

45th St. BLT Rest. LLC v Waterscape Resort II, LLC

2014 NY Slip Op 33223(U)

December 12, 2014

Supreme Court, New York County

Docket Number: 650901/14

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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45th STREET BLT RESTAURANT LLC,

Index No. 650901/14

Plaintiff,

Motion seq. nos. 002, 003

-against-

DECISION AND ORDER

WATERSCAPE RESORT II, LLC,

Defendant.

-----X
BARBARA JAFFE, J.S.C.:

For plaintiff:

Shari S. Laskowitz, Esq.
Nesenoff & Miltenberg, LLP
363 Seventh Ave., 5th fl.
New York, NY 10001
212-736-4500

For defendant:

Richard H. Byrnes, Esq.
Wu & Kao, PLLC
747 Third Ave., 22nd fl.
New York, NY 10017
212-755-8880

By order to show cause, as motion sequence number two, plaintiff-tenant moves for a temporary restraining order and preliminary injunction tolling and enjoining the running of the cure period set forth in a notice to cure dated April 30, 2014, and enjoining defendant-landlord from terminating the lease based on the notice and/or otherwise commencing eviction proceedings pending the determination of the action, and permitting tenant to amend the complaint. Landlord opposes.

By order to show cause, as motion sequence number three, tenant moves for a temporary restraining order and preliminary injunction tolling and enjoining the running of the cure period set forth in a notice to cure dated July 25, 2014, and enjoining landlord from terminating the lease based on the notice and/or otherwise commencing eviction proceedings pending the determination of the action. Landlord opposes.

The motions are consolidated for decision.

I. BACKGROUND

By lease dated January 1, 2011, tenant leased from landlord commercial unit 3 in the building located at 70 West 45th Street in Manhattan, to be operated as a restaurant; within the building are also a hotel and condominium residences. The lease commenced on March 1, 2011 for a 15-year term with tenant having the option of two additional five-year extensions.

(Affirmation of Shari S. Laskowitz, Esq., dated June 10, 2014 [Laskowitz Aff.], Exh. 1).

Pursuant to Article 43 of the lease rider, as pertinent here:

Use. A. The 'Restaurant, Hotel & Condo Services' that Tenant is obligated to provide to Landlord as part of its payment of Fixed Annual Rent include . . . (ii) serve breakfast, lunch, and dinner meals and alcoholic and non-alcoholic beverages seven (7) days a week (including weekends and holidays) commencing no later than 6:30 AM each day and ending no earlier than 10:00 PM weekdays and 11:00 PM weekends.

(*Id.*).

Pursuant to section iv of Article 43, "Tenant is obligated to . . . provide room service meals and beverages to hotel Guests and Condo Residents twenty-four (24) hours per days, seven (7) days per week, fifty-two (52) weeks per year (provided that between the hours of 12 midnight and 6 a.m. a limited menu only is available)." (*Id.*).

Pursuant to section E of Article 43, "Tenant agrees that at all times: (a) the services offered in the [premises] and the conduct of Tenant's business therein, will be reputable in every respect and in keeping with the standard of the neighborhood; and (b) the sales and service methods employed in said business will be in keeping with the standard of the neighborhood and in conformity with the highest business dealing in the same or substantially similar type of business . . ." (*Id.*).

A. April 2014 notice

In the April 30, 2014 notice, landlord notified tenant that it had violated and continues to violate Article 43 of the lease rider by failing to serve breakfast and provide room service meals and beverages to hotel guests and condo residents. Landlord gave tenant 15 days' notice of the default and advised that if the defaults were not cured or if tenant had not diligently commenced to cure them within the 15-day period, landlord may serve a 5-day notice of cancellation of the lease, and within 5 days thereafter cancel the lease. (*Id.*, Exh. 2).

B. July 2014 notice

By notice dated July 25, 2014, landlord advised tenant that it had breached Article 43 of the lease by terminating without notice its service of a limited breakfast menu. (Laskowitz Aff., Exh. 2).

II. CONTENTIONS

By affidavit dated June 10, 2014, Salim Chakalo, a member of tenant, states that tenant has begun serving breakfast, and that it has been trying for a "significant period of time" to coordinate with landlord details for providing room service. He contends that coordination is necessary to implement room service and that the following details must be agreed upon: pricing, menus, how the restaurant will receive orders from guests and residents, how the food will be delivered, who will retrieve empty dishes, how the guests will be charged, and how tenant will be paid. (Affidavit of Salim Chakalo, dated June 10, 2014).

By affidavit dated July 15, 2014, Charles Fan, landlord's asset manager, states that tenant's proposed menu is unacceptable to landlord, and that the parties have not yet agreed upon who will deliver food to guests and retrieve dishes and trays. He contends that these items are

within tenant's control and that it has thus not shown the desire to resolve them. (Affidavit of Charles Fan, dated July 15, 2014). By supplemental affidavit dated August 1, 2014, Fan asserts that tenant's breakfast service is limited and non-compliant with the lease, and that the parties have still not resolved the room service issues. (Affidavit of Charles Fan, dated Aug. 1, 2014).

By supplemental affirmation dated November 14, 2014, tenant's counsel asserts that the parties have met several times and discussed the issues raised in the notices, that tenant's consultant, Cobi Levy, and landlord's representative, Jennifer Villanueva, have communicated regarding the issues and are attempting to resolve them, and that the alleged defaults have either been cured or are in the process of being cured and tenant has therefore demonstrated a willingness and ability to cure them. (Supplemental Affirmation of Shari S. Laskowitz, Esq., dated No. 14, 2014).

Levy avers, in an affidavit dated November 14, 2014, that he has met and/or corresponded with Villanueva, that they agreed upon a breakfast menu which has been implemented, and that they still need and continue to work out details for room service and the other menus. Levy advises that some of the problems that tenant has had with complying with the lease arise from shortcomings at the premises, namely, that the hotel has no room to store carts, plateware, glassware, linens, condiments, or beverages; lacks the staff to deal with room service; and has no method or means of receiving room service orders from guests. (Affidavit of Cobi Levy, dated Nov. 14, 2014).

While landlord agrees that the parties have exchanged various menus, it contends that as of November 14, 2014, tenant has failed to respond to its comments on the last proposed menu submitted by tenant, and has not commenced serving meals or providing room service. In

particular, landlord alleges, through its attorney, that:

- (1) The “breakfast buffet menu” is not available at 6:30 am or on Sundays, as required by the lease, and lacks a sufficient amount of hot and cold foods;
- (2) The “overnight menu” is cost-prohibitive as it contains a turkey sandwich priced at \$33 and a delivery charge of \$20, and is not available through 6 am, as required;
- (3) The “all day menu” is not available for room service all day or on Sundays, as required, and has a cost-prohibitive service charge of \$15;
- (4) All of the menus lack a dedicated four-digit room service number provided to Tenant by Landlord; and
- (5) They all also lack alcoholic and non-alcoholic beverages.

(Supplemental Affirmation of Stephen L. Brodsky, Esq., dated Nov. 14, 2014).

III. ANALYSIS

A. Yellowstone injunction

The purpose of a *Yellowstone* injunction is to maintain the status quo so that a commercial tenant, when threatened with the termination of its lease, may protect itself by obtaining a stay tolling the cure period so that upon determination of the merits of the alleged defaults, it may cure the default and avoid a forfeiture. (*Graubard Mollen et al. v 600 Third Ave. Assocs.*, 93 NY2d 508 [1999]). A party seeking 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 to terminate its 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. (*Id.* at 514). The limited purpose of the injunction is to toll the running of the applicable cure period while a determination is made on the merits of the alleged default. (*Id.*). It is undisputed that the first three elements are not in issue here.

In *225 E. 36th St. Garage Corp. v 221 E. 36th Owners Corp.*, the Appellate Division, First

Department, found that a *Yellowstone* injunction should have been granted where the tenant contended that it had made efforts and cured some purported breaches and was continuing to take various steps to remedy the other alleged defaults, which, the Court found, satisfied the requirement that the tenant have the desire and ability to cure. (211 AD2d 420 [1st Dept 1995]).

