188 Ave. A Take Out Food Corp. v Lucky Jab Realty Corp.
2021 NY Slip Op 31224(U)
April 12, 2021
Supreme Court, New York County
Docket Number: 653967/2020
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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188 AVE. A TAKE OUT FOOD CORP. and TARIK FALLOUS

Plaintiffs,

- v -

LUCKY JAB REALTY CORP.,

Defendant.

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INDEX NO. 653967/2020

MOTION DATE 04/12/2021

MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 50, 53, 54, 55, 56, 57, 58, 59, 60, and 62 (Motion 002)

were read on this motion to/for REARGUMENT/CROSS MOTION FOR LEAVE TO AMEND COMPLAINT.

The defendant landlord (the landlord) moves pursuant to CPLR 2221(d) for leave to reargue its opposition to the motion of the plaintiff tenant (the tenant) for a *Yellowstone* injunction (*First National Stores, Inc. v Yellowstone Shopping Center, Inc.*, 21 NY2d 630 [1968]) that had been granted by order dated December 21, 2020. The tenant opposes the motion, and cross-moves pursuant to CPLR 3025(b) for leave to amend the complaint both to streamline its prior allegations and to add a cause of action for reformation of the underlying lease, based on an alleged one-digit mutual mistake in the lease's tax escalation provisions.

The landlord's motion is granted to the extent that leave to reargue is granted and, upon reargument, the court (a) adheres to its determination in the December 21, 2020 order granting the *Yellowstone* injunction, and (b) directs the tenant to post an undertaking in the sum of $7,500 as a condition of continuing the injunction, as such an amount is rationally related to the quantum of damages that the landlord would sustain were it to be determined that the injunction was wrongfully issued. The landlord's motion otherwise is denied. The tenant's cross motion is granted, the tenant is granted leave to serve an amended complaint in the form set forth in

Docket Entry No. 56, and that amended complaint is deemed served upon the landlord as of the date of entry of this order.

In addition, in accordance with L 2021, ch 73, this action is stayed until June 12, 2021 to give the tenant an opportunity to serve and file a declaration of hardship should it be so advised. Hence, the tenant's obligation to post the required undertaking is stayed until 20 days after June 12, 2021, or until July 2, 2021.

As explained in detail in the court's December 21, 2020 order, the tenant entered into a commercial lease with the landlord on May 1, 2017 for the purpose of operating an indoor dining restaurant in the landlord's premises. On March 16, 2020, Governor Andrew Cuomo issued Executive Order 202.3 that, in relevant part, suspended indoor dining within the State of New York until further notice to prevent the spread of the COVID-19 pandemic. In accordance with the Executive Order, the tenant suspended its indoor restaurant operations, and has not employed the premises for such purposes at least until November 2020. In particular, the tenant was compelled to shut its business due to the COVID-19 pandemic in March 2020, and partially reopened for take-out service in mid-May, but could not sustain its business, thus again closing down until mid-July, when it reopened solely for outdoor dining services.

During April 2020, the landlord, without express permission from the tenant, drew down the sum of $14,935 from the tenant's security deposit, and applied it to allegedly outstanding rent. In May 2020, and again in June 2020, July 2020, and August 2020, the landlord similarly drew down the sum of $15,383.05 each month from the tenant's security deposit and applied it to allegedly outstanding rent. On August 7, 2020, the landlord served a 15-day notice upon the tenant, demanding that the tenant replenish the security deposit, and notifying the tenant and its principal that "if Tenant fails to replenish the Security Deposit on or before August 24, 2020, Landlord will terminate this Lease pursuant to Article 17(1) of the Lease."

The tenant and its principal commenced this action on August 20, 2020, seeking a judgment (1) declaring that they did not owe rent to the landlord from March 2020 forward by

virtue of the fact that the premises were rendered partially unusable due to a "casualty," a term that was left undefined in the lease, but construed by the plaintiffs to include the state of emergency in New York engendered by the COVID-19 pandemic and consequent suspension of all indoor dining for several months and (2) directing the landlord to replenish the tenant's security deposit and pay a rent credit to the tenant, inasmuch as the terms of the subject lease did not permit the landlord to demand replenishment of the deposit from the tenant when the landlord drew it down.

As explained in the court's prior order, the court was without authority to permit the landlord to seek ejectment of the tenant from the subject leasehold by virtue of both the Governor's series of executive orders placing a moratorium on commercial evictions, a moratorium that lasted from March 20, 2020 until January 29, 2021, and Admin. Code of City of N.Y. (Ad Code) § 22-902(a), a local law that prohibits commercial landlords from engaging in commercial harassment of a commercial tenant that has been adversely affected by the COVID-19 pandemic. The court held that, in any event, the tenant established its entitlement to *Yellowstone* relief under common-law principles. The court now notes that, on March 9, 2021, and thus subsequent to the entry of its prior order, the Legislature codified the Governor's moratorium until May 1, 2021 (*see* L 2021, ch 73).

The landlord now argues that the issuance of a *Yellowstone* injunction presupposes that the tenant remain obligated to continue paying rent as a condition of the injunction. Although the court explained in its prior order that a tenant is not required to establish its ability to cure a default in its obligations under a commercial lease prior to obtaining a *Yellowstone* injunction, it neglected to explain that, unlike the general requirements for obtaining a preliminary injunction in other contexts, a tenant is not required to demonstrate a likelihood of success on the merits of its action in order to secure a *Yellowstone* injunction (*see Sokoloff Arts Found. Inc. v Nur Ashki Jerrahi Community*, _____AD3d_____, 2021 NY Slip Op 01524 [1st Dept, Mar. 16, 2021]; *TSI W. 14, Inc. v Samson Assoc., LLC*, 8 AD3d 51, 53 [1st Dept 2004]; *Herzfeld & Stern v Ironwood*

Realty Corp., 102 AD2d 737 [1st Dept 1984]). The court nonetheless analyzed and approved the tenant's contention that, even if it were obligated to make such a showing, it did so by, among other things, demonstrating that the pandemic constituted a "casualty" within the meaning of the subject lease that obviated its obligation to pay rent during the period of emergency.

Consequently, the court rejects the landlord's contention that the court erred in relieving the tenant of its rent obligations during the continuation of the emergency in accordance with the terms of a lease that was drafted by the landlord itself. Upon reargument, the court thus adheres to its determination granting the requested *Yellowstone* injunction to the tenant and its principal.

The landlord, however, correctly argues on this motion that, upon reargument, the court should require the tenant to post an undertaking as a condition of the continuation of the injunction (*see 61 W. 62nd Owners Corp. v Harkness Apt. Owners Corp.*, 173 AD2d 372, 372 [1st Dept 1991]; *see also Sokoloff Arts Found. Inc. v Nur Ashki Jerrahi Community*, 2021 NY Slip Op 01524]). The amount of the undertaking must be fixed in an amount that is "rationally related to the quantum of damages which [landlord] would sustain in the event that [tenant] is later determined not to have been entitled to the injunction" (*61 W. 62nd Owners Corp. v Harkness Apt. Owners Corp.*, 173 AD2d at 373; *see* CPLR 6212[b]; *Margolies v Encounter, Inc.*, 42 NY2d 475, 479 [1977]; *Weitzen v 130 E. 65th St. Sponsor Corp.*, 86 AD2d 511, 511 [1st Dept 1982]). In those *Yellowstone* cases where, unlike here, a tenant continues to be obligated to pay rent during the pendency of the injunction, it may be proper for a court to fix the undertaking in the amount of unpaid rent plus interest, or even in a multiple of the amount of unpaid rent (*see 61 W. 62nd Owners Corp. v Harkness Apt. Owners Corp.*, 173 AD2d at 372). Here, however, where the court has already determined that it is likely that the tenant will prevail on the merits of its claim that its rent obligation was obviated pursuant to the terms of the lease, the amount of the undertaking must reflect that conclusion. Hence, the court fixes the

undertaking in the sum of $7,500, a sum that is equal to approximately 50% of one month's rent under the lease.

While, under normal circumstances, a tenant's failure timely to post such an undertaking would result in the denial or dissolution and vacatur of the preliminary injunction, on March 9, 2021, the New York State Legislature enacted L 2021, ch 73, which materially affects deadlines otherwise applicable to actions and proceedings in which a claim for ejectment or eviction is made. That statute, among other things, codified the anti-eviction provisions of the series of Executive Orders that the Governor had issued from March 2020 through December 2020. The statute stayed all commercial evictions and ejectments until May 1, 2021. The statute also provides, in relevant part, that

