

Unique Laundry Serv., Inc. v Hudson Park NY LLC
2013 NY Slip Op 33599(U)
January 29, 2013
Sup Ct, New York County
Docket Number: 111267/2007
Judge: Carol R. Edmead
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. CAROL EDMOND

PART 35

Justice

Index Number : 111267/2007

UNIQUE LAUNDRY CORP.

vs.

HUDSON PARK NY LLC

SEQUENCE NUMBER : 008

OTHER RELIEFS

INDEX NO. _____

MOTION DATE 1/15/13

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

Based on the foregoing, it is hereby

ORDERED that the motion by plaintiff Unique Laundry Service, Inc. for an Order: (i) ordering defendant Hudson Park NY LLC to discontinue the fourth cause of action in an action defendant commenced in New York County (the "Ejectment Action"); (ii) punishing defendants Hudson and Joel S. Wiener ("Wiener") pursuant to CPLR 5104 for contempt of the Court; (iii) staying the Ejectment Action pursuant to CPLR 2201 until final disposition of the instant action; and (iv) tolling plaintiff's time to cure any nonpayment of rent under the lease agreement with Hudson's predecessor in interest at issue herein is granted to the extent that

(1) it is ORDERED and ADJUDGED that defendants Hudson Park NY LLC and Joel S. Wiener are guilty of contempt of court pursuant to CPLR 5104 for failing to comply with the 2008 Preliminary Injunction issued herein;

(2) the Ejectment Action is stayed pursuant to CPLR 2201 until final disposition of the instant action; and

(3) plaintiff's time to cure any nonpayment of rent under the Lease Agreement is tolled until further order of the Court.

And it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 1.29.2013


J.S.C.

HON. CAROL EDMOND

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ 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 35

-----X
UNIQUE LAUNDRY SERVICE, INC.

Index No.: 111267/2007

Plaintiff,

Motion Seq. #008

-against-

HUDSON PARK NY LLC, JOEL S. WIENER, and
JESSE D. WOLF, GEORGE IGEL and ANTHONY
IGEL, as TRUSTEES OF THE B TRUST UNDER
THE LAST WILL AND TESTAMENT OF LEON
IGEL, and THE TARTAR FAMILY LIMITED
PARTNERSHIP,

Defendants.

-----X
HON. CAROL R. EDMOND, J.S.C.

MEMORANDUM DECISION

Plaintiff Unique Laundry Service, Inc. (“plaintiff” or “Unique Laundry”) moves for an Order: (i) ordering defendant Hudson Park NY LLC (“defendant” or “Hudson”) to discontinue the fourth cause of action in an action defendant commenced in New York County (the “Ejectment Action”),¹ on the ground that it violates the Preliminary Injunction previously issued herein; (ii) punishing defendants Hudson and Joel S. Wiener (“Wiener”) pursuant to CPLR 5104 for contempt of the Court; (iii) staying the Ejectment Action pursuant to CPLR 2201 until final disposition of the instant action; and (iv) tolling plaintiff’s time to cure any nonpayment of rent under the lease agreement with Hudson’s predecessor in interest at issue herein (the “Lease Agreement”).

¹ Hudson Park NY LLC v. Unique Laundry Service, Inc. and Naftali Berkowitz, New York County Index No. 154747/2012).

Factual Background

Plaintiff commenced this action by Order to Show Cause (the “OSC”), seeking a Temporary Restraining Order and Preliminary Injunction to enjoin defendants from causing plaintiff or any of his property to be ejected from the laundry room of the building located at 323 W. 96th St., New York, NY 10025 (the “Premises”), upon the supposition that it occupied the Premises pursuant to the Lease Agreement. This Court’s denied injunctive relief, plaintiff appealed, and the First Department granted a stay pending appeal.²

On October 16, 2008, the First Department reversed this Court’s denial, and granted injunctive relief, stating that “defendants [are] enjoined from removing plaintiff’s property from the premises during the pendency of this action.” (the “2008 Preliminary Injunction”).

Four years later, on July 20, 2012, Hudson Park commenced the Ejection Action, seeking, in the fourth cause of action, “an order ejecting Unique Laundry” from the Premises.

In support of its motion, plaintiff argues that such cause of action is a direct violation of the 2008 Preliminary Injunction, and as such, Hudson Park should be ordered to file a discontinuance of such cause of action.

Further, both Hudson Park and Wiener should be punished for disobeying the Preliminary Injunction by attempting to eject plaintiff from the Premises during the pendency of the instant action. As a party to the instant action, Wiener is personally bound by the 2008 Preliminary Injunction, and as the principal of Hudson Park, he is responsible for its actions. Therefore, he is personally culpable for violating said Injunction.

² Plaintiff contends that the stay was issued on the condition that Unique Laundry post a \$50,000 undertaking (the “Undertaking”), and that plaintiff posted the Undertaking with the clerk of the Court, which remains on deposit along with accrued interest.

Unique Laundry also seeks to stay the remainder of the Ejectment Action pending final disposition of the instant action.³ The first two causes of action in the Ejectment Action, for *quantum meruit* and unjust enrichment, seek “fair market” use and occupancy of \$3,500 per month for the entire period since Hudson purchased the building and assumed the ground lease. The third cause of action therein, for breach of contract, seeks to recover the \$1,150 per month rent provided for in the Lease Agreement. Hudson cannot disclaim the validity of plaintiff’s Lease Agreement in this action, and then seek to collect rent on it in another case. Moreover, even if the Lease Agreement is held invalid, Hudson may recover on the Undertaking. Thus, the remainder of the Ejectment Action should be stayed, as the amount of rent due (\$1,150 as per the Lease Agreement or fair market alleged by Hudson to be \$3,500) is dependent on the validity of the Lease Agreement, which is the very issue before the Court in the instant action. Further, the Ejectment Action is not a good faith attempt to recover rent, as plaintiff has not cashed plaintiff’s rent checks. Plaintiff has continually attempted to pay the rent on the Premises but, except for a few occasions, Hudson has continually refused to accept rent from plaintiff.

Plaintiff claims it is also entitled to a *Yellowstone* injunction tolling its time to cure any alleged nonpayment of rent under the Lease Agreement. Hudson has never served a proper rent demand pursuant to the Lease Agreement. Hudson stopped sending plaintiff rent bills and refused to accept payments from plaintiff. Instead, Hudson has demanded payment of use and occupancy in the sum of \$3,500. Plaintiff is ready, willing, and able to fulfill its \$1,150 rent obligation pursuant to the Lease Agreement upon a determination by the court that rent is in fact

³ Unique Laundry has not yet interposed an Answer in the Ejectment Action and the parties have stipulated to extend its time to do so until the Court decides this motion.

currently due pursuant to the terms of the Lease Agreement. Furthermore, the Ejectment Action claims that plaintiff only paid rent for three months; however, plaintiff paid six months of rent prior to the commencement of the action. Moreover, plaintiff maintains that it does not owe rent for all of the time claimed by Hudson, as it prepaid rent to Hudson's predecessor. Further, Hudson has refused to accept payment of rent from plaintiff, and thus, waived its right to collect such rent. As such, there is a dispute between the parties as to the rent due.

In opposition, defendants argue that except for a few months, plaintiff has failed to pay any fees for its use and operation of the Premises over the last five years. Hudson commenced the Ejectment Action Due to such nonpayment. Plaintiff cannot use the 2008 Preliminary Injunction, which prevents Hudson from removing plaintiff's property pending the determination of the validity and enforceability of the Lease Agreement, to avoid its payment obligations.

Hudson Park's ejectment claim does not violate the 2008 Preliminary Injunction as Hudson Park has not removed Unique's property from the Premises or otherwise taken any physical steps to evict Unique. Rather, Hudson Park has simply asserted legal claims and sought judicial intervention for Unique Laundry's use of the Premises. As Hudson Park fully intends to seek modification of the 2008 Preliminary Injunction prior to any physical ejectment of Unique or its property if, as and when it becomes necessary to do so, there is no basis to discontinue Hudson Park's ejectment claim in the Nonpayment Action or hold Hudson Park, much less Wiener in his individual capacity, in contempt.

Further, as the Ejectment Action lacks a complete identity of parties, and states causes of action and relief sought different from this action, the stay sought in connection with the Ejectment Action pending the resolution of this action should be denied. Finally, having failed to

establish any of the elements required for a *Yellowstone* injunction, plaintiff is not entitled to toll the time to cure its nonpayment default.

In reply, plaintiff argues that since purchasing the Premises, Hudson has continually refused to accept payment from plaintiff. In fact, Wiener informed plaintiff that the several checks that were cashed had been accepted unintentionally. Even after filing the Ejectment Action, Hudson failed to cash the rent checks tendered by Unique Laundry until the filing of this motion. It is uncontested that plaintiff has never attempted to evade its responsibility to pay rent on the Premises. Now that Hudson is prepared to accept plaintiff's rent payments, plaintiff has paid rent in a timely manner each month and will continue to do so.

The sole issue is how much back-rent is due and owing to Hudson, and the dispute over the amount of back-rent due, the central issue in the Ejectment Action, cannot be adjudicated prior to the adjudication of the central issue in this action (whether the lease agreement is binding on Hudson). If the Lease Agreement binds Hudson, then the rent due is as specified therein and not the amount demanded by Hudson as "fair market value."

And, this motion is not procedurally improper and need not have been made in the Ejectment Action. This is not a motion to dismiss pursuant to CPLR 3211, but to enforce the 2008 Preliminary Injunction.

Moreover, as the Ejectment Action is pending in this very Court, the Court may exercise jurisdiction over said action and enter an Order therein.

An evidentiary hearing is not required here as there is no question of fact for the Court to determine; Hudson's contempt is clear from its Complaint in the Ejectment Action. Wiener, who authorized the filing of the Ejectment Action, should also be held in contempt.

Plaintiff is prejudiced by the filing of the Ejectment Action by virtue of the threat of ejectment hanging over it and by being forced to incur attorneys' fees in connection therewith, including in the filing of the present motion.

Discussion

As to plaintiff's request that Hudson Park discontinue its fourth cause of action in the Ejectment Action and that the Court sanction Hudson Park (and its owner Weiner) on the ground that such cause of action constitutes a violation of the 2008 Preliminary Injunction, for a party to be found in violation of an injunction, the following circumstances must exist:

a decree granting injunctive relief, whether temporary or permanent, 'must define specifically what the enjoined person must or must not do, in language so clear and explicit that a layman can understand what he is expected to do, or refrain from doing, without placing the one enjoined in the position of acting at his peril. Stated otherwise, an injunction should plainly indicate to the defendant specifically all the acts which he is thereby restrained from doing without calling upon him for inferences, or any conclusions only to be arrived at by a more or less uncertain process of reasoning, and about which the parties might well differ in opinion either as to facts or law.'" (*Xerox Corp. v Neises*, 31 AD2d 195, 295 NYS2d 717 [1st Dept 1968]).

Here, the First Department directed that "defendants [are] enjoined from removing plaintiff's property from the premises during the pendency of this action."

The 2008 Preliminary Injunction "is enforceable through civil contempt proceedings" pursuant to CPLR 5104⁴ (*Zodkevitch v Feibush*, 7 Misc 3d 1106(A), 851 NYS2d 62 (Table) [Supreme Court, New York County, 2007] *citing* CPLR 5104; NY Jud. L. Section 753(A)(3)"). "In order to find that contempt has occurred in a given case, it must be determined that a lawful

⁴ CPLR 5104, entitled "Enforcement of judgment or order by contempt," provides:

Any interlocutory or final judgment or order, or any part thereof, not enforceable under either article fifty-two or section 5102 may be enforced by serving a certified copy of the judgment or order upon the party or other person required thereby or by law to obey it and, if he refuses or wilfully neglects to obey it, by punishing him for a contempt of the court.

order of the court, clearly expressing an unequivocal mandate was in effect. It must appear with reasonable certainty, that the order has been disobeyed. Moreover, the party to be held in contempt must have had knowledge of the court's order....” (*McCormick v Axelrod*, 59 NY2d 574, 583 [1983] [citations omitted]; *Gryphon Domestic VI, LLC v APP Intern. Finance Co.*, 58 AD3d 498, 871 NYS2d 115 [1st Dept 2009]).

The elements are sufficiently satisfied. It is uncontested that Hudson was aware of the 2008 Preliminary Injunction. Further, the prohibition therein is clear and unequivocal. The First Department expressly precluded Hudson Park from removing Unique Laundry’s property from the premises pending a determination of the claims herein, which claims include plaintiff’s request for an injunction precluding defendants from evicting plaintiff from the Premises (second cause of action). In their fourth cause of action in the Ejectment Action, however, Hudson alleges that plaintiff occupies the Premises illegally, has refused, despite demand, to vacate the Premises, and that an order should issue ejecting plaintiff from the Premises. While defendant has not “physically” removed plaintiff’s property from the Premises, this Court finds that the fourth cause of action seeks, in essence, a determination flatly at odds with the First Department’s 2008 Preliminary Injunction by requesting an order permitting Hudson Park to take the very action precluded by the First Department (*albeit* on a temporary basis) (*see e.g., L & R Exploration Venture v Grynberg*, 90 AD3d 538, 934 NYS2d 707 [1st Dept 2011] (holding that “Supreme Court providently exercised its discretion in finding respondent in contempt based upon his wife’s commencement of an action in Wyoming asserting the same claims that were stayed in this special proceeding in favor of arbitration”)). While Hudson Park now claims that it intends to seek a modification of the 2008 Preliminary Injunction, this intent is nowhere asserted

in the complaint in the Ejectment Action. Indeed, the fourth cause of action (and the complaint in the Ejectment Action) is silent in regard to refraining from removing plaintiff's property from the premises during the pendency of this action. While the 2008 Preliminary Injunction, in and of itself, does not relieve any alleged obligation of plaintiff to pay Hudson for use and occupancy, any failure to pay such use and occupancy is not a violation of the Injunction, or merits Hudson's pleading of the fourth cause of action in the Eviction Action.

"The mere act [of disobedience], regardless of motive, is sufficient to sustain a finding of civil contempt if such disobedience defeats, impairs, impedes or prejudices the rights of a party." (*Commissioner of Labor v Hinman*, 103 AD2d 886, 887 [3d Dept 1984]). Here, plaintiff's rights are prejudiced in that it has to litigate, now for a second time, its claim that it is entitled to continued possession of the Premises, and incur costs in so doing. Nor is plaintiff's failure to pay use and occupancy grounds to permit the Ejectment Action to advance forward. The Ejectment Action seeks monetary relief premised on either the theories of unjust enrichment and *quantum meruit*, or in the alternative, the Lease Agreement, the validity and enforceability of which remain at issue herein.

Therefore, based on the above, and the undisputed evidence, the Court finds that Hudson is in contempt. And, as it is uncontested that Weiner is the principal of Hudson, his actions in authorizing and continuing the contemptuous actions of Hudson warrant a finding of contempt against him as well.

Plaintiff's additional application for a stay of the Ejectment Action pursuant to CPLR 2201 until final disposition of the instant action is warranted. Pursuant to CPLR 2201, "[e]xcept where otherwise prescribed by law, the court in which an action is pending may grant a stay of

proceedings in a proper case upon such terms as may be just." Although the Ejectment Action seeks monetary relief not sought by plaintiff herein, the legal basis for such relief, either founded on theories of breach of the Lease Agreement or *quantum meruit*/unjust enrichment turn on whether the Lease Agreement is valid and enforceable against Hudson, an issue common to both actions. And, like the instant action, the fourth cause of action for an ejectment rests on whether plaintiff is occupying the Premises properly pursuant to the Lease Agreement. As the issues, relief sought, and parties in the two actions are substantially identical (*One Beacon America Ins. Co. v Colgate-Palmolive Co.*, 96 AD3d 541, 949 NYS2d 14 [1st Dept 2012]). The duplication of effort, waste of judicial resources, and possibility of inconsistent rulings in the absence of a stay outweigh any prejudice to Hudson (*id.*).⁵ In light of this Court's determination to stay the Ejectment Action, pending the disposition of the instant action, plaintiff's request for an order directing Hudson to file a discontinuance of the fourth cause of action is unwarranted.

