Westside Radiology Assocs., P.C. v St. Luke's-Rossevelt Hosp. Ctr.
2016 NY Slip Op 30970(U)
May 26, 2016
Supreme Court, New York County
Docket Number: 652999/2015
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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WESTSIDE RADIOLOGY ASSOCIATES, P.C.,

Plaintiff,

-against-

THE ST. LUKE'S-ROOSEVELT HOSPITAL CENTER, SLRHC 425 59TH STREET CONDOMINIUM, LLC, and BETH ISRAEL MEDICAL CENTER,

Defendants.

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DECISION AND ORDER

Index No. 652999/2015

HON. ANIL C. SINGH, J.:

Plaintiff/tenant Westside Radiology Associates, P.C., moves by order to show cause pursuant to CPLR 6311 and 6313 for an injunction restraining and enjoining the landlord from: 1) commencing a summary holdover proceeding to evict plaintiff from the premises or taking any other action to evict plaintiff based upon the notice of default dated May 29, 2015; or 2) cancelling the lease dated January 1, 2010. Defendant/landlord The St. Luke's-Roosevelt Hospital Center opposes the motion.

Defendant, as landlord, entered into a written lease agreement with plaintiff, as tenant, for commercial office space at 1090 Amsterdam Avenue, Suite 337, Suites 5K and 5L in Manhattan. The lease, dated January 1, 2010, was for a term of ten years. Paragraph 11 of the lease states that tenant shall not assign the premises

without prior written consent from landlord. Paragraph 17 states that landlord shall notify tenant in writing of an alleged default, and tenant shall have thirty days to cure. Paragraph 17 provides further that, upon tenant's failure to cure, landlord may serve five days' notice of cancellation.

Landlord mailed tenant a notice of default and notice to cure dated May 29, 2015, stating that the acquisition of Westside Radiology by RadNet, Inc., constituted an assignment of the lease without landlord's consent.

On or about June 10, 2015, tenant's counsel responded to the notice of default by sending a letter to landlord, denying the alleged acquisition or any change of ownership. The letter explained that Mid Rockland Imaging Partners, Inc., purchased certain assets from Westside Radiology.

Subsequently, tenant's counsel sent a follow-up letter dated July 24, 2015, reiterating that tenant was not in default of the lease. The letter also stated that, unless tenant received written confirmation by July 24, 2015, that the notice of default was withdrawn, tenant would commence an action in Supreme Court seeking a declaratory judgment that tenant was not in default.

On August 27, 2015, landlord served a notice of cancellation, notifying tenant that landlord elected to terminate the lease based upon tenant's failure to timely cure the alleged default.

Plaintiff commenced the instant action by filing a summons and verified complaint on August 31, 2015. The first cause of action is for a declaratory judgment that a software agreement entered into by plaintiff and defendant Beth Israel Medical Center ("BIMC") giving plaintiff access to patient medical records was valid and binding. The second cause of action is for an injunction enjoining BIMC from terminating the software agreement or interfering with plaintiff's access to the software system.

The third cause of action alleges that tenant is entitled to a declaratory judgment that: a) tenant has not assigned the lease and is not in default of the lease for any reason alleged in the notice of default; b) the notice of default is a nullity; and c) landlord may not terminate the lease or evict tenant.

The fourth cause of action seeks an injunction permanently enjoining landlord from taking any action to terminate the lease or evict tenant based on the allegations in the notice of default.

Discussion

Generally, a tenant disputes a default alleged in a notice to cure by making an application for injunctive relief in the form of a Yellowstone injunction.

A Yellowstone injunction maintains the status quo so that a tenant confronted by a threat of termination of its lease may obtain a stay tolling the cure period so

that tenant may cure a default and avoid a forfeiture (WPA/Partners LLC v. Port Imperial Ferry Corp., 307 A.D.2d 234, 236 [1st Dept., 2003]. To obtain such an injunction, a tenant must demonstrate that: (1) it holds a commercial lease; (2) it received a notice of default, a notice to cure, or a threat of termination; (3) it requested injunctive relief prior to the termination of the lease; and (4) it is ready, willing and able to cure the alleged default by any means short of vacating the premises (Lexington Ave. & 42nd Street Corp. v. 380 Lexchamp Operating, Inc., 205 A.D.2d 421, 423 [1st Dept., 1994]). This relief is designed to prevent the unjust or premature termination of a valuable leasehold interest, so courts routinely grant Yellowstone injunctions to avoid such forfeitures (225 E. 36th St. Garage Corp. v. 221 E. 36th Owners Corp., 211 A.D.2d 420 [1st Dept., 1995]).

It is well settled that there is no basis for relief provided by a Yellowstone injunction, where the injunction is sought after expiration of the period to cure and service of the notice of termination (Daashur Assoc. v. December Artists Apt. Corp., 226 A.D.2d 114, 114-115 [1st Dept., 1996]; KB Gallery, LLC v. 875 W. 181 Owners Corp., 76 A.D.3d 909 [1st Dept., 2010]; JH Parking Corp. v. East 112 Realty Corp., 298 A.D.2d 258 [1st Dept., 2002]; B. Boman & Co. v. Professional Data Mgt., 218 A.D.2d 637 [1st Dept., 1995]; 319 Smile Corp. v. Forman Fifth, LLC, 37 A.D.3d 245 [1st Dept., 2007]; Prince Fashions, Inc. v. 542 Holding Corp.,

15 A.D.3d 214, 215 [1st Dept., 2005]; and Weaver v. Essex Owners Corp., 235 A.D.2d 369, 370 [1st Dept., 1997]).

Here, it is undisputed that: a) paragraph 17 of the lease states that tenant has 30 days to cure any alleged default of the terms of the lease; b) landlord mailed a written notice of default and notice to cure dated May 29, 2015; c) tenant received the notice on or before June 10, 2015; d) no Yellowstone injunction was sought by tenant to toll the cure period; e) landlord mailed a five-day notice of termination dated August 26, 2015, stating that landlord elected to cancel the lease, effective September 2, 2015; and f) on August 31, 2015, tenant commenced the instant action seeking injunctive relief pursuant to CPLR Article 63.

Based upon the controlling legal authority, the Court finds that tenant's failure to seek injunctive relief during the cure period is fatal and forecloses any opportunity for subsequent injunctive relief.

Plaintiff contends that a Yellowstone injunction is not applicable under the present circumstances. Tenant asserts that the default alleged – namely, that Westside Radiology was acquired by Radnet – never occurred, so the alleged default was incapable of being cured. In support of its argument, tenant relies upon 233 E. 86th St. Corp. v. Park E. Apts., 131 Misc.2d 242 (Sup. Ct., 1986), aff'd, 123 A.D.2d 526 (1st Dept., 1986).

In 233 E. 86th St. Corp., a cooperative corporation sought to terminate a lease as self-dealing pursuant to a federal statute, the Condominium and Cooperative Abuse Relief Act of 1980, 15 USC section 3601 *et seq.* The trial court wrote:

> Initially the court must determine the appropriate injunctive standard. Plaintiff seeks an injunction to maintain the status quo and toll the termination notice based on the doctrine established in First Natl. Stores v. Yellowstone Shopping Center. The "Yellowstone doctrine," as it became known, allows injunctive relief in landlord-tenant matters without regard to the likelihood of success on the merits in order to protect a tenant's leasehold. The Yellowstone doctrine recognizes the unique nature of the leasehold. It allows the tenant to cure his default under the lease without jeopardizing his rental lease. The Yellowstone injunction is not applicable where there is no right to cure. Here, Park East, the cooperative corporation, seeks to terminate the lease as self-dealing pursuant to the Condominium Act. This defect is not capable of being cured and accordingly the court may not evaluate the request for injunctive relief based on the Yellowstone doctrine, the purpose of which is to permit a tenant to cure defects.
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> The appropriate standard is, therefore, the general standard for injunctive relief. This requires a showing of likelihood of success on the merits, a favorable balance of the equities and irreparable harm.

(233 E. 86th St. Corp, 131 Misc.2d at 244 (internal citations omitted)).

The Court finds that tenant's reliance on 233 E. 86th St. Corp. is misplaced for three reasons.

First, the First Department generally frowns upon awarding injunctive relief to a tenant pursuant to CPLR Article 63. In Manhattan Parking Sys.-Serv. Corp. v. Murray House Owners Corp., 211 A.D.2d 534 (1st Dept., 1995), the Court wrote:

> [W]e note our disagreement with the practice of granting preliminary injunctive relief pursuant to CPLR 6301 when Yellowstone relief is unavailable because of the untimeliness of the application....

