

RSI I, Inc. v La Rochelle 75 I, LLC

2007 NY Slip Op 32157(U)

July 16, 2007

Supreme Court, New York County

Docket Number: 0107902/2007

Judge: Shirley W. Kornreich

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

PRESENT: KORNREICH

PART 54

Justice

RSI, INC

- v -

LA ROCHELLE 75 I

INDEX NO. 107902/07
MOTION DATE 6/28/07
MOTION SEQ. NO. 001
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	
1, 4	
2, 5	
3	

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

FILED

JUL 19 2007

NEW YORK COUNTY CLERK

Dated: 7/16/07

HON. SHIRLEY WERNER KORNREICH
J.S.C.

Check one: FINAL DISPOSITION
Check if appropriate: DO NOT POST

NON-FINAL DISPOSITION
 REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

-----X

RSI 1, Inc., d/b/a COLDWELL BANKER
HUNT KENNEDY,

Plaintiff,

Index No.:107902/2007

-against-

LA ROCHELLE 75 I, LLC,

Defendant.

FILED
DECISION and
ORDER
JUL 19 2007
NEW YORK
COUNTY CLERK'S OFFICE

-----X
KORNREICH, SHIRLEY WERNER, J.:

RSI 1, Inc., d/b/a Coldwell Banker Hunt Kennedy ("plaintiff"), seeks a Yellowstone Injunction against La Rochelle 75 I, LLC ("defendant") in order to: (1) toll defendant's Notice to Cure ("Notice"), dated May 16, 2007; (2) extend the time by which plaintiff may cure any breach the Court finds; and (3) enjoin defendant from terminating plaintiff's tenancy. Defendant opposes, contending that plaintiff failed to demonstrate the necessary requirements for a Yellowstone Injunction.

I. Factual and Procedural History

Plaintiff, a commercial tenant in a building located at 329 Columbus Avenue, has a fifteen-year commercial lease that began on November 5, 1999 and will expire on October 31, 2014. Defendant's May 16, 2007 Notice alleged that plaintiff violated its tenancy and lease and required plaintiff to cure its defaults on or before June 7, 2007. In response, plaintiff commenced this action on June 5, 2007 and contemporaneously sought the instant Order to Show Cause. On June 20, 2007, defendant served an Answer with a Counterclaim.

Defendant's Notice makes several allegations. First, it claims that plaintiff created a nuisance and fire hazard by allowing an excessive amount of paper, paint and other combustible

materials to accumulate in the basement of the premises. It insists that since the paper and paint take up more than five-hundred square feet, plaintiff is required to install a sprinkler system. Second, the Notice states that plaintiff violated its Certificate of Occupancy because it failed to file an "alteration type 2" application and/or obtain a required permit in order to use a portion of the basement for offices and a meeting room. Finally, the Notice points to the third paragraph in plaintiff's lease that states: "[t]enant shall make no changes in or to the demised premises of any nature without Owner's prior written consent." It accuses plaintiff of altering the premises without written permission by installing a radiator in the basement. The radiator, the Notice claims, was installed incorrectly and is causing water to rise in the pipes, thus producing a leak in the residential apartments above.

A. Movant's Proof

Plaintiff avers that although its commercial lease for the ground floor store and portion of the building's basement will not expire until October 31, 2014, it has been pressured to relocate and/or surrender its lease ever since defendant purchased the building from Espol Realty Co. on February 8, 2007. It contends that defendant desires to combine its space with an adjacent ground floor area in order to create an "incredibly large offering of commercial space that would be most valuable within the real estate industry." It also claims that because defendant is not willing to reimburse it for any potential moving costs and/or loss, defendant created "a tale for the court" that plaintiff defaulted under its lease, thus necessitating its eviction. Plaintiff insists it never defaulted under its lease and avows that defendant's allegations are either "untrue, unfounded or able to be cured."

Moreover, plaintiff asserts that it never received a warning from the New York City Department of Health and Department of Buildings with respect to its refuse and rubbish and/or

storage space in the basement. In fact, plaintiff affirms that it does not store rubbish in the basement, but rather maintains a contract for its removal with M&M Sanitation Corporation. Plaintiff also claims that, in accordance with the Certificate of Occupancy, it uses the basement as a storage facility where, at most, there is only five square feet of paint (which already has been relocated) and various files stored within the 2,500-square-foot space. Plaintiff contends that the prior owner never mentioned an improper ratio of storage to space in the basement, but if defendant proves such arrangement is contrary to a City code, and the Court directs plaintiff to remove the files/boxes, it would "be more than willing to place its archives in another facility." Architect David M. McAlpin reviewed the applicable New York City Building Code (1968 "Old Code") and New York State Multiple Dwelling Law regarding basements on plaintiff's behalf and found no reference to limitations of commercial storage use for material or area.

Plaintiff also avows that it does not improperly use the basement for offices and meetings. It avers, however, that it holds group discussions there "on [a] rare occasion," but it will cease and desist such conduct if prohibited by law. Further, plaintiff contends it filed an "alteration type 2" application during the first few months of taking occupancy in 1999, and that defendant's objection to it being filed merely twenty days late is "silly" and barred by legal doctrines such as statute of limitations, waiver and laches.

Additionally, plaintiff claims that its former landlord authorized and requested it to install two radiators in the basement. Despite receiving such authorization, plaintiff attests that it is willing to remove them as long as defendant provides heat to the basement in accordance with paragraph thirty of the lease, which states: "[o]wner shall, if and insofar as existing facilities permit furnish heat to the demised premises...." Plaintiff insists that it has never been notified of

any problem with the use or installation of the radiators, and that defendant offers no expert affidavits supporting its proposition that a problem exists.

Finally, plaintiff avers that it has spent a lot of time and money in anticipation of conducting business at its location for the entire lease term. Since it does not have an adequate remedy at law, plaintiff avows that it will be harmed irreparably if it is found in breach of the Notice and defendant is able to terminate its valuable tenancy. Therefore, it requests a Yellowstone Injunction to prohibit defendant from terminating its lease based upon the May 16th Notice.

B. Defendant's Proof

Defendant contends that plaintiff's request for a Yellowstone Injunction must be denied because plaintiff failed to demonstrate it has the ability to cure its defaults. For example, defendant asserts that plaintiff has not cured or proven it is capable of curing its accumulation of refuse, rubbish and personal property in the basement. Defendant also avers that plaintiff neglected to file its "alteration type 2" application with the New York City Department of Buildings within twenty days of the lease's commencement date. Since plaintiff's lease began on November 5, 1999, and it waited until December 15, 1999 to file its application, defendant claims plaintiff's failure to timely comply with its lease is not curable. Finally, defendant asserts that plaintiff never obtained written permission to install two radiators in the basement, and it failed to demonstrate how it maintains the ability to remove such radiators without causing further damage to the premises and to the residential units located above.

Moreover, defendant's managing agent, Noel Intner, testified that defendant, La Rochelle 75 LLC, and its predecessor-in-interest, La Rochelle 75 LLC, are related entities. As such, Mr. Intner explained defendant has "no newfound desire to evict [p]laintiff," as "La Rochelle has

owned the building since January 2006.” Mr. Intner further revealed that defendant served its Notice as a result of plaintiff’s multiple lease violations, “which plainly endanger the health and safety of [p]laintiff and the residential tenants” in the building. Thus, defendant requests that plaintiff’s Order be denied.

II. *Conclusions of Law*

The purpose of a Yellowstone Injunction is to maintain the status quo so that the tenant served with a notice to cure an alleged lease violation may challenge the propriety of the landlord’s notice while protecting a valuable leasehold interest. *Accord First Nat’l Stores, Inc. v. Yellowstone Shopping Center, Inc.*, 21 N.Y.2d 630, 630 (1968); *Garland v. Titan West Assoc.*, 147 A.D.2d 304, 307 (1st Dept. 1989). Yellowstone relief effectively tolls the running of the cure period so that in the event of an adverse determination on the merits, the tenant may still cure the defect and avoid a lease forfeiture. *Garland*, 147 A.D.2d at 307. In granting Yellowstone Injunctions, courts generally have accepted far less than the showing normally required for the grant of preliminary injunctive relief. *Id.* Thus, to obtain a Yellowstone Injunction, the tenant-movant must demonstrate that: (1) it holds a commercial lease; (2) the landlord served upon tenant-movant a Notice to Cure or Notice of Defect, or that it faces threat of lease termination; (3) it sought 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 other than vacating the subject premises. *Lexington Ave. & 42nd St. Corp. v. 380 Lexchamp Operating, Inc.*, 206 A.D.2d 421, 423 (1st Dept. 1994); *see also 225 E. 36th St. Garage Corp. v. 221 E. 36th Owners Corp.*, 211 A.D.2d 420, 421 (1st Dept. 1995).

