159 MP Corp. v Redbridge Bedford LLC
2021 NY Slip Op 31716(U)
April 9, 2021
Supreme Court, Kings County
Docket Number: 4599/14
Judge: Lawrence S. Knipel

At an IAS Term, Part Comm-4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the ~~22~~ 1 day of ~~December~~ April 2021
~~2020~~

PRESENT:

HON. LAWRENCE KNIPEL,

Justice.

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159 MP CORP., 240 BEDFORD AVE REALTY HOLDING CORP.,

Plaintiffs,

- against -

REDBRIDGE BEDFORD LLC,

Defendant(s).

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The following efiled papers herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	
Opposing Affidavits (Affirmations)	
Reply Affidavits (Affirmations)	
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, plaintiffs 159 MP Corp. and 240 Bedford Ave Realty Holding Corp. move for an order, pursuant to CPLR 2221, granting leave to renew a prior order denying plaintiffs' motion for a Yellowstone injunction and granting the cross motion of defendant Redbridge Bedford LLC for summary judgment dismissing the complaint and, upon renewal, restoring this matter to the court's calendar, reinstating the case and granting

a Yellowstone injunction tolling the time for plaintiffs to cure the alleged defaults, based upon the adoption of Real Property Law [RPL] § 235-h.

On April 7, 2010, plaintiffs entered into two leases with defendant's predecessor, BFN Realty Associates LLC, for adjoining commercial spaces in the subject property at 159 North 3rd Street a/k/a 241 Bedford Avenue a/k/a 160 North 4th Street in Brooklyn. Plaintiffs used combined spaces to operate a supermarket. On or about March 12, 2014, defendant sent plaintiffs a notice to cure, wherein defendant alleged certain violations of the leases. In the notice to cure, defendant informed plaintiffs that if they failed to cure the alleged breaches on or before March 27, 2014, defendant would elect to terminate plaintiffs' tenancy and commence summary proceedings to recover possession of the leased premises.

Plaintiffs thereafter commenced this proceeding on March 26, 2014 by way of order to show cause seeking a Yellowstone injunction. In addition to injunctive relief, plaintiffs alleged causes of action for a declaratory judgment, equitable estoppel and breach of contract. Defendant cross-moved for summary judgment dismissing the complaint based on a contractual waiver clause (paragraph 67 [H] of the rider to the leases) which provided:

> "Tenant waives the right to bring a declaratory judgment action with respect to any provision of this Lease or with respect to any notice sent pursuant to the provisions of this Lease. Any breach of this paragraph shall constitute a breach of substantial obligations of the tenancy, and shall be grounds for the immediate termination of this Lease. It is further agreed that in the event injunctive relief is sought by Tenant and such relief shall be denied, the Owner shall be entitled to recover the costs of opposing such an application, or action, including its attorney's fees actually incurred, it is the intention of the parties

> hereto that their disputes be adjudicated via summary proceedings."

By order dated January 29, 2015, the court (Hon. David I. Schmidt, J.), denied the motion for a Yellowstone injunction and granted defendant's motion for summary judgment dismissing the complaint. The court held, in essence, that a Yellowstone injunction is unavailable unless predicated upon a declaratory judgment action, and the right to bring a declaratory judgment action was properly waived by plaintiffs under the aforesaid waiver clause. The order was thereafter appealed to the Appellate Division, Second Department. In affirming the order, the majority of the panel held, among other things, that the subject waiver clause was enforceable and not, as plaintiffs and the dissenting justices believed, contrary to public policy (*159 MP Corp. v Redbridge Bedford, LLC*, 160 AD3d 176 [2d Dept 2018]). The Court of Appeals thereafter affirmed the Appellate Division order in a split decision (*159 MP Corp. v Redbridge Bedford, LLC*, 33 NY3d 353 [2019]).

On December 19, 2019, in response to the aforesaid court determinations, the legislature enacted RPL § 235-h, which provides:

> "No commercial lease shall contain any provision waiving or prohibiting the right of any tenant to bring a declaratory judgment action with respect to any provision, term or condition of such commercial lease. The inclusion of any such waiver provision in a commercial lease shall be null and void as against public policy."

The legislature stated that the act "shall take effect immediately" (L 2019, ch 689, § 2).

Plaintiffs now seek to renew their prior motion seeking a Yellowstone injunction based on the new statute which, if applied to the subject commercial lease, would nullify plaintiffs' waiver of the right to bring a declaratory judgment action.

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law ***that would change the prior determination***" (CPLR 2221 [e] [2] [emphasis added]). While there is no dispute that RPL 235-h represents a change in the law, in order for the new statute to change the prior determination, plaintiffs must demonstrate that the new statute was intended to be applied retroactively to leases entered into before its enactment.

"[I]t has long been a primary rule of statutory construction that a new statute is to be applied prospectively, and will not be given retroactive construction unless an intention to make it so can be deduced from its wording" (*Aguaiza v Vantage Props., LLC*, 69 AD3d 422, 423 [1st Dept 2010], *see Majewski v Broadalbin–Perth Cent. School Dist.*, 91 NY2d 577, 584 [1998]). "Even remedial statutes are applied prospectively where they establish new rights, or where retroactive application would impair a previously available defense" (*State of New York v Daicel Chem. Indus., Ltd.*, 42 AD3d 301, 302 [1st Dept 2007]). Here, there is no mention from the legislature about retroactive application of the statute, only that it "shall take effect immediately." "[W]here a statute directs that it is to take effect immediately, it does not have any retroactive operation or effect" (*Murphy v Board of Educ.*

of N. Bellmore Union Free School Dist., 104 AD2d 796, 797 [2d Dept 1984]), *affd* 64 NY2d 856 [1985], *see Marrero v Crystal Nails*, 114 AD3d 101, 112-113 [2d Dept 2013]; *Morales v Gross*, 230 AD2d 7, 9 [2d Dept 1984]). Under the circumstances, the court finds that RPL 235-h cannot be given retroactive effect and is thus inapplicable to the subject lease. Accordingly, the change in the law would not change the prior determination.

At any rate, insofar as plaintiffs seek a Yellowstone injunction, such relief cannot be granted where, as here, the cure period had expired and the lease had been terminated (*see Korova Milk Bar of White Plains, Inc. v PRE Props.*, LLC, 70 AD3d 646, 647 [2d Dept 2010]).

As a result, plaintiffs' motion is denied in all respects.

The foregoing constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE