Lex Retail, LLC v 71st St.-Lexington Corp.
2020 NY Slip Op 31457(U)
May 7, 2020
Supreme Court, New York County
Docket Number: 151392/2020
Judge: John J. Kelley

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **IAS MOTION 56EFM**

Justice

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LEX RETAIL, LLC,

Plaintiff,

- v -

71ST STREET-LEXINGTON CORPORATION,

Defendant.

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INDEX NO. 151392/2020

MOTION DATE 02/07/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, and 43

were read on this motion to/for JUDGMENT – PRELIMINARY INJUNCTION.

Pursuant to a 30-year commercial lease, the plaintiff corporation leases commercial space in a building owned by the defendant, 71st Street-Lexington Corporation, and managed by Douglas Elliman Real Estate (DERE). The lease obligates the plaintiff to maintain liability insurance that names both the defendant and DERE as additional insureds. After the defendant served it with a 15-day notice to cure for failure to maintain such liability insurance, the plaintiff commenced this action and made the instant motion for a *Yellowstone* injunction (*First National Stores, Inc. v Yellowstone Shopping Center, Inc.*, 21 NY2d 630 [1968]), seeking to stay termination of the lease and to enjoin the defendant from commencing or continuing any attempts to terminate the lease or evict the plaintiff from the leased premises pending disposition of the action. In the order to show cause initiating the motion, dated February 7, 2020, this court temporarily restrained the defendant from commencing or continuing any such attempts, pending hearing of the motion.

The defendant cross-moves pursuant to CPLR 3211(a)(7) to dismiss the complaint. The plaintiff opposes the cross motion.

The plaintiff's motion for a *Yellowstone* injunction is granted, and the defendant's cross motion to dismiss the complaint is denied.

"The purpose of a Yellowstone injunction is to allow a tenant confronted by a threat of termination of the lease to obtain a stay tolling the running of the cure period so that after a determination on the merits, the tenant may cure the defect and avoid a forfeiture of the leasehold" (*Hopp v Raimondi*, 51 AD3d 726, 727 [2d Dept 2008]). An applicant for a *Yellowstone* injunction must establish 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"

(*Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc.*, 93 NY2d 508, 514 [1999], quoting *225 E. 36th Street Garage Corp. v 221 E. 36th Owners Corp.*, 211 AD2d 420, 421 [1st Dept 1995]; *see 3636 Greystone Owners, Inc. v Greystone Bldg.*, 4 AD3d 122 [1st Dept 2004]).

> "Since courts cannot reinstate a lease after the lapse of time specified to cure a default, an application for Yellowstone relief must be made not only before the termination of the subject lease--whether that termination occurs as a result of the expiration of the term of the lease, or is effectuated by virtue of the landlord's proper and valid service of a notice of termination upon the tenant after the expiration of the cure period--but must also be made prior to the expiration of the cure period set forth in the lease and the landlord's notice to cure"

(*Korova Milk Bar of White Plains, Inc. v PRE Props., LLC*, 70 AD3d 646, 647 [2d Dept 2010] [citation and internal quotations marks omitted]). It is well settled that a plaintiff need not admit responsibility for the alleged default set forth in a notice to cure in order to establish entitlement to relief under *Yellowstone*, provided that the plaintiff remains willing and able to cure, should a default be found (*see Artcorp Inc. v Citirich Realty Corp.*, 124 AD3d 545 [1st Dept 2015]; *Boi To Go, Inc. v Second 800 No. 2 LLC*, 58 AD3d 482 [1st Dept 2009]). If the default is not susceptible to cure, the *Yellowstone* application will be denied (*see Zona, Inc. v Soho Centrale,* 270 AD2d 12, 14 [1st Dept 2000]). Nonetheless, a tenant is not required to prove its ability to

cure prior to obtaining a Yellowstone injunction (*see WPA/Partners v Port Imperial Ferry Corp.*, 307 AD2d 234, 237 [1st Dept 2003]).

The defendant's cross motion to dismiss the complaint must be denied, as the complaint states a valid cause of action for declaratory relief (*see DiGiorgio v 1109-1113 Manhattan Ave. Partners, LLC*, 102 AD3d 725, 728 [2d Dept 2013]; *Matter of Tilcon, Inc. v Town of Poughkeepsie*, 87 AD3d 1148, 1150 [2d Dept 2011]; *Fillman v Axel*, 63 AD2d 876, 876 [1st Dept 1979]), and the defendant has not established either that the plaintiff materially breached the terms of the lease or that the default is not susceptible of cure if there were a breach.

On or about October 30, 2019, Lenore Somerstein commenced a personal injury action against, among others, the defendant and Vesta New York, LLC (*see Somerstein v Walter & Samuels, Inc.*, Sup Ct, N.Y. County Index No. 161112/19). The defendant asserts that it learned that the plaintiff was in default under the terms of the lease when it tendered Somerstein's claim against it to the plaintiff's insurer, and the insurer declined to defend it. The defendant now argues that the plaintiff defaulted under the terms of the lease because the plaintiff did not maintain required insurance naming the defendant and DERE as additional insureds, and that a default in insurance coverage requirements under a commercial lease is not curable as a matter of law. The plaintiff denies that it defaulted under the lease and that it nonetheless stands ready, willing, and able to make the defendant whole if it is found in default, thus curing any alleged breach of the lease.

