

**Mid Atlantic Inc. v 4250 Broadway Retail Owners
LLC**

2017 NY Slip Op 30770(U)

March 30, 2017

Supreme Court, New York County

Docket Number: 650266/2016

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 46

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MID ATLANTIC INC.,

Index No. 650266/2016

Plaintiff

- against -

DECISION AND ORDER

4250 BROADWAY RETAIL OWNERS LLC,

Defendant

-----X

LUCY BILLINGS, J.S.C.:

Petitioner holds a commercial retail lease for store #14 at 4250 Broadway, New York County, owned by defendant. Plaintiff has moved for a preliminary injunction tolling a Notice to Cure dated December 30, 2015, that defendant served on plaintiff, giving it 15 days to cure multiple violations of the parties' lease.

I. THE CLAIMED VIOLATIONS OF THE LEASE

The Notice to Cure claims that plaintiff is using portions of the cellar that is included in the leased premises as a residence and as an office, in violation of ¶ 2 of the lease and the Certificate of Occupancy of the building. Plaintiff's owner attests without contradiction that she placed a cot in the cellar on which she naps during long hours working in her retail seafood store upstairs, but no one stays overnight or otherwise resides in the cellar, and that she performs accounting and other recordkeeping in the cellar attendant to the leased premises' use as a retail store. Moreover, defendant has expressed a

willingness to allow the occasional use of the cellar for ancillary office work.

The Notice to Cure claims that the sprinkler coverage in the leased premises is inadequate, in violation of the New York City Building Code, N.Y.C. Admin. Code § 27-954, because the sprinkler heads are too far apart to protect all areas of the premises. Paragraph 42 of the lease governs the leased premises' sprinkler system: "Tenant shall not be responsible for structural or extraordinary repairs . . . to the demised premises, including but not limited to, the fixtures, . . . equipment and installations, . . . and installation and maintenance of a sprinkler system." Aff. of Moshe Assis Ex. B ¶ 42 (emphasis added). Defendant does not claim that plaintiff installed the sprinkler system in the leased premises. In fact plaintiff's owner attests that defendant replaced several sprinkler heads in September 2015, without installing them closer together and curing the claimed Building Code violation. Thus plaintiff tenant is not responsible for the installation of sprinkler heads too far apart to provide adequate protection nor, under ¶ 42 of the lease, for repair to the sprinkler system to remedy this inadequacy. The cure requires the installation of a more comprehensive system of sprinkler heads, a remedy to be undertaken by defendant under ¶ 42.

The Notice to Cure claims that the leased premises also violate the Building Code because of the many holes in the walls and ceilings that create a fire hazard and the unprotected wood

joists in the cellar. Depending on the cause and nature of the holes and of the unprotected joists, the repair of these conditions may be structural and thus defendant's responsibility pursuant to ¶ 42 of the lease, or they may be plaintiff's responsibility because plaintiff caused them or because they are non-structural such that it undertook to repair them pursuant to ¶ 8 of the lease. If plaintiff created the holes, or if the joists simply need covering with a fire protective material, for example, plaintiff would bear responsibility for the repair.

The Notice to Cure also claims two more violations of the Building Code: New York City Administrative Code § 27-366, because the only means of egress from the cellar is unenclosed and of combustible material, and § 27-759, because the plumbing fixtures for the toilet in the cellar are inadequate, and the toilet does not exhaust to the exterior. Plaintiff maintains that the former condition is insufficiently specific to inform petitioner what correction is necessary, although the only ambiguity, easily resolved by reference to § 27-366, is whether the correction requires both an enclosure and non-combustible material or only one or the other. Plaintiff claims no lack of specificity in the latter condition, although defendant does not specify any insufficiency in the plumbing fixtures other than the failure to exhaust to the exterior.

In any event, even assuming both these claimed conditions are sufficiently specific, again, depending on the extent of the necessary repair, it may be structural and thus defendant's

responsibility pursuant to ¶ 42 of the lease. On the other hand, if plaintiff constructed or renovated the cellar's means of egress or installed the toilet in the cellar or the associated plumbing fixtures or exhaust system, their repair may be plaintiff's responsibility because plaintiff caused the conditions or they are non-structural such that it undertook to repair them pursuant to ¶ 8 of the lease.

The Notice to Cure then claims that the leased premises violate the New York City Plumbing Code because the drains from plaintiff's equipment drain onto the floor without connecting to waste lines and thus may be damaging the building's structure. Plaintiff maintains that this notice of a violation is insufficiently specific regarding what equipment defendant refers to and what provision of the Plumbing Code defendant claims plaintiff is violating, to inform it what correction is necessary. If the drain is from plaintiff's fish displays, then plaintiff is responsible for correcting the drain's connection to waste lines so that the drain does not cause unsafe structural damage. In response to the affidavit by plaintiff's owner that plaintiff has connected its drain on the first floor to a waste line and is preparing to lay concrete to repair the surrounding floor, defendant does not identify any other drain from any other equipment. Although defendant refers only to Plumbing Code Subchapter 16, without a specific section, defendant's reference to damage to the building's structure suggests a claim that plaintiff is violating § 1600.6(x), requiring that "the

structural safety of a building shall not be affected . . . as a result of the installation . . . of a plumbing system or any part." Again, responsibility for the repair of any unsafe structural condition caused by a drain depends on whether the owner or tenant created the condition and the extent of the necessary repair to the plumbing system and the building's structure. Plaintiff, however, has cured the cause of any such condition and demonstrates a readiness, willingness, and ability to cure any damage caused. Graubard Mollen Horowitz Pomerantz & Shapiro v. 600 Third Ave. Assoc., 93 N.Y.2d 508, 514 (1999); Artcorp Inc. v. Citirich Realty Corp., 124 A.D.3d 545, 546 (1st Dep't 2015); Boi To Go, Inc. v. Second 800 No. 2 LLC, 58 A.D.3d 482, 482 (1st Dep't 2009); TSI W. 14, Inc. v. Samson Assoc., LLC, 8 A.D.3d 51, 52-53 (1st Dep't 2004).

The Notice to Cure then claims that the leased premises violate the New York City Electrical Code due to electrical wiring hanging from the walls and ceiling. Plaintiff maintains that this notice of a violation is also insufficiently specific regarding what provision of the Electrical Code defendant claims plaintiff is violating, to inform it what correction is necessary. Insofar as defendant's description of the offending condition informs plaintiff of the necessary correction, however, plaintiff's owner again attests without contradiction that plaintiff has engaged an electrician to cure any hanging wires. Thus, even though plaintiff further maintains that the cure is a "structural or extraordinary repair[] . . . to . . . the

fixtures, appurtenances, improvements, equipment and installations," Assis Aff. Ex. B ¶ 42, plaintiff demonstrates it is ready, willing, and able to cure, if not already in the process of curing, the claimed lease violation.

In sum, the undisputed evidence demonstrates that plaintiff has not violated the parties' lease by using the leased premises as a residence or as an office or by installing or maintaining an inadequate sprinkler system. Plaintiff has raised factual questions whether it is responsible for the other claimed Building Code violations because plaintiff caused them or undertook to repair them pursuant to ¶ 8 of the lease. These claimed violations are the holes in the leased premises' walls and ceiling, the unprotected joists in the premises' cellar, the means of egress from the cellar, and the toilet in the cellar and the associated plumbing fixtures and exhaust system. Plaintiff has cured, is curing, or is prepared to cure the drainage that has damaged the leased premises' first floor and the hanging electrical wiring.

Insofar as the court may determine that defendant is responsible for any claimed violations of the lease, plaintiff is ready, willing, and able to permit defendant to enter the leased premises to repair these offending conditions. Insofar as the court may determine that plaintiff is responsible for any violations of the lease, plaintiff is ready, willing, and able to repair these offending conditions. No evidence indicates the violations are incurable. American Youth Dance Theatre, Inc. v.

4000 E. 102nd St. Corp., 140 A.D.3d 630, 630 (1st Dep't 2016); Artcorp Inc. v. Citirich Realty Corp., 124 A.D.3d at 546; TSI W. 14, Inc. v. Samson Assoc., LLC, 8 A.D.3d at 52-53; Empire State Bldg. Assoc. v. Trump Empire State Partners, 245 A.D.2d 225, 229 (1st Dep't 1997).

II. INJUNCTIVE RELIEF

Until the court determines which party bears responsibility for any lease violation that plaintiff has not cured, part of the ultimate relief sought by the complaint, plaintiff is entitled to a preliminary injunction tolling the cure period in the Notice to Cure dated December 30, 2015. This injunction maintains the status quo and protects plaintiff's leasehold while challenging its responsibility for the violations claimed by defendant.

Graubard Mollen Horowitz Pomerantz & Shapiro v. 600 Third Ave. Assoc., 93 N.Y.2d at 514; Artcorp Inc. v. Citirich Realty Corp., 124 A.D.3d at 546; Village Ctr. for Care v. Sligo Realty & Serv. Corp., 95 A.D.3d 219, 222 (1st Dep't 2012); Boi To Go, Inc. v. Second 800 No. 2 LLC, 58 A.D.3d at 482.

This injunction, however, is conditioned on plaintiff's provision of an undertaking in the form of timely ongoing payment to defendant of all charges due under the parties' lease and, within 10 days after entry of this order, payment to defendant of any outstanding arrears in such charges. C.P.L.R. § 6312(b); 1414 Holdings, LLC v. BMS-PSO, LLC, 116 A.D.3d 641, 643-44 (1st Dep't 2014); Witham v. vFinance Invs., Inc., 52 A.D.3d 403, 404 (1st Dep't 2008). See Graubard Mollen Horowitz Pomerantz &

Shapiro v. 600 Third Ave. Assoc., 93 N.Y.2d at 515. Therefore the court grants plaintiff's motion for a preliminary injunction, but, if plaintiff fails to make any such payment, the preliminary injunction will be vacated. C.P.L.R. §§ 6301, 6312(a) and (b).

DATED: March 30, 2017

Lucy Billings

LUCY BILLINGS, J.S.C.

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