

Commerce Bank, N.A. v Dworman

2007 NY Slip Op 32457(U)

August 2, 2007

Supreme Court, New York County

Docket Number: 0104267/2007

Judge: Walter Tolub

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

PRESENT: _____
Justice

PART 15

Commence Bank

INDEX NO. 204867/07

MOTION DATE _____

- v -
Danyel Swomas

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the accompanying memoranda opinion.*

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

FILED
AUG 09 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/2/07

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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: IAS PART 15

-----x
COMMERCE BANK, NA

Plaintiff,

-against-

DARRYL DWORMAN

Defendants.

-----x

WALTER B. TOLUB, J.:

This is the third lawsuit in four years between these two parties in a series of disputes over a commercial lease for premises located at 2173 86th Street in Brooklyn ("the premises").¹ By this motion, plaintiff Commerce Bank ("Tenant") seeks a Yellowstone injunction staying and tolling the effective date of the termination date of the Lease as set forth in defendant Darryl Dworman's ("Landlord") Notice of Termination (the "Notice of Termination") dated March 23, 2007 and Notice of Default dated February 19, 2007 (the "Notice of Default"). Tenant further seeks an order preliminary enjoining Landlord and all persons acting on his behalf from taking further action to terminate or cancel the lease in accordance with the Notice of

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¹ Presently before this court are Commerce Bank v. Dworman (Index No. 117271/2003), commenced when defendant refused to install an elevator on the premises; and Dworman v. Commerce Bank (Index No. 120146/2003), in which plaintiff alleges unapproved and unauthorized alterations to the premises. It bears note that neither case has been heard from since the middle of 2006, and the latter action has recently been sent to a Special Referee.

Default.

The parties entered into a lease for the subject premises in early 2003, with the proviso that the lease would expire on May 31, 2017 unless Tenant elected its option to renew the lease for three consecutive terms of five years each. The lease required Tenant to provide an estoppel certificate as follows:

Section 7.09 Tenant's Estoppel Certificate: From time to time, within fifteen (15) days next following Owner's request, Tenant shall deliver to Owner a written statement executed and acknowledged by Tenant, in form reasonably satisfactory to Owner, (I) stating that this Lease is then in full force and effect and has not been modified (or if modified, setting forth the specific nature of all modifications), and (ii) setting forth the date to which the Fixed Rent has been paid, and (iii) stating whether or not, to the best of Tenant's knowledge, Owner is in default under this Lease, and, if Owner is in default, setting forth the specific nature of all such defaults and (iv) stating that Tenant has accepted and occupied the Demised Premises and all improvements required to be made by Owner pursuant to the provisions of this Lease, have been made, if such be the case. Tenant acknowledges that any statement delivered pursuant to this Section may be relied upon by any purchaser or owner of the Building, or of the Real Property, or any part thereof, of Owner's interest in the Building or the Real Property or any Superior Lease, or by the holder of any Mortgage, or by any assignee of the holder of any Mortgage, or by any Mortgage or by any lessor under any Superior Lease.

(Order To Show Cause, Exhibit A).

On February 19, 2007, Landlord served plaintiff with a Notice of Default, claiming violation of the provision requiring

the production of the estoppel certificate, and giving Tenant until March 22, 2007 to cure the violation under the lease (Order to Show Cause, Exhibit B). On March 8, 2007 Tenant contacted Landlord's legal counsel by e-mail, and attached an unsigned mark-up of the required estoppel certificate for approval, as the estoppel certificate had to be produced "in form reasonably satisfactory to Owner" (Order to Show Cause, Exhibits A, C).

On March 9, 2007, the day after Tenant contacted Landlord's legal counsel with the unsigned mark-up of the estoppel certificate, Landlord's legal counsel contacted Special Referee Crespo by email. The purpose of that communication was to request a discovery extension in the related actions (Commerce Bank v. Dworman (Index No. 117271/2003) and Dworman v. Commerce Bank (Index No. 120146/2003)). Landlord's legal counsel sought the extension based upon the claim that they were changing Law Firms and the necessity to clear conflicts before proceeding with the action.²

²The relevant portion of the email sent by Landlord's counsel, Ralph Berman, Esq. to Special Referee Crespo reads:

Subject to clearing conflicts, it is our understanding that we will continue to represent Mr. Dworman, but the next week or two will be consumed with transition issues, including packing and transferring files, including Mr. Dworman's. Thus, for at least some time, we will not be able to access our files or meaningfully prepare for depositions. I would appreciate being given an extension to Monday, March 19, to report to the Court and Commerce concerning deposition dates.
(Order to Show Cause, Exhibit D).

On March 23, 2007, Landlord served Tenant with a Notice of Termination, which declared Landlord's intent to terminate the lease due to Tenant's failure to present the estoppel certificate by the end of the cure period. The Notice of Termination further included the following language:

PLEASE TAKE NOTICE, that unless you remove from the Premises on or before March 30, 2007, the day on which your term expires [...] Landlord will commence summary proceedings to remove you from the premises holding over after the expiration of your term and will demand the fair value of your use and occupancy of the Premises during such holding over, as well as legal fees and expenses.

(Order to Show Cause Exhibit E). This litigation followed.

It is well established that to qualify for the relief of a Yellowstone injunction, the moving party must demonstrate that they (1) hold a commercial lease, (2) received either a notice of default, a notice to cure, or the threat of lease termination from the landlord and (3) have the "desire and ability to cure the alleged default by any means short of vacating the premises" (Pergament Home Centers, Inc., v. Net Realty Holding Trust, 171 A.D.2d 736, 737 [2nd Dept. 1991]; 225 E. 36th Street Garage Corp. v. 221 East 36th Owners Corp., 211 A.D.2d 420, 421 [1st Dept. 1995]).

Courts have routinely held that there generally is no basis for a Yellowstone injunction once the cure period has expired or after the notice of termination has been delivered (King Party Center of Pitkin Ave., Inc. v. Minco Realty, 286 AD2d 373 [2nd

* 6]

Dept 2001)). However, courts have recognized a tenant's right to a Yellowstone injunction, notwithstanding the expiration of the cure period or the service of the notice of termination, where it has been demonstrated that the tenant has diligently taken action to cure the alleged default or that the landlord has unreasonably interfered with the tenant's effort to cure the alleged default (Becker Parkin Dental Supply Co., Inc. v. 450 Westside Partners, LLC., 284 AD2d 112 [1st Dept 2001]; Long Island Gynecological Services, PC v. 1103 Stewart Avenue Associates Limited Partnership, 224 AD2d 591 [2nd Dept 1996]).

Three cases have now been commenced with respect to what was allegedly due and what was allegedly done by the both Landlord and Tenant under the terms of the subject lease. Litigation of all three actions, to put it mildly, has been contentious (were it not, this court would have never sent it to a Special Referee for closer oversight). In this particular action, Landlord served Tenant with a notice to cure a default which required the production of an estoppel certificate, by Tenant, **in a form acceptable to the Landlord**. Tenant attempted to cure the default, within the allotted time, by e-mailing a copy of the marked-up proposed estoppel certificate to Counsel for Landlord for comment and/or approval. Counsel for Landlord, who sought an extension of time to complete discovery before the Special Referee in one of the other related actions, did not, for

whatever reason, respond to Tenant's emailed submission. Instead, Landlord did nothing until the expiration of the cure period.

The terms of the lease required Landlord's approval of the certificate. Landlord never responded to the proposed certificate, and the arguments offered for why they did not respond are simply unavailing. To put it simply, given the atmosphere created as between the parties at this juncture, it is this court's determination there is no way that Tenant, who needed Landlord's approval, could have cured the claimed defect within the allotted cure period. As such, it is


ORDERED that Tenant's motion for a Yellowstone injunction is granted.

Counsel for all parties in this action, as well Commerce Bank v. Dworman (Index No. 117271/2003), and Dworman v. Commerce Bank (Index No. 120146/2003), are directed to appear for a conference in this matter in IA Part 15, Room 335, 60 Centre Street, New York, New York at 9:30 a.m. on August 29, 2007 so as to ascertain the status of the two related cases, and to determine what, if any, discovery is required in this action. Counsel for all parties in all actions are further forewarned that although this case cannot be consolidated for administrative reasons, this court has no problem expediting the instant action,

in the interest of judicial economy, so as to have it trial ready
in time to join its 2003 counterparts.

This constitutes the decision and order of the Court.

Dated: 8/2/07


HON. WALTER B. TOLUB, J.S.C.

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