

Crown Castle AS LLC v 723 Eleventh Ave LLC
2022 NY Slip Op 31140(U)
March 31, 2022
Supreme Court, New York County
Docket Number: Index No. 157842/2021
Judge: Alexander Tisch
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ALEXANDER TISCH PART 18

Justice

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CROWN CASTLE AS LLC, T-MOBILE NORTHEAST LLC

Plaintiff,

- v -

723 ELEVENTH AVE LLC,

Defendant.

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INDEX NO. 157842/2021

MOTION DATE 10/20/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 24, 26, 27, 29, 30, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 120

were read on this motion to/for INJUNCTION/RESTRAINING ORDER

Upon the foregoing documents, plaintiffs, commercial tenant and subtenant Crown Castle AS LLC (Crown Castle) and T-Mobile Northeast LLC (T-Mobile) (collectively, plaintiffs) move by order to show cause dated August 31, 2021 (NYSCEF Doc No. 24) for a Yellowstone injunction (First Natl. Stores v Yellowstone Shopping Ctr., 21 NY2d 630 [1968]) tolling the time to cure the default set forth in the notice dated June 21, 2021 issue by defendant-landlord and staying defendant from terminating the commercial leases or otherwise recovering possession pending the determination of this action.

"A Yellowstone injunction maintains the status quo so that a commercial tenant, when confronted by a threat of termination of its lease, may protect its investment in the leasehold by obtaining 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. Assoc., 93 NY2d 508, 514 [1999] [hereinafter Graubard]; see

Lexington Ave. & 42nd St. Corp. v 380 Lexchamp Operating, Inc., 205 AD2d 421, 423 [1st Dept 1994] [its purpose “is to maintain the status quo so that the tenant may challenge the landlord’s assessment of its rights without the tenant . . . forfeiting its valuable property interest in the lease”]).

The party requesting a *Yellowstone* injunction 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 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 (*Graubard*, 93 NY2d at 514, quoting *225 E. 36th St. Garage Corp. v 221 E. 36th Owners Corp.*, 211 AD2d 420, 421 [1st Dept 1995]).

Defendant’s primary argument in opposition is that the application is untimely. Because “courts cannot reinstate a lease after the lapse of time specified to cure a default’ (*Goldstein v Kohl’s*, 16 AD3d 622, 623 [2d Dept 2005]), an application for *Yellowstone* relief must be made not only before the termination of the subject lease . . . but must also be made prior to the expiration of the cure period set forth in the lease and the landlord’s notice to cure” (*Korova Milk Bar of White Plains, Inc. v PRE Props., LLC*, 70 AD3d 646, 647 [2d Dept 2010]).

Defendant served plaintiffs with a letter dated June 21, 2021 giving “notice of default and termination” of the leases (NYSCEF Doc No. 4 [hereinafter 2021 Notice]). In the 2021 Notice, defendant referenced and incorporated a letter dated October 21, 2019, that previously advised tenant Crown Castle that it was allegedly in violation of the leases regarding an unsafe condition with the parapet wall on the roof and that it was Crown Castle’s responsibility to fix it (NYSCEF Doc No. 47 [hereinafter 2019 Notice]). The damage was allegedly caused by the equipment stored on the roof by the subtenant T-Mobile (*see id.*).

Section 23 (A) of the relevant lease provides that, after receipt of a written notice of default, the defaulting party shall have up to thirty (30) days to cure a non-monetary default (*see* NYSCEF Doc No. 9). It goes on to provide:

“The Defaulting Party shall have such extended periods as may be required beyond the thirty (30) day cure period to cure any non-monetary default if the nature of the cure is such that it reasonably requires more than thirty (30) days to cure, and Defaulting Party commences the cure within the thirty (30) day period and thereafter continuously and diligently pursues the cure to completion. The Non-Defaulting Party may not maintain any action or effect any remedies for default against the Defaulting Party unless and until the Defaulting Party has failed to cure the same within the time periods provided in this Section” (*id.*).

After plaintiffs acknowledged receipt of the 2021 Notice, counsel for the parties conferred and, “in the spirit of good faith and cooperation,” entered into an agreement whereby the cure period for the 2021 Notice was tolled through August 23, 2021 (*see* NYSCEF Doc No. 5) (hereinafter the Agreement).

Notwithstanding such Agreement, defendant now contends that the application is untimely because the 2019 Notice was never cured and the lease was terminated by service of the 2021 Notice, which it characterizes as a “Termination Notice” and not a default notice (*see* NYSCEF Doc No. 37, deft mem at 23 [stating that “Owner terminated the Rooftop Leases in June 2021”]; *id.* at 25 [claiming “there is no way to construe the Termination Notice as a default notice”]). However, not only does the 2021 Notice specifically say it is a “notice of default and termination” but the parties’ subsequent Agreement specifically states that the defendant “acknowledges that the Lease and Existing Lease are in full force and effect and not terminated.”

“The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties’ intent” (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002]). “The best evidence of what parties to a written agreement intend is what they say in their writing” (*id.*, quoting *Slamow v Del Col*, 79 NY2d 1016, 1018 [1992]). “Thus, a written

agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms” (*Greenfield*, 98 NY2d at 569). The Court of Appeals has “also emphasized this rule’s special import ‘in the context of real property transactions, where commercial certainty is a paramount concern, and where . . . the instrument was negotiated between sophisticated, counseled business people negotiating at arm’s length’” (*Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004], quoting *Matter of Wallace v 600 Partners Co.*, 86 NY2d 543, 548 [1995]). “In such circumstances, ‘courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include’” (*Vermont Teddy Bear Co.*, 1 NY3d at 475, quoting *Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 72 [1978]).

Here, the parties’ Agreement made no reference to the 2019 Notice and explicitly stated that the leases were not terminated. Accordingly, this Court cannot accept the defendant’s contention that the leases have terminated in light of plaintiffs’ alleged failure to cure the 2019 Notice.

In any event, putting the Agreement aside, the applicable lease itself states that the time to cure is extended upon plaintiff commencing to cure “within the thirty (30) day period and thereafter continuously and diligently pursues the cure to completion.” Here, defendant’s own submission shows that, within 30 days of the 2019 Notice, plaintiff Crown Castle notified plaintiff T-Mobile who was not served with the letter and plaintiffs arranged for a general contractor to take an assessment. Thereafter, plaintiffs and its agents participated in inspections; retained engineers and/or agents onto the site to facilitate in relocating T-Mobile’s equipment; provided design drawings; and the parties engaged in multiple negotiations and conferences spanning over a year to implement an agreed upon plan for repairs (*see generally* NYSCEF Doc

No. 41; NYSCEF Doc No. 99 at ¶¶ 14-15). Accordingly, it cannot be said that the plaintiffs failed to commence diligent efforts to cure the default within 30 days of the 2019 Notice such that that cure period expired and/or permitted defendant to terminate the lease (see, e.g., Village Center for Care v Sligo Realty and Service Corp., 95 AD3d 219, 223 [1st Dept 2012]).

The Court has considered defendant’s remaining contentions and finds them without merit. Accordingly, it is hereby ORDERED that plaintiffs’ motion for a *Yellowstone* injunction is granted; and it is further

ORDERED that the time for plaintiffs to cure the alleged lease violations is tolled during the pendency of this action; and it is further

ORDERED that defendant is enjoined from terminating the leases or otherwise recovering possession of the premises during the pendency of this action.

This constitutes the decision and order of the Court.

3/31/2022

DATE



ALEXANDER TISCH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE