

**Vidipax, LLC v LIC Crown Leasehold Owner LLC**

2007 NY Slip Op 33877(U)

November 19, 2007

Supreme Court, Queens County

Docket Number: 0013720/2007

Judge: Orin R. Kitzes

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## MEMORANDUM

SUPREME COURT : QUEENS COUNTY  
IA PART 17

VIDIPAX, LLC	X	INDEX NO. 13720/2007
Plaintiff,		MOTION
- against -		DATE: OCTOBER 24, 2007
		MOTION CAL. NO. 60
LIC CROWN LEASEHOLD OWNER LLC; 30TH PLACE HOLDINGS, LLC,		MOTION SEQ. NO. 1
Defendants.		BY: KITZES, J.
	X	DATED: NOVEMBER 19, 2007

In this action for a declaratory judgment and other related relief, plaintiff Vidipax, LLC (Vidipax) seeks a Yellowstone injunction to stay the cure period set forth in a notice to cure dated May 10, 2007 and enjoin defendants from terminating its commercial lease for premises located on the sixth floor, of 35-00 47th Avenue, Long Island City, New York. Defendants cross-move 1) to dismiss pursuant to CPLR 3211(a) (1) and (7) the first, second, third and fifth causes of action, 2) for dismissal under CPLR 3016(b) for failure to plead fraud with particularity and 3) to compel Vidipax to pay all past and future rent.

Vidipax entered into a commercial lease with defendant 30th Place Holdings, LLC (30th Place) on March 10, 2005. Title to the premises was subsequently transferred to defendant LIC Crown

Leasehold Owner, LLC (LIC Crown) in May 2006. On or about November 2005, Vidipax began withholding rent as a result of alleged severe and recurrent water leaks and mold that necessitated the abandonment of a portion of the leased space and caused substantial monetary damages due to defendants failure to remedy the defective conditions. By notice to cure dated May 10, 2007, LIC Crown alleged lease violations pertaining to rent and additional rent as well as a default in failing to provide it with proper certificates of insurance. Inasmuch as Vidipax has since supplied LIC Crown with the proper insurance documentation defendants concede this default has been rendered moot.

This court will first address the cross motion as it may be dispositive of this action. In the first branch which seeks to dismiss, it is incumbent upon the court to liberally construe a challenged pleading and accept as true the material allegations of fact and determine whether any cause of action cognizable at law exists. (See, Goshen v Mut. Life Ins. Co., 98 NY2d 314 [2002]; Mendelovitz v Cohen, 37 AD3d 670 [2007].) To prevail on the basis of documentary evidence the documents relied upon must conclusively dispose of plaintiff's claim. (Held v Kaufman, 91 NY2d 425 [1998]; Shaya B. Pac. LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, 38 AD3d 34 [2006].)

The first cause of action interposed is for a Yellowstone injunction and the second seeks declaratory relief with respect to

defects in the notice to cure. Inasmuch as it is conceded by Vidipax that an independent cause of action for Yellowstone relief does not exist and defendants also concede that the issue of insurance has been rendered moot, the first cause of action is dismissed and the statements set forth therein shall be deemed incorporated into the remaining portion of the declaratory judgment action pertaining to unpaid rent.

Dismissal of the third cause of action for fraud in the inducement is premised upon 1) allegations that Vidipax negotiated with the prior tenant for a sublease and was, thus, aware of an ongoing dispute with 30th Place concerning leaks, 2) the insertion of the lease provision which requires the landlord to repair any roof leaks and 3) LIC Crown's lack of ownership at the time the lease was executed. The papers presented, however, do not definitively resolve the issue of Vidipax's knowledge of leaks in the building, nor do they include any documentary evidence as to the relationship of the defendants and whether LIC Crown assumed any liabilities of its predecessor in title at the time the lease was assigned and the premises was purchased. (See, Won's Cards v Samsondale/Haverstraw Equities Ltd., 165 AD2d 157 [1990].) Moreover, the mere inclusion of a repair clause in the lease does not refute Vidipax's fraud claim. As to the additional assertion that the third cause of action lacks particularity under CPLR 3016,

the pleading sufficiently states the circumstances to withstand dismissal at this early stage of the proceedings.

The fifth cause of action asserts a claim for partial constructive eviction. In an action of this type, the landlord's wrongful acts must substantially and materially deprive a tenant of the beneficial use and enjoyment of the property. (Barash v Pennsylvania Term. Real Estate Corp., 26 NY2d 77 [1970]; 2 Dolan, Rasch's Landlord and Tenant-Summary Proceedings § 28:21, at 339 [4th ed].) Commercial tenants may, however, avail themselves of the doctrine when the use of a part of the premises has been disturbed. (See, Johnson v Cabrera, 246 AD2d 578 [1998].) Whether the conditions which exist in the subject premises rise to the level of a constructive eviction and whether Vidipax abandoned the affected portion of the leasehold within a reasonable time raise issues of fact which cannot be resolved upon the conflicting affidavits presented. (See, Melbourne Leasing Co. v Jack LaLane Fitness Ctrs., 211 AD2d 765 [1995].) While defendants contend the fifth cause of action is duplicative of the fourth which asserts a breach of the covenant to repair, their reliance on Phoenix Garden Rest. v Chu (245 AD2d 164 [1977]), is misplaced as that action, unlike this matter, included claims for constructive eviction and breach of the covenant of quiet enjoyment. Plaintiff may upon proper proof eventually recover either damages for the breach of the duty to repair

(2 Dolan, Rash's Landlord & Tenant-Summary Proceedings § 18:32 at 56 [4th ed]) or a rent abatement based upon constructive eviction. (See, Minjak Co. v Randolph, 140 AD2d 245 [1988]; Oceana Holding Corp. v Atlantic Oceana Co., 4 Misc 3d 1029A [2004].) These claims may remain in the pleading as alternative theories of liability.

This court will next address Vidipax's request for a Yellowstone injunction. Unlike the situation where a landlord serves a mere notice of nonpayment of rent on a commercial tenant and the cure provisions of RPAPL 751(1) are applicable (see, M.B.S. Love Unlimited v Jaclyn Realty Assocs., 215 AD2d 537 [1995]; Top-All Varieties v Raj Dev. Co., 151 AD2d 470 [1989]), here, LIC Crown has served a notice that includes a default which threatens to prematurely terminate the lease. (See, Purdue Pharma, LP v Ardsley Partners, LP, 5 AD2d 654 [2004].) Under these circumstances, Yellowstone injunctions are routinely granted to maintain the status quo pending a declaration of the parties' rights and obligations under the lease. (See, Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assocs., 93 NY2d 508 [1999]; Benningan's of New York v Great Neck Plaza, LP, 223 AD2d 615 [1996]; Lexington Ave. & 42 St. Corp. v 380 Lexchamp Operating, 205 AD2d 421 [1994].) In light of Vidipax's valuable leasehold interest in the premises and a sufficient demonstration of the necessary elements, a preliminary injunction is warranted to

avoid termination. (See, TSI West 14, Inc. v Samson Assocs., LLC, 8 AD3d 51 [2004]; Marathon Outdoor, LLC v Patent Constr. Sys. Div. of Harasco Corp., 306 AD2d 254 [2003].)

Accordingly, plaintiff's application is granted to the extent that defendants are enjoined from pursuing summary proceedings to evict Vidipax, taking any action to terminate the subject lease or otherwise interfering with the occupancy and possession of the premises based upon the defaults set forth in the notice to cure dated May 10, 2007 during the pendency of the action. The foregoing is conditioned upon the maintenance of already deposited funds at the Sterling National Bank Account No. 4400021511 as per the so-ordered stipulation of the parties dated June 20, 2007, and as it appears that only a partial constructive eviction may be established, the payment of all future rents and monetary obligations as they become due shall be paid directly to LIC Crown. In addition, an undertaking shall be filed in accordance with CPLR 6312, which amount shall be fixed in the order to be entered hereon. The issue of past rental payments and any monetary adjustments pertaining to the claim of constructive eviction shall be resolved at the trial of this matter. Upon settlement of the order, the parties may submit proof and recommendations as to the undertaking.

Settle order.

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J.S.C.