

Valueworks LLC v 1450 Realty Assoc., LLC

2007 NY Slip Op 32603(U)

August 13, 2007

Supreme Court, New York County

Docket Number: 0604147/2006

Judge: Emily Jane Goodman

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

PRESENT: GOODMAN
Justice

PART 17

VALUWORKS, LLC

INDEX NO. 604147/06

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

- v -

1450 REALTY ASSOCIATES, LLC

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

and cross motion

Upon the foregoing papers, it is ordered that this motion

be denied per

attached

FILED

AUG 21 2007

COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 8/13/07
[Signature]

[Signature]

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION
EMILY JANE GOODMAN C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 17

-----X
VALUEWORKS LLC,

Plaintiff,

-against-

1450 REALTY ASSOCIATES, LLC,

Defendant.

-----X
EMILY JANE GOODMAN, J.S.C:

Index No 604147/06

FILED 1

AUG 21 2007

COUNTY CLERK'S OFFICE
NEW YORK

In this commercial real estate matter, plaintiff Valueworks LLC (Valueworks) moves, by order to show cause, for an order, pursuant to CPLR 6301, 6311, and 6313, granting a preliminary injunction restraining defendant 1450 Realty Associates, LLC (1450 Realty) from leasing any part of the 41st floor of a building located at 1450 Broadway, New York, New York to any party other than Valueworks. 1450 Realty opposes the motion and cross-moves, for an order, pursuant to CPLR 6312, requiring Valueworks to post an undertaking bond, in the sum of \$342,000.00, as security for the preliminary injunction in the event that the court issues the requested preliminary injunction.

The underlying facts are as follows. By commercial lease (Lcase) dated January 1, 2003, 1450 Realty as "Owner" and Valueworks as "Tenant" agreed that Valueworks would use and occupy the entire 42nd floor of the building for its executive and general offices, commencing on January 1, 2003, and terminating on July 31, 2010 (the Lease Term). Pursuant to Article 68 of the Lease, Valueworks was granted a Right of First Refusal (ROFR) with respect to renting all or part of the 41st floor. Article 68 provides, in relevant part:

In the event that at any time during the Term of this Lease, Landlord receives a written offer (the "Offer") from a third party (the "TP") to lease all or any portion of the 41st floor of the Building (the "ROFR Space") and Landlord desires to accept the Offer from the TP, Landlord shall . . . provide Tenant with written notice that Landlord has received the Offer including a detailed summary of the terms and conditions (the "T&C") included in the Offer and including what portion of the ROFR Space the TP intends to lease (the "Offer Space"). Tenant shall have the right (the "ROFR"), exercisable by written notice given by Tenant to Landlord by no later than five (5) days after Tenant's receipt of the Offer, to lease the Offer Space on the T&C. In the event Tenant exercises the ROFR, Tenant and Landlord shall thereafter promptly enter into an amendment of this Lease (or new Lease, at landlord's option) memorializing the leasing by Tenant of the Offer Space on the T&C (time being of the essence with respect to said five (5) day period), Tenant shall [sic] deemed to have waived its right to lease the Offer Space . . .

By letter dated July 7, 2006, the Landlord notified plaintiff that a third party had made an offer to lease approximately 3,106 square feet of space on the 41st floor of the Building, and that pursuant to Article 68 of the Lease, it could exercise its ROFR in accordance with the terms and conditions offered by the third party. The letter includes the following cautionary advice:

Pursuant to Article 68 of the Lease, Tenant must notify Landlord within five (5) days that it will lease the Offer Space on the T&C, TIME BEING OF THE ESSENCE. In the event that Tenant fails to timely elect to lease the Offer Space on the T&C, Tenant shall be deemed to have waived its right to lease the Offer Space and thereafter Article 68 and the ROFR shall be null and void and of no further force or effect [emphasis in the original].

It is undisputed that, by letter dated July 11, 2006, Valucworks provided a timely, written acceptance of the offer, stating, in relevant part, "[p]lease accept this letter as our client's exercise of its Notice on the terms and conditions therein stated. We look forward to receiving from you those documents required in order to memorialize the Tenant's leasing of the Offer Space." Defendant, through its legal counsel, then sent Valucworks an initial draft of the lease for the Offer Space. The cover letter informs Valucworks that the draft has not been reviewed by

1450 Realty, and therefore, the draft “must remain subject to further review and/or revision . . . and there is no agreement absent the execution and delivery by all parties of a written agreement.”

