

Elite Wine & Spirit LLC v Michelangelo Preserv. LLC

2021 NY Slip Op 33833(U)

September 17, 2021

Supreme Court, Bronx County

Docket Number: Index No. 29527/2019E

Judge: Julia I. Rodriguez

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

- Part 27

-----X **Index No. 29527/2019E**

Elite Wine & Spirit LLC,
Plaintiff,

-against-

**POST HEARING
DECISION & ORDER**

Michelangelo Preservation LLC,

Defendant.

Present:
Hon. Julia I. Rodriguez
Supreme Court Justice

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Recitation, as required by CPLR 2219(a), of the papers considered in review of Plaintiff's OSC seeking a yellowstone injunction.

<u>Papers Submitted</u>	<u>Numbered</u>
OSC, Affidavit & Exhibits	1
Affidavit in Opposition & Exhibits	2
Memorandum of Law in Opposition	3
Plaintiff's Post-Hearing Brief	4
Defendant's Post-Hearing Statement	5

In the instant declaratory judgment action, Plaintiff seeks a judicial determination of the rights and obligations of the parties under a lease between Plaintiff/Tenant Elite Wine & Spirit LLC ("Tenant") and Defendant/Landlord Michaelangelo Preservation LLC ("Landlord") for commercial space operated as a liquor store.

Tenant moves by Order to Show Cause, dated August 16, 2019, for a *Yellowstone* injunction and a stay of the Notice of Cancellation of Lease pending the determination of the declaratory judgment action.

In support of the OSC, Tenant submitted the affidavit of Roland Eshaghoff, Managing Member of Tenant, lease documents and various correspondence. In opposition, Landlord submitted the affidavit of Michael LeConte, a member of Landlord and President of BSR Management, Landlord's managing company for the subject property, and various notices addressed to Tenant regarding the subject lease. By Interim Order dated October 8, 2019, this Court directed that a hearing be held at which the parties were advised to present evidence sufficient to establish their claims and/or defenses. Said hearing was conducted over the span of

three days – on February 7, 2020, April 20, 2021 and May 11, 2021. At the hearing, the Court heard testimony from Roland Eshaghoff and Michael LeConte, and various exhibits were admitted into evidence.

Based upon the evidence submitted in support of the OSC, the hearing testimony, evidence submitted at the hearing, and the parties' closing statements, the Court finds as follows:

On January 23, 2019, Landlord sent a "Twenty 20 Day Notice of Default" via overnight Federal Express to Tenant. As pertinent here, the Notice included the following defaults: (1) failure to properly clean and maintain the sidewalk and (2) failure to provide access to the premises in accordance with the Americans with Disabilities Act ("ADA"). With respect to the sidewalk, the Notice stated that "immediate repairs are necessary since the sidewalk is raised, cracked and has damages that can cause serious injury." With respect to the ADA default, the Notice explained that the premises failed to comply with the ADA by "having a barrier to entry by the existence of a step into the entrance of the Premises without a ramp or other means of entry for disabled people."

By letter dated February 12, 2019, Tenant responded to the nine allegations of default set forth in the 20-Day Notice and submitted copies of various permits, licenses, invoices and a certificate of liability insurance. With respect to the aforementioned defaults, Tenant requested that Landlord advise Tenant as to the "exact nature" of the alleged failure to "maintain and/or repair the sidewalks," and Landlord's "proposed requirements to remedy same." With respect to the ADA default, Tenant stated that "the lease has no provisions that we are responsible for remedying any potential ADA conditions. Regardless, the allegations that the leased premises do not comply with ADAS [sic] regulations are not accurate. Upon taking over the store, we had a leased premise inspected by the State Liquored [sic] Authority, which then determined (and hence approved our licenses) the space to be complying with all their regulations and for use by the public."

On March 18, 2019, Landlord sent a "Second Notice of Default" to Tenant via Federal Express. The Second Notice advised Tenant that the following repairs/replacements to the sidewalk must be made immediately: "(a) the sidewalk is raised in a dangerous manner and the

slab must be cut and repaired to make it even with the other sections of the sidewalk; and (b) the sidewalk portion closest to the curb is cracked with a large hole and must be completely replaced.” With respect to the ADA default, the Notice stated that the State Liquor Authority had no authority over the ADA and that Tenant must ensure that the premises is in compliance with “all applicable laws.” The Notice further stated that Tenant must “immediately remove all barriers to entry at the Premises in compliance with its obligations under the Lease.”

In March of 2019, Landlord commenced a nonpayment proceeding in Housing Court which resulted in a Stipulation, dated June 14, 2019, signed by counsel for Landlord and counsel for Defendant. Pursuant to the Stipulation, Tenant consented to a final judgment of \$32,292.00 representing all rent, additional rent and charges due through June 30, 2019. Paragraph 6 of the Stipulation states: “This agreement settles all claims between the parties hereunder except as set forth herein.” At the hearing, Roland Eshaghoff testified that none of the alleged defaults included in the default notices were mentioned by Landlord’s attorney at any time during the Housing Court Proceeding, and, he believed that meant that he was in compliance with the default notices. Eshagoff also testified that, prior to June 14, 2019, he sent photographs of his repairs to the sidewalk and of the ramp to Landlord and heard nothing back from Landlord regarding same as of June 14, 2019.

By letter dated April 17, 2019, Tenant responded to the Second Notice by stating that Tenant repaired the crack in the sidewalk, but Con Edison caused a slab of sidewalk to be raised and was responsible for repairing that condition. Tenant also stated that the step entering the store is directly in front of the “Con Edison Hatch” and, as such, “there is no ample space to build a ramp on the sidewalk.” Tenant further stated that “the size of the store and store entry make it impossible to install a ramp on the inside of the store, and that Tenant had “built a custom built, removable ADA ramp with a notice on the window advising patrons of the availability of the removable ramp.” Tenant attached photographs of the above to the letter. A photograph admitted into evidence at the hearing depicts the front door of the store with a sign stating “HANDICAP RAMP AVAILABLE ON SITE,” as well as a sticker on the door with a blue wheelchair logo. The photograph also depicts a bell near the door, which Eshaghoff

testified, was to alert a worker inside the store that someone needed to use the ramp to enter the store. Eshaghoff also testified that due to a large Con Ed grate near the store entrance, it was not possible to build a permanent ramp on the sidewalk as it would cover the grate. Several photos admitted into evidence depict a grate directly in front of the door and extending to the right of the door, adjacent to the building, and an area of sidewalk in which a crack had been filled in with cement. Eshaghoff testified that he performed the sidewalk work and believed it satisfied the defect alleged in the default notices.

On May 21, 2019, Landlord sent a “Final Notice of Default” to Tenant via overnight Federal Express. A Fed Ex receipt indicates that the Final Notice was delivered on May 23, 2019 to “R. ROLAND,” an electronic signature. In the Final Notice, Landlord stated that: (1) the crack in the sidewalk had not been properly repaired, (2) Tenant had not provided Landlord with a Dept. Of Buildings permit for the sidewalk work, (3) under the lease, Tenant was obligated to repair the raised sidewalk even if Con Ed caused the condition, (4) the removable ramp was not in compliance with the ADA and must be replaced with a permanent ramp or Tenant needed to provide Landlord with a report from a licensed engineer that it was not possible to install an “accessible ramp” at the premises. The Final Notice advised Tenant that it had an additional ten days to cure the defaults. At the hearing, Eshaghoff testified that he never received this notice and that he would have responded to it if he had, just as he had done upon receipt of the other notices.

On August 5, 2019, Landlord sent a “Notice of Cancellation” to Tenant via hand delivery and Federal Express. The Notice states that Tenant failed to cure the defaults specified in the 20-Day Notice of Default and Final Notice of Default and, accordingly, the “Lease is hereby cancelled and terminated,” Tenant had ten days to vacate and quit the premises and that, upon expiration of the ten-day period, “the Lease and term thereunder shall end and expire. . .”

At the hearing, Eshaghoff testified that in 2016, 2017 and 2018, the prior Landlord never complained about the condition of the sidewalk or noncompliance with the ADA, the condition of the sidewalk was in the same condition at that time, and the entrance to the store had a raised step at that time. Eshaghoff also testified that he has since replaced the entire slab of sidewalk

near the grate, including where the crack had been, and installed an ADA-compliant ramp with handrails.

At the hearing, Michael LeConte acknowledged that the lease does not state specifically that Tenant has to comply with the ADA. While LeConte testified that the removable ramp is not ADA-compliant, he also testified that he knows this because he did a Google search. Mr. LeConte also testified that he had not received any violation citing that the premises were not ADA compliant.