Here, tenant submits proof that it has attempted and continues to attempt to resolve the issues raised in landlord's notices to cure, and that they have resolved some issues, but need further discussions with and cooperation by landlord to address all of the issues fully. Tenant has thus established that it has both the desire and ability to cure the alleged defaults. (*See 109th and First Ave. Corp. v 2113 First Ave., LLC*, 51 AD3d 487 [1st Dept 2008] [affidavits of plaintiff's principal and engineer showed that plaintiff had made efforts to comply with lease obligations, and thus showed that plaintiff has requisite desire and ability to cure default]; *TSI W. 14, Inc. v Samson Assocs., LLC*, 8 AD3d 51 [1st Dept 2004] [plaintiff satisfied burden of showing desire and ability to cure by indicating in motion papers its willingness to repair conditions and providing proof of substantial efforts already made in addressing conditions]).

Having failed to submit an affidavit from Villanueva, the person employed by landlord, who has allegedly been negotiating these issues with tenant, or from anyone else with personal knowledge of the pertinent facts, landlord has not controverted or disputed tenant's allegations that it has cured or is attempting to cure the alleged defaults.

Even assuming that landlord's counsel has personal knowledge of the pertinent facts, his limited criticism of tenant's proposed menus shows that progress has been made, and that some details remain to be resolved. Moreover, some of his complaints, such as to those addressing the proposed service and delivery charges and costs of menu items, are not related to or required by

any specific lease provision.

As the law does not favor the forfeiture of a valuable leasehold, especially here where many years remain on the lease (*Vill. Ctr. for Care v Sligo Realty and Svce. Corp.*, 95 AD3d 219 [1st Dept 2012]; *Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352 [1st Dept 2005]), and under all of the circumstances, tenant has established its right to the issuance of a *Yellowstone* injunction.

B. Motion to amend

In its memorandum of law, tenant states that it seeks to amend the complaint, asserting that after it filed the original complaint, issues have arisen regarding real estate tax calculations as well as problems with water leaks and infiltration at the premises, and that landlord is aware of these issues and would be neither surprised nor prejudiced by the amendment. (Mem. of Law, dated June 10, 2014). However, the proposed amended complaint is not verified by tenant, nor does it submit an affidavit of merit or any other proof. (Laskowitz Aff., Exh. 6).

Having failed to submit an affidavit or verified complaint or any other proof, tenant has not established that its proposed claim is not palpably insufficient or completely devoid of merit. (See *Nichols v Curtis*, 104 AD3d 526 [1st Dept 2013] [leave to amend denied as plaintiff failed to support request with affidavit of merits and other evidence appropriate on motion for summary judgment]; *247 E. 32nd LLC v Gasparich*, 95 AD3d 790 [1st Dept 2012] [leave to amend answer properly denied as movant failed to submit affidavit in support of motion]; *CDR Creances S.A.S. v Cohen*, 77 AD3d 489 [1st Dept 2010] [motion to amend denied as unsupported by evidentiary showing, such as affidavit based on personal knowledge]; *Estate of Brown v Pullman Group*, 60 AD3d 481 [1st Dept 2009], *lv denied* 13 NY3d 789 [proposed amendment not supported by

affidavit of merit or verified pleading]).

IV. CONCLUSION

Accordingly, it is hereby

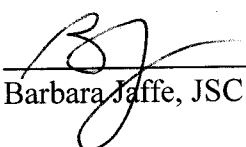
ORDERED, that plaintiff's motions seeking *Yellowstone* injunctions related to Notices to Cure dated April 2014 and July 2014 are granted; it is further

ORDERED, that defendant, its agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of defendant, are enjoined and restrained, during the pendency of this action, from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under the supervision or control of defendant or otherwise, any of the following acts: terminating the Lease with plaintiff and/or otherwise commencing eviction proceedings pending the determination of the within action and plaintiff's right to the use and quiet enjoyment of the premises; it is further

ORDERED, that plaintiff's motion for leave to amend is denied; it is further

ORDERED, that the parties are directed to appear for a status conference as to their progress in resolving the issues raised in the two notices on January 14, 2015 at 2:15 pm at 80 Centre Street, Room 279, New York, New York.

ENTER:



Barbara Jaffe, JSC

DATED: December 12, 2014
New York, New York