Second, New York law holds that a tenant must seek a Yellowstone injunction where assignment is at issue. In Golub Corp. v. Northeastern Indus. Park Inc., 188 A.D.2d 729 [3rd Dept., 1992]), a tenant commenced an action seeking a declaratory judgment that the landlord unreasonably withheld its consent to the assignment of a lease in violation of a covenant in a lease agreement. The tenant moved by order to show cause for a Yellowstone injunction. The trial court denied the motion. The appellate court reversed, stating:

> In our view, Supreme Court erred in not granting a Yellowstone injunction to plaintiff. It must be remembered that the purpose of a Yellowstone injunction is to preserve the status quo after a notice to cure has been served by the landlord while a declaratory judgment action is brought to determine the parties' rights under the lease.
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> . . .
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> The parties' arguments with respect to the validity of the assignment must await trial for an appropriate determination. Since the minimal prima facie requirements for a Yellowstone injunction have been met on this record, plaintiff is hereby granted the requested relief.

(Golub, 188 A.D.2d at 730-731).

In Matter of Merrie Christie Refreshments v. Sheehan, 233 A.D.2d 200 [1st Dept., 1996], the trial court denied a net-lessee/subtenant's application for a Yellowstone injunction. The First Department reversed, stating:

> The IAS court's determination regarding the validity of the assignment of the net lease was premature.... The facially valid assignment of the net lease ... and the parties' contentions regarding the validity of the assignment must await trial. Inasmuch as the minimal prima facie requirements for a Yellowstone injunction were met, [the net-lessee] is entitled to such relief.

(Matter of Merrie, 233 A.D.2d at 200).

In the instant case, the notice of default specifically alleged that tenant had violated the assignment provision of the lease. Accordingly, as the tenants did in Golub and Matter of Merrie, tenant should have acted expeditiously to secure a Yellowstone injunction. The application is untimely now.

Third, the lease has been terminated, and this Court has no authority to enjoin the landlord from cancelling the lease. Since there was no temporary restraining order in place at the time the notice of cancellation was served, the notice was validly served, and the lease was terminated (166 Enterprises Corp. v. I G Second Generation Partners, L.P., 81 A.D.3d 154, 159 [1st Dept., 2011]). "Once the lease was terminated in accordance with its terms, the court lacked the power to revive it" (id.).

Plaintiff's motion to enjoin the landlord from commencing a summary proceeding is denied.

Tenant contends that the Supreme Court is a superior forum to the Civil Court because the "heart" of the lease dispute – the interpretation of an asset

purchase agreement – is better suited for the "expertise" of the Commercial Division than the Civil Court of New York City.

We disagree. Issues of contract interpretation are litigated commonly in the commercial landlord-tenant part of the Civil Court. Likewise, issues presented in a summary proceeding in a landlord-tenant dispute are straightforward issues for the Civil Court to determine whether or not an assignment occurred. It is well settled that the Civil Court is the preferred forum for resolving landlord-tenant issues expeditiously (Marbru Associates v. White, 114 A.D.3d 554 [1st Dept., 2014]).

Plaintiff also contends that this Court is a superior forum because it is the only court that can hear both of plaintiff's claims. Plaintiff argues that the Civil Court lacks the authority to grant the declaratory relief that plaintiff seeks and has no jurisdiction to determine whether plaintiff has an obligation to pay for access to the software system in question under the software agreement.

The cause of action alleging breach of the software agreement is unrelated to the landlord-tenant dispute arising from an alleged illegal assignment. The software claim is properly raised in this action and will be decided here.

Tenant's final contention is that landlord's notice of default is fatally defective in that it failed to alert tenant of a new and different default landlord alleges for the first time in its opposition. Tenant asserts that there is a

contradiction between the notice of default alleging an illegal assignment of the lease, and landlord's assertion that tenant's alleged default stems from a transfer of "operational control" over the premises. Because the notice of default does not mention "operational control," tenant contends that the notice did not specifically apprise tenant that the alleged default resulted not from the alleged acquisition of Westside Radiology by RadNet but, instead, from a change in operational control.

Tenant raises the issue that the notice is defective for the first time at page 7 of its reply papers. It is well settled that it is improper to raise a new argument in support of a motion for the first time in reply papers (All State Flooring, L.P. v. MD Floors, LLC, 131 A.D.3d 834 [1st Dept., 2015]). In any event, as tenant acknowledges, the issue of whether or not the notice of default is defective is properly litigated not in the Supreme Court, but in a summary proceeding in the Civil Court.

Accordingly, it is

ORDERED that the motion is denied.

The foregoing constitutes the decision and order of the court.

Date: May 26, 2016
New York, New York

Anil C. Singh