> "Any eviction proceeding pending on the effective date of this act, including eviction proceedings filed on or before March 7, 2020, or commenced within thirty days of the effective date of this act shall be stayed for at least sixty days, or to such later date that the chief administrative judge shall determine is necessary to ensure that courts are prepared to conduct proceedings in compliance with this act and to give tenants an opportunity to submit the hardship declaration pursuant to this act. The court in each case shall promptly issue an order directing such stay and promptly mail the respondent a copy of the hardship declaration in English, and, to the extent practicable, the language in which the commercial lease or tenancy agreement was written or negotiated, if other than English"

(L 2021, ch 73, Part A, § 3). In other words, where, as here, a proceeding involving a commercial tenant may result in ejectment or eviction, the proceeding must be stayed for 60 days to provide the tenant with an opportunity to serve and file a declaration of hardship in the form annexed to this order. Hence, all proceedings in this action are stayed until June 12, 2021, and the court grants the tenant an additional 20 days after the stay is dissolved, or until July 2, 2021, to post the undertaking.

Leave to amend a pleading is to be freely given absent prejudice or surprise resulting from the amendment (*see* CPLR 3025[b]; *McCaskey, Davies and Assocs., Inc v New York City Health & Hospitals Corp.*, 59 NY2d 755 [1983]; *360 West 11th LLC v ACG Credit Co. II, LLC*, 90 AD3d 552 [1st Dept 2011]; *Smith-Hoy v AMC Prop. Evaluations, Inc.*, 52 AD3d 809 [1st Dept

2008]; *Daniels v Kromo Lenox Assoc.*, 275 AD2d 608 [1st Dept 2000]; *Bellini v Gesalle Realty Corp.*, 120 AD2d 345 [1st Dept 1986]). Thus, leave to amend should granted unless the proposed amended pleading is "palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]; s*ee Hill v 2016 Realty Assoc.*, 42 AD3d 432 [2d Dept 2007]) or the amendment would prejudice the opposing party (*Blue Diamond Fuel Oil Corp. v Lev Mgt. Corp.*, 103 AD3d 675, 676 [2d Dept 2013]). Here, the proposed amended complaint is not palpably insufficient or clearly devoid of merit and would not prejudice the defendant. In the first instance, the pleading seeks to streamline prior allegations. It also seeks to add a cause of action for reformation of the lease based upon mutual mistake, arising from the alleged mistranscription of one digit in the tax escalation provisions of the lease. A court may reform a contract based on mutual mistake (*see 106 Spring St. Owner, LLC v Workspace, Inc.*, 188 AD3d 588, 589 [1st Dept 2020]). "A claim of mutual mistake is stated where the allegations indicate that the parties have reached an oral agreement and, unknown to either, the signed writing does not express that agreement" (*Friedland Realty, Inc. v 416 W, LLC*, 120 AD3d 1185, 1186 [2d Dept 2014] [internal quotation marks omitted]; *see 106 Spring St. Owner, LLC v Workspace, Inc.*, 188 AD3d at 589). Inasmuch as the tenant's proposed new cause of action for reformation is not "clearly devoid of merit," leave to amend the complaint to add that cause of action must be granted.

In light of the foregoing, it is

ORDERED that the defendant's motion is granted to the extent that leave to reargue is granted and, upon reargument, the court adheres to its prior determination in the order dated December 21, 2020 granting the plaintiff's motion for a *Yellowstone* injunction, and modifies that order by adding a provision directing the plaintiff to post an undertaking with the court in the sum of $7,500 in accordance herewith as a condition of the continuation of the injunction, and the motion is otherwise denied; and it is further,

ORDERED that the plaintiff's cross motion is granted, the plaintiff is granted leave to serve an amended complaint in the form set forth in Docket Entry No. 56, and that amended complaint is deemed served upon the defendant on the date of entry of this order; and it is further,

ORDERED that this action is stayed until June 12, 2021 to provide an opportunity to the plaintiff to serve and file a declaration of hardship in the form annexed to this order; and it is further,

ORDERED that, upon dissolution of the stay, the preliminary injunction is conditioned upon the plaintiff's posting of an undertaking in the sum of $7,500 on or before July 2, 2021; such undertaking may be in the form of a surety bond or a deposit of cash, money order, or bank check with the County Clerk of the County of New York, and such undertaking shall remain in effect until further order of this court; and it is further,

ORDERED that in the event the undertaking is not posted in accordance herewith, the injunction currently in force and effect shall be dissolved, and the plaintiff's motion for a preliminary injunction will be denied in its entirety.

This constitutes the Decision and Order of the court.

4/12/2021
DATE

JOHN J. KELLEY, J.S.C.

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