Finally, plaintiff's request for *Yellowstone* injunction tolling its time to cure any nonpayment of rent under the Lease Agreement is granted. The purpose of the *Yellowstone* injunction is to maintain the *status quo* so that a commercial tenant may protect its valuable property interest in its lease while challenging the landlord's assessment of its rights (*see Lexington Ave. & 42nd Street Corp. v 380 Lexchamp Operating, Inc.*, 205 AD2d 421 [1st Dept 1994], *citing Post v 120 E. End Ave. Corp.*, 62 NY2d 19, 26 [1984]). A *Yellowstone* injunction forestalls the cancellation of a lease to afford the tenant an opportunity to obtain a judicial determination of its breach, the measures necessary to cure it, and those required to bring the

⁵ And, it is unclear from the parties' submissions whether Hudson ever requested use and occupancy during the pendency of this litigation.

tenant in future compliance with the terms of the lease (*see Waldbaum, Inc. v Fifth Ave. of Long Is. Realty Assocs.*, 85 NY2d 600, 606 [1995]).

In order to obtain a *Yellowstone* injunction, the tenant must demonstrate (1) the existence of a commercial lease; (2) receipt from the landlord of a notice of default thereunder, a notice to cure such default, or a threat of termination of the lease; (3) application for the issuance of an injunction, made prior to the lease's termination; and (4) the tenant's ability and desire to cure the alleged default, by any means short of vacating the premises (*New Eagle Inc. v H.R. Neumann Assoc., Inc.* 2004 N.Y. Slip Op. 50724(U); *Empire State Bldg. Assoc. v Trump Empire State Partners*, 245 AD2d 225 [1st Dept 1997]; *Marathon Outdoor, LLC. v Patent Const. Sys. Div. of Harsco Corp.*, 306 AD2d 254 [2d Dept 2003]; *WPA/Partners LLC. v Port Imperial Ferry Corp.*, 307 AD2d 234 [1st Dept 2003], *citing Herzfeld & Stern, supra*). A tenant seeking a *Yellowstone* injunction must convince the court "of his desire and ability to cure the defects by any means short of vacating the premises" (*Cemco Rest., Inc. v Ten Park Ave. Tenants Corp.*, 135 AD2d 461 [1st Dept 1987]; *Jemaltown of 125th St., Inc. v Leon Betesh/Park Seen Realty Assoc.*, 115 AD2d 381, 382 [1st Dept 1985]).

Plaintiff contends that it did not receive a Notice to Cure, and thus, it there is no issue as to whether plaintiff's motion is timely. And, the record indicates that plaintiff is ready, willing and able to pay use and occupancy at the rate of \$1,500.00 in accordance with the commercial Lease Agreement. Therefore, plaintiff's request for an order tolling its time to cure any nonpayment of rent under the lease agreement.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by plaintiff Unique Laundry Service, Inc. for an Order: (i) ordering defendant Hudson Park NY LLC to discontinue the fourth cause of action in an action defendant commenced in New York County (the "Ejectment Action"); (ii) punishing defendants Hudson and Joel S. Wiener ("Wiener") pursuant to CPLR 5104 for contempt of the Court; (iii) staying the Ejectment Action pursuant to CPLR 2201 until final disposition of the instant action; and (iv) tolling plaintiff's time to cure any nonpayment of rent under the lease agreement with Hudson's predecessor in interest at issue herein is granted to the extent that

(1) it is ORDERED and ADJUDGED that defendants Hudson Park NY LLC and Joel S. Wiener are guilty of contempt of court pursuant to CPLR 5104 for failing to comply with the 2008 Preliminary Injunction issued herein;

(2) the Ejectment Action is stayed pursuant to CPLR 2201 until final disposition of the instant action; and

(3) plaintiff's time to cure any nonpayment of rent under the Lease Agreement is tolled until further order of the Court.

And it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: January 29, 2013



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMED