Mangiare Gourmet, Inc. v 225 Broadway Co., LP
2015 NY Slip Op 30608(U)
April 16, 2015
Supreme Court, New York County
Docket Number: 159089/14
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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MANGIARE GOURMET, INC.

Plaintiff

DECISION AND ORDER

-against-

INDEX NO.: 159089/14

225 BROADWAY COMPANY, LP

Defendant

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NANCY M. BANNON, J.

I. Introduction

In this action for, *inter alia*, a judgment declaring the parties' rights and obligations under a commercial lease, the plaintiff tenant moves for a Yellowstone injunction (First National Stores, Inc. v Yellowstone Shopping Center, Inc., 21 NY2d 630 [1968]), to stay termination of the lease and to enjoin the defendant landlord from commencing or continuing any attempts to evict the plaintiff from the leased premises pending determination of the action. In the alternative, the plaintiff moves for a preliminary injunction pursuant to CPLR 6301 enjoining the defendant from seeking to terminate the plaintiff's lease and preserving the status quo. The defendant argues for denial of any injunction or, should that relief be granted, an order requiring plaintiff to post a bond of $100,000. The defendant contends any injunctive relief is improper since there is no extant right to cure, in that the lease terms authorize it to terminate the lease as it attempted to do, without a Notice to Cure and with only a three-day notice of Cancellation, where, as here, the tenant defaults in the rent twice in a twelve-month period, resulting in two summary proceedings. The defendant, however, discontinued the two summary proceedings, each on the first court appearance, and the plaintiff contends that they were brought in bad faith. A TRO was granted. The motion is granted to the extent indicated below.

II. Background

The plaintiff and defendant entered into a 12-year lease agreement in November 2002 for commercial premises located at 225 Broadway in Manhattan, and that lease was subsequently extended through October 2019, at a monthly rent of $23,658.00, increasing annually to $34,736.25 in 2019. The plaintiff operates a cafeteria-style restaurant at the location. Paragraph 17 of the parties' lease required the defendant landlord to give the plaintiff tenant five days notice to cure any default in the lease terms, except for "covenants for the payment of rent or additional rent."

However, Paragraph 59(A) of the lease rider provides:

> In the event that twice in any twelve (12) month period... (B) Tenant shall have defaulted in the payment of Annual Base Rent or additional rent, or any part of either, and Landlord shall have commenced a summary proceeding to dispossess Tenant in each such instance, then, notwithstanding that such defaults may have been cured at any time after the commencement of such summary proceeding, any further default by Tenant within such twelve (12) month period shall be deemed a substantial violation of this lease by Tenant and Landlord may serve a written three (3) days' notice of cancellation of this lease upon Tenant and upon the expiration of said three (3) days, this lease and term of this lease shall end and expire as fully and completely as if the expiration of such three (3) day period were the day herein definitely fixed for the end of this lease and the term of the lease and Tenant shall then quit and surrender the demised premises.

That is followed by Paragraph 59(B) which expressly modifies Paragraph 17 by adding the payment of rent back into the notice provision. It states that 5-days notice must by given by the landlord to cure any default "including, without limitation, the covenants for the payment of rent and additional rent."

The plaintiff alleges and the defendant does not dispute that the defendant accepted late rent payments from November 2012 to April 2014. However, the defendant commenced a non-payment summary proceeding against the plaintiff in April 2014. That proceeding was voluntarily discontinued by the defendant on May 9, 2014, the first court date, even though rent was still outstanding. The defendant then rejected the plaintiff's proffer of May rent. A letter

dated June 13, 2014, states that the defendant was returning the plaintiff's check for $28,273.50, since the balance due was then $56,547.00, and it was unwilling to accept partial payment. The defendant commenced a second non-payment proceeding in June 2014, alleging that the plaintiff failed to pay May and June rent. That second proceeding was discontinued on July 25, 2014, again on the first court appearance. The defendant served a three-day notice of termination on September 5, 2014. The same day, the defendant rejected the plaintiff's check in the amount of $32,273.50. The plaintiff commenced this action by Order to Show Cause on or about September 17, 2014. Thereafter, on October 2, 2014, the defendant served a five-day rent demand on the plaintiff seeking rent and additional rent through October 2014, in the sum of $65,904.28. The plaintiff claims to have paid all rent and additional rent due through November 2014.

III. Discusssion

The purpose of a Yellowstone injunction is to stop the running of the cure period of a tenant's alleged default, thereby protecting the tenant's investment in the leasehold and preserving the status quo until the parties' rights can be adjudicated. See Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc., 93 NY2d 508, 514 (1999). The applicant for a Yellowstone injunction must establish 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 of termination of the 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." Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc., 93 NY2d at 514 *quoting* 225 E. 36th Street Garage Corp. v 221 E. 36th Owners Corp., 211 AD2d 420, 421 (1st Dept. 1995). Yellowstone relief may be granted even where nonpayment of rent is the only issue. See Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc., supra; 3636 Greystone Owners, Inc. v Greystone Bldg., 4 AD3d 122 (1st Dept. 2004); Lexington Ave. & 42nd St. Corp. v 380 Lexchamp Operating, Inc., 205 AD2d 421 (1st Dept. 1994). However, a motion for Yellowstone relief must be made before the cure period has expired. See 875 West 181 Owners Corp. v KB Gallery, LLC, 124 AD3d 549 (1st Dept. 2015); KB Gallery, LLC v 875 W. 181 Owners Corp., 76 AD3d 909 (1st Dept. 2010). Here, even assuming, as the plaintiff argues, that it was entitled to a 5-day cure period, it moved for relief after that period had expired. Therefore, Yellowstone relief is not available to the plaintiff, notwithstanding that it may have otherwise met the above requirements for the relief.