* * * * *

In order to obtain a *Yellowstone* injunction, the moving party must demonstrate that: (1) it holds a commercial lease; (2) it received from the landlord either a notice of default, a notice to cure, or a threat of termination of the lease; (3) it requested injunctive relief prior to the expiration of the cure period and prior to the termination of the lease; and (4) it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises. *Three Amigos SJJ Rest., Inc. V. 250 W. 43 Owner LLC*, 144 A.D.3d 490, 41 N.Y.S.3d 224 (1st Dept. 2016); *225 East 36th Street Garage Corp. v. 221 East 36th Owners Corp.*, 211 A.D.2d 420, 421, 621 N.Y.S.2d 302 (1st Dept. 1995). The First Department has recognized a limited exception in cases where the lease contains an unspecified longer period of cure if the default is of a nature that it cannot be completely cured within the specified time period and the tenant has attempted to cure said default prior to the expiration of the cure period. *Village Ctr. For Care v. Sligo Realty & Serve Corp.*, 95 A.D.3d 219, 943 N.Y.S.2d 11 (1st Dept. 2012).

The subject lease lists six scenarios, defined as “Events of Default,” where the Landlord, “at Landlord’s option” shall give Tenant a ten days’ notice of termination; one such “Event of Default” is “if Tenant shall default in the observance or performance of any term, covenant or condition . . . and Tenant shall fail to remedy such default within twenty (20) days after notice by Landlord to Tenant of such default unless Tenant has demonstrated a good faith effort to remedy the default and is taking steps to correct same....” [Section SIXTEENTH (A)].

Here, Tenant responded timely to the Twenty Day Notice of Default and addressed each of the nine allegations of default. Notably, based upon the documentary evidence submitted in

Tenant's response letter, most of the allegations had been satisfactory refuted. The issues concerning the sidewalk and the ADA were also addressed in that response letter, albeit not to the satisfaction of Landlord. In the Second Notice of Default, Landlord provided the requested clarification regarding the repair of the sidewalk. With respect to the ADA issue, Landlord explained to Tenant that compliance with State Liquor Authority requirements does not mean that Tenant had satisfied its obligations under the ADA. In response, Tenant filled in the crack with concrete but failed to replace the slab of concrete. Tenant did not repair the raised portion of the sidewalk next to the Con Edison grate and explained that it believed it was Con Edison's responsibility to do so. As to the ADA issue, Tenant constructed a removable ramp for entrance to the building by people with disabilities, and noted that the presence of the Con Edison grate prevented Tenant from installing a permanent ramp. Notably, in the three years prior to Landlord's assumption of the lease, the prior landlord never raised an issue with respect to access to the store.

With respect to Eshaghoff's claim that he never received the Final Notice of Default, the court finds Eshaghoff's claim credible. As an initial matter, the Fed Ex receipt bears an electronic signature of "R. Roland," which misspelled Eshaghoff's name, lending credence to his claim that the receipt must have been signed by someone else, albeit in his store. Inasmuch as Eshaghoff had responded to all prior notices, his testimony that he would have responded to the Final Notice if he had received it is credible. Concomitantly, if Eshaghoff did not receive the Final Notice of Default, his claim that he believed his sidewalk repair and the removable ramp were satisfactory to Landlord is not incredible.

In addition, it is not unreasonable for Eshaghoff to have believed that, since the sidewalk and ADA defaults were never mentioned by Landlord's attorney during the course of the proceeding in Housing Court, he had complied with the Notices of Default. That Eshaghoff contacted Defendant upon receipt of the Notice of Cancellation and requested an extension of time to complete the sidewalk repair to Landlord's specifications further demonstrates that Eshaghoff was consistently responsive to Landlord's requests and made good faith efforts to comply with same.

Given the aforementioned steps taken by Tenant to comply with the Notices of Default, and that the lease provides an unspecified longer period to cure a default if Tenant demonstrates it is making a good faith effort to remedy the default and that is taking steps to correct same, the Court finds that Tenant has satisfied the requirements for a *Yellowstone* injunction.

Accordingly, it is

ORDERED that Plaintiff's motion, brought by Order to Show Cause, for a *Yellowstone* injunction and a stay of the Notice of Cancellation is **granted**; and it is hereby

ORDERED that the Notice of Cancellation, dated August 5, 2019, is stayed pending the determination of this declaratory judgment action.

The Clerk is directed to enter Judgment.

Dated: Bronx, New York
September 17, 2021



Hon. Julia I. Rodriguez, J.S.C.