

Dollar Gem, Inc. v Myung Kuk Chun

2010 NY Slip Op 33562(U)

December 10, 2010

Sup Ct, Queens County

Docket Number: 19798/10

Judge: Allan B. Weiss

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MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 2

DOLLAR GEM, INC., X

Plaintiff,

- against -

MYUNG KUK CHUN,

Defendant.
_____ X

INDEX NO. 19798/10

MOTION SEQ. NO. 1

BY: WEISS, J.

DATED: December 10, 2010

Plaintiff Dollar Gem Inc., in this action for injunctive relief and damages, seeks an order granting a temporary restraining order and a preliminary injunction enjoining defendant Myung Kuk Chun and all persons known and unknown acting on behalf or in concert with defendant from taking any action to terminate plaintiff's lease and/or commencing a summary proceeding to evict the plaintiff or otherwise interfere with its possession of the premises known as 229-12 to 229-16 Merrick Blvd. Laurelton, New York; staying and tolling the termination date and/or expiration of the cure period set forth in the 5 day notice to pay rent regarding said premises; declaring said notice to be a nullity, or in the alternative extending plaintiff's time to cure any default under the lease as alleged in said notice; and awarding

plaintiff costs, disbursements and attorney's fees. Defendant Myung Kuk Chun cross-moves for an order dismissing the complaint in its entirety with prejudice, and declaring that plaintiff has defaulted in its obligations under the lease and that plaintiff is entitled to possession of the premises and owes rent and/or use and occupancy pendente lite to date; granting an order of ejectment and a judgement or writ of possession; granting a judgment for rent in a sum not less than \$38,775.24 plus interest; and a judgment for use and occupancy in an amount to be determined by the court, plus interest; and a judgment for attorney's fees and costs to be determined by the court.

Dollar Gem Inc., entered into a commercial lease in January 2004, and a rider dated January 13, 2004, and a second rider with Myung Kuk Chun, whereby it leased the premises known as 229-12 to 229-16 Merrick Blvd., Laurelton, New York for the period commencing January 15, 2004 and ending on December 31, 2023. Mohammad Arif, as President, of Dollar Gem Inc., executed the lease and first rider on behalf of the tenant.

The first rider to the lease provides, in pertinent part, that "[t]he Tenant shall pay his pro rata tax increase

for the entire building. The base real estate tax shall be calculated at tax year 2003 and that shall be the base tax for the balance of the lease agreement. During the 2004 tax year, the tenant shall pay no tax increase. Commencing in 2005, the tenant shall pay his pro rata share. The pro rata share will be based on 4,750 square feet as recorded in the New York City Department of Buildings." Mr. Chun's counsel, in letters dated January 30, 2009, November 16, 2009, and February 15, 2010, requested that Dollar Gem Inc. pay specified real estate tax arrears. The letter of February 15, 2010 also requested that the tenant provide proof of insurance as required under the lease. In a letter dated March 11, 2010, counsel for Dollar Gem Inc., in response to the February 15, 2010 letter, objected to the amount claimed for the 2009-2010 real estate taxes on the grounds that the property owner had failed to protest the tax assessment and failed to timely inform the tenant so that the tenant could have filed a protest.

Mr. Chun's counsel, in a letter dated July 19, 2010 and addressed to Mohammad Arif and Syed Zubair, Dollar Gem Inc., at the leased premises, stated that there were "unpaid arrears and current balances due, as much as \$50,403.58 in

additional rents as of June 18, 2010. A breakdown was given of the amounts claimed for real estate taxes and interest, for the 2005-2006 tax year; for additional real estate taxes for 2008-2009; for real estate taxes for 2009-2010; for real estate taxes for 2010-2011; and for a New York City Violation and legal fee in connection with said violation. Mr. Chun's counsel further stated that the tenant was required to maintain general comprehensive liability insurance for the benefit of the landlord, with a combined single limit of \$2,000,000 with respect to one accident, \$500,000 with respect to property and \$500,000 per person, and that the failure to maintain the insurance is a default under the lease and the landlord may terminate the lease based upon such default. Although said letter is dated July 19, 2010, it requested that the tenant submit payment for the arrears and payments totaling \$50,403.53 and the proof of insurance to Mr. Chun by June 25, 2010. Said letter recites that it was sent by certified mail and fax. Although the fax transmission data submitted herein reveals that said letter was faxed on July 19, there is no evidence that the letter was separately mailed. Rather, on July 19, 2010, the landlord Myung Kuk Chung mailed the July 19, 2010 letter along with "5

DAY NOTICE TO PAY RENT." The 5 day notice is addressed to Mohamed Arif and Syed Zubair, Dollar Gem Inc., at the leased premises, and provides as follows:

"PLEASE TAKE NOTICE that you are in default under the terms of the Lease dated January 13, 2004 between you as tenant, and Myung Kuk Chun, as landlord, in that you failed to comply with:

(a) Lease Rider (RE: Real Estate Taxes and Licenses and Permits) thereof in that you are indebted to the landlord in the sum of \$50,403.58 for the additional rents since about the year of 2005 as described in the letter sent to you previously, a copy of which is attached herein;

(b) Lease Rider (Re: Insurance) thereof in that you failed to maintain, for the benefit of the Landlord, General Comprehensive Liability Insurance in standard form, written by good and solvent companies duly licensed to do business in the State of New York, with a combined single limit in an amount of at least \$2,000,000.00 in respect to any one accident and in the amount of \$500,000 in respect to property and \$500,000 per person.

You are required to pay said rent and submit proof of insurance to the landlord on or before the expiration of five (5) days from the day of the service of this Notice, or surrender up the possession of said Premises to the Landlord. This notice of default is being sent to you pursuant to paragraph 17 of said Lease, Should you fail to cure your default within five (5) days from the day of service of this Notice, the Landlord may terminate your Lease and commence summary proceedings under the Statute to recover possession thereof.

In addition to the foregoing, the Landlord demands reasonable attorneys' fees in the sum of \$500.00."

The 5 Day Notice to Pay Rent and the attached letter of July 19, 2010 letter were mailed on July 19, 2010 to Dollar Gem by certified mail, return receipt requested. The return receipt card is signed and dated July 20, 2010. Dollar Gem commenced the within action on August 5, 2010, and seeks a preliminary injunction in its first cause of action. The second cause of action seeks damages for negligence the third

cause of action seeks damages for breach of contract and fourth cause of action seeks to recover attorneys' fees.

Dollar Gem, in its order to show cause dated August 5, 2010 seeks a *Yellowstone* injunction. This court, in the order to show cause, granted a temporary restraining order, pending the hearing and determination of the motion, enjoining the defendant from taking any action to evict the plaintiff, to terminate its lease, and/or commence summary proceedings or otherwise declare a default or take any action adverse to plaintiff's possession of the premises, and tolled the expiration date set forth in the 5 Day Notice to Pay Rent, dated July 29, 2010.

"A *Yellowstone* injunction maintains 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. The party requesting a *Yellowstone* injunction must demonstrate that: '(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

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" (*225 E. 36th St. Garage Corp. v 221 E. 36th Owners Corp.*, 211 AD2d 420, 421; *Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assocs.*, 93 NY2d 508, 514 [1999]).

Dollar Gem Inc.'s motion for a *Yellowstone* injunction is timely, as defendant did not terminate the lease prior to the commencement of this action. Dollar Gem has demonstrated that it holds the subject commercial lease, that it received the July 19, 2010 5 Day Notice To Pay Rent on July 20, 2010, that the defendant landlord did not terminate the lease prior to the commencement of this action on August 5, 2010, and that it is prepared to pay the rent arrears, although it contests the portion designated as 2009-2010 real estate taxes. Plaintiff asserts that the defendant property owner failed to timely file a Real Property Income and Expense statement for 2009-2010 which resulted in the real tax assessment, and claims that it should not be required to pay additional amounts attributable to the defendant's inaction and gross negligence. Plaintiff further asserts that it has always maintained liability insurance for the premises and has

submitted a certificate of insurance for the period of July 14, 2010 through July 14, 2010, names Mr. Chun as the certificate holder.

That branch of plaintiff's motion which seeks an injunction enjoining the defendant from taking any action to evict the plaintiff, to terminate its lease, and/or commence summary proceedings or otherwise declare a default or take any action adverse to plaintiff's possession of the premises, and staying and tolling the expiration date set forth in the 5 Day Notice to Pay Rent, dated July 29, 2010, is granted upon the condition that the plaintiff post an undertaking in an amount to be determined in the order to be entered hereon. The parties may submit affidavits regarding the amount of the undertaking along with the proposed order.

That branch of plaintiff's motion which seeks to declare the 5 Day Notice to Pay Rent a nullity is denied. It is well established that "[t]he purpose of the notice to cure is to specifically appraise the tenant of claimed defaults in its obligations under the lease and of the forfeiture and termination of the lease if the claimed default is not cured within a set period of time" (*Filmtrucks, Inc. v Industries and Terminal Corp.*, 127 AD2d 509 [1987]). Here, the 5 Day

Notice to Pay Rent sufficiently apprised plaintiff of its obligation to pay the outstanding rent arrears and other charges due under the terms of the lease, and to provide proof of insurance. Therefore, the notice was sufficient to advise plaintiff of the condition which defendant wants cured.

That branch of plaintiff's motion which seeks attorneys' fees and disbursements is denied.

Defendant's cross motion is denied. Defendant now states that the amount it demanded in the 5 Day Notice to Pay Rent is withdrawn and that the amount of the arrears is \$38,775,24. It is noted that plaintiff contests this amount to the extent that defendant seeks to recover a pro rata share of real estate taxes for 2009-2010, as they were assessed at a higher amount due to the property owner's failure to file the appropriate tax statement with the Department of Finance. To the extent that defendant asserts claims for breach of contract, ejectment and a writ of assistance, and seeks to recover rent arrears and use and occupancy, the moving papers fail to include a copy of an answer and counterclaims for such relief. Defendant's thus has not established that it is entitled to such relief at this time.

Settle order.

J.S.C.