

Unique Laundry Corp. v Hudson Park N.Y. LLC

2007 NY Slip Op 32924(U)

September 18, 2007

Supreme Court, New York County

Docket Number: 0111267/2007

Judge: Carol R. Edmead

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

CAROL EDMEAD
J.S.C.

PRESENT: _____

PART 35

Justice

UNIQUE LAUNDRY
CORP.

INDEX NO. 111267107

MOTION DATE 9/18/07

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -
HUDSON PARK NY LLC
ET AL.

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

FILED
SEP 18 2007
NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the order to show cause is denied; and it is further

ORDERED that the cross-motion is denied as premature; and it is further

ORDERED that in light of defendant's representation during oral argument that a demand for a complaint was served, plaintiff shall serve a complaint within 30 days of the date of this order; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the parties appear for a preliminary conference on November 20, 2007, 2:15 p.m. Part 35.

This constitutes the decision and order of the Court.

Dated: 9/18/07


CAROL EDMEAD
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK; PART 35

-----X
UNIQUE LAUNDRY CORP.,

Index No. 111267-2007

Plaintiff,

-against-

HUDSON PARK NY LLC AND JOEL W. WIENER,

Defendants.

-----X
HON. CAROL ROBINSON EDMEAD, J.S.C.

FILED
SEP 18 2007
NEW YORK
COUNTY CLERK'S OFFICE

MEMORANDUM DECISION

Plaintiff, Unique Laundry Corp. (the "plaintiff") moves by order to show cause, pursuant to CPLR §§ 6301 and 6311 for a temporary restraining order enjoining defendant Hudson Park NY LLC ("Hudson") and Joel W. Wiener ("Wiener") (collectively, the "defendants") from (1) causing the plaintiff or any of plaintiff's property to be ejected from the laundry room (the "Premises") of the building located at 323 W. 96th Street, New York, New York 10025 (the "Building"), which are being occupied by the plaintiff, (2) moving, damaging, or tampering with certain washer and dryer machines (the "Machines") at the Premises, and (3) interfering with plaintiff's use of the Premises.

Order to Show Cause

Plaintiff alleges that in August 2003, plaintiff entered into an 18-year "Proposal/Contract" (the "Contract") with a previous owner of the Building, Shaya B. West, LLC, whereby Plaintiff was leased the Premises for the purpose of operating the coin-operated Machines. Pursuant to the Contract, plaintiff agreed to purchase and maintain the Machines for installation in the Premises, and the previous owner agreed to lease the Premises to plaintiff for the purpose of

installing and operating the Machines, at a fixed monthly rent of \$1,150.00. According to plaintiff, the Contract accompanied a floor plan and contains a specific description of the premises to be exclusively occupied by the Plaintiff, and the fixed term of the Contract. The Contract also provides that it shall run with the land and bind all future owners and assignees. Although the Contract requires that the lessor obtain a written assumption from any subsequent purchaser, it also provides that the assignment to any successor shall be self-operative despite the lessor's failure to obtain an assumption.

By letter dated July 26, 2007, the same day that the sale of the Building closed, the defendant Hudson, as the new owner of the Building, invoiced plaintiff for the rent due under the Contract. By separate letter also dated July 26, 2007, the plaintiff was notified that the "the new owner, Hudson Park NY LLC, will not assume the laundry contract dated August 15th, 2003"

Plaintiff contends that the defendants had actual and constructive knowledge of the Contract prior to closing on the purchase of the Building. Plaintiff claims that defendants were managers of the Building for weeks or months before closing on the purchase, and had constructive notice of the Contract by virtue of plaintiff's open and notorious use of the Premises, the presence of plaintiff's Machines, and plaintiff's employee's frequent visits to the Premises. Defendants assumed the Contract prior to repudiating it, by invoicing the plaintiff for rent due. Further, as defendants' first letter repudiating the Contract is dated on July 26, 2007, the same day that the sale of the Building closed, the defendants are not "good faith" purchasers.

Plaintiff argues it has a likelihood of success on the merits of its claim that it has a valid lease agreement, continues to pay rent thereunder, and defendants' threatened eviction of plaintiff

is unjustified. In addition, plaintiff will suffer irreparable harm unless a temporary and preliminary injunction are granted, in that the revenue generated by the Machines constitutes the vast majority of plaintiff's revenue and the loss thereof would immediately render plaintiff insolvent. Further, a balancing of the equities establishes plaintiff's entitlement to such relief, as defendants will suffer no harm from being enjoined from this unlawful eviction.

Cross-Motion

In response, defendants cross move pursuant to CPLR 3211 (a)(1) and (7), to dismiss the action on the ground that plaintiff has no cause of action against either defendant, and for costs and disbursements of this action. Defendants contend that plaintiff is not a tenant, does not have a lease, and has no basis in law or in equity for this action.

Defendants argue that the Contract is not a lease, but a license and defendants are not bound by it. Defendants assert that the Contract is a license, in that the Contract (1) does not describe any specific premises as being demised to the plaintiff, and (2) does not give exclusive use and occupancy of any particular premises to anyone, but requires the owner of the Building to maintain the premises in clean condition, remove rubbish, keep the premises available for use, and provide free utilities, water and sewer; in a true lease, the tenant pays for water, electricity or gas used or consumed by laundry room users. At best, the Contract merely gives plaintiff the exclusive right to install, maintain, and repair laundry equipment in the Building. In addition, since the Contract term is for more than 3 years and was not recorded and not in recordable form, it cannot be enforced against a future purchaser. Plaintiff is not even listed on the rent roll annexed to the contract of sale for the Building.

Defendants also argue that the Contract is unconscionable and should not be enforced. According to defendants, the prior owner, was named after Shaya B. Boymelgreen, who is the father of Zvi Boymelgreen, the person who signed the Contract. The Boymelgreens are personal close friends of the plaintiff's Vice-President. Therefore, even if the Contract were a lease, which it is not, it is an unconscionable and unenforceable attempt by the Boymelgreens to enrich their friend at the expense of Hudson.

Furthermore, the Contract violates the underlying ground lease's provisions which require that subleases be the result of an arms' length transaction and take the form customarily used for the rental of commercial space in New York City. The Contract also fails to state that it is subordinate to the ground lease and that it shall terminate no later than one day prior to the expiration date of the ground lease, as so required. The Contract violates three of the guidelines for subleases under the ground lease, in that it does not contain an express statement that it is subordinate to the ground lease, it does not charge market rent, and does not include all the usual pass-through expenses, including real estate tax escalations, water, sewer and sprinkler fees, common area maintenance, or porter's wage calculation.

Hudson asserts that at the closing of the Building, Hudson specifically excluded the Contract from the Assignment of Leases and Rents. When Hudson reviewed the Contract with its attorneys, Hudson confirmed that the Contract was a mere license to provide laundry services to the Building's tenants. Hudson promptly notified plaintiff that Hudson was not bound by the Contract and that plaintiff should remove the Machines. Upon plaintiff's request, Hudson granted plaintiff more time to remove the Machines. Hudson's inadvertent sending of a rent bill

before becoming aware of all the facts does not constitute a waiver nor create a tenancy out of the Contract.

Defendants also contend that a search of the Department of State's database reveals an entity called Unique Laundry *Service* Corp., which is not the named plaintiff in this action.

It is further argued that there cannot be any tortious interference with contract, since there is no valid contract in the first instance between plaintiff and Hudson or between plaintiff and Wiener. Nor will a tortious interference with a contract claim lie where the person alleged to have interfered with the contract has a legitimate business reason and here, defendants acted for legitimate business reasons in that the Contract is extremely economically disadvantageous to Hudson. Further, there can be no claim for anticipatory breach, since there is nothing to be breached.

As to defendant Wiener, he contends that he is not personally liable to the plaintiff. Moreover, a licensor can use self-help to remove a licensee once the license has expired or terminated. Further, the plaintiff is still operating a laundry service in the Building and has not been evicted.

A preliminary injunction is unwarranted, as plaintiff failed to demonstrate a substantial likelihood of success on the merits. Further, plaintiff waited months after being told that the Contract was a license and that Hudson was not bound by it, before moving for relief. Such delay undermines any claim of immediate, irreparable harm or lack of an adequate remedy at law. Finally, the balancing of equities tips in favor of defendants, as plaintiff has no right to continue to provide laundry services once the Contract ended.

Reply

In opposition to the cross-motion and further support of injunctive relief, plaintiff argues that the cross-motion to dismiss is premature, since no Complaint has been served in this action. Additionally, as only the lessor under the ground lease (who benefits from the relevant clause of the ground lease), may make assertions that the Contract violates the ground lease, defendants lack standing to challenge the Contract on such grounds.

Plaintiff insists the Contract is a lease, as it contains terms for fixed rent, is irrevocable for a definite term, is freely assignable, contains *indicia* of exclusivity, and the parties intended to create a lease. The course of conduct between plaintiff and the prior owner indicates that the plaintiff had complete and exclusive control and dominion over the Premises. Plaintiff contends that it contracted with “Furst Vending” for Furst Vending to install soda and snack vending machines on the Premises. At no time did plaintiff or Furst Vending consult the previous building owner at that time, and the previous building owner never objected to the installation of said vending machines. Thus, such contract demonstrates that plaintiff has sole and exclusive occupancy, possession, control and dominion of the Premises.

Nor is the Contract defeated by the lack of recording, as there is no question that the defendants knew of plaintiff’s lease, as well as plaintiff’s occupancy on the subject premises. Thus, the Contract is binding on defendants, and any ambiguity in the description of the demised premises is resolved by the floor plan. Plaintiff also points out that defendants acknowledged the Contract as a lease, by referring to the Contract as “The Laundry Lease” in an Assignment of

Leases and Rents.¹ Further, plaintiff's payment for services such as water and sewer is included in the fixed rent. In the event the Contract is deemed a license, defendants' appropriate recourse is to commence a special proceeding under RPAPL §713(7).

Additionally, the Contract is the product of an arm's length negotiation over its terms, in that plaintiff's prior owner demanded that plaintiff beat the terms of a competing offer. Plaintiff made a more attractive offer, which included higher rent, more machines, and a \$15,000.00 up-front payment to the prior owner. Further, plaintiff contends that the Contract is a fair lease and it is preposterous to claim that the commercial lease between multi-millionaire businessmen is unconscionable. At the time the Contract was entered into, the building was under construction and almost completely vacant. That such a contract might be worth more now says nothing about the fairness of the agreement at the time.

And, plaintiff alleges, it has an additional cause of action against Wiener for conspiring with the previous building owner to defraud plaintiff by leading it to invest significant sums of money in reliance on the Lease. In any event, the cross-motion to dismiss the claims against Wiener is premature, since no evidence has been presented to establish his authority to act on behalf of defendant Hudson in tortiously interfering with plaintiff's Contract. Further, plaintiff intends to claim fraud by Wiener, thus precluding him from hiding behind the corporate shield.

With respect to the corporate name of the plaintiff, the fact that the final word of the corporate name was accidentally omitted from the caption is of no consequence. Defendants'

¹ In support of this argument, plaintiff points out that although the Contract is labeled "Proposal/Contract," in the Assignment of Leases and Rents, defendant Wiener personally handwrote the words "Except for the Laundry Lease" in the third recital paragraph, thereby admitting that the Contract is a lease.

counsel identified plaintiff as “Unique Laundry Service Corp., and plaintiff is prepared to seek leave to amend the caption so as to assuage any concerns.

Further, plaintiff has invested considerable sums in the operation of its laundry business, and the disruption of plaintiff’s business and injury to its reputation are consequences for which compensation would be difficult. Any eviction of the plaintiff would cause personal financial ruin for its principal shareholder. And, the loss of future income would be difficult to determine, rendering monetary remedy inadequate. Nor can it be said that plaintiff waited months to assert its rights, since its instant application was made on August 16, 2007, three days after plaintiff first received a written communication from defendants.

At worst, defendants would temporarily be deprived of a potentially higher rent from another lessee, which loss defendants could seek to recover from plaintiff, should defendants ultimately prevail at trial. Further, denial of preliminary injunctive relief would be tantamount to summary judgment in defendants’ favor, with no discovery, thereby depriving plaintiff due process of law. And, defendants have unclean hands, as they created the present controversy by tortiously interfering with plaintiff’s Contract with the prior owner of the Building, by inducing the prior owner to forego the assumption it had covenanted to obtain from defendants.

Analysis

A preliminary injunction is a drastic remedy that “require[s] a clear showing of likelihood of ultimate success on the merits,” danger of irreparable injury in the absence of an injunction, and a balance of the equities in its favor (*Faberge Intl. v Di Pino*, 109 AD2d 235, 240 [1st Dept 1985]; *see also, Credit Index v RiskWise Intl.*, 282 AD2d 246 [1st Dept 2001]; *see also Grant*

Co. v Srogi, 52 NY2d 496, 517, 438 NYS2d 761 [1981]; *Casita, L.P. v Maplewood Equity Partners (Offshore) Ltd.*, -- NYS2d ----, 2007 WL 2199043 [1st Dept 2007]).

Plaintiff's entitlement to preliminary injunctive relief first rests on its ability to establish a likelihood of success on the merits of its claim that the Contract constitutes a "lease," as opposed to a license as defendants contend, and if so, whether its rights may be terminated by defendants.

The construction of an unambiguous contract is a question of law for the court to pass on, and circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered, where, as here, the intention of the parties can be gathered from the instrument itself (*Lake Constr. & Development Corp. v. City of New York*, 211 A.D.2d 514, 515, 621 N.Y.S.2d 337 [1st Dept 1997]).

It has been stated that if the occupation of the land is in connection with a service to be rendered to the landlord, then possession continues to be that of the landlord (*Kaypar Corp. v Fosterport Realty Corp.*, 1 Misc 2d 469 [Supreme Court, Bronx County 1947], citing *Kerrains v People*, 60 NY 221, 225). Thus, generally, an agreement for the installation and servicing of laundry facilities for the use of tenants of a building has been held to create a license (*Dime Laundry Serv., Inc. v 230 Apartments, Corp.*, 120 Misc 2d 399, 466 NYS2d 117 [Supreme Court, New York County 1983]; see *Linro Equip. Corp. v Westage Tower Assoc.*, 233 AD2d 824 [3d Dept 1996] [finding that a seven-year agreement obligating plaintiff to install and maintain coin-operated laundry machines on each of the floors of defendant's condominium for a set sum for "rent" is a license, and not a lease]).

For an agreement to constitute a lease such as to create a landlord-tenant relationship, on the other hand, there must be an indication that, by the terms thereof, plaintiff paid rent "for

outright ownership [of a definite space] for the duration of the term” (*Linro Equip. Corp. v Westage Tower Assoc.*, *supra.*, citing, *Kaypar Corp. v Fosterport Realty Corp.*, *supra.*, at 471). Even where the agreement contains “exclusive” language, there must be evidence of sole and exclusive dominion by the tenant over the “area where the machines are installed” (*Dime Laundry Serv. v 230 Apts. Corp.*, *supra.*). Such exclusivity, necessary for the creation of a landlord-tenant relationship, could be indicated by “control over the patrons of the laundry services, control of the keys, or exclusion of other vending machines or services” (*Dime Laundry Serv. v 230 Apts. Corp.*, *supra.*, at 401). Notwithstanding the terminology used, a lease is not created where the essential element of sole and exclusive dominion and control over the designated space is lacking (*see Linro Equip. Corp. v Westage Tower Assoc.*, *supra.*)

The Contract at issue is indistinguishable from most other laundry-servicing agreements which create only a license to use a designated space for the purpose of providing and maintaining a service to the tenants (*see Linro Equip. Corp. v Westage Tower Assoc.*, *supra.* *see, supra;* *Kaypar Corp. v Fosterport Realty Corp.*, *supra;* *Greenbro Coin Meter Corp. v Basch*, 205 Misc 853 [Supreme Court, New York County 1954] [“A written agreement for the installation by plaintiff in a building of coinmetered washing machines constituted a license, notwithstanding that the agreement purported to lease a designated space in the building described as a ‘Laundry room in basement’”]; *see also Wash-O-Matic Laundry Co. v 621 Lefferts Ave. Corp.*, 191 Misc 884, 82 NYS2d 572] [Supreme Court, New York County 1948]).

Here, the plaintiff proposed to “furnish and install” washing and drying machines at the “above captioned premises” which is identified within the Contract as “323 west 96th St. N.Y.C [sic].” According to the “Service” section of the Contract, plaintiff agreed to do “all

• maintenance” and “all necessary repairs” at its own cost and expense. As to the “Use” of the Premises, the “Lessee” was permitted to “use the Premises for the purpose of installing and operating coin-operated laundry equipment.” The Building Owner was obligated to supply the water, electricity and all necessary plumbing to run the machines, and the Contract gave the plaintiff “the right to connect said equipment [the Machines] through electric, water, gas, sewer and vent lines serving the Building.” Further, the “Lessor” agreed that “No charge shall be made to the Lessee for water, gas, electricity or use of sewer and vent lines.” The Contract expressly prohibited the Lessor from “install[ing] or permit[ting] any person other than Lessee to install laundry equipment or drying lines the Building”

A fair reading of the Contract indicates that the Contract essentially granted plaintiff the right to furnish, install, maintain, and operate the Machines at the Building for the term of 18 years from the date of equipment installation. Such right merely amounts to the grant of the exclusive right to provide, install and operate the Machines as a laundry service, and is thus distinguishable from the right to exclusive possession and dominion over the *area* in which the Machines are installed.

In *Kaypar*, the plaintiff corporation operated coin metered washing machines in the basement of a building owned by the defendant therein. Plaintiff sought a declaratory judgment declaring that the parties were landlord-tenant. In construing the agreement between the parties and finding that the subject agreement was a license, the Court reasoned that the agreement was to procure for the tenants of defendant a laundering service, and that plaintiff, through its installations, was granted a privilege to occupy the land for the purpose of performing its contract of furnishing this laundry service to the tenants. The Court concluded that the plaintiff had no

ownership of the space allotted to its equipment “in the sense that usually obtains in the relationship of landlord and tenant” (*see also, Sebco Laundry Sys., Inc. v Oakwood Terrace Housing Corp.*, 277 AD2d 303 [2d Dept 2000] [stating that agreements which gave “sole and exclusive right” to install and maintain laundry equipment were licenses, where, *inter alia*, agreements did not convey sole and exclusive dominion and control over the areas where the machines were installed]).

Although the “Lessor” herein was precluded from installing or permitting any person other than the plaintiff from installing laundry equipment, the terms of the Contract do not preclude the defendants from exercising control or possession over any portion of the Premises for a different purpose. Plaintiff’s contract with the vending machines is illustrative, in that although plaintiff exercised control over the Premises, its exercise of control is not necessarily at the exclusion of the “Lessor.” Notably, there is nothing in the Contract that precludes the defendants from entering into similar agreements over of the use of the Premises, provided such use is not for laundry services.

Further, that the Contract identifies the previous owner as “Lessor” and the plaintiff as “Lessee” and contains references to the parties as “Lessor” and “Lessee” does not warrant a different result. In construing an instrument, the Court looks to the rights and obligations it confers to determine its true nature (*Dime Laundry Service v 230 Apartments Corp.*, *supra*; *see also Linro Equip. Corp. v Westage Tower Assoc.*, 233 AD2d 824, 650 NYS2d 399 [3d Dept 1996] [holding that notwithstanding the terminology used, a mere license was created since the essential element of sole and exclusive dominion and control over the designated space was lacking]).

• Since the Contract is determined to be a license, which is a “personal, revocable and nonassignable privilege” (*Linro Equip. Corp. v Westage Tower Assoc., supra; Dime Laundry Serv. v 230 Apts. Corp., supra*, at 403; *see*, Rasch, New York Law of Landlord and Tenant § 71), it was extinguished upon the conveyance of the property (*see, Todd v Krolick, supra*, at 696; *Dime Laundry Serv. v 230 Apts. Corp., supra*, at 403).²

The Court also notes that the remaining potential claims asserted by plaintiff sounding in fraud, tortious interference with contract, and conspiracy are insufficiently supported by the record to warrant injunctive relief.

In any event, there is no showing here that plaintiff will suffer irreparable harm if the injunction is denied. Plaintiff’s losses can be compensated by money damages, as ascertained from the income it derives from its laundry machines (*see Coinmach Corp. v Fordham Hill Owners Corp.*, 3 AD3d 312, 770 NYS2d 310 [1st Dept 2004] *citing Mr. Dees Stores, Inc. v A.J. Parker, Inc.*, 159 AD2d 389, 553 NYS2d 16; *Di Stefano v PSFB Assocs.*, 103 AD2d 839, 478 NYS2d 360, *appeal dismissed* 64 NY2d 776).

With respect to defendants’ cross-motion to dismiss the action, such relief is premature.

² The Court notes that with respect to any new purchasers of the Building, the “. . . Lease shall be binding upon and inure to the benefit of all future owners . . . and it is the intention of the parties hereto that this Lease runs with the land and Premises.” The “Lessor agree[d] that in the event of any sale, . . . Lessor will obtain an assumption in writing by the transferee agreeing to be bound by the terms and conditions of this Lease.” The Contract also provided that “any sale . . . Shall be subject to this Lease and this provision shall be self-operative; no further instrument shall be required to effect this purpose.” Under sections 290 and 291 of the Real Property Law, an agreement, whether a lease or license, which creates interest in real property for longer than three year, and is not recorded, is void as against any person who “subsequently purchases or acquires . . .the same real property . . .in good faith for a valuable consideration.” However, the purchaser’s actual or constructive knowledge of the agreement, though not recorded, renders section 291 inapplicable. Thus, that the Contract was not recorded is inconsequential, since the record indicates the defendants had actual notice of the Contract at the time it closed on the sale of the Building.

In light of the foregoing, the Court does not reach the merits of the parties' remaining arguments.

Based on the foregoing, it is hereby

ORDERED that the order to show cause is denied; and it is further

ORDERED that the cross-motion is denied as premature; and it is further

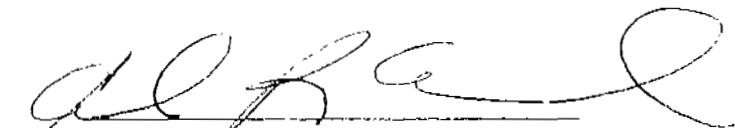
ORDERED that in light of defendant's representation during oral argument that a demand for a complaint was served, plaintiff shall serve a complaint within 30 days of the date of this order; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

ORDERED that the parties appear for a preliminary conference on November 20, 2007, 2:15 p.m. Part 35.

This constitutes the decision and order of the Court. **HON. CAROL EDMEAD**

Dated: September 18, 2007


Hon. Carol Robinson Edmead, J.S.C.

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