

Bui Bros Props. LLC v Black Iris Express Inc.

2021 NY Slip Op 31418(U)

April 20, 2021

Supreme Court, Kings County

Docket Number: 522900/20

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8
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BUI BROS PROPERTIES LLC,

Plaintiff,

Decision and order

- against -

Index No. 522900/20

BLACK IRIS EXPRESS INC. and ZAID DEMIS,
Defendant,

April 27, 2021

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking summary judgement pursuant to CPLR §3212 on the grounds there are no questions of fact the defendants breached the terms of the lease. The defendant has opposed the motion. Papers were submitted by the parties after reviewing all the arguments, this court now makes the following determination.

On October 1, 2019 the plaintiff's predecessor entered into a lease with the defendant tenant concerning space located at 224-228 Dekalb Avenue in Kings County. A notice to cure was served by the plaintiff, the new owner and landlord, on October 20, 2020 alleging numerous defaults. The defaults included the fact an exhaust hood was not in compliance with New York City Department of Buildings Codes and was not approved by the Fire Department, there were illegal plumbing fixtures in the basement, there was no battery backup for exit and emergency lighting, the Ansul system was not approved for use by the Fire Department, the hot water heater lacked the proper fresh air intake or gas flue, the air conditioning system was not in compliance with various

Building Codes, the bathroom was not handicapped accessible and was not in compliance with the requirements of the Americans with Disabilities Act, and the cellar was impermissibly used for food preparation. The tenant failed to remedy any of the above named defaults and served a notice of termination on November 12, 2020. Further, the plaintiff served a summons and complaint alleging a breach of the lease, money owed and an ejectment. The defendants answered the complaint and included one counterclaim, namely that the plaintiff promised to "deliver a "letter of No objection" issued by the appropriate governmental agency and enabling defendants to apply for a liquor license for the premises. Such representation was a material part of the current lease and defendants relied upon that representation when they entered into such lease" (see, Answer and Counterclaim, ¶27). The defendants assert the plaintiff failed to deliver such letter. In any event, the plaintiff has now moved seeking summary judgement arguing that there can be no question of fact the defendants breached the lease and failed to cure such breaches in a timely manner and they are entitled to judgement as a matter of law. The defendants oppose the motion arguing questions of fact exist which foreclose a summary determination.

Conclusions of Law

A Yellowstone injunction is a remedy whereby a tenant may

obtain 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" (Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assocs., 93 NY2d 508, 693 NYS2d 91 [1999], First National Stores v. Yellowstone Shopping Center Inc., 21 NY2d 630, 290 NYS2d 721 [1968]). For a Yellowstone injunction to be granted the Plaintiff, among other things, must demonstrate that "it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises" (Graubard, supra).

Thus, a tenant seeking a Yellowstone must demonstrate that: (1) it holds a commercial lease, (2) it has received from the landlord a notice of default, (3) its application for a temporary restraining order was made prior to expiration of the cure period and termination of the lease, and (4) it has the desire and ability to cure the alleged default by any means short of vacating the premises (see, Xiotis Restaurant Corp., v. LSS Leasing Ltd. Liability Co., 50 AD3d 678, 855 NYS2d 578 [2d Dept., 2008]).

In Korova Milk Bar of White Plains v. PRE Properties LLC, 70 AD3d 646, 894 NYS2d 499 [2d Dept., 2010] the court held that the court cannot reinstate a lease after the time to cure the default has lapsed. Further, if a Yellowstone injunction is not sought and the cure period expires then the lease becomes

terminated. The defendants argue there are questions of fact whether any defaults really exist and without incontrovertible evidence summary judgement cannot be granted. However, that argument really seeks a Yellowstone injunction so the propriety of the defaults can be litigated. As noted, the tenant cannot seek a Yellowstone at this juncture and the failure to do so in a timely manner forecloses any possibility of relief or reinstatement of the lease.

The defendants further argue they maintain a counterclaim against the landlord for the failure to secure a letter of no objection enabling them to secure a liquor license. However, even if such claim is viable it does not have anything to do with the defaults which precipitated the termination at all. Nor can it reasonably be argued the failure to secure the no objection letter permitted a delay of tenant's obligations since the obligations were unrelated to the no objection letter. Further, the tenants cannot demonstrate any damages as a result of the failure to secure the letter. Paragraph 93 of the lease stated that "tenant expressly acknowledges and agrees that Owner has not made and is not making, and Tenant, in executing and delivering this Lease, is not relying upon any warranties, representations, promises, or statements, except to the extent the same are expressly set forth in the Lease" (id). While the promise to secure a letter of no objection was included within the lease the

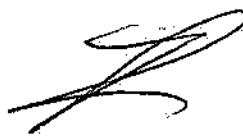
lease does not provide any remedy for the failure to secure such letter. Moreover, even if such letter had been secured there was no guarantee such liquor license would have been approved. The defendants argue that since none of the defaults contained in the notice to cure were valid the failure to secure the letter of no objection was the only obstacle in opening and that such obstacle was the fault of the plaintiff. However, as noted the defendants are estopped from raising any factual disputes regarding the defaults since the failure to timely object rendered the lease terminated. Thus, the failure to secure the letter had no bearing on the termination.

Therefore, based on the foregoing the motion seeking summary judgement regarding the causes of action contained in the complaint is granted.

So ordered.

ENTER:

DATED: April 27, 2021
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC