

Bedford Hotel, Inc. v Rand

2013 NY Slip Op 30947(U)

April 17, 2013

Supreme Court, New York County

Docket Number: 100187/13

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS PART 58

DONNA M. MILLS, J.S.C. *Justice*

BEDFORD HOTEL, INC.,

Plaintiff,

INDEX NO. 100187/13

-against-

MOTION DATE _____

WILLIAM RAND, et al.,

FILED

MOTION SEQ. No. 01

MAY 02 2013

MOTION CAL No. _____

NEW YORK COUNTY CLERK'S OFFICE

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

PAPERS NUMBERED

| | |
|---|----------|
| Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... | <u>1</u> |
| Answering Affidavits- Exhibits _____ | <u>2</u> |
| Replying Affidavits _____ | <u>3</u> |

CROSS-MOTION: _____ YES _____ NO

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

Dated: 4/17/13

Donna M. Mills

J.S.C.

DONNA M. MILLS, J.S.C.

Check one: _____ FINAL DISPOSITION

NON-FINAL DISPOSITION

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

BEDFORD HOTEL, INC.,

INDEX NO.
100187/13

Plaintiff,

- against -

WILLIAM RAND, RUTH ALPERT AND ESTHER
EVANS, et al.,

Defendants.

FILED DECISION/ORDER

Donna M. Mills, J.:

MAY 02 2013

In this action regarding the prospective ~~NEW YORK~~ of a commercial lease, plaintiff Bedford Hotel, Inc. ("Plaintiff"), move by order to show cause for a preliminary injunction, pursuant to First National Stores, Inc. v Yellowstone Shopping Center, Inc. (21 NY2d 630 [1968]) ("Yellowstone").

Plaintiff is the tenant in a triple net Lease for a 19 floor building owned by defendant-owners, William Rand, Ruth Alpert and Esther Evans (As Successors in Interest to the Estate of Merna Alpert) Andre T. Jagendorf, Richard Read, William C. Rand and Bedford-Wrand, LLC ("Defendants"). Plaintiff has operated the building as a Hotel for over 40 years and has about two years of Term remaining on its Lease with Defendant-Owners who are the landlords. As a triple net lease, the Plaintiff is responsible for the maintenance obligations of the building including structure, tenant improvements as well as for operating the building in compliance with applicable law and with the building's certificate of occupancy.

Defendants contend that Plaintiff has neglected important covenants of its Lease resulting in Defendants serving a series of default notices on Plaintiff and, finally, a Notice to Cure, which precipitated Plaintiff seeking this Yellowstone injunction. Plaintiff's alleged defaults include: (i) operating the building in violation of the building's certificate of occupancy, (ii) failing to properly insure the building and improvements; (iii) failing to pay

rent on a timely basis, (iv) failing to provide proper financial statements, and (v) obstructing Defendants' rights to access the property for the purposes of reviewing/auditing Plaintiff's financial statements and for showing the building to prospective purchasers.

Plaintiff claims that the Defendants' actions in serving the default notices is a ploy to harass the Plaintiff in an effort to terminate the remaining two years of the commercial lease prematurely. Moreover, Plaintiff claims that in or about October 12, 2002, it made a formal written request for consent to the assignment of the Lease. By letter dated October 26, 2012, Defendants, denied the request. Following the denial of the assignment of lease, Defendants caused to be served a Notice to Cure dated November 16, 2012. On the same date, Plaintiff hand delivered notice to Defendants that it was exercising its right pursuant to Section 18.04 of the lease to demand arbitration of a dispute, which Plaintiff deemed Defendants' refusal to consent to the assignment to constitute.

Plaintiff now moves for relief in the form of a Yellowstone injunction enjoining Defendants from taking any steps to cancel or terminate the lease relating to the Hotel during the pendency of this action. Defendants oppose the application and seek to stay the pending arbitration contending that if both the arbitration proceeding and the instant action proceed concurrently, there is a risk of conflicting determinations between the two on the issue of whether, and the extent to which, Plaintiff is in default under the subject lease.

Yellowstone relief is available to protect against leasehold forfeiture, provided that the tenant has the ability to cure by means short of vacatur in the event the tenant is found to be in default of its obligation under a lease (Post v 120 E. End Ave. Corp., 62 NY2d 19, 25 [1984]). This rationale is in line with this State's public policy against the forfeiture of leases (see Sharp v Norwood, 223 AD2d 6, 11 [1996], affd 89 nY2d 1068 [1997]). This disinclination against leasehold forfeitures serves to promote the economy and business in our City. This public policy concern takes on greater weight when a tenant diligently and

in good faith attempts to cure the defect, but through no inaction of its own, can not do so (see Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co., 86 NY2d 685, 695 [1995]). The Court of Appeals has acknowledged that courts routinely grant Yellowstone relief to reflect this State's policy against forfeiture, and courts have done so by accepting "far less than the normal showing required for preliminary injunctive relief" (Post, 62 NY2d at 25).

While a tenant is not required to prove its ability to cure the claimed default prior to obtaining a Yellowstone injunction, there must be a basis for believing that the tenant desires to cure and has the ability to do so through any means short of vacating the premises (WPA/Partners LLC v. Port Imperial Ferry Corp., 307 AD2d 234, 237 (1st Dept. 2003)). The primary thrust of Defendants' allegations against the Plaintiff, is the Plaintiff's failure to perform all steps to obtain a proper certificate of occupancy. Defendants argue that on account of the passage of new legislation in 2011, the building can no longer be operated "legally" as a hotel unless the Certificate of Occupancy is upgraded from Class A to Class B.

Here, it appears that Plaintiff primary interest is assigning the lease. Its allegations do not indicate that it has any interest in remaining at the premises after the lease term ends in two years, nor any interest or ability in curing the alleged violation of the Certificate of Occupancy (403 W. 43 Street Rest. Inc. v. Ninth Ave. Realty LLC, 36 AD3d 464 (1st Dept. 2007)).

Plaintiff's President, Hyman Arbesfeld in an affidavit submitted in reply to Defendants' opposition, represents that he and others in the Hotel industry are not sure what is actually needed to effectuate the proposed alteration of the building to convert from a Class A multiple dwelling to a Class B multiple dwelling. He further maintains that since the statute permits 1 or 2 year extensions in order to complete the procedure, it would be impossible to cure this alleged violation of the lease in the time provided in the Notice to

Cure.

In light of Plaintiff's interest in assigning the lease, coupled with its uncertainty in being capable of converting the Certificate of Occupancy pursuant to the applicable statute, it can not be said that Plaintiff desires to cure and has the ability to do so. As such, the most prudent course, under the circumstances, is to stay arbitration of the issue of the reasonableness of Defendants' refusal to approve the proposed assignment until the issue of whether Plaintiff is in default under the subject lease is resolved. Should it be determined that Plaintiff did, in fact, default under the lease as noticed, failed to timely cure, and was given proper notice of termination, the reasonableness of Defendants' refusal to approve the assignment would be moot.

Accordingly, it is

ORDERED, that Plaintiff's motion for Yellowstone injunction is denied; and it is further,

ORDERED, that Defendant's request to stay arbitration in the matter between the parties is granted and the arbitration is hereby stayed pending further order of this Court.

Dated: 4/17/13

FILED
MAY 02 2013
NEW YORK
COUNTY CLERK'S OFFICE

So Ordered
DM

Donna M. Mills, J.S.C.
DONNA M. MILLS, J.S.C.