

Tuckahoe Realty, LLC v 241 E. 76 Tenants Corp.

2020 NY Slip Op 33629(U)

October 30, 2020

Supreme Court, New York County

Docket Number: 656414/2019

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 42

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TUCKAHOE REALTY, LLC

Plaintiff,

DECISION AND ORDER

- v -

Index No. 656414/2019

241 EAST 76 TENANTS CORP.,

MOT SEQ 001

Defendant.

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NANCY M. BANNON, J.:

I. BACKGROUND

This action presents the issue of whether a commercial tenant may be charged for cold water usage when the lease provides that the landlord shall pay for hot water and is silent as to cold water. The plaintiff-tenant, Tuckahoe Realty LLC (Tuckahoe) is a limited liability company that operates a business subleasing retail space in the building owned by the defendant-landlord 241 East 76 Tenants Corp. (241 East). On September 17, 2019, 241 East served Tuckahoe with a notice of default relating to, *inter alia*, its failure to pay additional cold-water charges under the lease in the sum of \$109,787.52.¹

¹ The notice of default also advised Tuckahoe that it was in default of its lease for either performing or permitting its subtenants to perform alterations on the building without 241 East's consent and required Tuckahoe to inform 241 East in writing when the alterations would be remediated and that, if Tuckahoe failed to diligently perform the remediation work in a timely manner, 241 East may elect to perform such work at Tuckahoe's expense. This alleged default is not at issue in the instant motion.

The notice of default provided that if Tuckahoe did not pay the outstanding balance by October 31, 2019, 241 East would proceed to terminate the lease. Tuckahoe 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]) to stay termination of the lease, toll the period in which the tenant may cure its alleged default under the lease, and enjoin 241 East from commencing or continuing any attempts to terminate the lease or evict Tuckahoe from the leased premises on those grounds pending determination of the action. 241 East opposes the motion. The motion is granted.

II. BACKGROUND

The subject premises, the ground-floor retail space of the building located at 241 East 76th Street in Manhattan, is the subject of a long-term commercial lease and rider dated November 25, 1984. The lease and rider are between 241 Associates, the predecessor in interest to 241 East, and DSJFMZ Realty Corp., the predecessor in interest to Tuckahoe. After a series of three amendments, the lease is currently scheduled to expire on November 30, 2045. Paragraph 28(c) of the lease provides that 241 East shall provide "water for ordinary lavatory purposes" but further provides that if Tuckahoe "uses or consumes water

for any other purposes or in unusual quantities of which the landlord shall be the sole judge, [then] the landlord may install a water meter at the tenant's expense...and tenant shall pay for water consumed or shown on said meter as additional rent." Paragraph 37 of the rider to the lease modified this portion of the lease, providing that heat and hot water were to be included in the base rent.

In October 2017, following a change in composition of the building's board of managers and the hiring of a new building management company, 241 East determined that Tuckahoe and its subtenants were using unusually large quantities of cold water and new water meters were installed. Following the meter installation, 241 East began invoicing Tuckahoe for its cold-water usage. Tuckahoe disclaimed any obligation to pay the additional invoices contending that as of 2001 it had never been required to pay for cold water and that the invoices constituted an impermissible double billing as water usage was used in the defendant-landlord's calculation for its base rent. Tuckahoe also claimed that the water charges were so excessive that they must be in error. Following Tuckahoe's failure to pay these outstanding water charges, 241 East sent the September 17, 2019 notice of default demanding the payment of the \$109,787.52 in additional water charges by October 31, 2019, leading to the

Tuckahoe's application for a Yellowstone injunction and temporary restraining order.

Tuckahoe filed the instant motion on October 30, 2019, presented it to the court on October 1, 2019, and was ultimately heard November 1, 2019. On November 1, 2019 this court granted Tuckahoe's request for a temporary restraining order pending the hearing of the motion on December 18, 2019.

At the December 18, 2019 hearing the parties stipulated that Tuckahoe would retransmit the November and December rent payments it had made and which were refused by 241 East and continue its monthly rent obligations during the pendency of this matter, excepting the disputed cold water charges. The parties also agreed to cooperatively engage the services of a plumbers or other experts to investigate the cause of the unusually large increase in water usage and take necessary steps to remediate any problem. As a result, Tuckahoe reported that a faulty valve in the refrigeration system of the café, a subtenant of Tuckahoe, was repaired in January 2020. 241 East hired its own expert to inspect the premises and was of the opinion that the excess water usage was properly metered and is being caused by multiple improper water-cooled HVAC systems installed and used by Tuckahoe's subtenants.

III. DISCUSSION

The purpose of a Yellowstone injunction is to maintain the *status quo* so that the tenant served with a notice to cure an alleged lease violation may challenge the propriety of the landlord's notice while protecting a valuable leasehold interest. See Garland v Titan W. Assocs., 147 AD2d 304 (1st Dept. 1989) citing First National Stores, Inc. v Yellowstone Shopping Center, Inc., *supra*. The grant of Yellowstone relief tolls the running of the cure period so that in the event of an adverse determination on the merits the tenant may still cure the defect and avoid a lease forfeiture. See Post v 120 E. End Ave. Corp., 62 NY2d 19 (1984). When granting a Yellowstone injunction courts have generally accepted less than the showing normally required for the grant of preliminary injunctive relief. See *id.*

The 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 at 514, quoting 225 E. 36th Street Garage Corp. v 221 E. 36th Owners

Corp., 211 AD2d 420, 421 (1st Dept 1995). "These standards reflect and reinforce the limited purpose of a Yellowstone injunction: to stop the running of the applicable cure period." Id. As such, it has further been held that a Yellowstone injunction is inappropriate where the cure period has expired. See 166 Enterprises Corp. v I G Second Generation Partners, L.P., 81 AD3d 154 (1st Dept. 2011). Moreover, 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).

Here, it is undisputed that Tuckahoe holds a commercial lease and received a notice of default from 241 East, satisfying the first and second elements. Tuckahoe also establishes that it requested injunctive relief prior to the termination of the lease and the expiration of its' period to cure. Tuckahoe filed the instant motion for a Yellowstone injunction, on October 30, 2019. According to Tuckahoe's counsel, the application was made before this court during the afternoon on October 31, 2019, the final day of the cure-period designated by 241 East. At the time the application was presented to the court, counsel for both

parties were told that there was insufficient time to hear the argument prior to the closing of the courtroom and that the application would be heard the next day. This is sufficient to establish that Tuckahoe requested relief prior to the termination of the lease or the expiration of the cure period.

While 241 East purportedly mailed a notice of termination on the morning of November 1, 2019, the day that the application was ultimately heard, it is without effect given that Tuckahoe's application was timely made prior to the termination of the lease or the running of the applicable cure period. The decisional authority relied upon by 241 East is inapposite as these cases hold only that a motion for a Yellowstone injunction is untimely if it is filed and presented to the court after the cure period has ended and the lease has been terminated. See e.g., Three Amigos SJL Rest., Inc. v 250 W. 43 Owner LLC, 144 AD3d 490 (1st Dept. 2016); KB Gallery LLC v 875 W. 181 Owners Corp., 76 AD3d 909 (1st Dept. 2010); 319 Smile Corp. v Forman Fifth, LLC, 37 AD3d 245 (1st Dept. 2007). That is not the case here.

Tuckahoe also satisfies the fourth element by establishing that it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises. Tuckahoe submits the affidavit of Richard Scharf, a managing

member of Tuckahoe, in which he attests to Tuckahoe's willingness and ability to cure the default should it be required to pay the cold-water costs, particularly in light of the potential claims that may be brought against Tuckahoe by both 241 East and its subtenants were it to vacate the premises. Although 241 East argues that Scharf's affidavit is conclusory and fails to establish an ability to pay, it is sufficient for the purposes of the instant motion. See Jemaltown of 125th St., Inc. v Leon Betesh/Park Seen Realty Assocs., 115 AD2d 381 (1st Dept. 1985). Indeed, it is because Tuckahoe has demonstrated that it could pay the sums due if ultimately required to do so, that the court, upon the request of 241 East, is requiring Tuckahoe to hold all unpaid water charges, both past and future, in escrow pending a final determination. See Lexington Ave. & 42nd St. Corp. v 380 Lexchamp Operating, Inc., 205 AD2d 421 (1st Dept. 1994).

As such, Tuckahoe establishes its entitlement to a Yellowstone injunction.

Finally, 241 East asserts an argument that the instant application should be denied as its expert report states that the HVAC units being used by Tuckahoe's subtenants are improperly using cold water and therefore Tuckahoe is unlikely to prevail on the merits of its claim. Such an argument is not

relevant to the instant motion. In order to obtain a Yellowstone injunction, a plaintiff need not establish a probability of success on the merits or the other elements normally required for a preliminary injunction. See Jemaltown of 125th St., Inc. v Leon Betesh/Park Seen Realty Assocs., supra. Any competing expert opinions would be considered in subsequent proceedings.

IV. CONCLUSION

Accordingly, it is hereby,

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

ORDERED that, pending final adjudication of this matter, the defendant is hereby enjoined and restrained from terminating or cancelling the plaintiff's lease or from taking any further action to evict the plaintiff from the premises based upon its non-payment of the disputed cold-water charges and the cure period provided in the subject notice of default is tolled *on the condition that, within 20 days of service of a copy of this order with notice of entry, the plaintiff shall pay into an interest bearing escrow account to be maintained by the plaintiff's attorney all past disputed cold-water charges and*

shall deposit all future disputed charges into the same escrow account; and it is further,

ORDERED that the parties are to contact chambers on or before November 30, 2020 to schedule a preliminary/settlement conference.

This constitutes the Decision and Order of the court.

Dated: October 30, 2020

ENTER:



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON