Ray & W Cut Inc. v 240 W. 37 LLC
2008 NY Slip Op 30174(U)
January 15, 2008
Supreme Court, New York County
Docket Number: 0111411/2007
Judge: Joan Madden

[* 1]

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

PRESENT: MADDEN
Justice

PART 11

RAY + W CUT INC.

- v -

240 WEST 37 LLC

INDEX NO. 111411/07

MOTION DATE

MOTION SEQ. NO. 01

MOTION CAL. NO.

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

Upon the foregoing papers, it is ordered that this motion and cross-motion are determined in accordance with the annexed decision and order.

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

FILED
JAN 23 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: January 15, 2008

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: PART 11
---X
RAY & W CUT INC.,

Plaintiff, INDEX NO. 111411/07

-against-

240 WEST 37 LLC,

Defendant.
---X
JOAN A. MADDEN, J.:

In this action involving a dispute between a commercial tenant and landlord, plaintiff tenant is moving by order to show cause for a Yellowstone injunction: 1) staying and tolling plaintiff's time to cure the defaults alleged in the Notice to Cure dated August 9, 2007; and 2) enjoining defendant landlord from terminating or canceling plaintiff's lease, from interfering with plaintiff's right of possession, and from commencing any summary or other proceeding or action to terminate or cancel the lease or to evict plaintiff based upon the August 9, 2007 notice. Defendant opposes the motion and cross-moves for an order dismissing the complaint and awarding attorney's fees.

The purpose of a Yellowstone injunction is to "maintain the status quo so that a commercial tenant, when confronted by a threat of termination of its lease, may protect its investment in the leasehold by obtaining a stay tolling the cure period so that upon an adverse determination on the merits, the tenant may cure the default and avoid a forfeiture." Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Avenue Assocs., 93 NY2d 508, 514 (1999). "As such, it may be granted on less than the normal showing required for preliminary injunctive relief." Lexington Avenue & 42nd St. Corp. v. 380 Lexchamp Operating, Inc., 205 AD2d 421, 423 (1st Dept. 1994). In order to obtain a Yellowstone injunction, a tenant must demonstrate that: 1) it holds a commercial lease; 2) it received from the landlord a notice to cure, a notice of default, or a threat that the lease would be terminated; 3) it requested injunctive relief prior to the expiration of the cure period and termination of the lease; and 4) it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises. See Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Avenue Assoc., supra.

Plaintiff has made a sufficient showing that it is entitled to Yellowstone relief. It undisputed that plaintiff holds a commercial lease and that it received a notice of default dated August 9, 2007.[1] Moreover, by the instant order to show cause, plaintiff has made a timely

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[1]The notice of default, lists the following lease violations:

1. Paragraphs 11 and 58 of your lease prohibit an assignment or sublet of your premises without the Owner's written permission. Additionally, the Rules and Regulations, paragraph 4, which are a part of your lease , prohibit the name of anyone other than the Tenant on the doorway to the premise. You have sublet your space or assigned your lease and have further allowed other entities names to appear on the doorway to your premise, without written permission, all in violation of your lease. You are therefore in default of your lease.

2. Paragraph 3 prohibits alterations without the Owner's written permission. You have installed partitions and walls throughout the premise without the owner's written permission. This is also a violation of the Rules and Regulations, paragraph 6, which are part of your lease. You have not obtained written permission from the Owner. You are therefore in default of your lease. Additionally, please note that paragraph 3 of our lease requires you to obtain all necessary permits, approvals, and certificates required by any governmental body, which includes the Department of Buildings. No approvals were obtained. Again, you are in violation and default of your lease.

3. Paragraph 43 of your lease requires you to maintain at all times during the term of this Lease and at all times when you are in possession of the premises, public liability insurance in respect of the demised premises and the conduct or operation

[* 4]

application for injunctive relief prior to the expiration of the cure period. The August 9, 2007 notice of default gave plaintiff 15 days to cure the alleged defaults, which would have expired on August 24, 2007; plaintiff secured the instant order to show cause prior to the time on August 21, 2007. Plaintiff has also satisfied its burden of demonstrating both a willingness and ability to cure the alleged lease violations, by submitting an affidavit from its president, Wing Chan, that plaintiff "is prepared to continue to lease the demised premises in the event it is required to cure the alleged default and to remove the two subtenants." Mr. Chan states that "Ray & W Cut Inc. is ready, willing and able to occupy the entire space by itself" and "will expand its shop to take over the space currently occupied by the subtenants." If the subletting of the premises constitutes a violation of the lease, the termination of the subleases presumably satisfies the obligation to cure. See Reade v. Highpoint Associates IX, LLC, 1 AD3d 276 (1st Dept 2003). Plaintiff also

of your business therein, the Owner and Owners Managing Agent as additional named insured with limits of not less than $1,000,000.00 for bodily injury or death to any one person and $3,00,000.00 for bodily injury or death to any number of persons in any one occurrence and $500,000.00 for property damage. Paragraph 43(b) requires You to have delivered to Owner such policies or certificates of such policies and each renewal policy or certificate at least thirty (30) days before the expiration of the existing policy. All such policies shall be issued by companies licensed to do business in the State of New York and all such policies shall contain a provision whereby the same cannot be cancelled or modified unless Owner and any other insured are given at least thirty (30) days, prior notice of cancellation, or modification, including without limitation, any cancellation resulting from the non-payment of premiums. You have failed to provide the predecessor Owner or us, as the new Owner, with the renewal policy or certificate and have provided no proof that the predecessor owner or us has been listed as an additional insured, with notice of cancellation or modification right, as noted above. You are therefore in violation and default of your lease. Please note that 240 West 37 LLC should be listed on your renewal policy or certificate as the additional insured.

asserts that it has sufficiently complied with its insurance obligations under the lease.

The law is clear that a tenant is not required to prove its ability to cure prior to obtaining a Yellowstone injunction, as "[t]he proper inquiry is whether a basis exists for believing that the tenant desires to cure and has the ability to do so through any means short of vacating the premises." WPA/Partners LLC v. Port Imperial Ferry Corp., 307 AD2d 234, 237 (1st Dept 2003)(quoting Herzfeld & Stern v. Ironwood Realty Corp., 102 AD2d 737, 738 [1st Dept 1984]). "Moreover, since plaintiff risks forfeiture of its leasehold 'and the law does not favor such forfeiture, [plaintiff] need not, as prerequisite to the granting of a *Yellowstone* injunction, demonstrate a likelihood of success on the merits.'" TSI West 14, Inc. v. Samson Assocs, Inc., 8 AD3d 51 (1st Dept 2004) (quoting Herzfeld & Stern v. Ironwood Realty Corp., supra).

In opposing plaintiff's motion and cross-moving to dismiss the complaint, defendant cites Excel Graphics Technologies, Inc. v. CFG/AGSCB 75 Ninth Avenue, L.L.C., 1 AD3d 65 (1st Dept 2003), lv app dism 2 NY3d 794 (2004), and argues that a Yellowstone injunction cannot be granted where, as here, the lease requires written permission to sublet, and includes a non-waiver and merger clause. Excel, however, is legally and factually distinguishable from the instant case. In Excel, it was undisputed that the tenant had placed the subtenants into possession without the landlord's prior written consent and that it was "collecting rent and profiting" from the subtenants; the tenant admitted that it had a "sweetheart" lease and that its rent was "significantly lower than market value." Id at 68. The tenant argued that the landlord waived the prior written consent requirement based on the fact that the subtenants' names were listed on the building directory and the fact that the landlord accepted rent from the tenant with knowledge of the subtenants. The lease, however, contained two specific non-waiver clauses which provided that the building directory's listing of the names of the subtenants would not be deemed a consent to a sublet, and that the landlord's acceptance of rent with knowledge of the tenant's breach of the lease would not be deemed a waiver of such breach. The First Department held that the tenant's waiver claim failed as a matter of law, since the "lease provisions unambiguously and unequivocally negate[d] the two essential facts asserted by plaintiff in support of its claim of waiver." Id at 69.

Here, in contrast to Excel, the factual basis for plaintiff's waiver claim is not "unambiguously and unequivocally negated" by the express language of the lease. While the instant lease contains non-waiver and merger clauses, plaintiff relies the course of dealings between the parties in asserting that the prior landlord consented to the subletting. See Simon & Son Upholstery, Inc. v. 601 West Associates, LLC, 268 AD2d 359, 360 (1st Dept 2000). It is well settled that the parties to a lease may waive a non-waiver clause, where the reasonable expectations of both parties under a lease has been modified by subsequent action of the parties. See TSS-Seedman's, Inc. v. Elota Realty Co., 72 NY2d 1024, 1027 (1988); Kenyon & Kenyon v. Logany, LLC, 33 AD3d 538, 539 (1st Dept 2006); Simon & Son Upholstery, Inc. v. 601 West Associates, LLC, supra at 359-360; Lee v Wright, 108 AD2d 678, 680 (1st Dept 1985). Plaintiff alleges that the prior landlord was fully apprised of and orally consented to the subletting from the outset of the lease, and was involved in the alterations to the premises which subdivided the space for use by the subtenants. See Simon & Son Upholstery, Inc. v. 601 West Associates, LLC, supra at 360. Taking such allegations as true, as the court must on a CPLR 3211 pre-answer motion to dismiss, see DeMicco Bros. Inc. v. Consolidated Edison Co., 8 AD3d 99 (1st Dept 2004), plaintiff has alleged "sufficient indicia that the reasonable expectations of the parties under the original lease were supplanted by subsequent actions." Simon & Son Upholstery, Inc. v. 601 West Associates, LLC, supra at 360.

Notwithstanding this conclusion, the court notes that defendant submits an affidavit from the former managing agent of the building, stating that he never "allowed any tenant to sublet all or part of its demised premises" and that he "had no knowledge of the shared rental/illegal submit situation of Ray & W Cut, nor any other tenant." This affidavit, which directly contradicts the affidavit from plaintiff's president, Wing Chan, raises questions of credibility which are not properly considered on a CPLR 3211 motion to dismiss, where plaintiff's allegations must be accepted as true. See DeMicco Bros. Inc. v. Consolidated Edison Co., supra.

Based on the foregoing, plaintiff's motion for a Yellowstone injunction is granted and defendant's cross-motion to dismiss and for an award of attorney's fees, is denied.

Accordingly, it is hereby

ORDERED that plaintiff's motion for a Yellowstone injunction is granted on condition that plaintiff continuing paying use and occupancy and/or rent in the amount provided for in the lease; and it is further

ORDERED that the expiration of the period for plaintiff to cure any alleged defaults pursuant to defendant notice of default dated August 9, 2007, is stayed and tolled, and defendant is enjoined from taking any steps to terminate plaintiff's lease or commencing a summary proceeding seeking to evict plaintiff based upon the August 9, 2007; and it is further

ORDERED that defendant's cross-motion is denied; and it is further

ORDERED that if defendant has not already done so, it shall serve and file an answer within 20 days of the date of this decision and order; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on February 21, 2008 at 9:30 a.m., Part 11, Room 351, 60 Centre Street.

The Court is notifying the parties by mailing copies of this decision and order.

DATED: January 15, 2008

ENTER:

J.S.C.