

Sagi Rest. Corp. v Brusco W. 78th St. LLC
2014 NY Slip Op 30626(U)
March 11, 2014
Supreme Court, New York County
Docket Number: 653992/2013
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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SAGI RESTAURANT CORP.,

Index No.: 653992/2013

Plaintiff,

Motion Seq. No. 001

-against-

BRUSCO WEST 78th STREET, LLC,

Defendant.

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HON. CAROL ROBINSON EDMOND, J.S.C.

MEMORANDUM DECISION

In this action arising from a commercial lease dispute, plaintiff Sagi Restaurant Corp. (“plaintiff”) moves by order to show cause seeking, *inter alia*, a *Yellowstone* injunction¹ preventing defendant Brusco West 78th Street, LLC (“defendant”) from acting to terminate the lease entered into by plaintiff as tenant and defendant as landlord on July 29, 2011 (the “Lease”).

Factual Background

Plaintiff operates a restaurant at the ground-floor level of the building located at 373 Amsterdam Avenue and 170 West 78th Street in Manhattan pursuant the Lease. Paragraph 41 of the Lease provides that “[plaintiff] will pay [defendant] as additional rent thirty (30%) of any increase in the real estate taxes or of any assessment taxes levied against the premises...” Complaint, ¶ 6.

Paragraph 41 also provides that

“[T]he base year upon which additional rent shall be calculated under the paragraph will be the fiscal tax year commencing July 1, 1991 to June 30, 1992. Additional rent under this paragraph will be calculated by subtracting the base year real estate taxes from those real estate taxes actually payable in the following years of

¹ *First Natl. Stores v. Yellowstone Shopping Ctr.*, 21 NY2d 630 [1968]).

this lease term and then multiplying the result by 0.30. [Plaintiff] shall then pay the additional rent due within twenty (20) days of demand..." Complaint, ¶ 7.

Immediately following paragraph 41, a handwritten notation -- purportedly initialed by Francis Sagi, plaintiff's president, and Joseph Brusco, a member of defendant -- states: "1st tax year for Tenant to be 2012/2013."

In the tax years of 2011/2012 and 2012/2013, plaintiff paid \$27,308.86 and \$36,945.28 in such additional rent, respectively. These figures were calculated using 1991/1992 as the base year.

Therefore, in addition to injunctive relief, plaintiff's complaint (filed in November 2013) seeks a declaratory judgment establishing that the base fiscal tax year upon which real estate taxes due by plaintiff to defendant under the Lease is 2012/2013, not 1991/1992. Alternatively, the complaint requests reformation of the Lease on the grounds of mutual mistake. Plaintiff further seeks a refund of monies paid by plaintiff for the 2011/2012 and 2012/2013 tax years on the grounds of unjust enrichment. Lastly, plaintiff seeks the costs and disbursements of the action.

On or about January 9, 2014, defendant served a notice to plaintiff demanding \$41,957.07 for rent and additional rent (\$41,956.56 in taxes and \$0.51 in water charges) for 2013/2014; the calculation was again based on the 1991/1992 tax year. The notice further provided the following:

[Y]ou must make payment on or before the expiration of three (3) days from the date of service of this notice upon you, or surrender up the possession of the premises, in default of which the landlord will commence proceedings against you, and pursuant to your lease, you will be liable for the reasonable cost of attorneys' fees

incurred (plaintiff's Exhibit "A").

In response, plaintiff filed the instant motion.² Although plaintiff refused to pay the \$41,957.07 demanded by defendant, plaintiff deposited this sum in an escrow account as required by this court.

Arguments

Plaintiff argues that a *Yellowstone* injunction is warranted because it holds a commercial lease; received notice from defendant threatening Lease termination upon the occurrence of a condition; plaintiff sought injunctive relief prior to the purported termination of the lease; and plaintiff is ready, willing and able to cure the alleged default (based on the bond it posted along with the instant motion).

Plaintiff asserts that the pending declaratory judgment/reformation action is the proper forum for resolution of the dispute. By demanding payment of the disputed taxes within three days or alternatively demanding possession of the premises, defendant seeks to thwart the adjudication of the action. In the absence of a preliminary injunction, plaintiff's rights in the action will be unfairly compromised (due to the termination of the Lease), while there is no prejudice to defendant if the *status quo* is maintained.