Discussions and negotiations were then held by and between the parties and their respective legal counsel which culminated in the drafting of a revised lease which incorporated some of the changes requested by Valueworks. By September 28, 2006, despite the fact that plaintiff’s requests for co-terminus end dates for leased spaces on the 42nd and 41st floors, and for permission to join the two floors with an interior staircase had not been agreed to by 1450 Realty, 1450 Realty was, apparently, still willing to proceed with the leasing of the Offer Space to Valueworks and forwarded a revised lease. The September 28, 2006 cover letter states, in relevant part:

attached, please find the revised lease (blacklined pages showing all changes from original). Please note that Landlord has agreed to a number of Tenant’s comments. The comments not incorporated herein are not acceptable to Landlord.

With respect to the request that the lease provide for a combination of the two spaces, with the leases to be coterminous and an extension of up to 10 years, Landlord cannot agree

This is not an offer - the deal remains to be worked out - and, as aforementioned, Tenant is not entitled to its request per the [ROFR]. However, in the interest of accommodating the request, Landlord will entertain the unification of the two spaces. If this is not acceptable please advise immediately. The [ROFR] offer will be deemed terminated if tenant does not agree to enter in to the lease transmitted herewith (subject to revisions re: HVAC, and the conditions in the preceding paragraph []).

Please note that Landlord has not had the opportunity to review the attached or the above and thus remains subject to revision in all respects. Please call to discuss.

Evidently, the failure of the parties to promptly conclude their negotiations and execute a lease

for the Offer Space frustrated defendant to the point that it sought to terminate the ROFR. By letter, dated October 30, 2006, defense counsel informed plaintiff, in relevant part, that, "during the three (3) month period following the ROFR, Tenant has sought to expand the scope thereof to include new deal terms [and that the] delays have prejudiced Landlord's ability to lease the subject premises." The letter concludes: "[b]ased upon the lapse of time and the interposition of unwarranted demands and conditions, the ROFR is hereby terminated effective immediately."

Immediately, plaintiff's counsel responded by letter dated November 2, 2006, stating, in relevant part, that:

[a]s you know, we have for a while now been engaged in good faith negotiations over certain of the terms and conditions relating to the lease of the new space. At all times you lead me to believe that negotiations were on-going between us and at no time did you ever indicate to me that unless the lease as presented was signed the landlord would refuse to enter into the new lease with my client. . . . As I indicated to you by phone, if in fact your client is unwilling to make any concessions on these points my client is nevertheless prepared at this point to sign the new lease on the original terms. . . the Tenant rejects your attempt to terminate its right of first refusal

In a further effort to prevent defendant from leasing the Offer Space to the third party, plaintiff commenced the instant action for declaratory relief [based upon allegations of breach of contract] by service of motion by order to show cause for a preliminary injunction enjoining defendant from leasing the Offer Space to a third party. The motion was granted to the extent that a temporary restraining order was issued specifically preventing defendant from entering into a lease with third party Miller Caufield, the law firm holdover tenant, while permitting Miller Caufield to continue to occupy the Offer Space until the underlying matter is resolved.

On or about February 1, 2007, 1450 Realty responded by cross motion for an order denying the preliminary injunction, or in the alternative, for an order requiring plaintiff to post an

undertaking bond in the sum of \$342,000.00 as security for the preliminary injunction. Although defendant offers an explanation for how it arrived at the \$342,000.00 figure, no corresponding figure or input is proffered by plaintiff.

It is well established that, in order to be granted a preliminary injunction, the movant must demonstrate the likelihood of ultimate success on the merits, irreparable injury absent the granting of the preliminary injunction, and that a balancing of the equities favors the movant's position (Montauk-Star Is. Realty Group v Deep Sea Yacht & Racquet Club, 111 AD2d 909, 910 [2nd Dept 1985]).

The parties do not dispute the ROFR language contained in the Lease. Rather, the parties' dispute centers around the three-month period during which letters and phone calls were exchanged which failed to culminate in either an amendment or an executed lease with respect to the Offer Space. While plaintiff argues that defendant's decision to terminate the ROFR was unjustified and that the termination notification letter came without warning, defendant asserts that Valueworks, for a variety of self-serving reasons, stalled and delayed the process, demanded terms and conditions which varied from the third party's terms and conditions (in contravention of Article 68 of the Lease), and that Valueworks failed to execute a lease for the Offer Space in a reasonable and timely manner.

1450 Realty points to the language contained in its letters as proof that Valueworks was aware of 1450 Realty's desire to finalize the lease for the Offer Space on an expedited bases. A letter sent by defendant, dated July 28, 2006, notes "that in the interest of time, we have submitted the enclosed (proposed lease) without providing our client the opportunity to review the same." A letter sent by defendant, dated August 22, 2006, states "[p]lease note that in the

* 7]

interest of time, we have submitted the enclosed without providing our client the opportunity to review the same.” Defendant’s third letter, faxed to plaintiff, on or about September 28, 2006, threatens to terminate the ROFR if Valueworks does not promptly finalize the transaction. The fax states, in relevant part, “[t]his is not an offer - the deal remains to be worked out . . . The ROFO [ROFR] offer will be deemed terminated if tenant does not agree to enter in to the lease transmitted herewith (subject to revisions re: HVAC, and the conditions . . . [].”

It is undisputed that the next written notice plaintiff received from defendant was the October termination notice. It is also undisputed that Valueworks desires the Offer Space because of its interest in physically joining its premises on the 42nd floor with the Offer Space on the 41st floor, rendering the disputed leasehold location unique. However, fiercely disputed are the underlying substantive issues which include whether: (1) 1450 Realty evinced a willingness to consider Valueworks’ requests for terms and conditions which vary from Miller Caulfield’s terms and conditions; (2) 1450 Realty acquiesced to a non-specific period of negotiations with plaintiff; and (3) 1450 Realty played a role in the delayed execution of a lease/ amendment by stating in its letter, dated July 28, 2006 that “the enclosed [initial draft] must remain subject to further review and/or revision. The delivery of this document shall not constitute nor be deemed an offer and there is no agreement absent the execution and delivery by all parties of a written agreement”; and again, by stating in its fax, dated September 28, 2006, that “[t]his is not an offer - the deal remains to be worked out.”

Defendant’s sworn statements and documentary evidence fails to identify a Lease provision setting forth a time limit for the execution of a written agreement with respect to the Offer Space, other than the requirement in Article 68 that the parties “promptly enter into an

amendment of this Lease (or new Lease, at landlord's option) memorializing the leasing by Tenant of the Offer Space on the T&C." The Lease does not provide for a specific period of time (number of days) or a specific end date after which the ROFR could be terminated if an agreement is not procured. Presumably however, the parties would not dispute that the ROFR could be terminate if an agreement was not procured "promptly." If plaintiff is ultimately successful and it is determined that plaintiff did not breach the Lease provision to requiring it to "promptly enter into an amendment . . .or a new Lease," the victory would be pyrrhic because absent injunctive relief, plaintiff would not be able to lease the very asset for which it bargained in the January 1, 2003 Lease, and around which this contractual dispute is centered. Although 1450 Realty complains that plaintiff "sought to expand the scope thereof to include new deal terms," and although the renewal option was only "to lease the Offer Space on the T&C" 1450 Realty was free to consider plaintiff's requests, at its option, which it did for a period of time. Valueworks has evidenced a likelihood of success on the merits sufficient to justify the granting of a preliminary injunction, and defendant does not meaningfully argue that the injunctive relief would cause it to suffer irreparable harm. Rather, defendant's cross motion seeks an order requiring Valueworks to post an undertaking bond as security in the event that a preliminary injunction is issued. The record justifies the imposition of a preliminary injunction, as the equities balance in favor of maintaining the status quo pending resolution of the underlying dispute (see Gramercy Co. v Benenson, 223 AD2d 497, 498 [1st Dept 1996]).

Accordingly, it is

ORDERED that the motion by plaintiff for a preliminary injunction is granted and will continue during the pendency of this action/until the underlying dispute is resolved; and it is

further

ORDERED that defendant, its agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of defendant, are enjoined and restrained, during the pendency of this action from entering into a lease with Miller Caulfield or any other third party with respect to the ROFR Space; and it is further

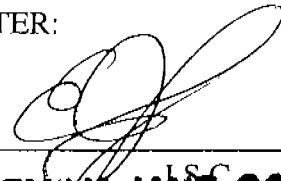
ORDERED that plaintiff is directed to post a preliminary injunction bond in the amount of \$342,000 forthwith after receipt of a copy of this Decision and Order.

This constitutes the Decision and Order of the Court.

Dated: ~~September 4, 2007~~

8/13/07

ENTER:



EMILY JANE GOODMAN
JSC

FILED

AUG 21 2007

COUNTY CLERK'S OFFICE
NEW YORK