

Value Pharm., Inc. v LSS Leasing Ltd. Liab. Co.
2009 NY Slip Op 31276(U)
June 10, 2009
Supreme Court, New York County
Docket Number: 600038/09
Judge: Martin Shulman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Shulman
Justice

PART 1

Value Pharmacy, Inc.

INDEX NO.

600038/09

MOTION DATE

MOTION SEQ. NO.

01

MOTION CAL. NO.

L&L Leasing Limited

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

~~Notice of Motion~~ / Order to Show Cause — Affidavits ^{Supp. Affs.} Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2, 3, 4

5, 6

7

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the attached decision and order.

FILED

JUN 11 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: June 10, 2009

Martin Shulman
MARTIN SHULMAN 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 1

-----X
VALUE PHARMACY, INC.,

Plaintiff,

Index No: 600038/09

-against-

Decision and Order

LSS LEASING LIMITED LIABILITY COMPANY

Defendant.

FILED

JUN 1 2009

COUNTY CLERK'S OFFICE
NEW YORK

Hon. Martin Shulman, J.S.C.,

Plaintiff-tenant, Value Pharmacy, Inc. ("VPI" or "Tenant") commenced this declaratory judgment action to permit Plaintiff, as a licensed New York State Lottery Sales Agent, to sell lottery tickets at its full service pharmacy located at 59-17 Junction Boulevard, Corona, New York 11368 (the "Premises"). VPI further seeks to permanently enjoin defendant-landlord, LSS Leasing Limited Liability Company ("LSS" or "Landlord") from holding VPI in default of its lease or taking any action against VPI for any alleged default of Tenant's lease as a result of VPI selling lottery tickets at the Premises.

In furtherance of this litigation goal and pending the ultimate determination of this action, VPI initially filed a proposed order to show cause ("OSC") for a temporary restraining order against LSS to enjoin Landlord from taking any action adverse to its possessory interests and permitting Tenant the right to sell lottery tickets *pendente lite* which this court declined to grant after signing the OSC and even after colloquy with counsel for the parties on the April 21, 2009 return date of the OSC.¹

¹ On the return date and after finding no emergent situation was implicated, this court *inter alia* suggested that issue be joined and that this OSC be deemed the equivalent of a motion for summary judgment solely addressing the legal question of whether VPI's sale of

The following is a brief background underlying this action. On September 20, 2006, Landlord executed a commercial lease and rider with Saffron Drugs, Inc., VPI's predecessor in interest (the "Lease" as Exhibit B to OSC) which the latter validly assigned to Tenant in April 2008 (Goldin Aff. in Support of OSC at ¶ 6).

In November of 2008, Tenant unilaterally installed an ATM machine and a New York State Lottery machine for ticket sales as well as placed signage at or near its store front window promoting these customer services. On November 20, 2008, Landlord's managing agent served Tenant a letter-formatted notice of default to remove the ATM and lottery machines and accompanying signs (Exhibit C to OSC). To avoid being deemed in default of its Lease and risking forfeiture of its valuable leasehold interest, VPI removed the ATM machine² and signs and ceased selling lottery tickets. After being unsuccessful in its negotiations with Landlord for permission to sell lottery tickets, Tenant commenced this declaratory judgment action seeking the right to do so.

In support of its first cause of action for declaratory judgment not to restrict Tenant from selling lottery tickets at the Premises and have its ticket sales declared in consonance with Article 2 of the Lease (see ¶¶ 21-22 of Complaint as Exhibit A to OSC) and for a permanent injunction barring LSS from ever finding VPI in default of its Lease with respect to Tenant's sale of lottery tickets, VPI *inter alia* contends that:

lottery tickets constitutes restricted use activity and a violation of the parties' lease. Landlord's counsel was afforded sufficient time to oppose the OSC for injunctive and declaratory relief and file its answer. Likewise, Tenant's counsel was afforded additional time to supplement VPI's OSC with supporting affidavits and further legal argument.

² Because Article 42 [C](2)(d) of the Lease expressly bars Tenant from installing an ATM machine on the Premises, VPI apparently acknowledged this default and has not claimed any entitlement to provide this customer service.

(1) VPI's permitted use of the Premises as a "full service Pharmacy with the sale of health and beauty aids, home medical supplies, vitamins and the sale of gifts and other items that are customarily sold in a CVS Pharmacy . . . and for no other purpose." ("CVS Clause"), contains no express, restrictive language barring the sale of lottery tickets; (2) at least "six-hundred and fifty-three (653) full service pharmacies . . ." (Murray Supp. Aff. at ¶ 4), throughout the State sell lottery tickets including the pharmacy chain, Duane Reade; (3) the CVS Clause is "merely an illustration of the type of items that the [L]andlord would like to have sold in the pharmacy – it is an affirmative, not a restrictive, clause . . ." (Dash Supp. Aff. at ¶ 17); (4) CVS pharmacies outside the State do sell lottery tickets and CVS's parent company "is currently in the process of obtaining a New York Lottery Sales Agent license for all CVS locations in the State of New York." (Murray Supp. Aff. at ¶ 5); (5) during its short run as a New York State Lottery Sales Agent, VPI claimed a monthly income stream of \$4000.00 from ticket sales and increased patron foot traffic to purchase its other products as well (Goldin Aff. in Support of OSC at ¶¶ 13-14), a revenue source Landlord has impermissibly curtailed; (6) Landlord's actions undermine the laudable public policy goals of the New York Lottery for Education Law; (7) Landlord's claim that selling lottery tickets would run afoul of the restriction against "gambling activities" (Lease Article 42[C][2][k]) is misplaced when such sales constitute "validly licensed, state-sanctioned activities . . ." (Dash Supp. Aff. at ¶ 7, n. 5); and (8) although an irrelevant concern and contrary to Landlord's claim, the insertion of the CVS Clause in the Lease does not adequately protect the purported primary source of income of Carole's Smoke Shop, Ltd. ("Carole's"), a lobby newsstand tenant (situated in the same building as the

Premises), derives from lottery ticket sales.

LSS believes VPI's OSC and this declaratory judgment action to be totally without merit for quite a number of reasons. First, the CVS Clause limits Tenant to selling only those items typically sold in CVS pharmacies throughout New York, a limitation or restriction bolstered by Tenant's admission that no CVS pharmacy in New York State sells lottery tickets. Second, Article 2 of the Lease containing the CVS Clause has two independent criteria: (1) how Tenant must use the Premises, i.e., as a full service pharmacy; and (2) what Tenant is permitted to sell there ("other items that are customarily sold in a CVS pharmacy. . ." is unambiguously restrictive language and not merely illustrative giving Tenant free rein to sell lottery tickets). Third, to the extent Tenant seeks to find the CVS Clause ambiguous and construe same against Landlord, as drafter and in favor of Tenant, that argument is undermined by ¶59B of the Lease rider which deems the "Lease to have been jointly prepared by both of the parties . . .", neutralizing any ambiguities for or against either party. Fourth, even if CVS pharmacies sell lottery tickets outside New York State and/or its parent company is actively seeking lottery ticket sales agent's licenses for its pharmacies within this State, these factors are unproven, speculative and irrelevant. Fifth, the CVS Clause was intentionally inserted in Article 2 of the Lease to protect Carole's business which derives its principal income from lottery ticket sales (see Caputo Opp. Aff. at ¶¶ 7-8 and Exhibit B to Taylor Opp. Aff.). Finally, the "New York State Lottery is gambling; however it is legalized gambling . . ." (Taylor Opp. Aff. at ¶ 35), thus, the selling of lottery tickets is one of the restricted activities the Lease prohibits.

Discussion

The law favors the free and unobstructed use of real property (*see Huggins v. Castle Estates*, 36 NY2d 427, 369 NYS2d 80 (1975)). "Restrictive covenants such as 'use clauses' in leases should be enforced according to the intent of the parties, which will be primarily determined from the lease . . ." (*E.M.R. Managment Corp. v. Halstead Harrison Associates*, 299 AD2d 393, 749 NYS2d 569, 570 [2nd Dept. 2002]). And a party seeking to enforce a restriction contained in a lease use clause "must prove, by clear and convincing evidence, the scope, as well as the existence, of the restriction . . ." (*Greek Peak, Inc. v. Grodner*, 75 NY2d 981, 982, 556 NYS2d 509 [1990]).

