

Juncalito Meat & Produce Inc. v Genest Props. LLC
2016 NY Slip Op 31068(U)
January 28, 2016
Supreme Court, New York County
Docket Number: 161359/15
Judge: Robert Reed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 43

-----X
JUNCALITO MEAT & PRODUCE INC.,

Plaintiff,

-against-

Index No.

GENEST PROPERTIES LLC,

161359/15

Defendant.
-----X

ROBERT REED, J. :

Plaintiff moves for a *Yellowstone* injunction.¹

This is a landlord-tenant action involving an attempt to evict a commercial tenant that allegedly violated the terms of its lease. Plaintiff was initially a subtenant of a lease executed by defendant, the owner and landlord of the premises located at 2212-2224 Third Avenue, New York, New York, and Associated Food Stores, LLC (“Associated”), which used the premises as a supermarket. On June 4, 2013, the parties and Associated entered into a written agreement, known as the Lease Modification and Extension Agreement (“Agreement”), that assured the assignment of the lease from Associated to plaintiff. Specifically, the Agreement provides the following:

“[Juncalito] (plaintiff) has expressed an interest, sometime in the future, to become the direct tenant under the Lease which is acceptable to the Landlord and [Associated] and the Landlord, [Associated] and [Juncalito] wish to modify certain terms and conditions of the Lease and extend the terms of the Lease ...”

The Agreement acknowledges that plaintiff has been in occupancy of the premises and has been operator of the supermarket since December 21, 2004. In addition to the assignment,

¹See *First Natl. Stores v Yellowstone Shopping Ctr.*, 21 NY2d 630 (1968).

the Agreement extended the term of the lease for an additional 10-year period, from 2023 to 2033, and provided for payment of a security deposit upon assignment.

In its complaint, plaintiff states that the assignment occurred on July 23, 2015, and that, by letter, dated September 9, 2015, from defendant to plaintiff, defendant claimed that plaintiff was in default of the lease. Defendant had asserted that plaintiff had performed alterations without defendant's consent. Plaintiff commenced a prior action in this court, bearing Index No. 159418/15, also seeking a *Yellowstone* injunction, and alleging that defendant's notice of cure was defective. Plaintiff contended that defendant was aware of its alterations to the premises and had consented to them. In that action, the court granted plaintiff a temporary restraining order. On the return date of the order to show cause seeking a *Yellowstone* injunction, defendant stipulated to withdraw the notice to cure and the action was terminated.

Since the termination of the prior action, defendant has served another notice to cure, again claiming that plaintiff made alterations on the premises without defendant's prior written approval pursuant to the lease. Plaintiff seeks the same relief in this action that it sought in the prior action, raising the same grounds as in the earlier action. In addition, plaintiff asserts that the present notice of claim is defective because it fails to coherently apprise plaintiff of the lease defaults.

In its motion, plaintiff argues that it is entitled to a *Yellowstone* injunction because it is willing to cure its lease defaults, even as it disputes the defaults. Plaintiff also argues that it did not breach the lease, and that defendant has acted in bad faith and consented to the alterations.

In opposition to the motion, defendant argues that plaintiff has failed to demonstrate an ability or desire to cure the lease defaults. To date, defendant claims that plaintiff has failed to

provide it with engineering plans or any documentation of the work already performed, and failed to seek written approval for its work. Defendant also denies that its notice to cure lacks specificity or clarity, as alleged by plaintiff.

“A *Yellowstone* injunction maintains the status quo so that a commercial tenant, when confronted by a threat of termination of its lease, may protect its investment in the leasehold by obtaining a stay tolling the cure period so that upon an adverse determination on the merits the tenant may cure the default and avoid a forfeiture.” *Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave Assoc.*, 93 NY2d 508, 514 (1999).

In order to be entitled to *Yellowstone* relief, the tenant must prove that: (1) it holds a commercial lease; (2) it has received from the landlord a notice of default; (3) the application was made prior to the termination of the lease; and (4) it has the desire and means to cure the alleged default by any means short of vacating the premises. *See Aegis Holding Lipstick LLC v Metropolitan 885 Third Ave. Leasehold LLC*, 95 AD3d 708, 708 (1st Dept 2012).

Plaintiff has shown that it meets the standards for the granting of a *Yellowstone* injunction: it has a commercial lease; it received a notice to cure; it has shown that the termination of the lease has not occurred; and that it has a capacity to cure the alleged defaults short of a vacatur. Plaintiff has shown that it has the resources to cure the defaults and has expressed its willingness to cure. The disputes between the parties include the interpretation of the notice to cure and lease provisions, as well as assertions of bad faith and “unclean hands.” These relate to the merits of the case and should be resolved by trial. Thus, the parties should have their day in court to argue their positions.

Accordingly, it is

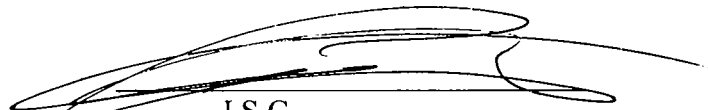
ORDERED that defendant, its agents, servants, employees and all other persons acting under the jurisdiction, supervision, and/or direction of defendant, are enjoined and restrained, during the pendency of this action, from terminating plaintiff's lease directly or through any attorney, agent, servant, employee or other person under the supervision or control of defendant; and it is further

ORDERED that an undertaking is fixed in the sum of \$10,000 conditioned that plaintiff, if it is finally determined that it was not entitled to an injunction, will pay to defendant all damages and costs which may be sustained by reason of this injunction; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Part 43, Room 5811, 111 Centre Street, on March 3, 2016, at 9:30 a.m.

DATED: January 28, 2016

ENTER:



J.S.C.