

Statler v Dioguardi
2017 NY Slip Op 31185(U)
May 31, 2017
Supreme Court, Suffolk County
Docket Number: 07432-2016
Judge: William G. Ford
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

COPY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE SUPREME COURT

Motions Submit Date: 02/02/17
Motion Seq #: 001 MD
Motion Seq #: 002 MD
Motion Seq #: 003 MD

RICHARD STATLER

Plaintiff,

-against-

ANTHONY DIOGUARDI,

Defendant.

PLAINTIFF'S ATTORNEY:

Bill Ian Jurow, Esq.
9 Dressler Road
Greenlawn, NY 11740

DEFENDANT'S ATTORNEY:

William D. Friedman, Esq.
9 Nichols Court
Hempstead, NY 11550

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The Court has considered the following in reaching a determination on the pending motions:

1. Plaintiff's Order to Show Cause, Affirmation in Support, Memorandum of Law and supporting papers dated July 29, 2016;
2. Defendant's Cross-Notice of Motion, Affirmation in Support and supporting papers dated October 4, 2016;
3. Plaintiff's Order to Show Cause, Affirmation in Support and supporting papers dated November 7, 2016
4. Defendant's Affirmation in Opposition to Order to Show Cause and supporting papers dated November 22, 2016;
5. Defendant's Reply in Further Support of Cross-Motion and supporting papers dated November 9, 2016;
6. Plaintiff's Affirmation in in Further Support of Order to Show Cause and supporting papers dated November 28, 2016;
7. Plaintiff's Affirmation in Opposition to Defendant's Cross-Motion and supporting papers dated January 24, 2017;
8. Plaintiff's Reply Affirmation dated December 9, 2016;

ORDERED that the presently pending motions are resolved as in accord with the following discussion and determination.

Procedural History

This matter presently pending before the Court was brought by plaintiff Richard Statler (“plaintiff” or “Statler” or “tenant”), a chiropractor on by Order to Show Cause before Special Term (Hudson, J.) on July 29, 2016. Statler sought the issuance of temporary restraining order, with a view towards issuance of a Yellowstone injunction, a provisional remedy judicially created and authorized the Court of Appeals in *First Nat. Stores, Inc. v Yellowstone Shopping Ctr., Inc.*, 21 NY2d 630 [1968] to enjoin the termination or cancellation of a commercial lease held between him and his landlord-defendant Anthony Dioguardi (“defendant” “DioGuardi” or “landlord”) concerning real property located at 517 East Jericho Turnpike, Huntington Station, New York. Special Term entered an order enjoining and restraining defendant from terminating the tenancy, commencing summary eviction proceedings, or serving further or additional lease termination notices upon plaintiff.

BACKGROUND

According to the plaintiff, it was agreed on or about April 12, 2016 with landlord that he would rent under a year-to-year tenancy whereby tenant would rent the premises to house his chiropractic office and practice ready for delivery and move in by April 15, 2016. Statler intended to utilize the entirety of the first floor as well as portions of the basement, half of which would be ready for move in by April 27, 2016, with the remainder ready by April 29, 2016. Further, plaintiff claims that his lease had a renewal option for an additional year if exercised on or before May 2, 2016. Statler additionally asserts that the lease provided that he could relocate, at his election, to a larger physical space located at 523 East Jericho Turnpike for a five year tenancy with renewal options. Statler states it was agreed pursuant to his lease agreement that he would pay \$1,300.00 monthly rent, but if he exercised the option to relocate, then \$2,600.00. A security deposit of \$2,600.00 paid by Statler by two (2) money orders of \$1,000 and \$600 was paid by plaintiff and accepted by defendant on or about April 12, 2016.

Pursuant to this understanding, Statler moved in and took possession of the premises on April 21, 2016, having received the keys to the space on April 15, 2016. Based on this, plaintiff’s understanding was that rent would be due June 1, 2016. Upon taking physical possession, plaintiff claims that the downstairs or basement portion of the building was not emptied as previously agreed or in move in ready condition. As a result, plaintiff made use of a shed or storage container owned by defendant to house his possessions on premises in the parking lot until April 20, 2016. Because of this, plaintiff alleges that defendant breached his obligations owed to his tenant under the lease agreement. More specifically, Statler alleges that the defendant failed to empty the entirety of the basement as agreed; failed to provide keys for access to the basement; failed to repair the building HVAC system; failed to makes repairs to doors, windows, and floors. Additionally, Statler states that DioGuardi did not provide a separate water meter for the premises and that defendant had the power shut off to the premises, which plaintiff alleges required police intervention to resume the connection. In so doing, Statler alleges that both the Suffolk County Police Department and PSEG confirmed the validity and existence of his lease to the subject premises.

