Garcia v Time Equities, Inc.
2008 NY Slip Op 33083(U)
November 13, 2008
Supreme Court, New York County
Docket Number: 101988/08
Judge: Martin Shulman
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SCANNED ON 11/18/2008

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

PRESENT: MARTIN SHULMAN J.S.C. Justice

PART 1

CESAR GARCIA, ET AL.

INDEX NO. 101988/08

MOTION DATE

- v -

MOTION SEQ. NO. 1

TIME EQUITIES, INC., ET AL.

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 A-E	1, 2
Cross-Motion Answering Affidavits — Exhibits 1-5	3, 4
Replying Affidavits	5, 6, 7

Cross-Motion: [X] Yes [ ] No

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

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

FILED
NOV 18 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: November 13, 2008

MARTIN SHULMAN J.S.C.
J.S.C.

Check one: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST [ ] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 1
---x
CESAR GARCIA d/b/a CESMAR LAUNDROMAT,

Plaintiffs,

Index No: 101988/08

-against-

Decision and Order

TIME EQUITIES, INC. and FRANCIS GREENBURGER,

Defendants.
---x

FILED
NOV 18 2008
COUNTY CLERK'S OFFICE
NEW YORK

Hon. Martin Shulman, J.:

Plaintiff-tenant, Cesar Garcia d/b/a Cesmar Laundromat ("plaintiff or "Garcia") commenced this action *inter alia* for a declaration that he has not breached his lease with defendant Francis Greenburger ("defendant" or "Greenburger"), the landlord of ground floor commercial space Garcia occupies at 325 West 11th Street (Store East), New York, New York 10003 ("premises" or "laundromat"). Parenthetically, the laundromat is located in a building actually owned by 323-325-327 West 11th Street Owners Corp, a cooperative corporation (the "Coop Owner") and co-defendant, Time Equities, Inc. ("Time") is Greenburger's managing agent.

Concomitantly with his filing of the summons and complaint, Garcia moved by order to show cause ("OSC") for a temporary restraining order ("TRO") and preliminary injunction (i.e., Yellowstone injunction) to toll the time period set forth in a January 9, 2008 Notice to Cure ("Cure Notice" as Exhibit A to OSC) to correct alleged substantial breaches of his lease, i.e., noise and vibrations from commercial washers/dryers "at the . . . [laundromat] which is disturbing other tenants– specifically the adjacent commercial tenant who operates an art gallery. . ." (the "noise/vibration problem") (Garcia Aff. in

support of OSC at ¶4), and the issuance of a New York City Environmental Control Board ("ECB") violation for not having automatic sprinklers for the gas dryers.

On February 4, 2008 this court signed the OSC but struck the TRO provision because the papers as presented did not indicate plaintiff's compliance with the notice requirements of Uniform Rule §202.7(f)[1] and the application for the TRO or Yellowstone injunction appeared to have been made after the cure period expired.

The OSC was made returnable on February 19, 2008. After the initial appearance, the parties' respective counsel agreed to no less than nine consent adjournments over an eight month period so the parties could attempt to resolve the noise/vibration problem and their joint course of action implicitly deemed a TRO to be in effect, tolling the cure period pending the determination of the OSC.[2] In the interim, counsel for Greenburger and Time (collectively "defendants") cross-moved on August 4, 2008 for an order ultimately denying plaintiff's application for a Yellowstone injunction and dismissing the underlying complaint. On October 28, 2008, the parties advised that ongoing negotiations have irretrievably broken down and that the OSC and cross-

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[1] Uniform Rule for Trial Courts (22 NYCRR) §202.7(f) provides that in the absence of significant prejudice, an applicant for a TRO must make a good faith effort "to notify the party against whom the . . . [TRO] is sought of the time, date and place that the application will be made in a manner sufficient to permit the party an opportunity to appear in response to the application. . ."

[2] During one of the status conferences held in August 21, 2008, this court informally addressed the issue of the timely filing of the OSC as well as the purported non-compliance with the notice requirements of Uniform Rule 202.7(f). Plaintiff's counsel conceded that although she did not formally state her compliance therewith in her supporting affirmation to the OSC, nonetheless, she advised that she verbally notified defendants' then counsel by telephone on February 1, 2008, that as a result of failed negotiations between the parties on Friday morning, she would be going to court that afternoon to apply for a Yellowstone injunction. Plaintiff's counsel's September 22, 2008 supplemental affirmation confirms the foregoing.

motion should be decided.

The OSC

In his supporting affidavit, Garcia attests that he satisfies the criteria for a Yellowstone injunction and has cured the ECB violation and paid the related fine. Plaintiff further attests to a two year chronology (2006-2008) of his good faith efforts to resolve the noise/vibration problem including expending $18,500.00 to install concrete pads under the washers and retaining a contractor, Luis Fermin and Chon Engineering, P.C. to draw plans for noise/vibration reducing alterations (Exhibit B to OSC). In addition, Garcia states that Time and the Coop Owner (albeit never joined as a party), insisted that Garcia use the latter's architects and their plans to complete alterations to eliminate the noise/vibration problem which were more costly than Garcia's own alteration proposals and not necessarily better. Garcia further advised that he was contemplating selling the laundromat and that as a condition of the sale, the proposed buyer would have to enter a contract with the Coop Owner's architects to remedy the noise/vibration problem. In any event, plaintiff contends it is really the Coop Owner, an entity with whom Garcia has no privity of contract, who is dictating what plaintiff must do. Garcia finally contends that defendants, while paying lip service to plaintiff's proposal, have actually marched in lockstep with the Coop Owner who is unilaterally making decisions which are jeopardizing his commercial tenancy at the premises.

The Cross-Motion

In defendants' cross-motion, Time noted that: plaintiff and defendants had entered into a ten year lease dated February 9, 2004 (Exhibit 4 to Cross-Motion); in

2006, Time began receiving complaints from the tenant operating the adjacent art gallery as well as from residential tenants above the laundromat about the noise/vibration problem; Time sent a notice to cure date November 6, 2006 regarding what defendants perceived to be a substantial breach of Garcia's lease (Exhibit 5 to Cross-Motion); plaintiff then used a band aid approach and resorted to placing rubber mats under the washers/dryers and removing certain cabinetry from the laundromat walls yet, the noise/vibration problem persisted; in 2007, the Coop Owner insisted that any remedial action Garcia would have to undertake must be subject to New York City Buildings Department ("DOB") approval and refused to grant permission to Garcia's contractor/architects to do any work without approved plans; Time has no authority to approve plaintiff's contractor's proposed alterations to a portion of the basement the Coop Owner owns and controls, thus, Time and, for that matter, plaintiff must abide by the Coop Owner's decisions; the Coop Owner did in fact retain its own architect and contractor to draw plans to correct the noise/vibration problem emanating from the laundromat which plaintiff rejected because of alleged higher costs; since no resolution ensued and the noise/vibration problem continued, it necessitated Time serving the Cure Notice with a time period the parties extended to February 1, 2008; and plaintiff's application for the TRO was untimely warranting the denial of the Yellowstone injunction, the dismissal of the underlying complaint and an award of attorneys' fees to defendants for their anticipated successful defense of this declaratory judgment action.

In opposition to the cross-motion, plaintiff's counsel pointed out that: (1) the proposed OSC was timely filed with the court on Friday, February 1, 2008, the last day of the time period set forth in the Cure Notice extended by defendants' then counsel

(see Exhibit 2 to Cross-Motion) and prior to the expiration of the February 25, 2008 termination date of Garcia's tenancy as set forth in defendants' subsequently served termination notice (Exhibit 3 to Cross-Motion); (2) an index number and Request for Judicial Intervention were purchased at about 3:45 pm that afternoon (Exhibit C to Warnock Opp. Aff. to Cross-Motion); and (3) the proposed OSC was pre-screened by the Ex-Parte Motion Support Office and routed to this court thereafter. It was further noted that because it was a Friday, the signing Justice, a Sabbath observer, had gone for the day and counsel's paralegal was instructed by the clerk's office to present the proposed OSC on Monday, February 4, 2008 due to the unavailability of another signing Justice (Warnock Opp. Aff. at ¶ 3). Counsel further stated that even if this action were dismissed, it would neither be on the merits nor constitute an ultimate outcome to entitle any party to attorneys' fees.

In Garcia's opposition affidavit, plaintiff took issue with certain alleged inaccuracies in the cross-motion papers, to wit: his contractor and engineer did file applications and plans for DOB approval; Time overlooked the preliminary work Garcia's contractor and engineer performed at considerable expense to produce plans and drawings for the noise/vibration reduction alterations; plaintiff did agree to retain the Coop Owner's architects who insist on "a significant sum of money payable . . . in advance. . ." (Garcia Opp. Aff. at ¶ 12); the Coop Owner's architects do not guarantee the noise/vibration problem will be cured and the claimed default or substantial breach "lies outside the discretion of my landlord [Greenburger] . . . and/or that the [Coop] Owner will change its mind about what method of curing the purported default is appropriate . . . [warranting] additional time . . . to determine exactly how the purported

condition can be cured by plaintiff." (bracketed matter added)(Garcia Opp. Aff. at ¶ 14).

Discussion

To obtain Yellowstone relief, a tenant must show: "(1) it holds a commercial lease; (2) it received from the landlord either a notice of default, a notice to cure, or a threat of termination of the lease; (3) it requested injunctive relief [e.g., a TRO] prior to the 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 . . . (citations omitted)". *Lexington Avenue & 42nd St. Corp. v. 380 Lexchamp Operating, Inc.*, 205 A.D.2d 421, 423, 613 N.Y.S.2d 402, 403-404 (1st Dept., 1994). The Yellowstone injunction is a stay which tolls the cure period effectively preserving the status quo which enables the tenant to obtain a determination on the merits of any perceived lease default, if any, and then cure same without forfeiting a valuable leasehold interest. *See Post v. 120 East End Ave. Corp.*, 62 N.Y.2d 19, 475 N.Y.S.2d 821 (1984).

