

**D'Espresso of 42nd St., LLC v Green 317 Madison,
LLC**

2014 NY Slip Op 30508(U)

February 28, 2014

Supreme Court, New York County

Docket Number: 150087/2014

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

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

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D'ESPRESSO OF 42ND STREET, LLC

Plaintiff,

Index No. 150087/2014

-against-

DECISION/ORDER

GREEN 317 MADISON , LLC, et.al.,

Defendants.
-----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 has brought the present motion against its landlord for a preliminary injunction tolling the running of the termination notice served by the landlord pending the determination of the underlying action. The defendant landlord has brought a cross-motion to dismiss the complaint on the basis that it terminated the plaintiff's lease as of January 13, 2014 by reason of plaintiff's default in the payment of rent. As will be explained more fully below, the cross-motion to dismiss the complaint is granted and the motion for preliminary injunctive relief is denied.

The relevant background is as follows. The parties entered into a commercial lease in October 2009 which was later amended pursuant to a Lease Modification and Additional Space Agreement dated as of March 25, 2010 (the "Lease"). Section 51.01 of the Lease provides that "[i]n the event that Landlord shall wish to (i) demolish or rehabilitate the Building or a majority thereof..., then Landlord shall have the right at any time to terminate this Lease (the "Termination Option") provided that...Landlord shall give prior notice (the "Termination Notice") to Tenant of Landlord's exercise of the Termination Option at least three hundred sixty-five (365) days prior to the proposed termination date set forth in such notice (the "Termination Date"). The Lease also provides in section 5.01 that if tenant defaults in the payment of rent, and if landlord gives a notice to cure, and tenant does not cure by paying the demanded rent within the cure period, then the landlord can give a notice terminating the Lease.

By letter dated September 27, 2013, the defendant landlord gave notice to plaintiff that it intended to demolish the building and thereafter construct a new building at the site and was therefore exercising its Termination Option under section 51.01 of the Lease. According to the notice, defendants were terminating plaintiff's lease as of September 30, 2014. As a result of receiving the Termination Notice, plaintiff commenced the present action by bringing an order to show cause on January 7, 2014 seeking a temporary restraining order and a preliminary injunction preventing the landlord from exercising its Termination Option. It also stopped paying rent.

Separate and apart from the Termination Notice that defendant served on plaintiff pursuant to the terms of the Lease, defendant served plaintiff with a notice to cure dated December 16, 2013 pursuant to section 5.01 of the Lease based on the tenant's nonpayment of

rent. The notice to cure informs the tenant that it is in default under the Lease based on its failure to pay rent and additional rent for October, November and December of 2013. It also states that if the tenant does not cure the default, within five days after the notice is deemed to be given, the landlord may serve a written five (5) day notice of cancellation of the Lease and upon expiration of the five days, the Lease shall end and expire. The tenant failed to pay any of the outstanding rent and did not seek any Yellowstone injunction tolling its time to cure. As a result, on January 7, 2014, the landlord served tenant with a notice to cancel the lease, effective as of January 13, 2014.

The courts have routinely upheld clauses in commercial leases which contain a conditional limitation of rent. *See Grand Liberte Cooperative v. Bilhaud*, 126 Misc.2d 961 (AT 1st Dept 1984); *Lexington Avenue & 42nd Street Corp. v. 380 Lexchamp Operating*, 205 A.D.2d 402 (1st Dept 1994). The mere fact that the landlord has the option to bring a nonpayment proceeding does not preclude the landlord from terminating the lease in accordance with its terms based on the nonpayment of rent. *Grand*, 126 Misc. 2d at 963. The tenant's remedy in such a circumstance, if it believes that the notice of termination is without basis, is to obtain a stay in Supreme Court to toll the running of the cure period and the expiration of the lease so that the tenancy is not terminated until the dispute is litigated. *Id.*

In the instant case, the defendant landlord is entitled to a dismissal of the complaint as it has properly terminated the Lease pursuant to the conditional limitation contained in section 5.01 of the Lease based on the tenant's failure to pay rent. The landlord served tenant with a notice to cure based on the failure to pay rent for October, November and December 2013, and tenant did not cure its default in response to the notice or seek any Yellowstone injunction staying its time

to cure. As a result, landlord was entitled to terminate the lease, which it has done.

Plaintiff's argument that the landlord could not terminate the lease based on the failure to pay rent because landlord's actions in sending the Termination Notice constituted a breach of the Lease excusing plaintiff's obligation to pay rent is without basis. The law in New York is that the tenant's "withholding of rent while in possession of the premises [is] a violation of a fundamental covenant of the lease, regardless of any breach by landlord." *Green 440 Ninth, LLC v. Duane Reade*, 10 Misc. 3d 75, 77 (AT 1st Dept 2005). See also *Allerand, LLC v. 233 E. 18th St. Co, L.L.C.*, 19 A.D.3d 275 (1st Dept 2005); *Earbert Rest. v. Little Luxuries*, 99 A.D.2d 734 (1st Dept 1984). Moreover, if the tenant wanted to preserve the right to argue that the landlord was not entitled to terminate based on the nonpayment of rent, its remedy was to get a Yellowstone injunction tolling the cure period contained in the notice to cure but this was not done. Even if the tenant had come to the court for a Yellowstone injunction, the mere service by the landlord of a Termination Notice under the Lease, even if the landlord was not sufficiently able to demonstrate its intent to demolish the building, would not constitute a breach of the Lease sufficient to allow the tenant to stop paying rent. Finally, plaintiff's argument that the notice to cure is legally insufficient is without basis.

Based on this court's finding that the landlord has properly terminated the Lease, the court need not reach the issue of whether the tenant is entitled to a preliminary injunction preventing the defendant from exercising its rights pursuant to the Termination Notice it sent plaintiff pursuant to section 51.01 of the Lease.

Based on the foregoing, this action is dismissed. This constitutes the decision and order of the court. The clerk is directed to enter judgment accordingly.

Dated: 2/28/14

Enter: CR

CYNTHIA S. KERN
J.S.C.