Landlord has clearly and convincingly demonstrated as a matter of law that the sale of lottery tickets at the Premises would violate Article 42[C](2)(k) of VPI's Lease. Gambling activities is one of the "Restricted Uses" enumerated in this unambiguous Lease provision. VPI understandably gives short shrift to this restricted use by characterizing this Lease subdivision as boilerplate and relying on a reasonable belief that the sale of New York State lottery tickets, as state-sanctioned activity, cannot be gambling. Tenant is mistaken because the very constitutional provision Tenant relies on for support says otherwise. NY Const. Art. 9, §1 states, in relevant part: "[E]xcept as hereinafter provided, no lottery or *the sale of lottery tickets*, pool-selling, book-making or *any other kind of gambling*, except lotteries operated by the state and the sale of lottery tickets in connection therewith . . . shall hereafter be authorized or allowed within the state . . ." (emphasis added). This type of gambling activity, even if legal, is still

gambling. In this context, none of the other enumerated Restricted Uses rests on an element of illegality. In fact, some of the proscribed activities are otherwise laudable (“Tenant . . . shall not permit the use of the Premises . . . (m) by or for any charitable, religious or other non-for-profit organization activities.”).

Thus, VPI is not entitled to a declaration that it be permitted to sell lottery tickets at the Premises. Nor can VPI maintain its second and third causes of action for breach of contract against LSS for directing the former to cease selling lottery tickets and remove any signage related thereto.

Because the parties’ respective papers substantially addressed whether Article 2 (the “Permitted Use” clause or CVS Clause) of the Lease similarly bars lottery ticket sales at the Premises, some discussion is necessary. After review and consideration, this court finds that Landlord failed to establish by clear and convincing evidence that Article 2 of the Lease contractually restricts Tenant from selling lottery tickets. As a preliminary matter, VPI is not a CVS pharmacy and is therefore not bound by any internal policies imposed by the CVS chain with respect to lottery ticket sales. In searching the record, it is readily apparent that Landlord never contemplated restricting Tenant from selling lottery tickets when Landlord entered into the Lease with Tenant’s predecessor or at the time the Lease was assigned to Tenant largely because neither Tenant nor its predecessor ever raised the subject of incidental lottery ticket sales with Landlord. Parenthetically, if LSS truly sought to protect this primary source of income for Carole’s, the former would have executed an exclusive use agreement with the latter and included an appropriate notice provision to VPI’s predecessor in the Lease together with an attached schedule listing that exclusive use agreement (*illustratively, see Article*

41[c] of the 1991 lease agreement between LSS and Carole's and Schedule A thereto as Exhibit A to Taylor Opp. Aff.). While the Lease has an identically worded provision in the Lease rider, no Schedule A was attached thereto to put VPI on notice that Carole's had an exclusive use agreement regarding lottery ticket sales.

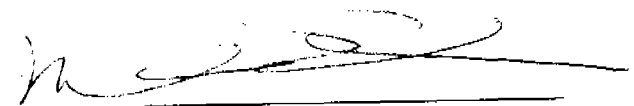
Contrarily, this court agrees with VPI that the CVS Clause is illustrative and not a restrictive covenant. As one of the largest pharmacy chains in New York, it seems obvious that Landlord inserted the CVS Clause to direct Tenant to operate its full service pharmacy modeled after a typical CVS pharmacy. It is only after VPI started this litigation that Landlord conjured up a self-perceived interpretation deeming the CVS Clause a non-competition clause. Moreover, LSS's claimed foreknowledge of the fact that the New York based CVS chain does not presently sell lottery tickets as the reason it inserted the CVS Clause in the Lease in 2006 is incredible. This is so because the CVS Clause, ostensibly intended to shield Carole's business, could easily become a sword at any given moment during VPI's Lease term "wounding" Carole's claimed primary source of income if the CVS parent company actually obtained New York Lottery Sales Agent's licenses for its New York pharmacy chain. In other words, at any given moment, these ticket sales could then be "items that are customarily sold in a CVS Pharmacy" vitiating the claimed restrictive covenant. If not for Article 42[c](2)(k) of the lease barring gambling activities at the Premises, Landlord's reliance on Article 2 of the Lease to block Tenant from engaging in lottery ticket sales would have been wholly unavailing. Accordingly, it is

ORDERED that pursuant to CPLR 3212(b), this court grants summary judgment to LSS denying VPI's OSC and dismissing Tenant's complaint, in its entirety.

The Clerk is directed to enter judgment accordingly.

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

DATED: New York, New York
June 10, 2009


HON. MARTIN SHULMAN, J.S.C.

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JUN 11 2009
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