

Stix Rest. Group, LLC v Christos Realty Inc.
2013 NY Slip Op 32228(U)
September 16, 2013
Supreme Court, New York County
Docket Number: 156833/2013
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN
J.S. Justice

PART 55

Stix Restaurant Group

INDEX NO. 156833/13

MOTION DATE _____

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

Christos Realty Inc.

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

is decided in accordance with the annexed decision.

Dated: 9/16/13

CYNTHIA S. KERN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
STIX RESTAURANT GROUP, LLC,

Plaintiff,

Index No. 156833/2013

-against-

CHRISTOS REALTY INC.,

Defendant.

-----X
HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits and Cross Motion.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u> </u>

Plaintiff tenant Stix Restaurant Group LLC (“Stix”) has brought the present motion by order to show cause for a Yellowstone injunction. Defendant Christos Realty Inc. (“Christos”) has brought a cross- motion to dismiss the complaint. For the reasons set forth more fully below, plaintiff’s motion is conditionally granted as follows and defendant’s cross-motion to dismiss is denied.

The relevant facts are as follows. Stix is the tenant of the ground floor and basement space located at 112 East 23rd Street (the “Premises”). In or about May 2012, it entered into a commercial lease agreement with Christos for a ten year term for the Premises (“the “Lease”). On or about June 27, 2013, Frank Parlarmis, Inc. filed a mechanic’s lien against the building for

work done by it while under plaintiff's employ. On or about July 16, 2013, Christos served Stix with its ten day notice of default. The notice alleges that plaintiff is in default of the Lease in that it has failed to provide defendant with certificates of final approval for the alterations to the Premises that it had undertaken and that it has caused the mechanic's lien of Frank Parlarmis, Inc. to be filed against the building. The notice states that the owner will elect to terminate the lease if the defaults by plaintiff are not cured within ten days. Plaintiff alleges in its moving papers that it has provided defendant with the certificates of final completion and that it agreed in principle with Frank Parlarmis, Inc. to resolve the lien issue. It also alleged that if it could not reach an agreement regarding the mechanic's lien, it could provide a bond for the lien but needed additional time to secure the bond. In between the time that it brought the present motion and the return date of the order to show cause, it brought a separate action to cancel the mechanic's lien issued by Frank Parlarmis, Inc.

Defendant has brought a cross-motion to dismiss the complaint on the ground that plaintiff has not made any effort to pay or bond the outstanding mechanic's lien. It points to the provision in the Lease which states that any lien filed against the building must be discharged by plaintiff via payment or bond. It alleges that plaintiff has failed to demonstrate its willingness to cure the mechanic's lien default because it has not bonded or paid the mechanic's lien.

The purpose of a Yellowstone injunction is to extend the cure period, thereby preserving the lease until the merits of the dispute can be resolved. *See Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assocs.*, 93 N.Y.2d 508, 514 (1999). "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.” *See id.* In the instant case, it is undisputed that plaintiff holds a commercial lease, that it received a notice to cure from the landlord and that it requested injunctive relief prior to the termination of the lease. This court finds that it can only establish the fourth required element, the ability to cure the default, by bonding the mechanic’s lien but that it should be given an opportunity to do so. Therefore, the motion for a Yellowstone injunction is granted on the condition that plaintiff bond the mechanic’s lien within three weeks from the date of this decision. To the extent that defendant raised the argument at the return date of this motion that the Lease bars the tenant from obtaining a Yellowstone injunction from the court, the court will not consider this argument as it is not raised in defendant’s cross-motion to dismiss or in any of its papers submitted on this motion. Accordingly, it is hereby

ORDERED that plaintiff’s motion for a Yellowstone injunction is granted; pending the determination of this action, the operation and effect of defendant’s notice dated July 10, 2013 is tolled and defendant is enjoined and stayed from taking any further steps or actions of any kind to (1) recover possession of the leased premises or (2) cancel or terminate the lease based upon the notice dated July 10, 2013 and defendant is prohibited from serving any notices of default, cancellation and/or termination based upon the same alleged defaults under the lease on the condition that plaintiff bond the mechanic’s lien within three weeks of the date of this decision. and it is further

ORDERED that plaintiff’s bonding the mechanic’s lien within three weeks of the date of this decision is a condition of the granting and continuation of this Yellowstone injunction.

This constitutes the decision, order and judgment of the court.

Dated: 9/16/13

Enter: CK

J.S.C.

CYNTHIA S. KERN
J.S.C.