

159 MP Corp. v Redbridge Bedford LLC

2015 NY Slip Op 32817(U)

January 29, 2015

Supreme Court, Kings County

Docket Number: 4599/14

Judge: David I. Schmidt

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At an IAS Term, Part Comm-2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 29th day of January, 2015

P R E S E N T:

HON. DAVID I. SCHMIDT,
Justice.

-----X
159 MP CORP., et ano.,

Plaintiffs,

- against -

Index No. 4599/14

REDBRIDGE BEDFORD LLC,

Defendant.
-----X

The following papers numbered 1 to 11 read herein:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	1-4, 5-7
Opposing Affidavits (Affirmations)_____	8-9, 10-11
Reply Affidavits (Affirmations)_____	12
_____ Affidavit (Affirmation)_____	_____
Other Papers_____	_____

Upon the foregoing papers, plaintiffs 159 MP Corp. and 240 Bedford Ave Realty Holding Corp. move, by way of order to show cause, for a Yellowstone injunction enjoining defendant Redbridge Bedford LLC from taking any action to terminate plaintiffs'

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commercial lease and evict plaintiffs from the subject premises. Defendant cross-moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint.

On April 7, 2010, plaintiffs entered into two leases with defendant's predecessor, BFN Realty Associates LLC, for adjoining commercial spaces in the subject property at 159 North 3rd Street a/k/a 241 Bedford Avenue a/k/a 160 North 4th Street in Brooklyn. Plaintiffs used combined spaces to operate a supermarket. On or about March 12, 2014, defendant sent plaintiffs a Notice to Cure, wherein defendant alleges the following violations of the leases and riders attached thereto:

1. In violation of paragraphs 3,6 and 8 of the Lease the tenant has built out the premises without obtaining any permits or approval from the Department of Buildings.
2. In violation of paragraph 3 of the Lease, tenant built the premises store without obtaining any Department of Buildings permits. The work included but was not limited to plumbing for various refrigerators and compressors, electrical work, cooking equipment including gas lines, sprinklers and HVAC installation. Landlord hereby demands that tenant cure this default, obtain all plans and perform all work to comply with all department of Buildings rules and regulations.
3. The configuration of the Premises Store is in violation of egress requirements under paragraph 6 of the Lease and poses an immediate danger to employees and customers and tenants of the building. The configuration is also a fire hazard. To cure these violations tenant must obtain all plans and perform all work to comply with all Department of Buildings rules and regulations.
4. Tenant has illegally and in violation of paragraph 6 of the Lease combined premises in the current store configuration. You must immediately reduce the size of the premises.

5. You currently vent all cooking equipment through a black iron vent attached to a wall adjacent to the Leased premises. This is a nuisance and is in violation of paragraph 63 of the Lease. In order to cure this violation, you must remove the vent system.

6. In violation of paragraph 63 of the Lease, tenant vents all cooking fumes through an illegal system which violated paragraph 63 of the Lease. Tenant must immediately remove this venting system. The compressors cause noise and vibrations which interfere with the comfort and safety of other tenants of the premises. In order to cure this violation, you must remove the compressors.

7. You have failed to provide access to the sprinkler system to the Fire Department for inspections. This is a violation under paragraphs 6 and 8 of the Lease.

In the Notice to Cure, defendant informed plaintiffs that if they failed to cure the alleged breaches on or before March 27, 2014, defendant will elect to terminate plaintiffs' tenancy and commence summary proceedings to recover possession of the leased premises.

Plaintiffs thereafter commenced this proceeding on March 26, 2014 by way of order to show cause seeking a Yellowstone injunction. In addition to injunctive relief, plaintiffs allege causes of action for a declaratory judgment, equitable estoppel and breach of contract. Plaintiffs maintain that no lease violations or defaults exist as the proper Department of Buildings (DOB) permits and certificates were issued for the installations mentioned in the Notice to Cure, the space was built out as a supermarket and accessory storage area as provided for in the leases and no violations have been issued by any government agency relating to the store or installations. In support of its equitable estoppel claim, plaintiffs

argue that defendant and its predecessor were aware of plaintiffs' usage and configuration of the space from the inception of the tenancy in 2009, accepted rent and acquiesced to such configuration and usage and that plaintiffs detrimentally relied on such consent and acquiescence. Plaintiffs also state that in the event they have breached the leases as described in the Notice to Cure, they are prevented from curing the violations unless and until defendant completes its alteration of the building and obtains a new certificate of occupancy. Defendant's alleged failure to complete its alteration of the building and obtain a new certificate of occupancy forms the basis of plaintiffs' breach of contract claim.*

In its answer, defendant interposes affirmative defenses that plaintiffs fail to state a cause of action and that plaintiffs contractually waived the right to seek injunctive relief. Defendant cross-moves for summary judgment dismissing the complaint based on the contractual waiver clause (paragraph 67 [H] of the rider to the leases) which provides:

Tenant waives the right to bring a declaratory judgment action with respect to any provision of this Lease or with respect to any notice sent pursuant to the provisions of this Lease. Any breach of this paragraph shall constitute a breach of substantial obligations of the tenancy, and shall be grounds for the immediate termination of this Lease. It is further agreed that in the event injunctive relief is sought by Tenant and such relief shall be denied, the Owner shall be entitled to recover the costs of opposing such an application, or action, including its attorney's fees actually incurred, it is the intention of the parties hereto that their disputes be adjudicated via summary proceedings.

*Plaintiffs do not cite to any terms or provisions in the leases or riders relating to this alleged obligation of defendant.

Plaintiffs argue that the aforesaid paragraph applies only to the right to bring a declaratory judgment action; there is no prohibition against seeking a Yellowstone injunction. However, a Yellowstone injunction is intended to stay the cure period, along with any proceeding to terminate the lease and evict the tenant, pending the court's determination of a declaratory judgment action relating to the alleged breach(es) of the lease. Because plaintiffs may not maintain a declaratory judgment action in this court under the terms of the waiver clause, there is no underlying basis upon which this court may grant a Yellowstone injunction. In *Post v 120 E. End Ave. Corp.* (62 NY2d 19 [1984]), the Court of Appeals explained the rationale behind Yellowstone injunctions:

“Yellowstone injunctions became commonplace following our decision in *First Nat. Stores v Yellowstone Shopping Center* (21 NY2d 630). That appeal involved a controversy between a landlord and a commercial tenant over which of them was required to bear the expense of a sprinkler system required by government orders. The landlord, contending that the cost properly belonged to the tenant, implemented provisions in the lease which provided that if the tenant did not cure a breach within 10 days the tenancy could be terminated. The tenant instituted legal proceedings but failed to obtain a temporary restraining order. Long before the dispute was legally resolved, the lease terminated because of the tenant's failure to cure or to toll the cure period. We held that under such circumstances the courts were powerless to revive the expired lease. As a result, tenants developed the practice of obtaining a stay of the cure period before it expired to preserve the lease until the merits of the dispute could be settled in court. The alternative for the tenant was to stand on his rights without correcting the violation, wait for the landlord to start summary proceedings in Civil Court and then defend against the landlord's claim in that court. If he won, well and good; if he lost he forfeited everything because the lease had terminated. The remedy for this all or

nothing result was to obtain a stay to toll the running of the cure period and the expiration of the lease. *Because Civil Court does not have jurisdiction to grant injunctive relief, stay applications necessarily were made in Supreme Court in conjunction with an action for declaratory judgment.* Once the merits had been decided by Supreme Court the stay terminated. If the tenant prevailed he had no further need for a stay. If he lost, he either cured the default during whatever part of the cure period remained or the lease expired and he was subject to removal by summary proceeding” (*Post v 120 E. End Ave. Corp.*, 62 NY2d at 24-25 [emphasis added]).

“In construing a contract, the document must be read as a whole to determine the parties’ purpose and intent, giving a practical interpretation to the language employed so that the parties’ reasonable expectations are realized. Further, a court should not adopt an interpretation which would leave any provision without force and effect” (*Krape v PDK Labs, Inc.*, 34 AD3d 751, 753 [2d Dept 2006] [citations omitted]). “A lease agreement, like any other contract, essentially involves a bargained-for exchange between the parties” (*Rowe v Great Atlantic & Pacific Tea Co.*, 46 NY2d 62, 67 [1978]). Therefore, “[a]bsent some violation of law or transgression of a strong public policy, the parties to a contract are basically free to make whatever agreement they wish, no matter how unwise it might appear to a third-party” (*id.* at 67-68).

Although there is no express prohibition against seeking a Yellowstone injunction in the subject waiver clause, it is clear from its terms that plaintiffs waived the right to bring a declaratory judgment action relating to the leases and/or any Notices to Cure and that the parties agreed to resolve their disputes in a summary proceeding should such issues arise.

By waiving the right to bring a declaratory judgment action, plaintiffs implicitly waived any entitlement to a Yellowstone injunction.

Further, the waiver of the right to bring a declaratory judgment action does not, by itself, prevent either side from performing the agreement or from recovering damages as a result of a breach or the parties' tortious conduct (*cf. Krape v PDK Labs, Inc.*, 34 AD3d at 753; *European Am. Bank v Mr. Wemmick, Ltd.*, 160 AD2d 905, 906 [2d Dept 1990]). Nor does the waiver of the right to bring a declaratory judgment action deny plaintiffs all legal redress in this instance. If plaintiffs dispute that they are in breach of the leases, they may raise any defenses they may have in any further commercial summary proceeding brought by defendant in Civil Court to evict them (*see Aloyts v 601 Tenant's Corp.*, Sup Ct, Kings County, January 24, 2007, Demarest, J., index No. 30043/06).

While plaintiffs attempt to cast their third and fourth causes of action as claims for equitable estoppel and breach of contract, they are essentially seeking a declaratory judgment that they are not in breach of the subject leases due to the acts or omissions of defendant. Indeed, with respect to the third cause of action sounding in equitable estoppel, plaintiffs seek relief in the form of a "declaratory judgment."

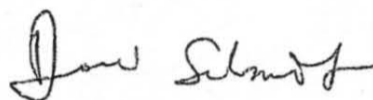
The argument of plaintiffs' officer that he was mistaken as to the effect of the waiver clause is unavailing. There is no allegation that plaintiffs were not afforded an opportunity to review each provision of the subject leases with the assistance and guidance of legal counsel. There is also no allegation that defendant's predecessor committed any fraud with

respect to the negotiation and signing of the leases. Without an allegation that they were fraudulently induced to enter the leases, plaintiffs cannot claim unilateral mistake (*see Barclay Arms, Inc. v Barclay Arms Assocs.*, 74 NY2d 644 [1989]).

As a result, plaintiffs' motion for a Yellowstone injunction is denied. Defendant's cross motion for summary judgment dismissing the complaint is granted. This proceeding is hereby dismissed.

The foregoing constitutes the decision and order of the court.

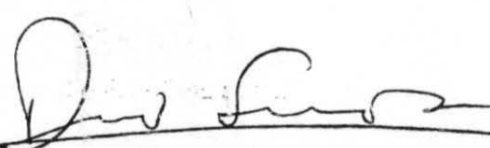
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J. S. C.

HON. DAVID I. SCHMIDT

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