93 South St. Rest. Corp. v South St. Seaport Ltd. Partnership

2013 NY Slip Op 31648(U)

July 18, 2013

Supreme Court, New York County

Docket Number: 156165/13

Judge: Manuel J. Mendez

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: MANUEL J. MENDEZ PART 13
Justice

93 SOUTH STREET REST. CORP., d/b/a HEARTLAND BREWERY,
Plaintiff,

- v -

SOUTH STREET SEAPORT LIMITED PARTNERSHIP,
Defendants.

INDEX NO. 156165/13

MOTION DATE 07-17-2013

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 4 were read on this motion for a Yellowstone injunction.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	3-4
Replying Affidavits	

Cross-Motion: ☐ Yes X No

Upon a reading of the foregoing cited papers it is ordered that plaintiff's motion for a Yellowstone injunction enjoining and restraining defendant from terminating the parties' storage lease agreement dated October 8, 2002 is granted. Plaintiff is to pay use and occupancy in the amount stated in the lease commencing the month of July 2013 and continuing every month thereafter until this action is concluded.

On October 8, 2002 the parties entered into a lease for retail premises and for storage premises located at defendant's shopping center in the South Street Seaport in New York County. The retail premises are used as a Restaurant and the storage premises are used for preparation of food to be consumed in the Restaurant. The Restaurant premises were damaged and have been inoperable since hurricane Sandy and plaintiff has had no need to use the storage area for food preparation.

On April 25, 2013 defendant mailed plaintiff notice that it was exercising it's right to relocate plaintiff's storage premises under section 11 of the Storage Lease Agreement, to space number 1375 first floor of 91 South Street. The notice contained a First Amendment to Storage lease to relocate the storage premises. It advised plaintiff that if it did not accept the Relocated Storage Premises within 30 days from the date of the notice, or May 25, 2013 then the storage lease shall automatically terminate. It further advised that plaintiff needed to remove any and all installed furniture, fixtures and equipment from the storage premises prior to May 25, 2013.[See letter dated April 25, 2013, moving papers Exhibit F]

On May 30, 2013 Plaintiff mailed defendant a letter accepting the premises, informing defendant that the lease states that the landlord is responsible for the move and cost of the move and that the amendment was being reviewed due to

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

inconsistencies in the amendment and the lease. [see letter dated May 30, 2013, moving papers Exhibit D].

On June 7, 2013 defendant mailed plaintiff a letter making reference to the April 25, 2013 letter and stating at paragraph 3: "Landlord hereby provides final notice to tenant that Tenant must accept the Relocated Storage premises and sign and deliver to Landlord an executed original First amendment on or before 12:00 P.M. Eastern Standard Time on June 14, 2013. If tenant has not accepted the Relocated Premises and /or has not delivered to Landlord an executed original First Amendment by said date and time, Landlord shall deem the Storage Lease as automatically terminated at 12:01 P.M. Eastern Standard time on June 14, 2013("the Storage Lease Termination Date"). In addition, if tenant has not accepted the Relocated Premises and/or has not delivered to Landlord an executed original First Amendment prior to the Storage Lease Termination Date, Landlord's offer for the Relocated Storage Premises shall automatically be withdrawn and/or revoked and be of no force or effect. Said withdraw and/or revocation shall not affect the termination of the Storage Lease, as the Storage Lease shall automatically terminate on the Storage Lease Termination date pursuant to Section 11."

At Paragraph 4 the letter states: " If tenant accepts the Relocated Storage Space and delivers to Landlord an executed original First Amendment prior to the Storage Lease Termination Date, Landlord shall, pursuant to section 11 of the Storage Lease, pay for Tenant's reasonable moving expenses incurred in connection with the moving of 'Tenant's furniture, fixtures, equipment and inventory.' Any and all other modifications, improvements, and/or preparations to allow tenant to use the Relocated Storage Premises, as a preparatory kitchen or otherwise, shall be done by Tenant at Tenant's sole cost and expense."
[See June 7, 2013 letter, moving papers Exhibit B].

Although plaintiff accepted the new premises, it has not removed from the old because the new premises are in a raw, unusable state requiring significant improvements for their potential use as a preparatory kitchen. [See Photographs of premises, moving papers Exhibit E]. Additionally, plaintiff objects to defendants imposition of two requirements not contained in the lease, i.e, the signing of a First Amendment and the payment by plaintiff for any cost to modify or improve the relocated premises. Plaintiff argues that this cost, in accordance with the lease should be borne by defendant.

