Namdor, Inc. v Boulevard Retail LLC
2018 NY Slip Op 31690(U)
March 23, 2018
Supreme Court, New York County
Docket Number: 650773/18
Judge: Andrea Masley

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

NAMDOR, INC. d/b/a GRISTEDE'S SUPERMARKETS,

Plaintiff,

- against - Index No. 650773/18

BOULEVARD RETAIL LLC and BOARD OF MANAGERS OF THE BOULEVARD CONDOMINIUM,

Defendants.

Masley, J.:

On February 16, 2018, plaintiff Namdor Inc. d/b/a Gristede's Supermarkets (Namdor) moved by OSC for a Yellowstone Injunction tolling the cure period set forth in the Default Notice, extended by agreement, until February 18, 2018.

On April 25, 1988, Broadway 86th Street Associates, as landlord, and Gristedes Supermarkets, Inc. (Gristedes, Inc.), as tenant, entered into a commercial lease commencing May 1, 1988 for a term of 10 years with two options to renew for an additional 20 years total; the lease is scheduled to expire in October 2018. Defendant Boulevard Retail LLC is the successor landlord (the Landlord). By a Notice to Cure, dated March 3, 2017, addressed to Gristedes, Inc., the Landlord informed the tenant of lease violations arising from a May 27, 2016 ECB violation for potentially dangerous discharges from Gristedes Inc.'s cooling towers which are allegedly too close to residences, giving twenty days to cure.

According to Charles D'Amico, Senior Vice President of Real Estate for Red Apple Group, Inc., the parent company to Namdor, Inc., Namdor has attempted to address the violation for two years. It engaged an engineer, submitted drawings, and

offered to replace the cooling tower. The Landlord has yet to consent to any proposal. At argument, Mr. Flitt, attorney for the Landlord, informed the court that he expects to sign an agreement allowing an easement for repairs.

Daniel J. Ansell, attorney for Namdor, challenges the Default Notice as it was served on Gristedes, Inc., an entity that has not existed since 1997 according to the NYS Secretary of State.

Also relevant here is the Landlord's nonpayment action against Gristedes, Inc., L&T Index No. 081424/17, in NYC Civil Court. In her January 18, 2018 affirmation, Emily Pankow, Esq., "Assistant General Counsel of Red Apple Group, Inc, the parent company of respondent Gristede's Supermarkets Inc." states:

> "the dispute...involves in part Gristedes' cooling tower and Petitioner's claim that Gristedes has failed to maintain it properly. Without conceding any default, Gristedes developed a plan to alter the cooling tower and its systems. Petitioner, however, asserted that approval of such plan by the Board of Managers of the Boulevard Condominium ... was necessary before the plan could be implemented. Such approval has been delayed...Gristedes has objected to this delay as unreasonable and unjustified"

(aff. of Pankow, ¶ 3).

Namdor is not mentioned. At argument, the court was informed that, at the Civil Court's direction, Gristedes (a/k/a Namdor) has paid two months use and occupancy.

In order to obtain a Yellowstone injunction, the moving party 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 (*225 E. 36th St. Garage Corp. v 221 E. 36th Owners Corp.*, 211 AD2d 420, 421 [1st Dept

1995][citation omitted]).

First, the Landlord argues that Namdor cannot satisfy the first requirement because it is not the named tenant on the lease and does not hold a commercial lease. As proof that Namdor is not the successor-in-interest to Gristedes, Inc., the Landlord relies on the parties' October 25, 2006 renewal letter that references Gristede's Supermarkets, Inc., not Namdor. The Landlord also points to Ms. Pankow's affirmation as a judicial admission that Gristedes, Inc., and not Namdor, is the tenant. However, Namdor submits a 1997 certificate of merger demonstrating that Gristedes's Supermarkets Inc. became Gristedes Operating Corp., and according to a 2000 certificate of merger, Gristedes's Operating Corp. was merged into Namdor, Inc. Therefore, Namdor Inc. d/b/a Gristedes's Supermarkets has established with unassailable documentary proof that it is the commercial tenant, holds the commercial lease, and thus, the proper party to initiate this action.[1]

The court finds that Namdor has also satisfied additional three elements necessary for a Yellowstone Injunction. Namdor received the March 3, 2017 Notice to Cure addressed to Gristedes from the landlord which threatens termination of the lease. Namdor timely requested injunctive relief prior to the termination of the lease. Finally, Mr. D'Amico established that Namdor is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises.

The Landlord objects that as a matter of equity, the injunction should be denied because Namdor owes $521,238.42 in rental arrears. The court rejects the Landlord's

[1]The court is troubled by Namdor's repeated use of the name Gristedes instead of its own. However, if there was fraud on the court, as the Landlord proposes, it was in Civil Court. Accordingly, the court will communicate this decision to that court.

reliance on *Second Source Funding LLC v Yellowstone Capital LLC*, 144 AD3d 445 (1st Dept 2016) for the proposition that there is a fifth requirement for a Yellowstone injunction, namely "the moving party must be in good standing under the lease, and cannot be liable for rental arrears due and owing thereunder." In spite of defendant's name, that case involves breach of contract for misappropriation of trade secrets. While it is true for a breach of contract claim that plaintiff must allege that it is in good standing because it has performed under the contract, there is no such requirement in the legion of Yellowstone Injunction cases. This court is not prepared to change the established law. (*First Nat'l Stores, Inc. v Yellowstone Shopping Center, Inc.*, 21 NY2d 630 [1968].)

The Landlord requests a bond as security "to reimburse the defendant for damages sustained if it is later determined that the preliminary injunction was erroneously granted." (*Margolies v Encounter, Inc.*, 42 NY2d 475, 477 [1977] See CPLR 6312 [b]). Namdor objects that its improvements of over $4,000,000 since 2000 secure the Landlord in the event that the Yellowstone is improvidently granted. Eighteen-year-old improvements are likely to be demolished if the lease expires, and thus, they do not protect the Landlord. However, the Landlord fails to identify the harm it would incur if the Yellowstone is improvidently granted. Indeed, if the lease expires, the grocery store will be evicted and the offensive cooling tower will be inoperative. Further, this court will not interfere with the expedited nonpayment proceeding in Civil Court. Thus, this request must be denied.

Accordingly, it is hereby

ORDERED that, until further order of this court, the operation and effect of

defendant Boulevard Retail LLC's Notice to Cure dated March 3, 2017 is tolled, and defendants are enjoined and stayed from taking any further steps or actions of any kind to (1) recover possession of the leased premises or (2) cancel or terminate the lease based upon the notice dated March 3, 2017, and defendants are prohibited from serving any notices of default, cancellation and/or termination based upon the same alleged defaults under the lease and it is further

ORDERED, that all parties shall appear for a conference on April 26, 2018 at 10:30 a.m.

DATED: 3/23/18

ENTER:

Andrea Masley, J.S.C.

HON. ANDREA MASLEY