14 Bruckner LLC. v 14 Bruckner Blvd. Realty Corp.
2009 NY Slip Op 33413(U)
May 22, 2009
Supreme Court, Bronx County
Docket Number: 302591/09
Judge: Mark Friedlander
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NEW YORK SUPREME COURT - COUNTY OF BRONX
PART IA-25

14 BRUCKNER LLC.,

Plaintiff,

-against-

14 BRUCKNER BLVD. REALTY CORP.,

Defendant.

MEMORANDUM DECISION/ ORDER
Index No.302591/09

HON. MARK FRIEDLANDER:

Plaintiff 14 Bruckner LLC ("BLLC") moves by order to show cause for a preliminary injunction enjoining defendant 14 Bruckner Blvd. Realty Corp. ("BB Realty") from terminating BLLC's lease and/or tenancy in the premises known as 14 Bruckner Boulevard, Bronx (the subject premises"), and tolling the running of the cure period set forth in BB Realty's notice to cure. BB Realty opposes the motion. At an initial hearing held on March 31, 2009, this Court, in signing the show cause order, granted BLLC a temporary restraining order and set a briefing schedule for the purpose of hearing fully from the parties, before deciding on the issuance of the preliminary injunction.

In 2002, BB Realty, as owner of the subject premises, granted BLLC a long term (49 year) lease covering the entire building. There is no question that the lease involved is a commercial lease. More than four years after the start of the lease, BLLC began withholding rent, as a result of a dispute with BB Realty over the structural condition of the building. BLLC, which had inspected the building prior to entry into the lease, and which had, under the terms of the lease, accepted the subject premises "in the condition and state in which (it is) now" (in other words, "as is"), nevertheless argued that the building contained defects so egregious and hidden that they could not have been discovered in advance and that BB Realty purposefully hid such defects from the tenant. According to BLLC, in order to continue its use of the subject premises, it was forced to make emergency repairs at enormous expense to it, and it thereafter began deducting rent as a set-off for its repair

costs.

BB Realty, in addition to asserting defenses based on BLLC's pre-lease inspection and on BLLC's acceptance of the premises as is, also argues that the lease expressly forbids set-offs, or the diminution of rent payments for any similar reasons. BB Realty's affiant herein also claims that the lease was drafted by BLLC, a claim not refuted by BLLC in these papers. Both parties hereto are sophisticated investors in real property.

There are numerous additional charges, counter-charges, defenses and refutations set forth in these papers, but the above will suffice as a bare-bones outline of the controversy between the parties.

In March 2009, BB Realty issued a notice to cure to BLLC, seeking both the rent arrears (together with late charges, as required by the lease) and compliance with lease requirements on mandatory insurance coverage. It appears that the issue of insurance coverage has since been resolved satisfactorily by BLLC (see Exhibit C to the Reply Affirmation), and that only the issue of the rent withholding remains in contention.

The issue before the Court is thus whether or not the preliminary injunction should issue. Injunctions of the type sought here, to preserve the occupancy rights of a commercial tenant during the pendency of a dispute, are referred to as "Yellowstone Injunctions" ("YI"), based on the decision in First National Stores v. Yellowstone Shopping Center, 21 N.Y.2d 630.

Plaintiff, inter alia, challenges the sufficiency of the notice to cure which was served by the landlord. The Court finds no merit in such challenge. Tenant first claims that the notice improperly combines a notice to cure with a notice of termination. The Court finds that the actual notice sent here merely informs the tenant of the consequences of tenant's failure to cure. The notice is conditional in its wording as to possible termination and is quite clear in its import. It engenders no confusion whatsoever. The tenant is asked to cure the alleged breaches of the lease, and is thereafter told that failure to cure by a certain date will result in termination. The Court cannot divine how such a straightforward recitation of appropriate information could be labeled defective. The precedent relied on by the tenant in no way supports the conclusion that the instant language is either

ambiguous or equivocal.

BLLC next charges that the notice to cure is defective because it provides two different dates for curing the alleged breaches and for possible termination. It is asserted that the notice is thus fatally confusing. The Court, however, finds nothing confusing about the scheme set forth in the notice to cure. It is clear that the landlord is giving the tenant some additional time to resolve the issue of obtaining and/or producing the required insurance policy, while holding the tenant to a tighter schedule in the demand for the withheld rent. This Court has had occasion over the years to engage in the painstaking review and interpretation of many confusingly drafted documents. This is not one of them. BLLC's attempts to argue otherwise are entirely unpersuasive.

Finally, BLLC cannot argue that the notice was improperly mailed when it was sent to the address set forth in the lease for communications between the parties, and when BLLC never served notice on BB Realty as to an address change for such purpose. The question of whether some agent of BB Realty had knowledge of BLLC's new address becomes irrelevant under such circumstances, and particularly where, as here, the document served was admittedly ultimately received in time for the recipient to make the instant motion

For all of the above reasons, the Court finds the notice to cure to have been properly drafted and served. There now remains the question of whether the YI should be issued to enjoin its impact.

It cannot be gainsaid that the standards for issuance of a YI are different than those for other types of preliminary injunctions. Many of the more stringent tests are not applied here. The parties in fact agree that the instant lease was a commercial lease and that the tenant has made the instant application prior to the termination of its lease. Further, BB Realty certainly does not dispute the Court's finding, supra, that a valid notice to cure was served, thus threatening termination of the tenant's lease. The only remaining test for determining the propriety of issuing a YI is that the tenant have the desire and ability to cure the alleged default.

It is as to the final test that the parties argue bitterly. In certain respects, each is in the wrong. BB Realty insists that the tenant hand over the rent, in order to meet the test of showing desire and ability to cure the

default. BLLC insists that doing so would pre-judge the ultimate outcome of the instant action, and that its placing of rent amounts in escrow should suffice to meet the test. To date, BLLC has placed in escrow amounts of rent withheld since 2007, but not the late charges or "additional rent" that would be due to BB Realty were it to prevail on the merits in this action.

BB Realty also insists that the lease provisions make clear the fatal defect in BLLC's claims against the landlord. BLLC counters that the sufficiency of its case is not at issue here, because the YI, unlike a standard preliminary injunction, can and should issue without any analysis of the likelihood of ultimate success on the merits and without any balancing of equities. In this contention, BLLC is correct. Jemaltown of 125th Street v. Leon Betesh, 115 A.D.2d 381; Garland v. Titan West, 137 A.D.2d 304.

Those cases to the contrary which are cited by BB Realty are inapposite. Some deal with instances wherein the tenant's showing of ability and willingness to cure was undermined by a clear display of bad faith on the tenant's part. Most deal with situations in which consideration of the YI was accompanied by resolution of a summary judgment or dismissal motion submitted by the landlord. In such situations, the ultimate merits of the dispute are in fact before the Court, and the Court is in a position to weigh them and fully resolve the dispute on papers. Such is not the case here. Although BB Realty has expressed some intention of bringing on a dismissal motion, it has not yet done so as part of the instant application, for reasons not revealed to the Court. Under these circumstances, BLLC's entitlement to withhold rents is not an issue ripe for resolution by this Court. All that may be resolved is BLLC's fulfillment of the fourth prong of the test for issuance of the YI.

There is some merit to BLLC's contention that requiring immediate payment of the rent to the landlord would pre-judge the ultimate issue in dispute in this litigation. Yet, it must be pointed out that large numbers of YI disputes revolve around a landlord's insistence that tenants take some action which directly threatens enjoyment of the tenant's leasehold (i.e ejecting a sub-tenant; changing a store's product line; taking down a storefront sign, etc.). In such instances, it is clear that the protection of the status quo, which the YI is intended

to guarantee, includes the right of the tenant to at least temporarily ignore the landlord's demand for "cure." Here, by contrast, the dispute revolves solely around payment of rent, with no direct threat, in the notice to cure, to the manner in which BLLC is enjoying or utilizing its leasehold.

In the final analysis, though, the Court finds no difference between a YI which preserves the physical status quo within the premises and a YI which preserves the financial status quo. Depending on the resources of the tenant, either disruption of the status quo has the potential to effectively terminate the tenant's ability to enjoy the rights afforded by the lease. The broadly granted right to a YI, as developed by case law, is nowhere limited so as to exclude purely financial disputes. In fact, the opposite appears to be the case. In Lexingtone Avenue & 42nd Street Corp v. 380 Lexchamp Operating, 205 A.D.2d 421, a dispute revolving around the tenant's alleged obligation to pay utility costs, the appellate court sustained a YI, provided that the tenant pay to the landlord previously withheld rental payments. However, the court specifically indicated that such rental payments were to be turned over because they were never in dispute, while, by contrast, the utility bill payments, which were the core of the dispute, were permitted to be placed in escrow (as BLLC has done here with disputed rental amounts).

Yet, if BLLC does indeed have the right to elicit the YI while still keeping the disputed amounts in escrow, it cannot abuse such right by unfairly depositing too little into such escrow account. BB Realty is correct in its contention that BLLC cannot "pick and choose" what it is willing to deposit into escrow. If BB Realty prevails in this dispute, it is clear that, under the language of the lease, BB Realty will be entitled to additional rent in the form of late charges as specified in the lease. The YI injunction sought herein can only be continued if BLLC undertakes to deposit into escrow, and thereafter does in fact so deposit, not only all back rents withheld to date, but also all additional rent amounts (i.e. late charges) as required by the lease.

Going forward, BLLC has the option of beginning to remit to the landlord the rent which is due prospectively under the lease, or, in the alternative, of placing such rent into the escrow account, but, if BLLC

chooses the latter option, it must be willing to include in its future escrow deposits the additional rents which would then be due under the lease for rental payments withheld from the landlord. In this way, BLLC's fourth and final obligation under the standards for YI issuance, to wit: demonstrating the willingness and ability to cure, will be fully met. It is clear that this Court may set such conditions as this for the issuance of the YI. See 1286 BR Operating v. McAlpin, 169 A.D.2d 450.

It may be that BB Realty has a powerful argument for dismissal and/or summary judgment under the facts described in these voluminous papers. But those considerations are not now before the Court, for the reasons set forth supra. The Court concludes here that, if the conditions set forth above are met by BLLC, the YI sought by BLLC may issue, and the current status quo, as modified by the Court's requirements above, may be preserved for whatever period this dispute endures.

For the foregoing reasons, the preliminary injunction sought by movant BLLC is granted, subject to the conditions set forth above.

Settle Order.

Dated: 5/22/09

MARK FRIEDLANDER, J.S.C.