Garden City Park, LLC v Frog Hollow Props., LLC
2019 NY Slip Op 33869(U)
December 12, 2019
Supreme Court, Nassau County
Docket Number: 613917/19
Judge: Thomas Feinman

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

Present:
Hon. Thomas Feinman
Justice

GARDEN CITY PARK, LLC,

Plaintiff,

- against -

FROG HOLLOW PROPERTIES, LLC, MARILYN R. TWYMAN IRREVOCABLE TRUST and JOHN W. RHODES CREDIT SHELTER TRUST,

Defendants.

TRIAL/IAS PART 5
NASSAU COUNTY

INDEX NO. 613917/19

MOTION SUBMISSION DATE: 10/24/19

MOTION SEQUENCE NO. 1

The following papers read on this motion:

Notice of Petition and Affidavits.....	X
Order to Show Cause.....	X
Answer and Affirmation in Opposition.....	X
Memorandum of Law in Opposition.....	X
Reply Affirmation.....	N/A

Relief Requested

The plaintiff/petitioner Garden City Park, LLC (hereinafter "GCP"), moves by way of Order to Show Cause for an order, inter alia, granting an injunction tolling the time in which to cure any alleged defaults and staying any Landlord/Tenant enforcement proceedings between the parties. The defendants/respondents Frog Hollow Properties, LLC, Marilyn R. Twyman Irrevocable Trust and John W. Rhodes Credit Shelter Trust (hereinafter "Frog Hollow") submit a memorandum of law in opposition. GCP submits a reply affirmation.

Background

The instant action stems from a ground lease (hereinafter "Lease") between GCP as tenant and Frog Hollow as landlord. GCP alleges that the Lease may be improperly terminated due to harassing tactics of Frog Hollow. The premises is a shopping center with various commercial establishments which GCP sub-leases to store owners.

At issue are paragraphs 33, 38, 39, and 40 of the Lease. Paragraph 80 of the Lease provides that "[i]n the event that any controversy arises between [Frog Hollow] and [GCP]... [it shall] be referred for decision by arbitration in Nassau County, New York, in accordance with the Commercial Arbitration Rules." However, no application has been made to compel arbitration (see CPLR § 7503).

Under paragraph 33 of the Lease, GCP agreed to comply with the laws, rules, and regulations of any governmental entity with jurisdiction over the premises. Pursuant to paragraph 38 of the Lease, GCP is obligated to maintain insurance policies with certain specific parameters. Under paragraph 39 of the Lease, GCP agreed to deliver certificates of insurance as well as the original policies to the landlord.

Paragraph 40 of the Lease, as amended, provides that "tenant may... make any alterations... to the demised premises... provided: (3) [t]hat the same shall be approved in writing by the Landlord (which approval is not to be unreasonably withheld) if the estimated cost of any single alteration... shall be in excess of the sum of [two hundred thousand dollars]." Paragraph 40(A)(5) of the Lease provides that, if the cost of an alteration exceeds two hundred thousand dollars, GCP shall provide the landlord with "a surety company completion bond recognized by the Superintendent of Insurance of the State of New York guaranteeing the completion of such work, free and clear of all liens and encumbrances, in accordance with plans and specifications, which shall be first submitted to and approved in writing by Landlord, which such approval of the Landlord shall not be unreasonably withheld."

Frog Hollow provided GCP with a Notice to Cure dated September 23, 2019, alleging six violations of the Lease: (1) GCP performed an alteration with an estimated cost over $200,000.00 without prior written consent of the landlord (see Lease paragraph 40[A][3]); (2) GCP failed to provide a surety completion bond guaranteeing the completion of work (see Lease paragraph 40[A][5]); (3) GCP allowed three summonses to be issued against the premises resulting in outstanding violations (see Lease paragraph 33); (4) GCP allowed permit number 2016-107449-bp to expire without closing out said permit (see Lease paragraph 33); (5) GCP failed to maintain proper insurance (see Lease paragraph 38); and (6) GCP failed to deliver certain insurance policies with proof of payment (see Lease paragraph 39). GCP claims that, if it is found to be in violation of any provisions of the subject lease, it is prepared and able to cure any such defects.

Applicable Law

"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 of the lease" (*225 Butler, Assoc., LLC v. 225 Butler, LLC*, 173 A.D.3d 649, quoting *JT Queens Carwash, Inc. v. 88-16 N. Blvd., LLC*, 101 A.D.3d 1089). A party requesting a Yellowstone injunction must demonstrate that: (1) it holds a commercial lease; (2) it received from the landlord either a notice of default, notice to cure, or a threat of termination of the lease; (3) it requested injunctive relief prior to the termination of the lease [or cure period];

and (4) it is prepared and maintains the ability to cure the alleged default[s] by any means short of vacating the premises (see *Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assoc.*, 93 N.Y.2d 508).

Discussion

As a preliminary matter, GCP's reply affirmation, which was improperly submitted on this Order to Show Cause, will not be considered by this Court.

GCP contends that certain portions of the Notice to Cure are not applicable, such as the summonses issued against the premises because they are not in the nature of outstanding, ongoing violations. GCP additionally argues that it had already cured the issue with regard to permit number 2016-107449-bp. GCP further provides copies of insurance policies, which it claims were properly maintained and delivered to Frog Hollow in compliance with paragraphs 38 and 39 of the Lease. If any such insurance coverage is insufficient, GCP claims that it is willing and able to retroactively cure any deficiency regarding past coverage.

Last, GCP claims that Frog Hollow wrongfully combined three projects, each with estimated costs under the $200,000.00 threshold, in order to concoct purported violations of paragraph 40 of the Lease. GCP alleges that these three subtenants made separate applications to the Building Department for the alterations at issue, but does not provide any evidence of such separate applications. In any event, GCP pledges to cure any default stemming from it's failure to obtain Frog Hollow's approval for the subject project.

In support of its position, GCP provides the affidavit of Ernst A. Bell, Vice President and Associated General Counsel for Regency Centers LP, the sole member and manager of GCP. Mr. Bell provides various explanations regarding the allegations contained in the subject Notice to Cure, and avers that GCP is willing and maintains the ability to cure any outstanding defects.

In sum, GCP argues that Frog Hollow has been engaging in a pattern of harassment, which includes the allegations contained in the subject Notice to Cure, as an attempt to force GCP to renegotiate the Lease. As such, GCP claims that Frog Hollow should be prevented from commencing eviction proceedings.

In opposition, Frog Hollow argues that the violations regarding the subject project and insurance policies are incurable. However, contrary to Frog Hollow's contentions, GCP has offered to obtain retroactive, rather than prospective, changes to insurance policies in order to ensure there are no potential gaps in coverage (see *Bliss World LLC v. 10 W. 57th St. Realty LLC*, 170 A.D.3d 401). In addition, while Frog Hollow has provided evidence demonstrating that GCP likely violated paragraph 40 of the Lease, Frog Hollow failed to demonstrate that GCP is unwilling or unable to cure any unauthorized alterations (see *Britti Corp. v. Perry Thompson Third LLC*, 26 A.D.3d 235; see also *Khatari v. Shami*, 35 Misc.3d 1211, citing *ERS Enters. v. Empire Holdings, LLC*, 286 A.D.2d 206).

In light of the foregoing, GCP should be afforded the opportunity to cure the defects enumerated in the Notice to Cure (see *Graubard Mollen Horowitz Pomeranz & Shapiro*, *supra*).

Conclusion

Accordingly, it is hereby

ORDERED that the plaintiff/petitioner's motion for a Yellowstone injunction is granted, and it is further

ORDERED that the period in which plaintiff/petitioner can cure any defaults under the Lease, as referenced in the Notice to Cure dated September 23, 2019, is hereby tolled, and the defendants/respondents are restrained from evicting plaintiff/petitioner based upon such Notice to Cure, pending the determination of the issues herein.

ENTER:

J.S.C. HON. THOMAS FEINMAN

Dated: December 12, 2019

ORIGINAL

ENTERED
DEC 16 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE