Kaufman v Alevis
2015 NY Slip Op 32974(U)
June 22, 2015
Supreme Court, Bronx County
Docket Number: 22950/2015E
Judge: Mary Ann Brigantti

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SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

PRESENT: Honorable Mary Ann Brigantti

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MICHELLE KAUFMAN, et als.,

Plaintiffs,

-against-

DECISION / ORDER
Index No. 22950/2015E

BRIAN ALEVIS, et als,

Defendants.

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The following papers numbered 1 to 6 read on the below motions noticed on June 15, 2015 and both duly submitted on the Part IA15 Motion calendar of **June 15, 2015:**

Papers Submitted	Numbered
Pls.' NOM, Exhibits	1,2
Defs.' Opp, Exhibits	3,4
Caselaw, Insurance Certificates	5,6

By way of Order to Show Cause, the plaintiffs Michelle Kaufman, Philip LeSabre, and Lillik LLC (collectively, "Plaintiffs"), seek (1) a *Yellowstone* injunction prohibiting Brian Alevis and 3392 Realty Co. (collectively, "Defendants"),their employees, servants, agents, attorneys, affiliates, from terminating the Plaintiff's lease agreement during the pendency of this action, from taking any action including but not limited to commencement of summary proceedings and/or ousting of the plaintiff from the building known as the ground floor and basement of 3390 and 3392 East Tremont Avenue, Bronx, New York, from disturbing Plaintiffs' possession of said property during the pendency of this action, (2) declaring the notice to cure a nullity without any further force and effect, or alternatively, (3) extending the time for Plaintiffs to cure any alleged default under the lease until such time as this Court has determined that such a default has occurred and Plaintiffs have been given sufficient opportunity to cure the default. Defendants oppose the Order to Show Cause.

Upon review of the submissions, and after holding oral argument, the Plaintiffs' Order to Show Cause is denied in its entirety. 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 Graubard Mollen Horowtiz Pomeranz & Shapiro v. 600 Third Ave. Assoc.*, 93 N.Y.2d 508, 514 [1999][internal quotation omitted]).

In this case, the parties do not dispute that Plaintiffs have satisfied the first three elements of securing *Yellowstone* relief. Regarding the fourth element, Plaintiffs- commercial tenants set forth the following arguments. First, Plaintiffs contend that the Notice of Cure is defective because "it did not identify with specificity the purported defaults," specifically, it alleged that work was performed on the premises without written approval from municipal agencies, but does not identify what alterations, modifications, or changes were made to the premises. Without that information, the tenant is unable to cure the alleged issues. In the event this Court finds that a defect exists, Plaintiffs assert that they are ready, willing, and able to cure the same. Next, Plaintiffs note that the Notice to Cure seeks payment of rent arrears and real estate taxes, which should not be included in such a notice. Article 17 of the parties' lease agreement expressly excepts out the payment of rent and additional rent in the defaults as a basis for the Defendants' ability to terminate the lease. Plaintiffs further note that the Notice to Cure was undated. In light of the foregoing, Plaintiffs argue that the Notice to Cure is defective, and the relief sought must be granted.

In opposition, Defendants contend *inter alia* that the Notice to Cure is not deficient and was served in accordance with the parties' lease agreement. The Notice further provided specifically that Defendants failed to comply with the paragraph of the lease and rider which mandated that the tenant procure general liability insurance from the commencement of the lease term. Defendants note that Plaintiffs have failed to demonstrate that they procured the requisite insurance coverage for this bar and restaurant. This failure constitutes an incurable defect. The insurance certificates provided by Plaintiffs conclusively demonstrate that there was no coverage between November 28, 2014 and January 8, 2015. Since Plaintiffs cannot demonstrate the ability to cure this default, they do not meet the criteria for a *Yellowstone* injunction.

Discussion

First, this Court finds that the alleged deficiencies in the Notice to Cure is not defective so as to warrant the imposition of a *Yellowstone* injunction for that reason alone. The purpose of a notice to cure is to "apprise the tenant of claimed defaults in its obligations under the lease and of the forfeiture and termination of the lease if those defaults are not cured within a set period" *(Filmtrucks, Inc. v. Express Indus. & Term. Corp.*, 127 A.D.2d 509, 510 [1st Dep't 1987]). The notice to cure must inform the tenant unequivocally and unambiguously how it has violated the lease and the conduct required to prevent eviction (*Chinatown Apts. v. Chu Cho Lam*, 51 N.Y.2d 786, 788 (1980).

Here, the Notice to Cure specifically refers to alleged violations of Paragraphs 3 and 4 of the lease regarding work allegedly performed within the premises without the consent of the landlord and without proper permits or compliance with municipal rules or New York City Building Code. The notice also states that the tenant must cure this defect within 15 days, in accordance with Paragraph 17 of the lease agreement, by either removing the alterations and returning the property to its original condition, or the work must be inspected or approved by City and municipal agencies. While Plaintiffs contend now that the alleged defaults contained in the notice are without merit, they were facially sufficient (*see 49 W.12 Tenants Corp. v. Seidenberg*, 6 A.D.3d 243 [1st Dept. 2004]).

The Notice to Cure next states that Plaintiffs are in default of Paragraph 8 of the lease, and paragraph 6 of the rider, in that they failed to comply with the general liability insurance requirements, and no insurance policies have been provided to the landlord evidencing that insurance was in full force and effect for the amounts stated in the lease. Plaintiffs' Order to Show Cause does not even address this portion of the Notice to Cure or otherwise contend that this portion of the notice was defective.

Plaintiff goes on to allege that those allegations in the Notice to Cure with respect to failure to pay real estate taxes and rent are improper, as the lease provided that a failure to pay rent or additional rent is not a basis for eviction (Paragraph 17[1]). To determine whether a notice is sufficient, the standard is "one of reasonableness in view of the attendant circumstances" (*Hughes v. Lenox Hill Hosp.*, 226 A.D.2d 4, 18 [1st Dept 1996], *lv denied* 90

N.Y.2d 829 [1997]). Here, the inclusion of past due rent and failure to pay real estate taxes, in view of the accompanying allegations concerning specific modifications or renovations in contravention of the lease, and allegations regarding the failure to maintain adequate insurance coverage, did not render the entire Notice to Cure defective. Further, Plaintiffs' have not demonstrated that the alleged mailing deficiencies constitute a substantive defect in light paragraph 27 of the parties' lease agreement.

Plaintiffs' application must be denied in any event, for failure to satisfy the fourth element of their request for a *Yellowstone* injunction, in that they have not demonstrated the ability to cure that portion of the notice that alleged a default in procuring adequate insurance coverage. Plaintiffs do not dispute that there was a lapse in insurance coverage during the lease term, from November 28, 2014, through January 8, 2015, in violation of Paragraph 8 of the lease agreement. This violation was a material breach of the lease (*see Kyung Sik Kim v. Idylwood, N.Y., LLC.*, 66 A.D.3d 528 [1st Dept. 2009]), and under these circumstances, constitutes "an incurable violation that is an independent basis for denial of *Yellowstone* relief" (*Id.*, citing *Grenadeir Parking Corp. v. Landmark Assoc.*, 294 A.D.2d 313 [1st Dept. 2002], *lv. den.*, 99 N.Y.2d 553 [2002]; *Zona, Inc. v. Soho Centrale, LLC.*, 270 A.D.2d 12 [1st Dept. 2000]).

The unreported Supreme Court, Kings County decision *Khatari v. Shami*, 35 Misc.3d 1211[A](Sup. Ct., Kings Cty., 2012) provided by Plaintiffs at oral argument, is readily distinguishable from this matter. In that case, the landlord served a notice to cure on January 4, 2011, alleging that the tenant breached the lease by allowing insurance coverage to lapse. On January 18, 2011, the landlord served a notice of termination and commenced a holdover proceeding. On May 31, 2011, however, the landlord withdrew its holdover proceeding "with prejudice" concerning all claims in the notice to cure. On September 21, 2011, the landlord served a new notice to cure alleging, *inter alia*, failure to maintain adequate insurance. In response, however, the plaintiff-tenant provided documentation demonstrating that he carried, and carried for the relevant period, the requisite coverage, commencing January 28, 2011. The Court, therefore, found that the insurance coverage defect was in fact curable, holding: "[b]ecause plaintiff's only lapse in insurance coverage occurred, and his current policy began, prior to the defendant [landlord's] withdrawal, with prejudice, of his claim against plaintiff

pursuant to the First Notice, by which defendant waived such default under the lease, plaintiff may not be denied a *Yellowstone* injunction solely on the basis of his failure to carry adequate insurance" (*Id.*, at 5). In this case, however, there was no waiver by the Defendant of any previous claim with respect to insurance coverage, and it is not disputed that there is lapse in insurance coverage, in violation of the controlling lease agreement. As noted in *Kyung Sik Kim v. Idylwood NY, LLC.*, *supra*, Plaintiff here cannot retrospectively cure this defect with its current coverage, as "such policy does not protect [Defendant] against the unknown universe of any claims arising during the period of no insurance coverage" (66 A.D.3d 528, 529).

Plaintiffs here have therefore failed to demonstrate that they were not in breach of the controlling lease agreement requiring it to maintain continuous insurance coverage. Under these circumstances, this was an incurable defect that forms an independent basis for the denial of *Yellowstone* relief, along with the alternative relief requested (*see JT Queens Carwash, Inc. v. 88-16 Northern Blvd., LLC.*, 101 A.D.3d 1089 [2nd Dept. 2012]), and this Court need not address the remaining alleged defaults on the part of the tenant-Plaintiffs.

Accordingly, it is hereby

ORDERED, that Plaintiffs' Order to Show Cause is denied, and all stays issued are lifted.

This constitutes the Decision and Order of this Court.

Dated: 6/22, 2015

Hon. Mary Ann Brigantti, J.S.C.