord has not submitted any evidence to establish these lease violations, and, indeed, they are specifically refuted by Frydman's affidavit. Likewise, Frydman's affidavit refutes the landlord's assertion that Savoy has violated its lease by failing to occupy the entire premises. In any event, it appears that all of these alleged lease violations relate to the occupancy of the premises by the affiliates, whose presence may be permissible within the terms of the lease addendum.

landlord maintains that the various nonwaiver clauses in the lease forego such an argument. However, "waiver is generally a question of fact". *Dice v. Inwood Hills Condominium*, 237 A.D.2d 403 (2d Dept. 1997). Moreover, "[w]hile the existence of a nonwaiver clause does not in itself preclude a finding of waiver, the intent to waive is generally a question of fact which must be proved." *255 Fieldstone Buyers Corp. v. Michaels*, 196 Misc.2d 105 (1st Dept. App. Term 2003). Here, Savoy alleges that the landlord was continuously aware, from the inception of the tenancy, that Savoy and its affiliates were using the premises together. Indeed, Savoy alleges that a specific provision was added to the lease to make this very use clear, and that the presence of the affiliates therefore was open and known to the landlord. In light of these allegations, the Court concludes that there is an issue of fact as to whether the landlord waived its right to enforce the lease provisions prohibiting use by others, despite the existence of the nonwaiver clauses. *See Sagson Co. v. Weiss*, 83 Misc.2d 806 (1st Dept. App. Term 1975)("[a] 'no waiver' clause . . . does not apply to a claim of waiver by open possession"); *201 East 37 Owners Corp. v. Cass*, 2004 N.Y. Slip Op. 50339U, 3 Misc.3d 1102A (N.Y.C. Civ. Ct. April 23, 2004)(same); *see also Simon & Son Upholstery, Inc. v. 601 West Associates, LLC*, 268 A.D.2d. 359 (1st Dept. 2000).

Excel Graphics Technologies, Inc. v. CFG/AGSCB 75 Ninth Avenue, L.L.C., 1 A.D.3d 65 (1st Dept. 2003), upon which the landlord relies, is distinguishable. In *Excel*, the tenant admittedly violated the lease by subleasing the premises to eight different entities and profited from the illegal subtenancies. Here, in contrast, Savoy maintains that it and its affiliates have been occupying the space together since even before the start of the tenancy, and there is no allegation of profiteering. Furthermore, whereas in *Excel*, the nonwaiver provisions of the lease unambiguously and unequivocally negated the essential facts asserted by the tenant in support of its waiver claim, such is not the case here. The landlord points to no specific nonwaiver clause which would bar Savoy's current claim that the landlord had express

knowledge, at the time the lease was signed and throughout the entire tenancy, of Savoy's shared use of the space by the affiliates. The rent acceptance provision relied upon by the landlord here, which is similar to the clause cited in *Excel*, does not require dismissal of the entire case since Savoy is relying upon more than mere acceptance of rent by the landlord to support the waiver claim. Thus, *Excel* is distinguishable and provides no reason for this Court to grant the landlord's cross-motion.

Savoy's motion for a *Yellowstone* injunction is granted because it has satisfied all four elements necessary to obtain such relief. Savoy is a commercial tenant that received a Notice of Default and sought injunctive relief prior to the expiration of the cure period. Contrary to the landlord's arguments, Savoy has shown that it is ready, willing and able to cure the alleged defaults. Specifically, Frydman's affidavit states that if the Court ultimately finds a lease violation, Savoy will stop managing the affiliates in the premises and will sever the affiliates' relationship to the premises. In light of Savoy's stated willingness to cure, *Yellowstone* relief is appropriate. *See TSI West 14, Inc. v. Samson Associates, LLC*, 8 A.D.3d 51 (1st Dept. 2004); *ERS Enterprises, Inc. v. Empire Holdings, LLC*, 286 A.D.2d 206 (1st Dept. 2001).

The cases cited by the landlord are distinguishable because they involve situations in which the tenant either affirmatively indicated its refusal to cure, or blatantly demonstrated that it had no real intention of curing an obvious breach. Here, in contrast, Savoy has clearly stated its willingness to end the affiliates' relationship with the premises should the Court find Savoy to be in breach of the lease. Nor is the Court convinced that Savoy acted in bad faith so as to warrant denial of the *Yellowstone* injunction. The parties have each accused each other of bad faith, and the landlord's allegations of bad faith against Savoy are sharply disputed. Finally, unlike the cases cited by the landlord, the default here is not incurable. There is no proof that the premises have been sublet or that the lease has been assigned.

All that is apparent at this stage of the proceedings is that Savoy may have permitted non-lessees to occupy its space, something that can certainly be cured. This is particularly true in this case, where Frydman is a principal of all the the affiliates, and clearly is in a position to have them removed from the premises. Finally, the Court finds it hard to reconcile the landlord's present argument with its Notice of Default, which specifically gave Savoy an opportunity to cure. Accordingly, it is

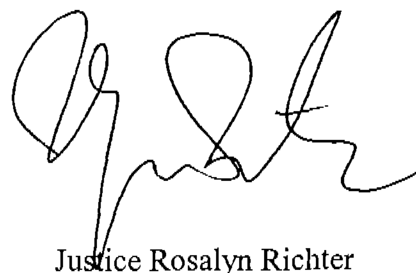
ORDERED that Savoy's motion for a *Yellowstone* injunction is granted, and Savoy's time to cure the alleged breaches contained in the April 19, 2005 Notice of Default is tolled, and the landlord is restrained during the pendency of this action from taking any steps to terminate Savoy's lease and tenancy based upon the April 19, 2005 Notice of Default; and it is further

ORDERED that the landlord's cross-motion to dismiss is denied; and it is further

ORDERED that the parties are directed to appear for a Preliminary Conference in Part 24 on August 10, 2005 at 10:00 a.m.

This constitutes the decision and order of the Court.

July 13, 2005



Justice Rosalyn Richter

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