However, the plaintiff has demonstrated entitlement to a preliminary injunction under CPLR 6301.

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 established a likelihood of success on the merits by proof in the form of an affidavit of its president, Boris Gozenput, the signatory on the lease, and documentary evidence, which support a conclusion that the defendant's Notice of Cancellation was not valid.

It is settled law that a lease is a contract which is subject to the same rules of construction as any other agreement. See George Backer Mgt. Corp. v Acme Quilting Co., Inc., 46 NY2d 211 (1978); 1009 Second Avenue Assocs. v New York City Off-Track Betting Corp., 248 AD2d 106 (1st Dept. 1998); New York Overnight Partners, L.P. v Gordon, 217 AD2d 20 (1st Dept. 1995). Thus, a written lease "agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." Greenfield v Philles Records, Inc., 98 NY2d 562, 569 (2002); see MHR Capital Partners LP v Presstek, Inc., 12 NY3d 640 (2009); Ashwood Capital, Inc. v OTG Management, Inc., 99 AD3d 1 (1st Dept. 2012); 150 Broadway N.Y. Associates, LP v Bodner, 14 AD3d 1 (1st Dept. 2004). Further, "[a]ll parts of a contract must be read in harmony to determine its meaning." Bombay Realty Corp v. Magna Carta, Inc., 100 NY2d 124, 127 (2003). This is because it is a cardinal rule of contract construction that no provision should be ignored nor any agreement interpreted so as to render any provision meaningless. See Beal Savings Bank v Sommer, 8 NY3d 318 (2007); Tini v Alliancebernstein L.P., 108 AD3d 409 (1st Dept. 2013); Kolmar Americas, Inc. V Bioversal, Inc., 89 AD3d 493 (1st Dept. 2011); Helmsley-Spear, Inc. v New York Blood Center, Inc., 257 AD2d 64 (1st Dept. 1999).

Reading all relevant provisions of the lease together, and giving meaning to each, the court finds that the defendant was required to give a five-day notice to cure to the plaintiff

before serving the Notice of Termination in April 2014. It appears that Paragraph 59(a) was included in the lease in an attempt to give the defendant a remedy for chronic non-payment by setting up a procedure by which it need only bring two non-payment proceedings before serving a Notice of Cancellation on three days notice. The intent of the provision is entirely proper. This is because a notice to cure is not required where there is chronic failure to pay rent and multiple nonpayment proceedings have been commenced to collect the late rent since such history constitutes a breach of a substantial obligation under the lease. See Definitions Personal Fitness, Inc. v 133 E. 58th Street LLC, 107 AD3d 617 (1st Dept. 2013); Adam's Tower Limited Partnership v Richter, 186 Misc 2d 620 (App Term 1st Dept. 2000); 326-330 East 35th Street Assoc. v Sofizade, 191 Misc 2d 329 (App Term, 1st Dept. 2002). Nor does the plaintiff dispute that it paid its rent obligations late on many occasions.

However, the circumstances here do not amount to the type of chronic non-payment and multiple summary proceedings that are usually present in cases where termination of the lease was found proper. For example, in Definitions Personal Fitness, Inc. v 133 E. 58th Street LLC, supra, the landlord had commenced 10 nonpayment proceedings over seven years and, in Adam's Tower Limited Partnership v Richter, supra, the landlord had commenced nine proceedings in three years. Here, by contrast, the defendant had commenced only two summary proceedings within two months time, and the fact that it discontinued both proceedings on the first court date supports the plaintiff's assertion that they were commenced in bad faith to nominally comply with Paragraph 59(A) of the lease. Further, the plaintiff was only minimally in arrears, there was a long prior history of late payments which were accepted by the defendant, and the plaintiff presented proof, by way of the Gozenput affidavit, that the defendant may be seeking to replace the plaintiff with a tenant who will pay a higher rent. The defendant has not provided and research does not reveal any decisional authority where a court gave effect to a Notice of Cancellation under the same or similar circumstances.

In any event, in addition to Paragraph 59(A), the court must consider the import of Paragraph 59(B) and 17. Read together, these two provisions require that the defendant give the plaintiff five days notice to cure, even for non-payment of rent and additional rent, before cancelling the lease. Indeed, it is clear that Paragraph 59(B) was expressly added to expand the types of defaults listed in Paragraph 17 which require service of a five-day notice, and expressly states that it shall be applied "without limitation." Any apparent inconsistency between the paragraphs may well be a result of oversight or poor drafting. However, had the defendant intended that the new notice provisions of Paragraphs 59(B) and 17, be *with* limitation and not applicable after the first two summary proceedings, it could have easily included that language in its lease. It did not. Further, even interpreting Paragraphs 59(B) and 17 in that manner, as the court must, does not render Paragraph 59(A) meaningless since, in

including such a provision concerning summary proceedings, the parties presumably did not envision proceedings commenced in bad faith, or intend to give termination rights to the defendant that are not supported by the prevailing relevant authority.

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 enjoys a unique location in the downtown area of New York City near the newly opened Freedom Tower and the 9/11Memorial Museum, that it has successfully operated the restaurant for 13 years, taking occupancy not longer after September 11, 2001, that the business has built up a substantial amount of goodwill, and that more than five years remain on the current lease term. These factors have been held to support a finding of irreparable injury should an injunction not be granted and the lease forfeited.

For example, 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.,85 NY2d 600 (1995); 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 that 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, became current in the rent after the Notice of Cancellation was served, 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.

IV. Conclusion

For these reasons, and upon the papers submitted and the oral arguments of the parties, the plaintiff's 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 subject Notice of Cancellation, and it is further,

ORDERED that the plaintiff shall comply with all obligations under the lease, including the obligation to pay rent and additional rent in a timely manner, 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 16, 2015

, JSC

HON. NANCY M. BANNON