PMB Soho, LLC v Soho Thompson Realty, LLC
2015 NY Slip Op 30540(U)
April 10, 2015
Supreme Court, New York County
Docket Number: 652144/14
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - PART 42

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PMB SOHO, LLC d/b/a PERA SOHO RESTAURANT

Plaintiff

DECISION AND ORDER

-against-

INDEX NO.: 652144/14

SOHO THOMPSON REALTY, LLC

Defendant

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NANCY M. BANNON, J.

I. Introduction

In this action for a judgment declaring the parties' rights and obligations under a commercial lease and cancelling a Notice of Termination, the plaintiff tenant moves for a preliminary injunction enjoining the defendant landlord from commencing or continuing any attempts to evict it from the leased premises, the ground floor restaurant at 54 Thompson Street in Manhattan, pending a trial. The defendant opposes the motion and cross-moves to dismiss the complaint pursuant to CPLR 3211(a)(7) or, in the alternative, to direct the plaintiff to pay rent and post an undertaking should a preliminary injunction be granted, or to direct the plaintiff to cure the breaches alleged in the Notice to Cure. The plaintiff's motion is granted and the defendant's cross-motion is granted in part.

II. Motion For Preliminary Injunction

The applicable law is well settled. A party is entitled to a preliminary injunction upon a showing of (1) likelihood of success on the merits, (2) irreparable injury absent the granting of preliminary injunctive relief, and (3) a balancing of the equities in the movant's favor. See Nobu

Next Door, LLC v Fine Arts Housing, Inc., 4 NY3d 839 (2005); Coinmach Corp. v Alley Pond Owners Corp., 25 AD3d 642 (2nd Dept. 2006). "The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual." Ying Fung Moy v Hohi Umeki, 10 AD3d at 604 (2nd Dept. 2004); see Trump on the Ocean, LLC v Ash, 81 AD3d 713 (2nd Dept. 2011); Masjid Usman, Inc. V Beech 140, LLC, 68 AD3d 942 (2nd Dept. 2009). While the showing must be made by clear and convincing evidence (M.H. Mandelbaum Orthotiv & prosthetic Svcs., Inc. v Werner, 126 AD3d 859 (2nd Dept, 2015); 1650 Realty Assocs, LLC v Golden Touch Mgt., 101 AD3d 1016 [2nd Dept. 2012]), pursuant to CPLR 6312(c), "the mere existence of an issue of fact will not itself be grounds for denial of the motion." Arcamone-Makinano v Britton Property, Inc., 83 AD3d 623, 625 (2nd Dept. 2011); see Reichman v Reichman, 88 AD3d 680, 681 (2nd Dept. 2011). Here, the plaintiff has made the requisite showing for a preliminary injunction.

First, it established a likelihood of success on the merits by proof indicating that it was not in breach of the lease. The Notice to Cure was based on eight violations issued by the Environmental Control Board ("ECB") against the defendant relating to the lack of a certificate of occupancy and place of assembly certificate, as well as various building code violations. The plaintiff alleges, and the defendant does not dispute, that the defendant failed to appear at the ECB hearings to resolve the violations, in contravention of the lease terms. The plaintiff submitted proof in the form of affidavits from Burak Karacam, managing member of the LLC, Charles Arnold, the former building manager, and Dimitar Belchev, an employee of the plaintiff, as well as documentary evidence showing that it remedied the defaults which were its own responsibility under the lease or within its control to cure prior to the date of the notice, such as removing and disposing of two propane tanks being stored on the property. The plaintiff maintains that it is not possible for it to remedy the remaining violations as they were erroneously issued, such as the violation for lack of a place of assembly certificate which was, in fact, issued; they pertain to areas outside the plaintiff's premises, such as the plumbing in a residential unit in the building; or they were the defendant's obligation to resolve under the lease in the first instance, such as obtaining a certificate of occupancy. Nevertheless, the defendant served the plaintiff with a Notice of Termination on July 2, 2014 on the grounds that it failed to cure the alleged defaults. However, the defendant does not dispute the plaintiff's present allegations in its papers. Even if the defendant did dispute the plaintiff's allegations in

whole or part, this alone would not warrant denial of the preliminary injunction. See CPLR 6312[c]; Arcamone-Makinano v Britton Property, Inc., supra; Reichman v Reichman, supra.

Secondly, the plaintiff has demonstrated that it would suffer irreparable injury if a preliminary injunction is not granted and it loses its lease. In so finding, the court recognizes the well settled principle that equity does not favor forfeiture of leases. See Village Center for Care v Sligo Realty and Service Corp., 95 AD3d 219 [1st Dept. 2012); 2246 Holding Corp.v Nolasco, 52 AD3d 377 (1st Dept. 2008). Indeed, the First Department has held that "irreparable injury is presumed" upon the termination of a commercial lease. A-1 Entertainment, LLC v 27th St. Prop. LLC, 60 AD3d at 516 (1st Dept. 2009). Furthermore, here, there is no dispute that the plaintiff spent approximately $1,250,000 to renovate and build out the space for its restaurant, that it enjoys a unique location in the Soho area of New York City, that it has successfully operated the restaurant for some four years, that the business has built up a substantial amount of goodwill, and that more than ten years remain on the fifteen-year lease term. These factors have been held to support a finding of irreparable injury should the lease be forfeited.

For example, in Waldbaum's, Inc. v Fifth Avenue of Long Island Realty Assocs., 85 NY2d 600 (1995), where the tenant had expended $3.5 million in renovations and improvements at the start of a fifteen-year lease, the Court found that forfeiture of these "valuable improvements" and the goodwill built up by the plaintiff at the store location warranted a preliminary injunction. See also Coinmach Corp. V Alley Pond Owners' Corp., 25 AD3d 642 (2nd Dept. 2006). In Second on Second Café, Inc. v Hing Sing Trading, Inc., 66 AD3d 255, 272 (1st Dept. 2009), where the plaintiff had similarly operated a restaurant on the subject premises for four years, the First Department expressly held that "the loss of the goodwill of a viable, ongoing business" constitutes "irreparable harm warranting the grant of a preliminary injunction." See Waldbaum's, Inc. v Fifth Avenue of Long Island Realty Assocs., supra; Grand Manor Health Related Facility, Inc. v Hamilton Equities, Inc., 85 AD3d 695 (1st Dept. 2011) . The loss of a particular location of a restaurant business may also render the resulting harm irreparable (see Oriburger,Inc. V B.W.H.N.V. Assocs., 305 AD2d 275 [1st Dept. 2003]) as would the loss of a valuable long-term leasehold. See Grand Manor Health Related Facility, Inc. v Hamilton Equities, Inc., supra; Masjid Usman, Inc. v Beech 140, LLC, supra; Empire State Bldg. Assocs. v Trump Empire State Partners, 245 AD2d 225 (1st Dept. 1997).

The defendant is correct in observing that where there is mere economic loss and monetary damages will fully compensate a plaintiff, there can be no finding of irreparable harm. See e.g. 306 Rutledge, LLC v City of New York, 90 AD3d 1026 (2nd Dept. 2011); Mar v Liquid Mgmt. Partners, LLC, 62 AD3d 762 (2nd Dept. 2009); Edcia Corp. v McCormack, 44 AD3d 991 (2nd Dept. 2007). However, this is not such a case. Under the circumstances here, total monetary damages are not readily quantifiable and would not adequately compensate the plaintiff should the lease be terminated.

For similar reasons, the plaintiff has met the third prong for a preliminary injunction by showing that the equities balance in favor of granting the plaintiff relief. That is, the harm to the plaintiff not granting the injunction and allowing the defendant to proceed with an eviction far outweighs any harm that may come to the defendant in allowing the plaintiff to continue operating its restaurant on the premises, particularly since the plaintiff has shown proof of lack of any breach, has kept current on the rent and will be directed to continue to keep current with the rent, as discussed below. See Masjid Usman, Inc. v Beech 140, LLC, supra. Finally, a preliminary injunction would clearly maintain the status quo and prevent "the dissipation of property that could render a judgment ineffectual." Ying Fung Moy v Hohi Umeki, supra; Masjid Usman, Inc. V Beech 140, LLC, supra.