Although plaintiff need not show a reasonable likelihood of success on the merits to obtain a *Yellowstone* injunction, plaintiff contends that the parties modified the Lease to provide that the base tax year for tax calculation would be 2012/2013. Moreover, a commercial lease in 2011 would generally not use a 20-year-old base tax year. Thus, the court should maintain the

² On January 22, 2014, the court granted plaintiff's request to temporarily enjoin and restrain defendant from terminating and/or interfering with plaintiff's leasehold interest pending the hearing of the instant motion.

status quo and enjoin defendant from seeking to evict plaintiff for nonpayment of the disputed taxes which are the basis of the action.

In opposition, defendant argues that he did not agree with plaintiff that the Lease contained the erroneous base year of 1991/1992. In contrast to plaintiff's claims, the handwritten modification at paragraph 41 was added by plaintiff's attorney.

In fact, plaintiff and defendant knowingly used the older base year from a prior commercial lease to keep the base monthly rent lower. This is clearly evidenced by plaintiff's payment of the first tax billing under the Lease for the 2012/2013 taxes, which defendant billed plaintiff in June 2012. That letter states that the base year is 1991/1992, and plaintiff paid such taxes then without objection.

As to the instant motion, plaintiff is not entitled to any stay, as defendant merely served a three-day notice, which is the prerequisite for the summary proceeding for nonpayment of rent, not a summary holdover proceeding. The *Yellowstone* injunction is a judicial remedy used to stay termination of a commercial tenancy by notice to cure or notice of termination as a prerequisite to a summary holdover proceeding and is not available to stay a nonpayment proceeding.

As such, defendant maintains that plaintiff should raise whatever defenses it may have to its nonpayment of rent as a defense in the commercial landlord-tenant part (should defendant commence a nonpayment proceeding therein). Accordingly, because there is no mistake in the Lease, the court should direct plaintiff to disburse the escrowed payment to defendant forthwith.

Discussion

A party requesting a *Yellowstone* injunction must demonstrate that it holds a commercial

lease; received from the landlord either a notice of default, a notice to cure, or a threat of termination of the lease; requested injunctive relief prior to the termination of the lease; and is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises (*see Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Associates*, 93 NY2d 508 [1999]; *First Nat'l Stores v. Yellowstone Shopping Ctr.*, 21 NY2d 630 [1968]).

A *Yellowstone* injunction maintains the *status quo* so that a commercial tenant, when confronted by a threat of termination of its lease, may protect its investment in the leasehold by obtaining a stay tolling the cure period so that, upon an adverse determination on the merits, the tenant may cure the default and avoid a lease forfeiture (*Graubard, supra*, 93 NY2d at 514). In other words, a *Yellowstone* injunction stays only the landlord's termination of a leasehold while the propriety of the underlying alleged default is litigated.

Thus, a *Yellowstone* injunction has been held unwarranted when a landlord intends to commence a summary nonpayment proceeding pursuant to RPAPL § 711(2) as opposed to a summary holdover proceeding (*see Parksouth Dental Group v. East River Realty*, 122 AD2d 708, 505 NYS2d 633 [1st Dept 1986] (finding "no need for a *Yellowstone* injunction," since the dispute concerned the amount of rent due "and did not involve a notice to cure an alleged lease violation which would necessitate a stay. The landlord was seeking to commence a nonpayment proceeding, not a holdover proceeding"); *Top-All Varieties v. Raj Dev. Co.*, 151 AD2d 470, 471, 542 NYS2d 259 [2d Dept 1989]; *Badler v. Best Equities, LLC*, 12 Misc3d 1161(A), 81 NYS2d 208 [Sup Ct Richmond Cty 2006]; *Island Rock Gym Corp. v. Skyline Holding Corp.*, 1997 WL 34847855 [Sup Ct Nassau Cty 1997]). In other words, *Yellowstone* relief is unwarranted where the condition precedent to a *Yellowstone* injunction, *to wit*: a threat of termination of the lease is

absent (*see Sal De Enterprises, Inc. v. Stobar Realty, Inc.*, 143 AD2d 180, 181, 531 NYS2d 628 [2d Dept 1988]) (“tenant’s request for a Yellowstone injunction . . . was misplaced because the landlord was not seeking to terminate the lease”) *citing Parksouth Dental Group, supra*).