At first blush, it would appear that plaintiff has met the criteria for the issuance of a Yellowstone injunction, *viz.*, plaintiff does occupy the premises pursuant to a commercial lease, plaintiff did receive the Cure Notice or notice of default, timely applied for the TRO and preliminary injunction/Yellowstone relief and did ostensibly attest to his willingness and ability to cure the default (i.e., the noise/vibration problem)[3].

But, it is not so "cut and dried." Significantly, plaintiff does not dispute the laundromat has created a longstanding noise/vibration problem which affected and continues to affect an adjoining commercial tenant as well as residential tenants

[3] Defendants' cross-motion did not challenge plaintiff's claim that the ECB violation has been resolved and is not a basis for a continuing default or substantial breach of Garcia's lease.

occupying the building in which the premises is located. What is also significant is that both plaintiff and defendants agree that the Coop Owner is seemingly a necessary player who possesses the right and authority to determine the manner in which any cure is to be performed as the ultimate result will affect its property interest. Against this factual backdrop, plaintiff has historically made efforts to resolve this problem.

However, on this record in a declaratory judgment action both parties protracted to attempt settlement, plaintiff's OSC and opposition papers express displeasure at defendants for aligning with the Coop Owner in bad faith and contain self-serving statements that Garcia's proposed, cost-effective alterations can effectuate the cure. Plaintiff has also unpersuasively, summarily dismissed the Coop Owner's architect's plan as cost-prohibitive and uncertain as to a resolvable outcome, especially without proffering an affidavit from an engineer or architect attesting to either the strengths and cost-effectiveness of Garcia's proposed alterations and any weakness or excessive costs contained in the Coop Owner's plan. What also cannot be overlooked is plaintiff's admitted intent to sell the laundromat and presumably wash his hands of the noise/vibration problem. Thus, plaintiff has not adequately demonstrated at this juncture that he *inter alia* has the willingness to cure the noise/vibration problem by means short of vacating the premises. *Cf., Duane Reade v. Highpoint Associates IX, L.L.C.*, 1 A.D.3d 276, 768 N.Y.S.2d 439 (1st Dept., 2003).

This resolution of the noise/vibration problem is simply not amenable to declaratory relief and hinges on whether plaintiff is willing to pay higher professional fees to resolve an admitted breach of lease. Perhaps this longstanding problem will be capable of resolution in landlord-tenant court. Accordingly, this court denies plaintiff's

OSC in its entirety and grants the branches of defendants' cross motion to deny plaintiff's application for a Yellowstone injunction and dismiss the underlying complaint.

However, defendants' branch of their cross-motion for attorneys' fees is denied. Preliminarily, defendants did not deny plaintiff's assertion that the ECB violation was corrected prior to service of the Cure Notice. Since defendants have implicitly conceded it was erroneous to include this item for correction in the Cure Notice, they would not have prevailed on this issue. Secondly, defendant Time did not deny that its office did not seriously take issue with plaintiff's proposed alteration plans but now claims to have reached a roadblock as to resolution of the noise/vibration problem because the Coop Owner has taken a pro-active stance as to how certain work should be performed because of the proposed work's impact on its property. In a sense, defendants are now using the Coop Owner's legitimate interference as a sword rather than a shield which appears to call into question their good faith in enforcing their rights under the lease.

Finally and most relevant to the issue of whether defendants are entitled to attorneys' fees here, the application for fees is premature because this court's dismissal of this action is not a final resolution of this matter. *Caldwell v. American Packaging Co., Inc.*, 2008 Slip Op. 0879, N.Y. App. Div. LEXIS 7981 (2nd Dept.) citing with approval *Elkins v. Cinera Realty, Inc.*, 61 A.D.2d 828, 404 N.Y.S.2d 432 (2nd Dept., 1978). In this context, defendants have made clear their intention to commence a holdover proceeding grounded on plaintiff's default or substantial breach of his commercial lease by virtue of the extant nature of the noise/vibration problem, plaintiff's failure to cure same during the requisite time period set forth in the Cure Notice and defendants' subsequent termination of Garcia's tenancy based thereon.

Notably, defendants have neither commenced this action to enforce its rights under the lease nor sought affirmative relief *vis-a-vis* their rights thereunder. The thrust of defendant's defensive posture was merely to block the issuance of the Yellowstone injunction without substantively proving plaintiff's efforts were/are totally in vain.

Defendants, on this record, have not conclusively shown they will prevail at the end of the day. On the other hand, unlike the dismissal of the action, a successful prosecution of the holdover proceeding will constitute an outcome-determinative result and if defendants prevail by obtaining a judgment of possession and warrant, they may be entitled to attorneys' fee at that time.

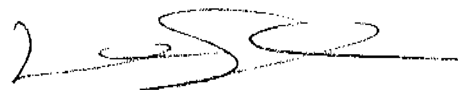
Accordingly, it is

ORDERED that plaintiff's OSC is denied and defendants' cross-motion is granted in part and denied in part; and it is further

ORDERED that the complaint is dismissed and the clerk is directed to enter judgment accordingly.

This constitutes this court's Decision and Order. Courtesy copies of same have been provided to counsel for the parties.

DATED: New York, New York
November 13, 2008



HON. MARTIN SHULMAN, J.S.C.

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