

1500 Broadway Chili Co., Inc. v Zapco 1500 Inv., L.P.
2005 NY Slip Op 30603(U)
January 7, 2005
Supreme Court, New York County
Docket Number: 108210/04
Judge: Karen S. Smith
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 44

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1500 BROADWAY CHILI CO., INC.,
Plaintiff,

Index No.: 108210/04

-against-

ZAPCO 1500 INVESTMENT, L.P.,
Defendant.

DECISION AND ORDER

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PRESENT: KAREN S. SMITH, J.:

Plaintiff's motion for an order, pursuant to CPLR § 602, consolidating and removing a Civil Court summary proceeding with this action, is denied.

Plaintiff is the lessee of the commercial premises located at 1500 Broadway pursuant to a lease dated February 17, 1994 for a term commencing on March 1, 1994 and expiring on May 31, 2004. The lessor was 1500 Realty Co., a successor in interest to defendant, the current landlord and lessor, Zapco 1500 L.P.

Lease Rider paragraph 70 "Security Deposit" provides that if the tenant has not defaulted "on or before January 1, 1996" then tenant is entitled to the return of \$11,500 of the security deposit no later than February 1, 1996.

Lease Rider paragraph 72 "Tenant's Renewal Option" provides, in pertinent part:¹

- A. Tenant shall have the right, at its sole option, to renew . . . for a renewal term . . . of five (5) years by written notice given to Landlord not later than April 15, 2003; provided, however, that Tenant shall not be in default under any of the terms, covenants or conditions on Tenant's part to observe or perform either on the date of the giving of the Renewal Notice or on the "Renewal Term Commencement Date"
- C. Tenant shall have the right, during the month of February, 2003, to request that Landlord inform Tenant, on or before March 15, 2003,

¹Lease paragraph 72 begins on page 19 and continues on the next page enumerated 21.

what the Fair Market Value for the demised premises shall be during the Renewal Term . . .

According to allegations in the complaint, defendant engaged in a program of harassment in order to intimidate plaintiff into giving up the lease or to “manufacture a default” so that defendant could secure a more favorable rent from a different tenant. Plaintiff contends that the notice of default dated November 21, 1996, which alleged that plaintiff defaulted for the failure to install a sprinkler system pursuant to Local Law § 5 and to properly vent cooking odors, was part of this campaign. As a result of that notice, on February 3, 1997, plaintiff obtained a *Yellowstone* injunction enjoining the lease termination.

The complaint alleges that a further example of this harassment was defendant’s 2001 summary nonpayment proceeding (1) which alleged that plaintiff owed in excess of \$72,000 in rent and additional rent going back to July, 1997, (2) which was based on “grossly inaccurate” rent bills and records, (3) which failed to credit plaintiff for payments made and (4) during the course of which defendant admitted that it did issue inaccurate bills at all relevant times during the lease term.

The complaint further states that (1) on January 15, 2003, plaintiff sent written notice to defendant of plaintiff’s election to exercise its renewal option and (2) on February 28, 2003, defendant wrote back that the exercise of the option was not valid as plaintiff was in default.

The complaint contains four causes of action: (1) a declaratory judgment that the notice of default dated May 5, 1999 [sic], is a nullity and insufficient to serve as a predicate to terminate plaintiff’s tenancy or to invalidate plaintiff’s exercise of the lease’s renewal option, (2) a declaratory judgment that plaintiff was not in default under the lease as of January 15, 2003, or February 28, 2003, that plaintiff validly exercised the renewal option and thus the lease is extended for the

additional five year period, (3) a permanent injunction mandating that defendant extend the lease through May 31, 2009, and (4) a preliminary injunction during the pendency of this action and a permanent injunction precluding defendant from commencing and/or maintaining a holdover proceeding against plaintiff based on the alleged expiration of the lease.

The complaint was filed on May 28, 2004 and served on defendant pursuant to BCL § 306 on June 7, 2004. On June 4, 2004, defendant commenced a summary holdover proceeding based on the expiration of the lease on May 31, 2004.

On June 24, 2004, plaintiff moved by order to show cause to remove and consolidate the summary proceeding with the instant action. Plaintiff withdrew the motion without prejudice.

On July 30, 2004, as amended on August 5, 2004, Hon Geoffrey D. Wright issued a decision in the 2001 summary nonpayment proceeding which granted defendant landlord a money judgment and a judgment of possession.

On September 9, 2004, plaintiff moved, by order to show cause, for an order pursuant to CPLR § 602, removing the holdover proceeding, *Zapco 1500 Investment, L.P. v 1500 Broadway Chili Co., Inc. et al.*, L&T Index No. 73712/04 from Civil Court and consolidating it with the instant action for a declaratory judgment. By interim decision and order dated October 14, 2004, this Court stayed the Civil Court proceeding pending a determination of this motion.

Plaintiff argues that it is entitled to removal and consolidation on the basis that both cases involve common issues of law and facts, specifically, whether plaintiff's renewal and defendant's rejection of that renewal, were valid. Plaintiff contends that both actions primarily involve a determination of the parties' respective rights and obligations under the lease and thus consolidation is warranted. Plaintiff further argues that Civil Court lacks the equitable powers possessed by

Supreme Court to prevent a forfeiture of plaintiff's renewal option.

Defendant opposes removal and consolidation on the ground that Civil Court is the proper and designated forum for the determination of a holdover proceeding and plaintiff has already raised the issue of its compliance with the lease as a defense in that action. Defendant argues that plaintiff's failure to timely pay rent for an extended period of time is a substantial breach of the lease and precludes the exercise of equitable intervention.

At oral argument, when questioned by the Court, the amount defendant's attorney stated that he believed to be owed as of January 15, 2003, the date the renewal option was exercised, was \$10,954.53. If, as plaintiff argued, it were to be determined that on January 1, 1996, plaintiff was not in default, then it would be owed a credit of \$11,500 pursuant to Lease Rider § 70 and that credit would subsume the lesser amount of arrears. The Court ordered a hearing on the amounts due on the relevant dates in order to determine whether this action and the proceeding should be consolidated.

Bruce Sterman, a principal of plaintiff testified that plaintiff was not in default on January 1, 1996 and plaintiff submitted evidence including rent bills and checks to support this claim. Mr Sterman further testified that (1) the history of the tenancy included defendant billing plaintiff for hot water and sewer charges for which plaintiff was not responsible under the lease, (2) in 1997, plaintiff obtained a *Yellowstone* injunction and (a) in that action an order was issued limiting plaintiff's use and occupancy to base rent (b) there was a stay on tax escalations as acknowledged by landlord in its 2001 predicate notice, and (c) that action was marked off the Court's calendar in April 1998, followed by motion practice in October 1998, but never finally resolved, (3) Mr Sterman had an agreement with Charles Bendit, an officer of defendant's former managing agent, which began in September 1995, that plaintiff could pay monthly rent by the end of the month, and (4) pursuant to that agreement,

plaintiff paid January 1996 rent on January 30, 1996.

Amy Henshaw, a financial manager for Cushman and Wakefield, defendant's managing agent, testified that she was responsible for overseeing the preparation of plaintiff's rent statements and that as of January 1, 2003, the total amount plaintiff owed was \$29,584.53, an amount which included December 2003 rent. Ms Henshaw further testified that as of January 31, 2003, the amount owed remained the same for although December rent had been paid, the January 2004 rent had not. Defendant introduced rent statements as exhibits to reflect these amounts.

The hearing on this motion was ordered because it appeared at oral argument that the difference between what landlord claimed was owed by plaintiff as of January 15, 2003 and the credit plaintiff stated it was entitled to as an offset, amounted to little more than five hundred dollars. It also appeared that after limited testimony the issue could be resolved expeditiously for all involved. However, after extensive testimony from plaintiff's principal and defendant's witness' testimony and documentary evidence, it became clear that the difference in the amounts claimed by the parties far exceeded \$500 and the parties' dispute could not be quickly resolved.

The motion before the Court is whether to remove and consolidate the Civil Court proceeding with this action for declaratory relief. It is well settled that Civil Court is the preferred forum for resolving landlord-tenant issues. (*Post v 120 East End Ave. Corp.*, 62 NY2d 19, 28 [1984]). "Indeed, '[o]nly where Civil Court is without authority to grant the relief sought should the prosecution of a summary proceeding be stayed' [citation omitted]." (*44-46 W 65th Apt Corp v Stvan*, 3 AD3d 440 [1st Dept 2004]). In that vein, removal and consolidation of a summary proceeding in Civil Court are only to be granted where there are common questions of law and facts and Civil Court is without jurisdiction to afford complete relief. (*See, Scheff v 230 E. 73rd Owners Corp.* 203 AD2d 151 [1st

Dept 1994]).

Here, while there are common issues of law and fact, plaintiff has failed to demonstrate that Civil Court can not afford it complete relief as Civil Court Act § 905 provides for the assertion of equitable defenses. (See also, *Handwerker v. Ensley*, 261 AD2d 190, 191 [1st Dept 1999]). Thus, all of plaintiff's equitable arguments can be asserted, and in fact already have been asserted, as defenses to the holdover proceeding. Plaintiff's defenses in the summary proceeding are the same issues in this declaratory judgment action. To the extent plaintiff also seeks injunctive relief i.e. a permanent injunction mandating that the lease is extended through May 31, 2009 and precluding defendant from commencing and/or maintaining a holdover proceeding against plaintiff based on the alleged expiration of the lease, that relief will be accorded to plaintiff if it prevails in the summary proceeding. Upon the resolution of the holdover proceeding, any issues left unresolved will be adjudicated in this action.

Accordingly, it is hereby

ORDERED that plaintiff's motion for an order removing and consolidating the Civil Court summary proceeding with this action is denied; and it is further

ORDERED that all stays are lifted; and it is further

ORDERED that the parties are to appear for a status conference in Part 44, Room 581 on March 17, 2004 at 11:30AM.

This constitutes the decision and order of the Court.

Dated: January 7, 2005

ENTER:

J.S.S.
J.S.C.

FILED

JAN 26 2005

**NEW YORK
COUNTY CLERK'S OFFICE**