

Il Posto LLC v Blenheim LLC

2006 NY Slip Op 30055(U)

May 11, 2006

Supreme Court, New York County

Docket Number: 0600229/0229

Judge: Helen E. Freedman

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

PRESENT: HELEN E. FREEDMAN
Justice

PART 39

Il Posto LLC,
Plaintiff,

INDEX NO. 600229/06

- v -

Blenheim LLC,
Defendant

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
FILED
MAY 15 2006

Cross-Motion: Yes No

COUNTY CLERK'S OFFICE
NEW YORK

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

Plaintiff Il Posto LLC, a commercial tenant which has been served with three Notices to Cure by its landlord, applies for (1) a *Yellowstone* injunction tolling its time to cure the alleged defaults and an order (2) removing a pending holdover proceeding that the landlord, defendant Blenheim LLC, brought in the Civil Court of New York City against plaintiff, and (3) consolidating the holdover proceeding with this action. Defendant cross-moves for an order enjoining plaintiff's restaurant from opening until it obtains a public assembly permit. For the reasons set forth below, a *Yellowstone* injunction is granted, removal and consolidation is denied, and defendant's cross-motion for an injunction is denied.

Background – This action concerns plaintiff's lease of a portion the premises located at 85 Tenth Avenue, NY, NY (the "Building") to operate a restaurant called Del Posto. Plaintiff installed hot water heaters, refrigeration compressors, elevator machine equipment, and associated wiring and piping, in the "vault space" located in the basement of the Building, and erected walls in the vault space to house the equipment, although the space is not part of the demised premises under its written lease (the "Lease"). Instead, plaintiff was granted a "revocable license" under the Lease to use and occupy the vault space.

Plaintiff entered into the Lease in April 2004 with the Building's former owner, AGBCW 85 Tenth LLC (the "Original Owner"). In July 2005, the Original Owner sold the Building to a third party, who thereafter assigned its rights to defendant Blenheim LLC. On or about January 11, 2006, defendant served plaintiff with a "Ten (10) Day Licensee Notice to Quit" (the "Notice to Quit"), which revoked plaintiff's license to occupy the vault space and gave it until January 28 to quit the area and remove its equipment and walls. If plaintiff failed to quit the vault space, the Notice to Quit warned, "Licensor/Owner will have the equipment removed and/or will commence summary proceedings in the Civil Court of the City of New York, pursuant to RPAPL Section

713(7), to remove you therefrom.”

On January 26, 2006, plaintiff commenced this action in the Supreme Court of New York county, in which it seeks a judgment declaring, among other things, that (1) the Lease had been orally modified to permit plaintiff to use and occupy the vault space and (2) the space was a necessary appurtenance to plaintiff’s business.

Simultaneously, plaintiff moved for an order preliminarily enjoining defendant from bringing summary proceedings predicated on the Notice to Quit. By decision and order dated February 6, 2006, this Court denied plaintiff’s motion, and on February 9 defendant commenced a holdover proceeding in Civil Court to evict plaintiff from the vault space. *Blenheim LLC v. Il Posto, LLC*, index no. 56948/06 (Civ. Ct. of N.Y.C) (the “Licensee Proceeding”).

Meanwhile, defendant served plaintiff with notices to cure dated January 24, February 9, and February 13, 2006 (the “Notices to Cure”), which allege that plaintiff had violated the Lease by (1) failing to obtain a public assembly permit, (2) failing to stay open and fully lighted for dinner every day of the week; (3) installing fixtures and using space lying outside of the demised premises (excluding the vault space), (4) failing to maintain approved seating plans at the premises, (5) installing light fixtures on the facade of the Building that interfered with security cameras, (6) failing to maintain a sump pump and (7) failing to provide defendant with insurance policies and contracts for exterminating pests and maintaining the fire protection system and flues, ducts, and exhaust fans.

Motion: “Yellowstone” injunction: Plaintiff’s application for a *Yellowstone* injunction is granted. After a commercial landlord has served its tenant with a notice to cure alleged defaults under its lease, and the tenant disputes that it has defaulted or needs more time to cure, the courts will “routinely” grant a *Yellowstone* injunction tolling the cure period and preserving the *status quo* to prevent the tenant from forfeiting its leasehold interest. *Graubard Mollen Horowitz Pernerz & Shapiro v. 600 Third Ave. Assocs.*, 93 N.Y.2d 508, 514 (1999). A party requesting a *Yellowstone* injunction must show that (1) it holds a commercial lease, (2) its landlord served it with a notice of default, notice of cure, or a threat to terminate the lease, (3) it applied for a *Yellowstone* injunction before the lease terminated, and (4) the tenant is able and willing to cure the alleged defaults by any means short of vacating the premises. *Id.*

Plaintiff meets these criteria: it denies that its actions as set forth in the Notices to Cure violate the Lease, but stands ready to cure them should the Court find in defendant’s favor. In opposition, defendant alleges that plaintiff willfully violated the Lease, and accordingly has “unclean hands” that bar a *Yellowstone* injunction. However, the equities are disputed, and a *Yellowstone* injunction is appropriate to maintain the status quo until the equities can be determined after a full hearing. *See Chai & Tantrakoon, Inc. v. Royal Realty Corp.*, 246 A.D.2d 398, 399 (1st Dept. 1998).

Removal & consolidation – Plaintiff’s motion to remove the Licensee Proceeding from the Civil Court and consolidate it with this action is denied. Civil Court is the proper forum for licensee proceedings governed by RPAPL § 713(7), and there is “a strong rule against staying a summary proceeding, or removing it, such as for purposes of a consolidation or a joint trial with some proceeding in the supreme court or some other superior court.” Siegel, *N.Y. Prac.* § 577, at 909 [2d ed.], *quoted in Scheff v. 230 E. 73rd St. Owners Corp.*, 203 A.D.2d 151, 152 (1st Dept. 1994). The Civil Court has the authority to adjudicate whether, as plaintiff claims, it is

entitled to use the vault space because the parties orally modified the Lease or defendant granted it an irrevocable license. If plaintiff asserts equitable claims as defense as claims in the Licensee Proceeding, the Civil Court can hear and resolve them. *See* RPAPL § 743. *See also Lun Far Co. v. Aylesbury Assocs.*, 40 A.D.2d 794, 794 (1st Dept. 1972) (holding that Civil Court had jurisdiction over tenant's defense that parties orally modified written lease). Finally, consolidation is not warranted because the facts and law of this action and the Licensee Proceeding are not closely connected. The Notice to Quit does not involve the landlord-tenant relationship, only concerns the licensed vault space, does not allege that plaintiff breached the Lease, does not afford plaintiff a right to cure, and does not threaten a termination of the Lease or plaintiff's tenancy. Conversely, the Notices to Cure implicate the Lease terms and the parties' landlord-tenant relationship, do not concern the vault space, advise plaintiff that it can cure the alleged Lease violations, and threaten to terminate the tenancy if plaintiff fails to cure.

The plaintiff need not file an undertaking provided that it stay current with its rent payment and all other amounts due defendant under the Lease

Cross-motion: Defendant's cross-motion for an order restraining the restaurant from operating is moot, inasmuch on March 9, 2006 the Department of Buildings issued plaintiff a place of assembly permit and temporary certificate of occupancy.

ORDERED that the plaintiff's motion for a preliminary *Yellowstone* injunction is granted, and it is further

ORDERED that the defendant is prohibited from terminating, cancelling or otherwise interfering with the plaintiff Lease (as defined above) and its right or possession thereunder, *pendente lite*, and it is further

ORDERED that the period during which the plaintiff has or will have the right to cure the alleged defaults set forth in the Notices to Cure dated January 24, February 9, and February 13, 2006 that defendant served on plaintiff is hereby tolled, stayed, and extended pending the determination by this Court or the Civil Court of the parties' dispute over the terms of the Lease, and it is further

ORDERED that the defendant shall accept, and the plaintiff shall pay, rent and other amounts called for in the Lease, and it is further

ORDERED that the filing of an undertaking by plaintiff is dispensed with, and it is further

ORDERED that the plaintiff's motion to remove *Blenheim LLC v. Il Posto, LLC*, index no. 56948/06 (Civ. Ct. of N.Y.C) from the Civil Court and consolidate it with this action is denied, and it is further

ORDERED that the cross-motion by defendant to enjoin the operation of plaintiff's restaurant on the premises is denied.

Dated: May 11, 2006


Helen E. Freedman, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

FILED
MAY 15 2006
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NEW YORK