Fay's Rest. & Bar, Inc. v 141 Chrystie St.Corp.
2015 NY Slip Op 31023(U)
June 15, 2015
Supreme Court, New York County
Docket Number: 153407/2015
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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FAY'S RESTAURANT & BAR, INC.,

Plaintiff,

Index No. 153407/2015

-against-

DECISION/ORDER

141 CHRYSTIE STREET CORP,

Defendant.

---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..................................	1
Answering Affidavits and Cross Motion....................................	2
Replying Affidavits..	3
Exhibits..	4

Plaintiff Fay's Restaurant & Bar, Inc. ("Fay's") brings the instant motion by Order to Show Cause for a Yellowstone injunction and a preliminary injunction. Defendant 141 Chrystie Street Corp. ("Chrystie") cross-moves for an Order (1) dismissing plaintiff's complaint; or, in the alternative, (2) removing this action to civil court; and (3) enjoining plaintiff from conducting any further construction work at its premises. The motions are resolved as set forth below.

The relevant facts are as follows. On or about June 15, 2010, plaintiff entered into a commercial lease (the "Lease") with defendant for the premises located at 141 Chrystie Street, New York, New York (the "subject premises"). In or around October 2014, plaintiff submitted to defendant a request to assign the Lease to third-party Saigon Shack Corp. ("Saigon Shack")

pursuant to Article 5(a) of the Lease, which states that the subject premises may be assigned to a third-party but only with the landlord's "written consent, which...will not be unreasonably withheld or delayed." Thereafter, defendant responded with requests for certain financial documents from Saigon Shack to determine the viability of the proposed tenant, which plaintiff provided. As of the date of the instant motions, defendant had not given its written consent to the assignment of the Lease to Saigon Shack.

On or about April 3, 2015, defendant served plaintiff with a thirty day Notice to Cure which alleges several defaults by plaintiff (the "Notice to Cure"), including, *inter alia*, defaults relating to construction work plaintiff conducted based on its alleged assumption that defendant consented to the assignment of the Lease and that plaintiff has failed to provide and keep in full force and effect comprehensive general liability insurance naming defendant as an additional insured, in the amount required by the Lease. In response to the Notice to Cure, plaintiff commenced the instant action and brought the present motion by Order to Show Cause for an Order granting it a Yellowstone injunction and a preliminary injunction directing defendant to consent to the assignment of the Lease to Saigon Shack. Defendant cross-moves for an Order (1) dismissing plaintiff's complaint; or, in the alternative, (2) removing this action to civil court; and (3) enjoining plaintiff from conducting any further construction work at its premises.

The court first turns to defendant's cross-motion. On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover, "a complaint should not be dismissed on a pleading motion so long as, when plaintiff's allegations are given the benefit of every possible inference, a cause of action exists." *Rosen v. Raum*, 164 A.D.2d

809 (1st Dept. 1990). "Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to 'whether it states in some recognizable form any cause of action known to our law.'" *Foley v. D'Agostino*, 21 A.D.2d 60, 64-65 (1st Dept 1977) (quoting *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956)). In order to prevail on a defense founded on documentary evidence pursuant to CPLR § 3211(a)(1), the documents relied upon must definitively dispose of plaintiff's claim. *See Bronxville Knolls, Inc. v. Webster Town Partnership*, 221 A.D.2d 248 (1st Dept 1995). Additionally, the documentary evidence must be such that it resolves all factual issues as a matter of law. *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314 (2002).

As an initial matter, that portion of defendant's cross-motion to dismiss the complaint's first cause of action for a Yellowstone injunction is granted. The purpose of a Yellowstone injunction is to extend the cure period, thereby preserving the lease until the merits of the dispute can be resolved. *See Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assocs.*, 93 N.Y.2d 508, 514 (1999). "The party requesting 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 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." *See id.* However, it is well-settled that a tenant cannot obtain a Yellowstone injunction when the default alleged is that insurance coverage has not been continuously maintained pursuant to the lease as such a breach is incurable regardless of plaintiff's desire to do so. *See Kyung Sik Kim v. Idylwood N.Y., LLC*, 66 A.D.3d 528, 529 (1st Dept 2009)("plaintiffs had not previously and continuously maintained

insurance coverage as required by their commercial lease...[which] was a material breach of the lease and...an incurable violation that is an independent basis for the denial of Yellowstone relief.") Indeed, "the failure to secure insurance coverage is incurable as a matter of law." *Kramer v. Bohensky*, 27 Misc.3d 1237 (Sup. Ct. Kings County 2009).

In the instant action, defendant's cross-motion to dismiss the complaint's first cause of action for a Yellowstone injunction is granted on the ground that plaintiff's failure to maintain insurance coverage as required by the Lease is an incurable breach of the Lease. As an initial matter, it is undisputed that the plaintiff holds a commercial lease, that it received a Notice to Cure from the landlord and that it requested injunctive relief prior to the termination of the Lease. However, plaintiff has not and cannot establish that it maintains the ability to cure one of the alleged defaults by any means short of vacating the premises, specifically, the default alleging that plaintiff has not obtained proper insurance as required by the Lease. Pursuant to Paragraph 25(a) of the Lease,

> At all times during the term of the Lease and during any renewal or extension period...[plaintiff] shall provide and thereafter keep in full force and effect, at [plaintiff's] sole cost and expense, the following...(I) Comprehensive general liability insurance naming [defendant]...as additional named insureds...Such comprchensive general liability insurance shall afford minimum protection during the term of this Lease of not less than four million and 00/100 dollars ($4,000,000.00) per occurrence for bodily injury or death and property damage.

Additionally, pursuant to Paragraph 25(b) of the Lease,

> All insurance policies that [plaintiff] shall be required to maintain, shall be issued for terms of not less than twelve (12) full calendar months and shall contain a provision that they shall not be subject to cancellation or reduction in coverage.

Plaintiff has provided the following evidence of general liability insurance: a Certificate of

Liability Insurance, dated April 3, 2015, containing general liability insurance for the period of March 6, 2015 through June 6, 2015 with a limit of one million dollars ($1,000,000.00) per occurrence; a Certificate of Liability Insurance, dated April 7, 2015, containing general liability insurance for the period of March 8, 2014 through December 12, 2014, with a limit of one million dollars ($1,000,000.00) per occurrence; a Commercial General Liability Declaration containing general liability insurance for the period of September 14, 2013 through September 14, 2014 with a limit of one million dollars ($1,000,000.00) per occurrence and which fails to name defendant as additional insured; and an Excess Liability Policy containing general liability insurance for the period of July 28, 2011 through July 22, 2012 with a limit of one million dollars ($1,000,000.00) per occurrence. The documentary evidence establishes that none of the policies have limits of four million dollars ($4,000,000.00) as required by the Lease; no insurance of any kind is provided for the period between December 12, 2014 and March 6, 2015; one of the policies fails to name defendant as additional insured as required by the Lease; and almost all of the policies with the exception of one were issued for terms of less than twelve full calendar months, in violation of the Lease.

Plaintiff's assertion that the defendant's motion to dismiss the complaint's first cause of action for a Yellowstone injunction should be denied on the ground that its failure to obtain general liability insurance as specified in the Lease is *de minimis* and therefore, a curable default, is without merit. Plaintiff's reliance on *Federated Retail Holdings, Inc. v. Weatherly 39th St.*, LLC, 32 Misc.3d 247 (Sup. Ct. N.Y. County 2011) for said proposition is misplaced as that case is distinguishable. In *Federated*, the tenant maintained insurance for the entire period at issue but was merely seeking to "amend its existing policy" which the tenant was allowed to do "by

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retroactive endorsement." Here, not only did plaintiff fail to obtain the proper amount of general liability insurance and fail to name the landlord as additional insured on one of its policies, but it also failed to maintain insurance during the period from December 12, 2014 through March 6, 2015, a fact which plaintiff does not dispute.

Plaintiff's assertion that it can and has cured any default of failing to maintain any general liability insurance for the period from December 12, 2014 through March 6, 2015 based on the statement by Richie Cheung, an officer of plaintiff, that during that gap period of no insurance, Honor Construction, plaintiff's contractor, maintained its own insurance for the subject premises is without merit. As an initial matter, the fact that plaintiff's contractor maintained insurance for the subject premises is immaterial as said insurance did not name defendant as an additional insured and there is no evidence that defendant could have benefited from such insurance. Additionally, defendant is not obligated to accept Honor Construction's alleged performance of the Lease obligation in lieu of that of plaintiff with whom defendant is in privity. *See CRS Realty Assoc., Inc. v. 235 Tenth Ave. Car Wash Inc.*, 46 Misc.3d 152 (Appellate Term, 1st Dept 2015)("[i]t is of no moment that tenant's sublessee may have carried adequate insurance, inasmuch as a building owner is not required to accept a [third-party's] performance of a lease obligation in lieu of the tenant with whom the owner is in privity.")

Plaintiff's assertion that it should be allowed to cure the insurance violation on the ground that "Richie Cheung, a shareholder, director and officer of Plaintiff, has agreed to indemnify defendant..." is also without merit. As an initial matter, it was Ming Cheung and not Richie Cheung, who affirmed in his affidavit, dated May 15, 2015, that he will allegedly "indemnify" landlord. However, plaintiff has not provided any basis for the proposition that it

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should be allowed to cure the insurance violation on said ground. Indeed, defendant has no way of knowing whether Ming Cheung is financially capable of indemnifying defendant nor should defendant have to accept Ming Cheung's promises that it will do so.

That portion of defendant's motion to dismiss the remaining causes of action in the complaint, including, the second cause of action for an injunction directing defendant to grant its written consent to the assignment of the Lease by plaintiff to Saigon Shack; the third cause of action for specific performance of defendant's obligation to not unreasonably withhold or delay its consent to the assignment of the Lease and to compel defendant to grant its consent to the assignment of the Lease; the fourth cause of action for a declaratory judgment that defendant has breached the Lease and that it has waived its right to object to the assignment of the Lease; and the fifth cause of action alleging damages against defendant in the amount of $300,000.00, is denied as defendant has failed to set forth any basis for why these remaining causes of action should be dismissed.

That portion of defendant's cross-motion for an Order removing the remainder of this action to the Civil Court, New York County, on the ground that this court is not the appropriate forum to hear this type of dispute is denied as the Civil Court lacks the jurisdiction to grant the equitable relief plaintiff seeks in the instant action. *See Bank of New York v. Irwin Intern. Imports, Inc.*, 197 A.D.2d 462 (1st Dept 1993).

Additionally, that portion of defendant's cross-motion for an Order pursuant to CPLR § 6301 granting it a preliminary injunction enjoining plaintiff from conducting any further construction work on the subject premises or making any further alterations to the subject premises is denied. As an initial matter, defendant has failed to establish its entitlement to a

preliminary injunction. Indeed, defendant's cross-motion merely states "[a]lternatively, pursuant to CPLR 6301, the Court should enjoin Plaintiff from conducting any further construction and/or alterations pursuant to the Lease." However, even if defendant had provided some analysis as to its entitlement to a preliminary injunction, its request would be denied on the ground that it has no underlying claims against plaintiff in this action. "A preliminary injunction is warranted only upon a showing of...a likelihood of success on the merits of the *underlying claim*." *East 13th Street Homesteaders' Coalition v. Lower East Side Coalition Housing Development*, 230 A.D.2d 622, 622-23 (1st Dept 1996)(emphasis added). Indeed, "[a] preliminary injunction may not be granted unless the party seeking it has stated a prima facie cause of action justifying a permanent injunction." *States Resources Corp. v. Whittingham*, 32 Misc.3d 1210 (Sup. Ct. Kings County 2011)(citing *Graham v. Wisenburn*, 39 A.D.2d 334 (3d Dept 1972)). Here, defendant would not be entitled to a preliminary injunction as it cannot demonstrate a likelihood of success on the merits. Indeed, it does not have any claims against plaintiff in this action and thus, it is prohibited from seeking a preliminary injunction.

However, that portion of defendant's motion for an Order directing plaintiff to pay prospective use and occupancy for the subject premises is granted as it would be unjust to allow plaintiff to remain in possession of the leased premises without making payments for ongoing use and occupancy. *See 401 Hotel v. MTI/Image Group*, 271 A.D.2d 228, 230 (1st Dept 2000).

As this court has granted defendant's motion dismissing the complaint's first cause of action for a Yellowstone injunction, that portion of plaintiff's motion for an Order granting it a Yellowstone injunction is denied. Additionally, that portion of plaintiff's motion for an Order

granting it a preliminary injunction directing defendant to consent to the assignment of the Lease by plaintiff to Saigon Shack is denied. The purpose of a provisional remedy, such as a preliminary injunction, is to maintain the status quo pending a hearing on the merits rather than to determine the parties' ultimate rights. *See Matter of 35 N.Y. City Police officers v. City of New York*, 34 A.D.3d 392 (1st Dept 2006). As a result, the court should not grant plaintiff the ultimate relief sought in the action as part of a provisional remedy. *See Id.* In the present case, plaintiff is not entitled to a preliminary injunction directing defendant to consent to the assignment of the Lease by plaintiff to Saigon Shack. The present status quo, which has been in place since the inception of the Lease in 2010, is that plaintiff is the tenant of the subject premises and that the Lease has not been assigned to Saigon Shack. Plaintiff is therefore not entitled to a preliminary injunction as the consent to the assignment of the Lease is the ultimate relief sought by plaintiff in the complaint.

Accordingly, it is hereby

ORDERED that defendant's motion for an Order dismissing the complaint is granted only to the extent that the complaint's first cause of action for a Yellowstone injunction is dismissed; and it is further

ORDERED that defendant's motion for an Order removing the instant action to the Civil Court, New York County is denied; and it is further

ORDERED that defendant's motion for an Order pursuant to CPLR § 6301 granting it a preliminary injunction enjoining plaintiff from conducting any further construction work on the subject premises or making any further alterations to the subject premises is denied; and it is further

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ORDERED that plaintiff's motion for an Order granting it a Yellowstone injunction is denied; and it is further

ORDERED that plaintiff's motion for an Order granting it a preliminary injunction directing the defendant to grant its written consent to the assignment of the Lease to Saigon Shack is denied; and it is further

ORDERED that plaintiff is directed to pay prospective use and occupancy for the subject premises pursuant to the terms of the Lease unless and until plaintiff is evicted from the subject premises. This constitutes the decision, order and judgment of the court.

Dated: 6/15/15

Enter: CK
J.S.C.

CYNTHIA S. KERN
J.S.C.