

Bui Bros Props. LLC v Black Iris Express Inc.

2021 NY Slip Op 32273(U)

October 28, 2021

Supreme Court, Kings County

Docket Number: Index No.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,

October 28, 2021

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 PRESENT: HON. LEON RUCHELSMAN

The defendants have moved pursuant to CPLR §2221 seeking to reargue a decision and order dated April 27, 2021 which granted plaintiff's motion seeking summary judgement. The plaintiff has opposed the motion. Papers were submitted by the parties and upon review of all the arguments this court now makes the following determination.

As recorded in a prior order, 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 tenant failed to remedy any of the 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. The court granted the plaintiff's motion seeking summary judgment and held that there were no questions of fact the defendants failed to cure the defaults in a timely manner and also failed to seek a stay of the enforcement of the defaults and thus there could be no reinstatement of the lease. Upon reargument the defendants assert the court misapprehended the relief they sought which did not include a Yellowstone at all. They further argue the court erred when it held there were no questions of fact without considering the defendant's counterclaim.

Conclusions of Law

A motion to reargue must be based upon the fact the court overlooked or misapprehended fact or law or for some other reason mistakenly arrived at in its earlier decision (Deutsche Bank National Trust Co., v. Russo, 170 AD3d 952, 96 NYS2d 617 [2d Dept., 2019]).

There can be no dispute that the failure to object to any defaults served by a landlord or to the notice of termination forecloses the possibility of any such relief in that regard. Therefore, upon the defendant's failure to seek a stay of those above mentioned notices, generally accomplished through a Yellowstone injunction, then the relief contained in the notices to cure and notice of termination is effective. Thus, when the

defendants failed to adequately seek to challenge any of the notices to cure in a timely manner, they waived the ability to do so. Likewise, they waived the ability to offer any substantive objection to the notice of termination. Thus, a Yellowstone injunction and only a Yellowstone injunction is the exclusive mechanism whereby a tenant can avoid the forfeiture of its leasehold (Hopp v. Raimondi, 51 AD3d 726, 858 NYS2d 300 [2d Dept., 2008]).

The defendants argue that even if all that is true they still had the right to be heard on their counterclaim. The Fourth Department case cited by the defendants Crystal Run Newco LLC v. United Pet Supply Inc., 70 AD3d 1418, 896 NYS2d 271 [4th Dept., 2010] does not stand for the proposition that counterclaims must be entertained after a lease has been terminated due to the failure to file a Yellowstone injunction. Rather, that case merely holds that Yellowstone's requirement that injunctive relief must be sought before the expiration of the cure period as set forth in the lease, not the landlord's notice to cure (New York Practice Series-Commercial Litigation in New York State Courts, §148:44 Yellowstone Injunctions [5th Edition 2021]). The Second Department (as well as the First and Third Departments, see, Gap Inc., v. 170 Broadway Retail Owner LLC, 195 AD3d 575, 151 NYS3d 37 [1st Dept., 2021],) maintain the Yellowstone must be filed even prior to the expiration contained

in the landlord's notice to cure (Riesenberger Properties LLLP v. Pi Associates LLC, 155 AD3d 984, 65 NYS3d 218 [2d Dept., 2017]). Thus, the case also cited by defendants, namely Westhampton Cabins & Cabanas Owners' Corp., v. Westhampton Beach & Tennis Club Owners Corp., 299 AD2d 478, 749 NYS2d 574 [2d Dept., 2002] merely stands for the proposition that in cases where a default of a notice to cure has occurred without a termination then the tenant may assert claims. However, where the termination has already taken place and the lease has been terminated there can be no counterclaims entertained. To the extent the defendants wonder how such a summary determination can take place, that is precisely the relief granted in a summary judgement motion.


Therefore, based on the foregoing the motion seeking reargument is denied.

Until lifted by the Legislature all evictions are stayed at this time during the COVID-19 Pandemic. In any event the defendants shall be afforded seven days in which to present any appeal to the Appellate Division.

So ordered.

ENTER:

DATED: October 28, 2021
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC