

Weinberg Holdings LLC v Ruru & Assoc. LLC

2013 NY Slip Op 30402(U)

February 25, 2013

Supreme Court, New York County

Docket Number: 103430/12

Judge: Saliann Scarpulla

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

PRESENT: SCARPULLA
Justice

PART 19

2/27/13
②

WEINBERG HOLDINGS
- v -
RURW & ASSOCIATES

INDEX NO. 103430/12
MOTION DATE _____
MOTION SEQ. NO. 1
MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

motion and cross-motion are decided in accordance with accompanying memorandum decision.

FILED
FEB 27 2013
NEW YORK
COUNTY CLERKS OFFICE

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N.Y. SUPREME COURT - CIVIL

Dated: 2/25/2013

Saliann Scarpulla
HON. SALIANN SCARPULLA J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

NOTION SUPREME COURT OFFICE
140 SUPREME COURT - CIVIL

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X
WEINBERG HOLDINGS LLC,

Plaintiff,

Index No.: 103430/2012
Submission Date: 11/14/12

-against-

RURU & ASSOCIATES LLC,

DECISION AND ORDER

Defendants
-----X

For Plaintiff:
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For Defendants:
Borah, Goldstein, Altschuler, Nahins & Goidel, P.C.
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Papers considered in review of this motion for a Yellowstone injunction and cross motion to dismiss:

Order to Show Cause	1
Affs in Support	2
Mem of Law	3
Cross Motion	4
Aff in Support and Opp	5
Mem of Law	6
Reply Aff	7
Reply Aff	8

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FEB 27 2013
NEW YORK
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HON. SALIANN SCARPULLA, J.:

In this commercial real estate action, plaintiff Weinberg Holdings LLC (“Weinberg” or “plaintiff”) moves by order to show cause for a Yellowstone injunction to stay and toll the expiration of the curative period set forth in defendant Ruru & Associates LLC’s (“Ruru” or “defendant”) Notice of Default, and to temporarily, preliminarily and permanently enjoin and restrain defendant from taking any action to terminate plaintiff’s lease and/or commence summary proceedings to evict plaintiff. Ruru opposes and cross

* 3]
moves to dismiss the complaint based on documentary evidence pursuant to CPLR 3211(a)(1), or in the alternative, to impose certain conditions upon the granting of the injunction.

Ruru is the landlord of a building located at 68 Second Avenue, New York, New York 10003 (the "building"). Pursuant to a lease dated June 9, 1999, between Weinberg and Bar None LLC ("Bar None"), the prior landlord, Weinberg is the tenant occupying and using "the two bars located on the north side of the building" (the "premises"), to operate two (2) bars and (1) delicatessen (the "lease").¹ As alleged in the complaint, on or about October 4, 2011, Bar None sold the building to Ruru, and the lease was thereby transferred to Ruru.

Weinberg received a letter dated December 15, 2011 from counsel for Ruru, stating that Ruru had recently inspected the building and found Weinberg's belongings in the basement. Ruru's counsel stated that Weinberg's tenancy did not extend to the basement, and demanded that Weinberg remove the belongings immediately or Ruru would commence a summary proceeding against Weinberg to compel compliance with the terms of the lease.

Weinberg responded with a letter from its counsel, dated January 6, 2011, stating that there is nothing in the lease which excludes Weinberg from using the basement, and that Weinberg has used the basement for many years.

¹ Weinberg alleges that it has been a lessee of the premises since 1993.

There was no further communication between the parties regarding the basement, until July 20, 2012, when Ruru served Weinberg with a "Fifteen Day Notice of Default" (the "Notice of Default"). The Notice of Default charges that Weinberg was using and occupying the basement contrary to the provisions of the lease and without prior written authorization by Ruru, and gave Weinberg fifteen (15) days, or until August 6, 2012, to cure the default.