Here, plaintiff failed to establish that it is confronted with a threat of termination of its commercial lease so as to warrant *Yellowstone* injunctive relief. In the case at bar, defendant’s January 9, 2014 letter (plaintiff’s Exhibit “A”), seeking payment or the surrender of possession, is akin to a notice of a nonpayment proceeding (*see* RPAPL § 711(2)³; *Top-All Varieties*, 151 AD2d at 470 [2d Dept 1989] (in a dispute over increased water bill charges, defendant landlord served plaintiff tenant with notice “demanding payment . . . or surrender of the premises within three days”; court denied plaintiff’s application for *Yellowstone* relief, as defendant had noticed a nonpayment proceeding) *citing Parksouth Dental Group*, 122 AD2d at 709, *supra*).

Further, although *Yellowstone* relief has been issued in limited circumstances where nonpayment of rent is the only issue (*see Lexington Ave. & 42nd Street Corp. v. 380 Lexchamp Operating*, 205 AD2d 421, 423-424, 613 NYS2d 402 [1st Dept 1994]; *3636 Greystone Owners, Inc. v. Greystone Bldg.*, 4 AD3d 122, 123, 771 NYS2d 341 [1st Dept 2004]), the notice in such cases was a notice of default and/or to cure a default, which were predicates for summary holdover proceedings, *not* nonpayment proceedings. The First Department specifically noted the significance of this distinction:

Plaintiff, rather than commencing a non-payment proceeding pursuant to RPAPL § 711(2), which would have allowed defendant

³ This statute provides, *inter alia*, that a summary proceeding for nonpayment may be maintained . . . when the tenant has defaulted in the payment of rent, pursuant to the agreement under which the premises are held, and either: (a) a demand of the rent has been made; or (b) at least three days’ notice in writing requiring, in the alternative, the payment of the rent or the possession of the premises has been served.

to cure at any time prior to the issuance of a warrant of eviction (RPAPL § 751(1)), instead chose to serve a notice to cure, a predicate notice to a holdover proceeding, *alleging that non-payment was a breach of a substantial lease obligation*. This would have allowed the termination of the lease, effectively eradicating defendant's interest in the leasehold, prior to the full adjudication of the parties' rights. As a result, a *Yellowstone* injunction was warranted to preserve the *status quo* (*Lexington Ave. & 42nd Street Corp.*, 205 AD2d at 423) (emphasis added)).

Here, the notice neither states that it is a notice to cure or that non-payment was a breach of a substantial lease obligation.

Further, plaintiff's assertion that defendant is not claiming nonpayment of rent (Sagi Affirmation, ¶ 7) is belied by paragraph 41 of the Lease, which defines the disputed 2013/2014 taxes as "additional rent," as well as the notice itself, which seeks "rent and additional rent." Likewise, plaintiff's claim that it "will be forced to pay taxes or defend a summary eviction proceeding" (Sagi Affirmation, ¶ 8) is unavailing. And, even assuming defendant commences a nonpayment proceeding and prevails therein, plaintiff would still have an opportunity to cure before a warrant of eviction would be issued (*see Lexington Ave. & 42nd Street Corp.*, *supra*).

Accordingly, plaintiff's application for a *Yellowstone* injunction is denied.

It is noted that the Civil Court, the preferred forum for speedy disposition of landlord-tenant disputes, can grant all appropriate relief to plaintiff herein (*see Parksouth Dental Group*, 122 AD2d at 709).

Lastly, the Court does not address the merits of the underlying action, which are referenced in the parties' papers. As the instant motion is resolved, the underlying action may now proceed and the posted amount in dispute shall not be disbursed to defendant at this time.

Conclusion

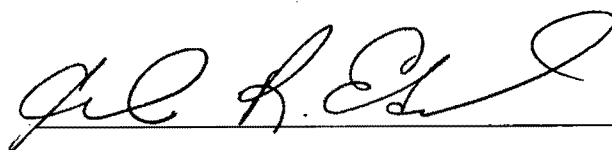
Based on the foregoing, it is hereby

ORDERED that plaintiff's motion is denied in its entirety; and it is further

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

This constitutes the decision and order of the Court.

Dated: March 11, 2014

A handwritten signature in cursive script, appearing to read 'Carol Robinson Edmead', written over a horizontal line.

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

HON. CAROL EDMEAD