The termination of lease date in the June 7, 2013 letter was extended a number of times, until it was finally extended to July 10, 2013. On July 8, 2013 plaintiff commenced this action for a preliminary injunction. Defendant argues that an injunction is not proper because the June 7, 2013 letter is a termination notice, not a notice of default or notice to cure. Defendant argues that there is nothing to cure and plaintiff can appropriately raise its defenses in the commercial Landlord and Tenant action to be commenced in Civil Court.

A notice of Commercial Lease Termination, indicating landlord's intent to terminate the lease within a specified period based on the tenant's failure to comply with a Landlord's prior demand constitutes a notice to cure, not a notice of termination, and a tenant's motion for a Yellowstone injunction filed before the termination date is timely (See Barsyl Supermarkets, Inc., v. Avenue P. Associates, LLC., 86 A.D. 3d 545,

928 N.Y.S. 2d 45 [2nd. Dept. 2011] deeming a notice terminating lease within 30 days from the date of the notice a notice to cure).

The June 7, 2013 letter advises plaintiff that it has until June 14, 2013 to accept the new premises, remove from the old premises and sign the First Amendment to lease, and that if it does not then the lease would terminate. This termination date was extended until July 10, 2013. The June 7, 2013 letter constitutes either a notice of default, a notice to cure or a threat of termination of the lease. Plaintiff moves to stay the termination of the lease prior to the termination date and thus the motion for a Yellowstone Injunction is timely.

A Yellowstone injunction is appropriate to preserve the status quo pending the determination of the underlying dispute. A Commercial tenant must satisfy the following criteria in order to obtain an injunction staying termination of the leasehold while the propriety of the underlying default is litigated: (1) tenant holds a commercial lease, (2) tenant has received a notice of default, notice to cure, or threat of termination of the lease, (3) tenant has requested injunction relief prior to the termination of the lease, and (4) tenant is prepared and has the ability to cure the alleged default by any means short of vacating the premises (Reade v. Highpoint Associates IX, LLC., 1 A.D. 3d 276, 768 N.Y.S. 2d 439 [1st. Dept. 2003]; Heon Lee v. TT & PP Main Street Realty Corp., 286 A.D. 2d 665, 729 N.Y.S. 2d 775 [2nd. Dept. 2001]). A Yellowstone injunction is not conditioned on Tenant's likelihood of success on the merits of the underlying action (Stuart, v. D& D Associates, 160 A.D. 2d 547, 554 N.Y.S. 2d 197 [1st. Dept. 1990]).

The purpose of a Yellowstone injunction is to toll the cure period. To allow a Commercial tenant faced with a threat of termination of its lease to protect its investment in the leasehold by tolling the cure period so that upon an adverse determination on the merits the tenant may cure the default and avoid a forfeiture (Graubard Mollen Horowitz Pomeranz & Shapiro, v. 600 Third Avenue Associates, 93 N.Y.2d 508, 715 N.E. 2d 117, 693 N.Y.S. 2d 91 [1999]).

Plaintiff has met the requirements for obtaining a Yellowstone injunction. It has a Commercial lease, (2) has received a notice of default, to cure or threat of termination, (3) has requested the relief prior to the termination of the lease, and (4) is prepared and has the ability to cure the alleged default by means short of vacating the premises. Accordingly, the motion for a Preliminary injunction is granted.

Plaintiff has accepted the new Storage Premises but issues remain to be resolved such as: who pays to improve the new premises from its raw, unusable state to a space suitable for use a preparatory kitchen, is plaintiff required to sign a First Amendment to lease, how much time does plaintiff have to move from the old premises once the new premises are accepted. These will require interpretation of the Storage Lease Agreement, and may require discovery.

Defendant requests that if the court grants the motion for a preliminary injunction, that it be conditioned on the paying of past rent, use and occupancy and the posting of a bond or undertaking. Defendant claims that there is owed on the Restaurant premises approximately $41,736.88 dollars which plaintiff should be required to pay. Plaintiff argues that these premises and the storage premises are not currently being used. That the court should not condition the granting of the

preliminary injunction on paying rent for the Restaurant premises as they are not the subject of this action and if the court will require any payment of rent or use and occupancy it should require that it be deposited with the court.

A court, in the exercise of its discretion, can order the posting of a bond or undertaking and the payment of use and occupancy as a condition of a Yellowstone injunction (37th Street Enterprises, Inc., v. 500-512 Seventh Avenue Associates,266 A.D. 2d 28, 697 N.Y.S. 2d 601 [1st. Dept. 1999]). The amount ordered deposited must be rationally related to the quantum of damages the landlord would sustain in the event that the tenant is later determined not to have been entitled to an injunction (61 West 62nd. Owners Corp., v. Harkness Apartment Owners Corp., 173 A.D. 2d 372, 570 N.Y.S. 2d 8 [1st. Dept. 1991]; 3636 Greystone Owners, Inc., v. Greystone Building, 4 A.D. 3d 122, 771 N.Y.S. 2d 341 [1st. Dept. 2004]).

Thus it has been found rational for the court to order posting of undertaking in the amount of $18,820 (John A. Reinsenbach Charter School v. Wolfson, 298 A.D. 2d 224, 748 N.Y.S. 2d 247 [1st. Dept. 2002]), posting of a $30,000 bond and timely payment of rent under the lease (E.C. Electronics, Inc., v. Amblunthorp Holding, Inc., 38 A.D. 3d 401, 834 N.Y.S. 2d 14 [1st. Dept. 2007]), Posting of a $10,000 bond (3636 Greystone Owners, Inc. V. Greystone Building, Supra), posting security of $100,000 pay arrears and make future monthly payments of $8,500 (Sportplex of Middletown, Inc., v. Catskill Regional Off-Track-Betting Corporation, 221 A.D. 2d 428, 633 N.Y.S. 2d 588 [2nd. Dept. 1995]), or simply the payment of use and occupancy (Metropolitan Transportation Authority v. 2 Broadway LLC, 279 A.D. 2d 315, 720 N.Y.S. 2d 12 [1st. Dept. 2001]).

Undertaking in the amount of three months rent as a condition of granting a Yellowstone Injunction has been deemed excessive when there is inadequate proof offered by landlord as to potential damages (Medical Building Associates, Inc., v. Abner Properties Company, 103 A.D. 3d 488, 959 N.Y.S.2d 476 [1st. Dept. 2013]).

Defendants have not provided this court with proof as to the landlord's potential damages for the use of the Storage Space if plaintiff were not to be entitled to an injunction. The only damage capable of computation is the payment of use and occupancy for the Storage space which plaintiff shall be required to pay commencing in the month of July and every month thereafter until this action is concluded.

Accordingly, it is ORDERED that plaintiff's motion for an order staying and tolling the expiration of the cure period set forth in the notice dated June 7, 2013 and preliminarily enjoining and restraining defendant, its agents, servants, representatives and all persons and entities known and unknown, acting on its behalf or in concert with it , in any manner or by any means, from taking any action to terminate the plaintiff's Storage Lease pursuant to the terms of the Storage Lease, or to commence any action or Summary proceeding to evict the plaintiff or to otherwise interfere with plaintiff's possession of the Storage Premises is granted, and it is further

ORDERED, that the expiration of the cure period set forth in the June 7, 2013 notice is stayed and tolled, and it is further

ORDERED, that defendant, its agents, servants, representatives and all persons and entities known and unknown, acting on its behalf or in concert with it, in any manner or by any means, are enjoined and restrained from taking any action to terminate the plaintiff's Storage Lease pursuant to the terms of the Storage Lease, the notice or at law, and/ or to commence any action or summary proceeding to evict the plaintiff from the Storage Premises or to otherwise interfere with plaintiff's possession of the storage premises, and it is further

ORDERED, that plaintiff is to pay use and occupancy in the amount stated in the storage lease commencing with the month of July 2013, within 15 days from the date of this order, and every month thereafter until this action is concluded, and it is further

ORDERED, that the parties are to appear for a preliminary conference in Part 13, located at 71 Thomas Street, Room 210, on the 31st. Day of July 2013 at 9:30 A.M.

Enter:

MANUEL J. MENDEZ
J.S.C.

Dated: July 18, 2013

Manuel J. Mendez
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE