

**Soundview Cinemas, Inc. v AC I Soundview, LLC**

2015 NY Slip Op 32709(U)

January 30, 2015

Supreme Court, Nassau County

Docket Number: 601464 /14

Judge: Thomas A. Adams

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK**

Present:

**HON. THOMAS A. ADAMS**

Supreme Court Justice

TRIAL/IAS, PART 24  
NASSAU COUNTY

SOUNDVIEW CINEMAS, INC.,

Plaintiff(s),

MOTION DATE: 12/16/14

INDEX NO.: 601464/14

-against-

SEQ. Nos. 2-5

AC I SOUNDVIEW, LLC by WAYNE H. WINK, JR.,  
ESQ., as RECEIVER, and LBUBS 2007-C7 SHORE  
ROAD, LLC,

Defendant(s).

The plaintiff's motions (Mot. Seq. Nos. 2,3 & 5) to extend an existing rent abatement, enjoin enforcement of its president, Jordan Desner's, individual guarantee, reimburse it for allegedly necessary repairs and expenses, leave to serve and file a second supplemental summons and amended verified complaint (adding the property manager, CBRE, Inc., as an additional defendant) and attorney's fees and the cross motion of the defendant LBUBS 2007-C7 Shore Road, LLC (hereinafter "LBUBS")(Mot. Seq. No. 4) to compel the plaintiff to pay rent from February 1, 2014 to date and prospectively in accordance with a February 9, 2012 lease, or, in the alternative, direct the defendant Wayne H. Wink, Jr., as Receiver, to reimburse it for unpaid rent and commence the payment of rent from his account, are determined as hereinafter provided.

The lengthy and unfortunate history of this commercial foreclosure action is well known and need not be repeated in detail. In sum, the plaintiff operates a multiplex movie theater at the "Soundview Marketplace" in Port Washington pursuant to a February 9, 2012 lease (see Exhibit A to the 7/14/14 affirmation of Keith M. Brandofino, Esq.) with its landlord, the defendant ACI Soundview, LLC (by its Receiver, Wayne H. Wink, Jr., Esq.) and the owner, the defendant LBUBS. The plaintiff leased the premises "As Is" (Article 14), the landlord agreed to deliver the property "with the heating, air conditioning and ventilation systems in working order" (Rider, para. 1) and Mr. Desner personally guaranteed the tenant's performance of the lease.

Approximately, a year and a half earlier, on November 9, 2011 LBUBS commenced an action (Index No. 15962/11) to foreclose consolidated mortgages on the shopping center and on November 28, 2011 the defendant Wayne H. Wink, Jr. was appointed Receiver of the premises. A property manager and leasing agent, CBRE, Inc., was appointed effective April 1, 2011. A Judgment of Foreclosure and Sale was ultimately issued on March 11, 2013 and LBUBS was the successful bidder at a January 21, 2014 public auction.

The plaintiff eventually took possession of the multiplex on March 19, 2013, however, in recognition of the theater's condition and in consideration of the repair work the plaintiff performed, its obligation to pay rent was consensually deferred until February 1, 2014. To date, well after the expiration of that period, no rent or additional rent has, however, been paid.

Instead, on or about April 3, 2014 the plaintiff commenced this action alleging that the defendants breached the lease, inter alia, by failing to perform necessary repairs to the premises. Specific performance is also sought. A supplemental summons and amended verified complaint was served on or about April 28, 2014. Finally, on or about May 8, 2014 LBUBS issued a demand to pay rent and additional rent upon the plaintiff (see LBUBS' cross motion, Exhibit E) and on June 6, 2014 a five (5) day notice of termination was served (*id.*).

The notice of termination prompted the plaintiff's initial request (Mot. No. 2), by order to show cause, to extend the rent abatement "for a period of not less than eighteen (18) months", for reimbursement of its expenses and attorney's fees. A contemporaneous order was also issued which directed the performance of certain affirmative repairs (i.e., "heating, air conditioning, HVAC, power surge, roof leak and lighting issues") within forty-five (45) days and enjoined the termination of the lease in the interim.

Subsequent thereto, on July 14, 2014 the plaintiff withdrew those branches of its order to show cause "seeking a rent abatement and reimbursement of expenses" (see Exhibit 5 to the 7/14/14 affirmation of Keith M. Brandofino, Esq.).

Approximately two weeks later, on the eve of the expiration of the forty-five (45) day stay, the plaintiff, once more, sought to

enjoin termination of the lease "pending resolution of this action" (see 7/23/14 affidavit of Jordan Desner, para.9). An August 3, 2014 temporary restraining order was issued enjoining a termination of the lease and enforcement of Mr. Desner's individual guarantee pending the hearing of the motion.

He contends that, since its April 26, 2013 opening, the plaintiff has "lost well over \$500,000.00 as a result of the catastrophic heating, cooling, HVAC, power surge, leak and lighting issues which have plagued the premises" (para.25).

Conversely, LBUBS' Vice President of Midland Loan Services, Chad Milbrandt, avers that, since issuance of the June 9, 2014 order, its contractors have "replaced nearly the entirety of the HVAC system at the Leased Premises at a cost of \$198,600.00, repaired the roof at a cost of \$10,836.00 in advance of the July 24, 2014 deadline imposed by the court" and "satisfied all of its contractual obligations as well as the repairs imposed upon it by the court" (see 8/22/14 affidavit, paras.14 & 16). The electrical power surges reportedly emanate from outside the premises and, after LBUBS took control, have been monitored by PSE&G (id at para.15). Consequently, the plaintiff's continued failure to pay rent after February 1, 2014 while simultaneously operating the 25,400 square foot complex and generating an unverified income reportedly necessitated the May 8, 2014 demand and June 6, 2014 termination notice.

Those branches of the plaintiff's initial motion (Mot. Seq. No. 2) seeking an eighteen (18) month extension of the rent abatement and reimbursement of its expenses are dismissed as academic in view of the parties' July 14, 2014 stipulation. Its remaining request, for attorney's fees, is referred to the trial.

With respect to the plaintiff's request, to enjoin LBUBS' termination of the lease (Mot. Seq. No. 3) and LBUBS' cross motion to compel payment of rent and the arrears (Mot. Seq. No. 4), it cannot presently be determined as a matter of law whether the defendants have breached the lease and therefore a further abatement is warranted or whether the plaintiff is simply in default. Indeed, the plaintiff presently seeks to amend its complaint for a second time and no disclosure has occurred. Therefore, in order to maintain the status quo until a determination can be made, the plaintiff's motion is conditionally

granted to the extent that, upon the posting of an undertaking in the amount of \$10,000.00, LBUBS' notice of termination and demand to recover the disputed arrears are hereby stayed (see CPLR 6312[b]; Barsyl Supermarkets, Inc. v Avenue P. Associates, LLC, 86 AD3d 545; Consolidated Payroll Services, Inc. v Berek, 18 AD3d 415).

However, "[t]he obligation of a commercial tenant to pay rent is not suspended if the tenant remains in possession of leased premises, even if the landlord fails to provide essential services .... Before a tenant may withhold rent, the tenant must prove actual or constructive eviction" (Prakhin v Fulton Towers Realty Corp., 122 AD3d 601 [2<sup>nd</sup> Dept; 11/5/14] quoting Westchester County Indus. Dev. Agency v Morris Indus. Bldrs., 278 AD2d 232). Here, although the success of the theater is in dispute, the plaintiff has remained in possession and, to some extent, been operational. In fact, Mr. Denser has acknowledged earning \$735,058.00 in ticket sales alone during the (May-August) 2013 Summer season (see Exhibit T to Mot. Seq. No. 3) as well as a varying amount of unverified monthly income (see 7/23/14 affidavit, para.25). Accordingly, pending a trial or resolution of this matter, the plaintiff is directed to prospectively pay \$10,000.00 per month commencing in January, 2015. The balance shall remain due, subject to an appropriate adjustment, if warranted, upon a final determination or resolution of the plaintiff's claim.

Finally, the plaintiff's remaining motion (Mot. Seq. No. 5), pursuant to CPLR 3025(b), for leave to serve and file its proposed second supplemental summons and amended verified complaint (plaintiff's Exhibit D) adding the property manager, CBRE, Inc., as a defendant is granted, without opposition. The new pleading shall be served upon all parties within twenty (20) days of this order.

JAN 30 2015

Dated: \_\_\_\_\_

  
 \_\_\_\_\_  
 J.S.C.

**ENTERED**

FEB 03 2015

NASSAU COUNTY  
 COUNTY CLERK'S OFFICE