As a result of plaintiff's allegations concerning breaches of the lease, Statler further claims that his landlord has constructively evicted him from the premises in part, and thus no rental payment is due to defendant. Statler argues that due to these difficulties, it has interfered with or prevented access to the internet and telephones at the premises, further interrupting chiropractic services to his patients. Thus, plaintiff has withheld rent payments due to DioGuardi due and owing for June and July 2016. However, Statler continues to maintain that he remains ready, willing and able to pay any and all rent due and owing should it be determined pending the outcome of this application.

On or about June 1, 2016, defendant served what purported to be a lease termination notice on plaintiff at the premises. DioGuardi has represented that he intended to commence a landlord-tenant summary eviction proceeding in the Suffolk County District Court by July 31, 2016. In part based upon that representation, plaintiff made the instant Yellowstone application. For his part, Statler strenuously objects to the notice making both substantive and procedural arguments. In sum, plaintiff argues that the notice cites the incorrect leased premises, referring to 517A East Jericho Turnpike, rather than 517 East Jericho Turnpike. More important, plaintiff, by his affidavit, disputes proper service of process, arguing that substitute service on an employee at his office at the leased premises did not constitute proper service of process as required by statute: CPLR or RPAPL. Thus, plaintiff argues that because the notice was not properly served and incorrectly describes the leased premises, it is defective and is a nullity.

In addition to plaintiff's perceived procedural irregularities alleged concerning the lease termination notice, Statler argues that it lacks the requisite notice to cure or curing provision and fails to particularize any specific breach of lease on tenant's part. Lastly, plaintiff notes that the notice was sent by defendant's counsel, rather than the landlord, absent a specific grant of such authority in the lease. Therefore, Statler brought this motion seeking the Yellowstone injunction, while simultaneously arguing that the notice is ineffective to terminate his tenancy.

In lieu of answering plaintiff's Complaint, and arguing in opposition and response to the Order to Show Cause, defendant made a preanswer motion to dismiss the action pursuant to CPLR 3211.¹ Succinctly summarized, DioGuardi has conceded that the putative lease termination is defective. Particularly, defendant has acknowledged the termination notice, by citing the incorrect physical address for the leased premises, is invalid. Accordingly, defendant in part argues the Complaint should be dismissed and the application for injunction denied in its entirety on mootness grounds. However, as argued by plaintiff, defendant to date has not withdrawn the now acknowledged invalid lease termination notice.

Additionally, defendant seeks dismissal disputing by sworn affidavit that any agreement

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Plaintiff has made several arguments pursuant to Judiciary Law § 487, 22 NYCRR § 130.1, and CPLR 2214, and has separately brought an Order to Show Cause, presented at Special Term (Reilly, J.) wherein the requested stay was denied. Thus, taken as a whole plaintiff's arguments essentially seek to enjoin this Court from considering defendant's cross-motion seeking dismissal, which taken in sum stands for the proposition that defendant's opposition to the Order to Show Cause and defendant's separately cross-noticed motion to dismiss are untimely having been improperly served, or alternatively, having been served after the return date noticed in Special Term's original order. This Court's view is that given the several substantive arguments concerning the merits of the matter made by plaintiff constitute waiver of any such arguments and thus this Court under its inherent authority will consider the merits of each parties' respective position. Similarly, this Court has considered and further denies any and all requests for sanctions as the Court has found that the arguments advanced for and against the respective applications to be grounded in good faith

towards year-to-year tenancy backed by lease agreement was ever reached by and between the parties. Rather, defendant argues that no written lease agreement was executed by either plaintiff or defendant, and thus at best, plaintiff has a month-to-month leasehold, which may be terminated under different and less stringent circumstances than an annual tenancy. Essentially, defendant argues that any putative lease agreement cited or relied upon plaintiff is invalid because it violates the Statute of Frauds.

DISCUSSION

I. Service of Process & Traverse Hearing

Plaintiff has repeatedly argued in his moving papers that prior to any determination concerning defendant's cross-motion seeking dismissal, this Court should render a decision granting plaintiff a *Traverse* hearing testing the validity of service of the putative lease termination notice. Statler argues without any citation to any particular provision of the RPAPL or CPLR that the termination notice should have been personally served on him as tenant. Thus, plaintiff's argument is that personal service on a person of suitable age and discretion at his place of business pursuant to CPLR 308(2) is improper service.

Notably, despite the fact that plaintiff disputes proper service via sworn affidavit, plaintiff has not disputed actual acknowledgement or awareness of the notice or that he received a copy of the notice as intended by the defendant. Further, as noted above, defendant has since disavowed the validity of the notice, but has not gone any further to withdraw the same, thus triggering a question as to mootness of the issue. That notwithstanding, this Court declines plaintiff's invitation to hold a *Traverse* style hearing.

The process server's affidavits of service constitutes *prima facie* evidence of proper service of legal process pursuant to CPLR 308(2). Therefore, although it is true that a sworn denial of receipt of service generally rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing, no hearing is required where the defendant fails to swear to 'specific facts to rebut the statements in the process server's affidavits' " (*Bank of New York v Samuels*, 107 AD3d 653, 653, 968 NYS2d 93, 94 [2d Dept 2013]; see also *City of New York v Miller*, 72 AD3d 726, 727, 898 NYS2d 643, 645 [2d Dept 2010][the bare denial of service was insufficient to rebut the prima facie proof of proper service pursuant to CPLR 308(4) created by the process servers' affidavits and to necessitate a traverse hearing]; *Countrywide Home Loans Servicing, LP v Albert*, 78 AD3d 983, 985, 912 NYS2d 96, 97–98 [2d Dept 2010][same]).

While plaintiff has challenged the legal sufficiency of the service of the putative lease termination notice, he has not sworn any denial of its receipt. Further, defendant has conceded that the notice itself is defective. Given this, this Court determines that no basis exists to hold any evidentiary hearing probing the validity of the notice's service and thus plaintiff's request for a *Traverse* hearing is denied.

Therefore, it is accordingly

ORDERED that that branch of plaintiff's application seeking entry of an order setting this matter down for a *Traverse* hearing is **DENIED**.

II. Mootness

Defendant has sought dismissal of this action on the grounds of mootness. DioGuardi here argues that since he has already conceded that by referring to the incorrect address on the putative lease termination notice, the notice has thus been rendered a nullity. Defendant then contends that the grounds or need for issuance of a Yellowstone injunction have dissipated where there no longer exists any threat of eviction from the tenant's perspective.

Generally speaking, courts may review only justiciable live controversies. "Under the mootness doctrine, courts are precluded from considering questions which, 'although once live, have become moot by passage of time or change in circumstances' when the rights of the parties with respect to the controversy will no longer be 'directly affected by the determination of the appeal' " (*In re Anonymous*, 114 AD3d 675, 675, 980 NYS2d 125, 126 [2d Dept 2014]).

However, every rule has its exception, and the mootness doctrine is not alone in this regard. One such exception permits courts to preserve for review important and recurring issues which, by virtue of their relatively brief existence, would be rendered otherwise nonreviewable" particularly where "the controversy or issue involved is 'likely to recur, typically evades review, and raises a substantial and novel question' " *Id.*

Here, the Court is not persuaded by defendant's reasoning that the instant action is moot and thus appropriate for summary dismissal on motion. Rather, given the substantive nature of the parties' dispute on the key and material terms and conditions, and indeed, whether or not a lease exists controlling the parties conduct and respective duties and obligations, this Court is of the view that the parties' controversy is likely to reoccur in the future, and might evade judicial review if not addressed herein at the present (*see e.g. Cisse v Graham*, 87 AD3d 1008, 1010, 929 NYS2d 628, 630 [2d Dept 2011][The exception to the mootness doctrine occurs where the controversy or issue involved is "likely to recur, typically evades review, and raises a substantial and novel question"]).

Thus, this Court finds that the matter is not moot, but rather the exception applies, despite defendant's disavowal of its defective lease termination notice. Therefore, that branch of defendant's cross-motion seeking dismissal of the Complaint on the grounds of mootness is **DENIED**.

Accordingly, it is therefore

ORDERED that defendant's cross-motion to dismiss the Complaint on the grounds of mootness has been considered and is hereby **DENIED**.

III. Existence of a Lease

Based on the arguments presented in all of the moving papers constituting the record before the Court, it can be fairly said that essential questions of fact concerning whether or not a lease agreement was reached, and the material elements of the same between the parties is squarely before the Court. Plaintiff asserts that it held a year-to year tenancy with options to renew or enlarge into a five year tenancy at a larger premises with its own option for renewal. To the contrary, defendant disputes that any annual leasehold was agreed upon and that at best

plaintiff possessed a month-to-month tenancy. Further defendant argues that the putative lease proffered by plaintiff violates the Statute of Frauds and cannot be considered as indicia of a bargained for agreement.

In opposition to defendant's cross-motion to dismiss, plaintiff makes two salient points. First and foremost, plaintiff argues that the lease is valid and has been executed. In reliance for this proposition, plaintiff offers the following provision:

Confirmation of Lease: Receipt/Acceptance of the \$2,600 security deposit, by the landlord, confirms acceptance of all conditions of the ... lease agreement and that those conditions will be valid as is and/or incorporated into the full and final written lease. Terms of this agreement shall stand as the existing lease if a full and final lease is not signed by both parties

In corroboration of this provision, plaintiff has tendered copies of the two money orders comprising payment by Statler and acceptance by DioGuardi, countersigned by DioGuardi on April 12, 2016 of the \$2,600.00 security deposit. Although plaintiff acknowledges that his landlord failed to sign or execute the lease, he argues that by its express terms, the draft and unexecuted lease has ripened into a validly binding lease by operation of the instrument itself.

Secondly, plaintiff attempts to avail himself of the part performance exception to the Statute of Frauds, arguing that defendant, by accepting the security deposit, providing plaintiff with keys and tendering delivery of the premises has partly performed under the key and material terms of the draft lease, thus taking the agreement out of the Statute of Frauds.

New York courts historically have recognized that the central distinguishing characteristic of a lease is the surrender of absolute possession and control of property to another party for an agreed-upon rental (*Matter of Dodgertown Homeowners Ass'n, Inc.*, 235 AD2d 538, 539, 652 NYS2d 761, 762 [2d Dept 1997]).

In order for an agreement, oral or written, to be enforceable as a lease, all the essential terms must be agreed upon, including the area to be leased, the duration of the lease, and the price to be paid. Where any of these essential terms are missing and are not otherwise discernible by objective means, a lease has not been created (*Davis v Dinkins*, 206 AD2d 365, 366-67, 613 NYS2d 933, 935 [2d Dept 1994]).

New York's Statute of Frauds, codified at General Obligations Law § 5-703 provides as relevant here that:

A contract for the leasing for a longer period than one year ... of any real property, or an interest therein, is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged

A party's admission of the existence and essential terms of an oral agreement is sufficient to take the agreement out of the statute of frauds. However, if the parties dispute "the very terms and conditions of the alleged oral" agreement, the statute of frauds applies (*Camhi v Tedesco Realty, LLC*, 105 AD3d 795, 797, 962 NYS2d 660, 662 [2d Dept 2013]).

The Statute of Frauds will not be a bar to specific performance of a lease where it has been demonstrated that there has been partial performance of the lease, although such performance must be “unequivocally referable” to the agreement. Mere payment of money is not enough to constitute part performance (*Tuttle, Pendelton & Gelston, Inc. v Dronart Realty Corp.*, 90 AD2d 830, 831, 455 NYS2d 830, 831 [2d Dept 1982]; *Carlton Ctr., LLC v Carlton Nursing Home, Inc.*, 303 AD2d 706, 707, 757 NYS2d 568, 569 [2d Dept 2003])[tenant’s argument that the act of making a substantial down payment constituted part performance of the draft agreement so as to take the agreement outside the statute of frauds by itself found unsuccessful]. “Unequivocally referable” conduct is conduct which is “inconsistent with any other explanation” (*745 Nostrand Retail Ltd. v 745 Jeffco Corp.*, 50 AD3d 768, 769, 854 NYS2d 773, 774 [2d Dept 2008]).

Here, the unexecuted and unsigned writing proffered by plaintiff purporting to constitute the lease pertinent to the leased premises identifies the landlord, tenant, leased premises and sets forth the dates for performance or delivery of the premises, duration of the tenancy, as well as payment schedules for monthly rent and the security deposit. It further encompasses other significant issues with provisions including, but not limited to, utilities, maintenance obligations, parking, and the HVAC system.

Defendant, arguing in opposition that no lease exists has contended that the putative lease lacks a provision for commercial liability insurance. Thus Dioguardi states this is further evidence that the draft lease was a mere agreement to agree between plaintiff and defendant to formalize and execute a lease in the future.

After reviewing the motion record presently pending before the Court, this Court is unpersuaded by defendant’s logic and thus determines that the Statute of Frauds does not bar consideration or operation of the unexecuted lease agreement proffered by Statler. Instead, this Court accepts plaintiff’s argument that part performance operates to ratify the lease on defendant’s part in plaintiff’s favor. Put differently, plaintiff has adduced sufficient evidence at this early stage of litigation sufficient for an inference that plaintiff’s payment and defendant’s acceptance of the \$2,600 security, tendered in two separate money orders signed for by defendant on April 12, 2016, that plaintiff paid security as called for in the agreement. Thus, plaintiff’s security deposit and defendant’s delivery of the premises including providing keys for access were all conduct sufficiently specifically referable to the agreement as to constitute part performance.

Further, this Court finds and determines that the draft and unexecuted lease contained enough material terms and conditions as to take it out from underneath a “mere agreement to agree” that defendant has suggested.

Thus, that branch of defendant’s motion to dismiss on the grounds that the Statute of Frauds barred consideration, reliance or use of the unexecuted draft lease is accordingly **DENIED**.

Therefore it is

ORDERED that defendant’s cross-motion to dismiss plaintiff’s complaint on the grounds of Statute of Frauds barring the consideration of the unexecuted draft lease is hereby **DENIED**.

IV. Grounds for Yellowstone Injunction

Plaintiff seeks a Yellowstone injunction to preserve the *status quo ante*, i.e. preserving its commercial tenancy allowing it to cure any existing defaults or breaches of lease and preventing defendant-landlord from terminating his tenancy.

A *Yellowstone* injunction is thus intended to preserve 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])

To obtain a *Yellowstone* injunction, the tenant 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 both the termination of the lease and the expiration of the cure period set forth in the lease and the landlord's notice to cure, and (4) it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises (*Barsyl Supermarkets, Inc. v Ave. P. Assoc., LLC*, 86 AD3d 545, 546, 928 NYS2d 45, 47 [2d Dept 2011]). This Court is well aware that in considering such applications, courts have generally accepted far less than the showing normally required for the grant of preliminary injunctive relief (*Trump on the Ocean, LLC v Ash*, 81 AD3d 713, 716, 916 NYS2d 177, 181 [2d Dept 2011]).

As consistent with the foregoing analysis and findings, defendant has conceded in his opposition to the Order to Show Cause seeking the injunction that his lease termination notice was substantively deficient and thus rendered null and void. While this Court has determined this has not rendered plaintiff's action moot, the question of whether a Yellowstone injunction would issue requires a differently nuanced analysis.

As previously noted, this Court has found and determined that defendant's motion to dismiss on the grounds of an invalid draft lease to be unsuccessful as the parties partly performed to take their agreement out from underneath the Statute of Frauds. Thus, plaintiff has supplied the first prong of the Yellowstone test. However, while defendant has not withdrawn the defective lease termination notice, this Court holds that the substantively defective notice is null and of no effect. Therefore, plaintiff cannot satisfactorily demonstrate that it has been served with a notice that its lease is about to be terminated. The Court's inquiry must then end there, given that without an effective or valid termination notice, there cannot be a need to cure or period within which to cure any outlined lease default. Accordingly, no adequate grounds presently exist on which this Court may issue an injunction.

Nevertheless, plaintiff may maintain this action on its Complaint pursuing recovery or recompense on any and all presently existing or past breaches of lease obligations on defendant-landlord's part.

Thus, this Court finds and determines that plaintiff's application seeking entry and issuance of a Yellowstone injunction is hereby **DENIED**.

Accordingly, it is

ORDERED that the branch of plaintiff's motion brought on by Order to Show Cause seeking entry of a Yellowstone injunction is hereby **DENIED**; and it is further

ORDERED that plaintiff is directed to serve a copy of this memorandum and decision with notice of entry on defendant **on or before July 5, 2017**.

ORDERED that counsel for both parties are directed to appear before this Court on **July 19, 2017 at 2:30 p.m.**, in IAS PART 38, 1 Court Street, Riverhead, New York for a status conference.

The foregoing constitutes the decision and order of this Court.

Dated: May 31, 2017
Riverhead, New York



WILLIAM G. FORD, J.S.C.

___ **FINAL DISPOSITION**

X **NON-FINAL DISPOSITION**