

Urban Outfitters, Inc. v Retail Prop. Trust

2007 NY Slip Op 33918(U)

November 27, 2007

Supreme Court, Nassau County

Docket Number: 6285-07/

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

URBAN OUTFITTERS, INC. and
ANTHROPOLOGIE, INC.,

Plaintiffs,

INDEX No. 016285/07

MOTION DATE: Oct. 2, 2007
Motion Sequence # 001, 002

-against-

THE RETAIL PROPERTY TRUST,

Defendant.

The following papers read on this motion:

Order to Show Cause.....	X
Cross-Motion.....	X
Affirmation in Opposition.....	XX
Affirmation in Support.....	X
Memorandum in Support.....	X

This motion, by plaintiffs, brought on by order to show cause, for an order staying and tolling the running and expiration of the cure period to maintain the status quo and enjoining defendant from terminating the leases or proceeding with any eviction proceedings; and a cross-motion, by defendant, for an order pursuant to CPLR 3211 dismissing the plaintiffs' Complaint and for such other and further relief which, as to this Court, may appear just and proper, are **both** determined as hereinafter set forth.

FACTS

The plaintiffs, Urban Outfitters and Anthropologie, Inc., bring this application for Yellowstone injunctive relief to maintain the status quo and to prevent the defendant, The Retail Property Trust ("RPT"), from taking any action to terminate the plaintiff's leases or to commence summary proceedings to evict the plaintiffs.

The underlying action is a dispute between the parties as to the calculation of payments due to the defendant from the plaintiffs representing the plaintiffs' share of property taxes at the Roosevelt Field Mall. Since the two leases commenced in 2002 for Urban Outfitters and 2005 for Anthropologie, Inc., the plaintiffs have operated retail stores at the Roosevelt Field Mall and have established their businesses at Roosevelt Field Mall.

PLAINTIFFS' CONTENTIONS

The plaintiffs contend that they should be granted the Yellowstone injunctive relief to stay and toll termination of the leases to maintain the status quo. The plaintiffs received two types of notices from the defendant: a "Notice of Default" dated June 5, 2007 from RPT, alleging that the plaintiffs were in default of the leases for failure to pay rent, and a "Notice to Tenant" dated August 15, 2007, that provided three days notice from the day of service to satisfy the alleged arrears "or to surrender up the possession of said premises". Neither notice, the plaintiffs argue, complied with Section 18.1 of the leases that provided that in the event of default, RPT may terminate the leases, "by giving notice to the [Tenants] stating the date upon which such termination shall be effective..." As a result, no specific date was given as to when the lease would be terminated and therefore this action is timely.

The plaintiffs also seek declaratory judgment, stating that they are not in default under the leases and thus are not obligated to correct or cure the alleged "default" cited by RPT, and seek judgment declaring that their use and occupancy of the leased premises are consistent with the terms of the leases, that they are not in default under the leases and that they do not owe RPT additional rent for real estate taxes or otherwise. Furthermore, the plaintiffs are seeking attorney's fees and costs pursuant to Section 24.24 of the leases, which provide that if any party to the leases shall institute any action against the other party to the leases, the unsuccessful party in such action shall reimburse the successful party for reasonable attorneys' fees, costs and expenses incurred by the successful party.

DEFENDANT'S CONTENTIONS

The defendant contends that the Yellowstone injunctive relief should not be granted because the plaintiffs failed to act within the ten-day period set in the Notices of Default sent to both plaintiffs and therefore this is untimely. Additionally, the notices in question advised each tenant of the lease provision at issue, its violation of that provision, the time allowed for compliance with the notice, and the possible consequences of a failure to comply, therefore satisfying to the requirements of a notice to cure. The defendant argues that the untimely commencement of the Yellowstone injunction requires dismissal.

DECISION

As stated by the Second Department in **Long Island Gynecological Services v. 1103 Stewart Avenue Associates Limited Partnership**, a tenant seeking Yellowstone relief must demonstrate that:

- “(1) It holds a commercial lease;
- (2) it has received from the landlord a notice of default, a notice to cure, or a threat of termination of the lease;
- (3) the application for a temporary restraining order was made prior to the termination of the lease; and (4) it has the desire and ability to cure the alleged default by any means short of vacating the premises.”

(Long Is. Gynecological Servs. V. 1103 Stewart Ave. Assocs. Ltd. Partnership, 224 A.D.2d 591, 593, 638 NYS2d 959, 2nd Dept., 1996). Such injunctive relief is amenable to declaratory relief (**Purdue Pharma v. Ardsley Partners, LP**, 5 AD3d 654, 656, 774 NYS2d 540, 2nd Dept., 2004).

The purpose of a Yellowstone injunction is to permit “a tenant confronted by a threat of termination of the lease to obtain a stay tolling the running of the cure period so that after a determination of the merits, the tenant may cure the defect and avoid a forfeiture of the leasehold” (**Long Is. Gynecological Servs. v. 1103 Stewart Ave.**

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Assocs. Ltd. Partnership, supra). Additionally, because the plaintiffs “have a substantial property interests in their lease[,] [e]quity demands that their right to cure be preserved so that if they prevail on the merits their success will be more than a hollow victory” (Garland v. Titan West Associates, 147 A.D.2d 304, 308, 543 NYS2d 56, 1st Dept., 1989).

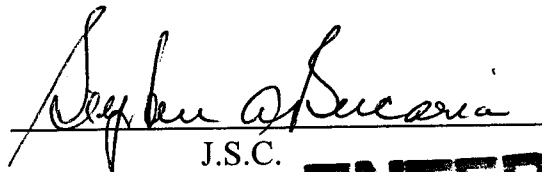
As to the issue of whether this application was untimely commenced, the court, in RKO Century Warner Theatres Inc. v. Morris Industrial Builders, (174 Misc 2d 954, 958, 667 NYS2d 217, Sup Ct, N.Y. County, 1997) concluded that despite being given a purported notice of termination, there was not date of termination and therefore the lease had “not been successfully terminated to date”. This is because a notice of termination “ ‘must be clear, unambiguous and unequivocal notice of limitation [which] must clearly by its terms provide for automatic expiration of the leasehold and convey this fact to the other party’ ” (Id. at 957-58, quoting Rasch, New York Landlord and Tenant-Summary Proceedings § 23.28, at 204 [3d ed]; see also City of Buffalo Urban Renewal Agency v. Lane Bryant Queens, Inc., 90 A.D.2d 976, 977, 456 N.Y.S.2d 568, 4th Dept., 1982). Additionally, section 18.1 of the leases between the plaintiffs and the defendant specifies that in the event of default, RPT may terminate the leases, “by giving notice to the [Tenants] stating the date upon which such termination shall be effective...”. Because no specific termination date was given, this application for Yellowstone injunctive relief is timely.

Therefore, the plaintiff satisfied all of the aforementioned criteria in support of its application for a Yellowstone injunction.

The Yellowstone injunctive relief is **granted**. The cross-motion by defendants is **denied**.

A Preliminary Conference has been scheduled for January 11, 2008 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client’s schedule for the purpose of setting **firm** deposition dates.

Dated November 27, 2007


J.S.C.

ENTERED

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COUNTY CLERK'S OFFICE