The plaintiff, Lex Retail, LLC, is a part of a consortium of stores operating under the umbrella of Vesta New York, LLC, and The Vesta Group, LLC. According to the plaintiff's managing member, Mark Blau, the plaintiff's insurer had issued a liability policy to The Vesta Group, LLC. He submits documentary evidence, in the form of an insurance certificate, demonstrating that the insurer indeed listed the defendant, as well as the plaintiff, as additional named insureds under the policy. Blau asserts that, when the defendant requested a defense and indemnification from the insurer in connection with the *Somerstein* action, the insurer

declined to provide a defense to the claim, but did not disclaim coverage; rather, he asserts that the insurer remained obligated to indemnify the defendant from any loss arising from the subject incident. He thus contends that the plaintiff satisfied its obligations under the lease by securing appropriate insurance naming the defendant as an additional insured, and that any dispute over whether the insurer would defend the defendant in the *Somerstein* action must be resolved in an appropriate declaratory judgment action. Blau further promised the defendant that, if the defendant became or remained obligated bear its own costs for the defense of the *Somerstein* action, the plaintiff would reimburse the defendant for those costs.

Although DERE was not named as an additional insured on the subject certificate, Blau asserts that the omission was caused by a clerical error, and not by the plaintiff's failure to request DERE's inclusion. Moreover, DERE was not named as a defendant in the *Somerstein* action, and Blau explains that insurance certificate has since been amended to include DERE as an additional named insured.

A promise to secure insurance in the future to insure against prospective losses does not constitute a cure of a tenant's breach of an insurance securement provision set forth in a commercial lease (*see 117-119 Leasing Co. v. Reliable Wool Stock*, 139 AD3d 420 [1st Dept 2016]; *166 Enters. Corp. v I G Second Generation Partners, L.P.*, 81 AD3d 154, 158 [1st Dept 2011]; *Kim v Idylwood*, 66 AD3d 528 [1st Dept 2009]). Where, as here, however, a plaintiff tenant agrees either to bond the defendant for losses incurred as a result of a purportedly insured claim or states that it can secure retroactive insurance to protect the landlord, a cure is possible (*see Agatha, LLC v Heller,* 2018 NY Slip Op 32636[U] [Sup Ct, N.Y. County, Oct. 10, 2018]; *Discount Columbia LLC v Bogopa-Columbia, Inc.*, 2017 NY Slip Op. 32934[U] [Sup Ct, Kings County 2017]; *Great Wall 384 Inc. v 385 Grand St. Hous.*, 2016 NY Slip Op 32942[U] [Sup Ct, N.Y. County, Sept. 29, 2016] [Cohen, J.]; *Federated Retail Holdings, Inc. v Weatherly 39th St., LLC*, 32 Misc 3d 247, 254 [Sup Ct, NY County 2011], *affd* 95 AD3d 605 [1st Dept 2012]). This court thus declines to follow contrary authority holding that a failure to secure

appropriate insurance coverage is incurable as a matter of law (*see Kramer v Bohensky*, 2010 NY Slip Op 51089[U], 27 Misc 3d 1237[A] [Sup Ct, Kings County, Jun. 22, 2010]).

The court concludes that the plaintiff raises issues of fact as to whether it had materially breached the terms of the subject lease, inasmuch as it has demonstrated that it secured an insurance policy naming the defendant as an additional insured, that the failure to name DERE as an additional insured on the insurance certificate occurred through no fault of its own, and that DERE, as the managing agent, implicitly approved the certificate of insurance and did not direct the plaintiff to seek an amendment thereof at any time prior to being placed on notice of the commencement of the *Somerstein* action. The plaintiff also raises issues of fact as to whether the absence of DERE as a named insured constituted a material breach, inasmuch as no claim has been asserted against DERE in the *Somerstein* action, the plaintiff has since secured a certificate naming DERE as an insured, and it suggests that it may be able to secure retroactive insurance for DERE for the pending *Somerstein* action. Moreover, the plaintiff promises to reimburse the defendant and make it whole for defense costs arising from its insurer's refusal to defend the defendant in the *Somerstein* action.

In light of the foregoing, the plaintiff established its entitlement to a *Yellowstone* injunction by demonstrating that it holds a commercial lease, it received a notice to cure from the defendant, it requested *Yellowstone* relief prior to both the termination of the lease and the cure period, and it either was not in default of the terms of the lease or that it remains willing to cure any default found by any means short of vacating the premises.

The court notes that, in any event, under the most likely scenario, if the plaintiff becomes liable to Somerstein in the underlying personal injury action, the plaintiff's insurer will cover the entirety settlement or judgment, and neither the defendant nor DERE will bear any personal responsibility for the injuries.

Although the plaintiff's motion also, by its terms, seeks a declaration that it is not in default under the lease, or that it cured any such default, that branch of the motion is premature,

as the court may not determine, on papers alone, whether such default has occurred, or whether the plaintiff has cured any such default.

The defendant's remaining arguments are without merit.

Accordingly, it is

ORDERED that the plaintiffs' motion is granted to the extent that its application for a *Yellowstone* injunction is granted and, pending final adjudication of this matter, the defendant and its agents are hereby enjoined and restrained from terminating or cancelling the plaintiff's lease and from taking any action to evict the plaintiff from the premises based upon the grounds alleged in the subject Notice to Cure Default, dated January 16, 2020, and the plaintiff's time to cure the alleged defaults under the lease is hereby tolled, and the plaintiff's motion is otherwise denied; and it is further,

ORDERED that the plaintiff shall comply with all obligations under the lease, including the obligation to pay rent and any additional rent in a timely manner; and it is further,

ORDERED that the defendant's cross motion to dismiss the complaint is denied.

This constitutes the Decision and Order of the court.

5/7/2020
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:		**CASE DISPOSED**			[X]	**NON-FINAL DISPOSITION**	
		GRANTED	[ ]	**DENIED**	[X]	**GRANTED IN PART**	[ ] **OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	[ ] **REFERENCE**