The law does not favor forfeiture, and it is recognized that “equity abhors forfeitures of valuable leasehold interests.” *Zaid Theatre Corp. v. Sona Realty Co.*, 18 A.D.3d 352, 355 (1st

Dept. 2005). Therefore, it is unlikely that the tenant-movant will be required to show the likelihood of its success, irreparable injury, and a balancing of the equities in its favor, as the mere threat of termination and forfeiture of the lease is sufficient to justify maintenance of the status quo by a Yellowstone Injunction. *Garland*, 147 A.D.2d at 307-08.

Here, plaintiff made a sufficient showing to warrant the granting of a Yellowstone Injunction. Specifically, it holds a commercial lease, received a Notice to Cure from defendant landlord, timely requested injunctive relief, and is prepared and able to cure. Contrary to defendant's claim, full evidentiary proof of plaintiff's ability to cure is not required at this juncture. *See WPA/Partners LLC v. Port Imperial Ferry Corp.*, A.D.2d 234, 236 (1st Dept. 2003). In fact, "rather than requiring [plaintiff] to *prove*, on [its] application, that [it] can cure the alleged defects, all [it] needs to do to obtain the Yellowstone [I]njunction is convince the court of [its] desire and ability to cure the defects by any means short of vacating the premises." *Jemaltown of 125th St., Inc. v. Leon Betesh/Park Seen Realty Assocs.*, 115 A.D.2d 381, 382 (1st Dept. 1985) (emphasis added). Plaintiff has met this burden.

For example, plaintiff is capable of curing its accumulation of refuse, rubbish and personal property in the basement. It already relocated five square feet of paint in the basement, and its contract with M&M Sanitation Corporation has not expired. Also, plaintiff is more than willing to desist from using the basement for offices and meetings. The fact that it failed to timely file an "alteration type 2" application *eight* years ago and/or obtain a required permit in order to use the basement for such purposes does not warrant plaintiff's eviction. As a general rule, the law will not sanction a forfeiture of possession where no substantial injury occurs or where a mere technical breach of the lease is involved. *Harar Realty Corp. v. Michlin & Hill, Inc.*, 86 A.D.2d 182, 188 (1st Dept. 1982).

Finally, even though plaintiff never obtained written permission to install two radiators in the basement, it avers that it is willing to remove them as long as defendant provides heat to the basement, an alleged obligation of the landlord under the lease. Defendant has not offered any expert testimony supporting its proposition that the radiators were installed improperly, have caused substantial damage to the residential units above, *or* that removing the radiators would cause damage to the premises. Thus, because plaintiff adequately expresses a strong desire and ability to cure its alleged defects, its request for a Yellowstone Injunction should be granted in order to preserve the status quo and prevent the forfeiture of its valuable interest in the leasehold. *See Lexington Ave. & 42nd St. Corp.*, 205 A.D.2d at 424. Accordingly, it is

ORDERED that plaintiff's motion for a Yellowstone Injunction is granted and pending the determination of this action, defendant La Rochelle 75 I, LLC, its general and limited partners, officers, employees, servants, agents, affiliates, subsidiaries, corporate parents and all other persons acting on behalf of, or in concert with, defendant be, and the same hereby are restrained and enjoined from taking any steps, pursuant to the May 16, 2007 Notice to Cure, to: (1) terminate the lease and tenancy of plaintiff, RSI I, Inc., in the premises located at 329 Columbus Avenue, New York, NY; (2) commence summary proceedings against plaintiff; and (3) disturb in any manner the possession and rights of plaintiff in the said premises; and it is further

ORDERED that pending the determination of this action, plaintiff shall pay to the landlord use and occupancy equaling all rent and additional rent owed under the lease dated November 5, 1999, by the first of each month, without prejudice to either party.

July 16, 2007

FILED
 JUL 19 2007
 NEW YORK
 COUNTY CLERK'S OFFICE

ENTER:

