SMG Auto. Holdings v AAF Real Estate, LLC
2021 NY Slip Op 30678(U)
March 4, 2021
Supreme Court, Kings County
Docket Number: 510650/20
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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SMG AUTOMOTIVE HOLDINGS AND ZACAHRY SCHWEBEL,

Plaintiffs, Decision and order

- against - Index No. 510650/20

AAF REAL ESTATE, LLC, KINGS AUTOMOTIVE HOLDINGS, LLC, GARY FLOM and VENIAMIN NILVA,

Defendants, March 4, 2021

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PRESENT: HON. LEON RUCHELSMAN

The defendant AAF Real Estate, the owner and landlord moves pursuant to CPLR §3212 seeking summary judgement regarding the first two causes of action. Further, the defendant seeks an order that a February 1, 2017 lease modification effectively modified the lease of October 2012 between AAF and Kings Automotive. The plaintiff opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments, this court now makes the following determination.

As recorded in a prior order, on February 7, 2017 the plaintiff entered into a sublease with sublessors Flom and Nilva, representatives of defendant Kings Automotive Holdings LLC concerning property located at 2318 Flatbush Avenue in Kings County. That sublease followed an asset sale agreement dated September 15, 2016 entered into between Kings and the plaintiffs. The defendant AAF Real Estate LLC is the owner and landlord of the property. Pursuant to the sublease the plaintiff secured the option to purchase the property and that option had been a key

component of the lease between Flom, Nilva and the landlord. Thus, the plaintiff paid monthly payments to the landlord. In early 2020 a dispute arose concerning the actual monthly rental amount and other issues. The landlord informed plaintiff that a week before the sublease was executed the sublessors and the landlord amended the lease which increased the rent, cancelled the option to purchase the property in year nine of the lease, required the tenant to pay for the refurbishing of a trailer on the property and pay for a guaranty. Indeed, on May 14, 2020 the landlord served a notice of default upon the plaintiff. The notice was based upon the plaintiff's failure to pay additional rent, the failure to pay to refurbish the trailer and the failure to provide a guaranty.

In the prior order the court concluded there were questions of fact whether modifications sent by counsel for Kings constituted a valid modification since paragraph 75 of prime lease prohibited modifications unless signed by "a duly authorized officer of the party to be charged" (see, Lease dated October 2, 2012, ¶75). The court held there were questions whether counsel for Kings was a duly authorized officer of Kings.

The motion seeking summary judgement is really a motion to reargue that determination. To be sure, the time in which to move to reargue has passed and thus the motion is addressed as one for summary judgement. However, the relief is the same,

namely a judicial determination the modification to the lease is valid and enforceable. The landlord argues that, contrary to the court's earlier determination, there are no questions of fact the email modification constituted a valid modification of the lease. In support of this argument the landlord cites to the affidavit of Veniamin Nilva part owner of Kings who acknowledges the modifications are only contained in an email by counsel. However, the affidavit of Mr. Nilva states that "to my knowledge, Gary Flom authorized Mr. Friedman to send this email on behalf of Kings Automotive Holdings LLC. Attached hereto as Exhibit B. It was our intention that this email be the sort of writing which would modify everyone's obligation under the lease, so long as Michael Ferraro gave his consent to enter into the sublease" (see, Affidavit of Veniamin Nilva, ¶11). That affidavit, which does not even definitively support the contention, can hardly conclusively satisfy paragraph 75 of the lease which, as noted, required execution by "a duly authorized officer of the party to be charged" (id). The landlord does not present any evidence that such a verbal authorization to send an email containing modifications rendered counsel the legal equivalent of a duly authorized officer. Essentially, the landlord is arguing that as long as a duly authorized officer instructed anyone to make any modifications on Kings' behalf then such modification would be valid. Thus, the landlord argues in conclusory fashion without

any support that "under any measure, the writing of a Kings authorized agent is equivalent to the signature of the principal himself and is sufficient to bind the Tenant" (see, Affirmation in Support, §22). The landlord argues that Kings has not disputed the effectiveness of the modification and that surely the plaintiff has no right to do so. The landlord argues that "there is no viable way for Kings to contest its obligation under the February 1, 2017 Modification, even if it chose to do that" (see, Affirmation in Reply ¶9). However, Kings has not responded to this motion and the landlord cannot pursue arguments not presented by Kings themselves.

Further, the doctrine of ratification is really another means by which to argue paragraph 75 was complied with in spirit but not in practice and that is sufficient as a matter of law. The court does not dispute Nilva's "knowledge" that Mr. Flom authorized Mr. Friedman, Kings' counsel, to agree to the modification. However, the same legal impediment still exists, namely whether that authorization is sufficient to satisfy the provisions of Paragraph 75 of the lease. Thus, it certainly may be true that such authorization is sufficient, following discovery and a trial, but the assertion is surely questionable at this juncture and thus inappropriate for summary determination.

In addition, any compliance on the part of the plaintiff

regarding the modification terms does not thereby transform counsel for Kings into a duly authorized officer, rather, as stated in the earlier decision, raises further questions of fact. Moreover, the plaintiff disputes the extra rent was paid because of the modification email. Indeed, Zachary Schwebel, a principal of the plaintiff submitted an affidavit wherein he denied any knowledge of the modification email and only discovered the increased rental payment upon conducting a routine review of its financials (see, Affidavit of Zachary Schwebel, ¶14-17). The landlord characterizes Mr. Schwebel's affidavit as an 'epiphany' contradicted by the plaintiff's payment history and that "there is no explanation of this conduct by Kings and SMG other that the volitional and knowing acceptance of the terms of the lease modification" (see, Affirmation in Support, ¶30). However, the affidavit of Mr. Schwebel is a factual assertion that directly contradicts the position of the landlord. Moreover, the fact the landlord believes the plaintiff's position in this regard "makes no sense" (see, Affirmation in Support, ¶30) does not provide any further basis to conclude no questions of fact exist. Consequently, there are surely questions of fact whether indeed the plaintiff ratified or acquiesced to the terms of the modification email.

Lastly, there is no estoppel argument which forecloses the plaintiff's opposition to this motion. The plaintiff was faced

with no other choice than to seek a Yellowstone to protect its interests and the court granted that request. Moreover, the court specifically noted in the prior order that if the plaintiff does not ultimately prevail they surely have the means and ability to cure any defaults. Its opposition to this motion is nothing more than an attempt to maintain the Yellowstone injunction. These positions are thus entirely consistent. The landlord has filed this motion seeking summary judgement but the ultimate relief amounts to the same result that was rejected in the prior decision, namely a dismissal of the Yellowstone injunction. Therefore, the plaintiff's opposition seeking to challenge the validity of the lease modification is the very same core position they have consistently maintained.

Therefore, based on the foregoing there are questions of fact whether the lease modification is valid. Consequently, the motion seeking summary judgement is denied.

So ordered.

ENTER:

DATED: March 4, 2021
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC