

Citiwindows LLC v 135 Kent Ave. Mgt. Corp.

2019 NY Slip Op 31826(U)

June 3, 2019

Supreme Court, Kings County

Docket Number: 503329/19

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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CITIWINDOWS LLC,

Plaintiff,

Decision and order

- against -

Index No. 503329/19

135 KENT AVENUE MANAGEMENT CORP.,

Defendant,

ms # 1
June 3, 2019

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking a Yellowstone injunction. The defendant has opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments, this court now makes the following determination.

On January 22, 2003 the plaintiff tenant entered into a lease with landlord concerning the rental of space located at 135 Kent Avenue in Kings County. A notice to cure was served on March 5, 2019 alleging six defaults. The first two defaults allege the plaintiff failed to maintain sufficient insurance. Further defaults allege the plaintiff failed to pay real estate taxes, failed to indemnify the landlord in a New York State Supreme Court action and an OATH action, failed to use the premises for commercial purposes only and failed to reimburse the landlord for various systems mandated by the New York State Department of Environmental Conservation. The plaintiff has moved seeking a Yellowstone injunction arguing either the noted defaults are baseless or that in any event

they can readily be cured.

Conclusions of Law

A Yellowstone injunction is a remedy whereby a tenant may obtain 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. Assocs., 93 NY2d 508, 693 NYS2d 91 [1999], First National Stores v. Yellowstone Shopping Center Inc., 21 NY2d 630, 290 NYS2d 721 [1968]). For a Yellowstone injunction to be granted the Plaintiff, among other things, must demonstrate that "it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises" (Graubard, supra).

Thus, a tenant seeking a Yellowstone must demonstrate that: (1) it holds a commercial lease, (2) it has received from the landlord a notice of default, (3) its application for a temporary restraining order was made prior to expiration of the cure period and termination of the lease, and (4) it has the desire and ability to cure the alleged default by any means short of vacating the premises (see, Xiotis Restaurant Corp., v. LSS Leasing Ltd. Liability Co., 50 AD3d 678, 855 NYS2d 578 [2d Dept., 2008]).

Many of the defaults are disputed by the plaintiff as constituting defaults. Thus, the plaintiff does not assert that it unequivocally is unwilling to cure any defaults (Metropolis Westchester Lanes Inc., v. Colonial Park Homes Inc., 187 AD2d 492, 589 NYS2d 570 [2d Dept., 1992]), but rather no such defaults exist. Therefore, the court will examine the defaults and if such are found to exist, the plaintiff will undoubtedly cure them (see, ERS Enterprises, Inc., v. Empire Holdings LLC, 286 AD2d 206, 729 NYS2d 23 [1st Dept., 2001]).

Concerning the defaults the plaintiff did not maintain sufficient insurance, the plaintiff has submitted numerous insurance documentation that appears to render moot the specific allegations of the defaults. To the extent any information is missing the plaintiff shall have thirty days from receipt of this order to supplement, if necessary, any missing insurance information.

Likewise, concerning the default the plaintiff did not pay taxes, the plaintiff has submitted information that demonstrates all taxes have been paid. To the extent any information is missing the plaintiff shall have thirty days from receipt of this order to supplement, if necessary, any missing tax information.

Concerning the default the plaintiff has failed to indemnify the defendant in a New York State Supreme Court action and a proceeding before the Office of Administrative Trials and Hearings Proceedings (OATH Proceeding). First, the OATH proceeding was resolved by stipulation on December 19, 2014. While it is true the OATH Proceeding concerned residential tenants and such tenants preceded the sixth modification of the contract the landlord has not presented any evidence of any indemnification to which they are entitled. Thus, the tenant acknowledges they are liable to indemnify for any and all claims, however, the defendant has not presented any such claim at this juncture. Similarly, the New York State Supreme Court action is still pending and no determination has yet been made. Thus, there is no indemnification which is due which the plaintiff has refused to pay. Indeed, as noted "undeniably, Plaintiff agreed, as Tenant, to indemnify Defendant against any and all claims" (Reply Affirmation, § 10). Thus, there can be no violation requiring plaintiff to cure since no indemnification is due. This premature claim is consequently invalid and is dismissed.

Concerning the default regarding reimbursement for the remediation there is a question of fact whether the tenant is responsible for those costs incurred. The tenant asserts the

environmental issue which led to the remediation was caused by the landlord and thus not the tenant's responsibility. Thus, while paragraph 67 of the lease the tenant is responsible for many defects, paragraph 57 of the lease states the landlord is responsible for its own negligent or wilful acts. Thus, there are questions whether the tenant is responsible for any remediation. This issue must be explored through discovery and at this juncture the motion seeking a Yellowstone is granted.

The landlord has alleged that the tenant has illegally converted the rental space from commercial use to a mix of commercial and residential use. The landlord concedes that during December 2015 the parties entered into a sixth modification of the lease which amended the lease to provide that "Tenants shall use and occupy the demised premises for and may subdivide for residential or commercial use and same shall be legal under the new Certificate of Occupancy approved on March 14, 2014" (see, Sixth Modification of Lease, page 2). The landlord has not presented any argument why that modification should not be recognized as valid. The landlord does argue that pursuant to paragraph 70 of the lease "Tenant warrants and represents that Tenant will use the demised premises for commercial purposes only and will not reside in


the building nor permit any part of the demised premises to be used for residential purposes" (see, §70 Rider to Lease). However, the first sentence of Section 70 states that "Tenant shall not use or occupy the premises or permit them to be used or occupied for any purpose except that purpose expressly authorized in paragraph 2 of this lease" (id). Thus, since paragraph 2 was amended that necessarily amended paragraph 70 of the rider as well rendering the mixed use of the property sanctioned under the lease. Therefore, no such violation exists.

Therefore, based on the foregoing all the defaults noted are dismissed, except for the default concerning remediation, provided the plaintiff satisfactorily presents evidence regarding insurance and taxes. The default concerning remediation is not dismissed and must proceed to discovery. The motion seeking a Yellowstone injunction is granted as to that default. The request for a bond is denied.

So ordered.

ENTER:

DATED: June 3, 2019
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC

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 KINGS COUNTY CLERK
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