Weinberg commenced this action on August 1, 2012, asserting causes of action for (1) a preliminary and permanent injunction enjoining Ruru from terminating Weinberg's lease or commencing any actions or proceedings seeking possession; (2) a declaratory judgment that Ruru may not terminate Weinberg's tenancy because of Weinberg's use and occupancy of the basement, as it is in accordance with the terms of the lease; and (3) for attorneys' fees.

In support of its order to show cause for the Yellowstone injunction, Weinberg maintains that its use of the basement is in compliance with the terms of the lease, but states that it "is willing to cure any purported lease defaults by ceasing its occupancy of the Basement Space if the Court finds that the Basement Space is not part of the Lease Agreement." Also, Weinberg contends that since the inception of the lease, it was the parties' understanding that the lease covered the basement space beneath the bars, and that Weinberg has been using the space continuously since 1993. In addition, Weinberg

alleges that Ruru is fabricating an excuse to exclude the basement space because Weinberg's rent for the space is at least fifteen percent (15%) below market value.

Ruru opposes the motion, and cross moves to dismiss the complaint pursuant to CPLR 3211(a)(1), for documentary evidence. As to the first cause of action, Ruru argues that it has no merit as Weinberg does not demonstrate an ability and/or desire to cure, and that it illegally occupies the premises without a certificate of occupancy and occupies the basement beneath the premises without authority. As to the second cause of action, Ruru argues that there is no certificate of occupancy in place, and that Weinberg has used and made material alterations to the premises and the basement without ever having obtained a certificate of occupancy for its use, in violation of the lease, and therefore Weinberg is not entitled to the declaratory relief it seeks. As to the third cause of action, Ruru asserts that its service of the Notice of Default was not frivolous, and there is no provision of the lease which authorizes payment of legal fees.

Ruru also asserts that Weinberg has a "sweetheart" lease with below market rent because at the time the lease was entered into, there was "unity of interest" between the tenant and landlord, making the lease "both suspect and subject to being set aside."

In opposition to the cross motion, Weinberg submits an affidavit of Neil Weinberg, managing member of Weinberg ("Mr. Weinberg"). Mr. Weinberg maintains that the bars have always used the basement, and that basement use was intended by all parties to the lease. Mr. Weinberg also admits that when he began operating the bars at the premises in

1993, another company of his, Blasing Enterprises, Inc., (“Blasing”) also owned the building. On June 8, 1999, Blasing sold the building to Bar None, and Weinberg then entered into the lease with Bar None. Weinberg is silent as to whether it was affiliated with Bar None. Weinberg also contends that there is a valid certificate of occupancy.

Discussion

“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.’” *WPA/Partners LLC v. Port Imperial Ferry Corp.*, 307 A.D.2d 234, 236 (1st Dep’t 2003) (quoting *Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Avenue Associates*, 93 N.Y.2d 508, 515 (1999)).

A plaintiff seeking a Yellowstone injunction must “demonstrate[] that it held a commercial lease, had received a notice to cure from defendant landlord, and had requested injunctive relief prior to the expiration of the cure period. Plaintiff also [must show] that it [is] prepared and maintain[s] the ability to cure the alleged defaults.” *Aegis Holding Lipstick LLC v. Metropolitan 885 Third Ave. Leasehold LLC*, 95 A.D.3d 708 (1st Dep’t 2012) (citing *Graubard*, 93 N.Y.2d at 515). At this time, the tenant does not have to “prove its ability to cure; rather, ‘[t]he proper inquiry is whether a basis exists for believing that the tenant . . . has the ability [to] cure through any means short of vacating

the premises.” *WPA/Partners*, 307 A.D.2d at 237 (quoting *Herzfeld & Stern v. Ironwood Realty Corp*, 102 A.D.2d 737, 738 (1st Dep’t 1984)).

Weinberg has made a sufficient showing for Yellowstone relief. There is no dispute that plaintiff holds a lease for the two bars located on the north side of the building for use as two (2) bars and one (1) delicatessen. It is also undisputed that Weinberg received a Notice of Default dated July 20, 2012, stating that it was in default of the lease for using and occupying the basement space beneath the premises.

Weinberg made a timely application for Yellowstone relief prior to the expiration of the cure period, by securing this order to show cause on August 1, 2012, as the Notice of Default provided until August 6, 2012 to cure. Weinberg has also established its willingness and ability to cure the alleged default by submitting Mr/ Weinberg’s affidavit in which he states that Weinberg is “willing to cure any purported lease defaults by ceasing its occupancy of the basement Space if the Court finds that the Basement Space is not part of the Lease Agreement.” *See TSI West 14 v. Samson Associates, LLC*, 8 A.D.3d 51, 52 (1st Dep’t 2004) (granting Yellowstone Injunction where plaintiff states “its willingness to cure, should the court find that necessary”).

Ruru cross moves to dismiss Weinberg’s complaint pursuant to CPLR 3211(a)(1), arguing that under the terms of the lease, the basement area is excluded. “Pursuant to CPLR 3211(a)(1), where the ‘documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law,’ dismissal is warranted.” *Excel*

Graphics Technologies, Inc. v. CFG/AGSCB 75 Ninth Avenue, L.L.C., 1 A.D.3d 65, 69 (1st Dep't 2003) (quoting *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994)). "While a complaint is to be liberally construed in favor of plaintiff on a CPLR 3211 motion to dismiss, the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence." *Robinson v. Robinson*, 303 A.D.2d 234, 235 (1st Dep't 2003)).

Here, the lease does not conclusively establish whether or not Weinberg is authorized to use the basement space. As both parties note, the lease refers to "Exhibit A," which purports to specify a description of the property, and the specifics of the premises subject to the lease. However, Exhibit A is blank in all copies of the lease submitted to the court. Accordingly, the Court can not resolve whether the basement is covered pursuant to the terms of the lease.

Further, the Notice of Default only charges that Weinberg is in default due to the use of the basement space. As such, Ruru's other arguments that Weinberg is in violation of the lease because of a lack of certificate of occupancy, and that Weinberg has unclean hands because of the sweetheart lease and "unity of interest" of Weinberg and the prior landlord, are not properly before this Court on the motion for the Yellowstone injunction. "In light of the conflicting allegations," regarding the use of the basement, "an injunction is necessary to preserve the status quo until a trial can be conducted on the merits, at which time the parties' additional contentions regarding each other's 'unclean hands' and bad faith may properly be resolved." *Tag 380, LLC v. Sprint Spectrum, L.P.*, 290 A.D.2d

404, 404-405 (1st Dep't 2002) (citation omitted); *S&B Petroleum, Inc. v. Gizem Realty Corp.*, 8 A.D.3d 550, 550-551 (2d Dep't 2004) (same).

In accordance with the foregoing, it is

ORDERED that plaintiff Weinberg Holdings LLC's motion for a Yellowstone injunction is granted and the expiration of the cure period contained in defendant Ruru & Associates LLC's Notice of Default dated July 20, 2012, is stayed and tolled, and defendant, its employees, agents, servants, representatives and all other persons acting on its behalf, are restrained and enjoined from taking any action to terminate plaintiff's lease, pending a resolution of this action on the merits, on the condition that the plaintiff continues to make timely payments of the rent as required by the lease; and it is further

ORDERED that defendant Ruru & Associates LLC's cross motion to dismiss the complaint is denied; and it is further


ORDERED that if defendant has not already done so, it shall serve and file an answer within twenty (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 April 10, 2013 at 2:15 p.m., in Part 19, Room 335, 60 Centre Street.

This constitutes the decision and order of the Court.

Dated: New York, NY
February 25, 2013

ENTER:


Saliann Scarpulla, J.S.C.

FILED
FEB 27 2013
NEW YORK
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