III. Cross-Motion to Dismiss Complaint

In support of its cross-motion to dismiss the complaint and in opposition to the plaintiff's motion, the defendant fails to address the merits of the plaintiff's application for a preliminary injunction, or the merits of its own Notice to Cure, or the plaintiff's allegations that the violations have been remedied or are not its responsibility. The affirmation of the attorney, who claims no personal knowledge of the facts, is without probative value on these motions. See Trawally v East Clarke Realty Corp., 92 AD3d 471 (1st Dept. 2012); Thelen LLP v Omni Contracting Co., Inc., 79 AD3d 605 (1st Dept.2010). Nor is anything else submitted except copies of the ECB violation notices. The defendant merely argues that the request for any Yellowstone injunction (First National Stores v Yellowstone Shopping Ctr., 21 NY2d 630) was untimely, and that the parties' dispute should be heard in the Civil Court and not the Supreme Court. Both arguments are unavailing. First, the plaintiff is not seeking Yellowstone relief since the essence of its

position is that it is not in breach of the lease and thus there is no cure to be had. Secondly, the defendant is correct in arguing that the Civil Court is the preferred forum for resolving landlord-tenant disputes. See Brecker v 295 Central Park West, Inc., 71 AD3d 564, 565 (1st Dept. 2010); A-1 Entertainment, LLC v 27th St. Prop. LLC , supra; 44-46 West 65th Apartment Corp. v Stvan, 3 AD3d 440 (1st Dept. 2004). However, it is well-settled that, except in situations not applicable here, the Civil Court may not grant equitable relief. See CCA 209; Bury v Cigna Healthcare of New York, Inc., 254 AD2d 229 (1st Dept. 1998); Jiskra v Canesper, 21 Misc 3d 129(A)(App Term, 2nd & 11th Jud Dists 2008); Washington v Culotta, 13 Misc 3d 18 (App Term, 2nd & 11th Jud Dists 2006); Goldstein v Stephens, 118 Misc 2d 614 (App Term, 1st Dept. 1983). This includes injunctive relief, such as declaratory relief. See Lex 33 Associates, L.P. v Grasso, 283 AD2d 272 (1st Dept. 2001); Trump Village Section 3, Inc. v Sinrod, 219 AD2d 590 (2nd Dept. 1995). Since the Civil Court has only limited authority to grant injunctive relief, it would be incapable of granting the primary relief sought by the plaintiff in this case, a declaration that it is not in breach of the lease. See Lex 33 Associates, L.P. v Grasso, supra; North Waterside Redevelopment Company, L.P. v Febbraro, 256 AD2d 261 (1st Dept. 1998). Indeed, that the defendant's papers are silent as to the merits of the various breaches it alleged in its Notice to Cure and to the plaintiff's proof that there are no breaches suggests that no such Civil Court proceeding, if commenced, would be successful, and that perhaps the Notice was served for some other undisclosed purpose.

The defendant's cross-motion is granted to the extent that the plaintiff is directed to continue to pay monthly rent and additional rent and otherwise comply with the lease terms throughout the pendency of this action. The motion is otherwise denied. No bond is warranted. To the extent that the defendant seeks injunctive relief in the form of an order directing the plaintiff to cure any breaches listed in the Notice to Cure, the court notes that such request appears only in the Notice of Cross-Motion, without explanation in the supporting papers which, as previously stated, are silent as to those issues.

IV. Conclusion

For these reasons, and upon the papers submitted and the oral arguments of the parties, the plaintiff's motion is granted and the defendant's cross-motion is granted to the extent indicated.

Accordingly, it is

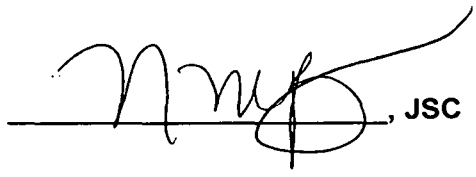
ORDERED that the plaintiff's motion for a preliminary injunction is granted and, pending a final determination of this matter, the defendant is hereby enjoined and restrained from commencing or continuing any attempts to evict the plaintiff from the leased premises based upon the grounds alleged in the Notice to Cure, and it is further,

ORDERED that the defendant's cross-motion is granted to the extent that the plaintiff shall make timely and full payments of all rent and additional charges as required by the lease during the pendency of this action, and the cross-motion is otherwise denied, and it is further,

ORDERED that the parties shall appear for a preliminary conference on June 11, 2015, at 9:30 am.

This constitutes the Decision and Order of the court.

Dated: April 10, 2015



, JSC

HON. NANCY M. BANNON