

Goris Grocers Madison Ave. Corp. v Heritage Holdings, LLC

2022 NY Slip Op 31172(U)

April 6, 2022

Supreme Court, New York County

Docket Number: Index No. 652587/2021

Judge: Barbara Jaffe

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. BARBARA JAFFE PART 12

Justice

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INDEX NO. 652587/2021

GORIS GROCERS MADISON AVE. CORP.,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 002

- v -

HERITAGE HOLDINGS, LLC,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 26-36, 46-49 were read on this motion for partial summary judgment.

By notice of motion, defendant moves pursuant to CPLR 3212 for an order granting it partial summary judgment on its counterclaims against plaintiff for breach of contract and attorney fees and expenses, and deeming the *ad damnum* clause related to the first counterclaim for breach of contract amended to reflect the current amount of rent owed by defendant. Plaintiff opposes.

I. PERTINENT BACKGROUND

A. Complaint (NYSCEF 2)

In this action, plaintiff, tenant of defendant's premises in Manhattan, sues defendant, its successor landlord. As alleged by plaintiff, in June 2010, it entered into a lease with the previous owner and landlord for the premises at issue. The lease consists of an initial 15-year term, commencing on June 1, 2010, with an additional five-year option exercisable by the tenant. In November 2014, the previous owner and landlord transferred ownership of the premises to BSREP UA Heritage LLC, and in November 2019, BSREP transferred it to defendant.

In June 2020, during the COVID-19 pandemic, defendant allegedly served plaintiff with a notice to cure, in which it was alleged that plaintiff was in default of the lease based on its failure to maintain insurance as required by the lease. From June to July 2020, defense counsel agreed to extend plaintiff's time to respond to the notice.

On or about July 30, 2020, plaintiff delivered to defendant a copy of its insurance certificate, and on or about January 4, 2021, a copy of its renewal certificate.

On or about March 19, 2021, defendant served plaintiff with an amended notice to cure, again alleging that plaintiff had defaulted by failing to maintain the required insurance; the notice had a deadline to cure of April 8, 2021. Before the deadline had passed, defendant served a second amended notice to cure, containing the same alleged default, and providing a cure deadline of April 21, 2021.

Plaintiff commenced this action before the expiration of the cure deadline. As its first cause of action for a temporary, preliminary, and permanent injunction, plaintiff denies that it defaulted under the lease and/or that any alleged defaults have been cured, that alternatively, if it had defaulted, it is ready, willing, and able to cure, and that it will suffer irreparable harm if it is evicted. As a second cause of action, it alleges that defendant wrongfully and improperly served the notices to cure by failing to comply with the pertinent lease terms, that defendant claims otherwise, and that, therefore, a declaration is necessary to determine the parties' respective rights and obligations. In its third cause of action, it seeks reimbursement of its attorney fees, costs, and disbursements in commencing the action.

B. Defendant's answer (NYSCEF 19)

In its answer, defendant asserts a counterclaim for breach of contract, alleging that plaintiff has failed to pay rent and additional rent, and currently owes more than \$650,000, and a

counterclaim for reimbursement of its attorney fees and costs and expenses.

C. Decision on *Yellowstone* injunction (NYSCEF 20)

On July 15, 2021, plaintiff's application for a *Yellowstone* injunction was denied:

Absent proof that plaintiff obtained, inter alia, umbrella insurance and worker's compensation insurance from the time that defendant became owner of the premises to respectively, July 1, 2020 and January 4, 2020, plaintiff fails to demonstrate its compliance with the pertinent insurance requirements set forth in the parties' lease. As such gaps in coverage cannot be cured, there is no legal basis for the injunctive relief sought by plaintiff.

II. CONTENTIONS

A. Defendant (NYSCEF 27)

According to defendant, it is undisputed that plaintiff owes it rent and additional rent. While it served plaintiff with a notice of termination of the lease, effective as of November 1, 2021, it has not commenced a summary proceeding or sought an ejectment given the stay on commercial evictions resulting from the COVID-19 pandemic. As of January 2022, plaintiff owes defendant over \$500,000 in unpaid rent and additional rent, plus approximately \$380,000 owed to BSREP, from whom defendant received an assignment to collect the unpaid rent. In support, defendant submits its rent ledger and asserts that it is admissible as a business record. Moreover, it claims to be entitled by the lease to recoup its attorney fees, costs, and expenses in defending against this action and enforcing its rights under the lease.

B. Plaintiff (NYSCEF 46-49)

Plaintiff's president details many issues that plaintiff has faced during the pandemic, including inventory and staff shortages, and attests that from 2020 and continuing through 2022, plaintiff has earned approximately 30 percent less in gross receipts than before the pandemic. He also contends that defendant waived its right to collect real estate tax payments, as neither of the predecessor landlords ever charged or sought to collect such taxes. Moreover, although

defendant's ledger reflects that it began billing plaintiff for real estate taxes in September 2020, it never notified plaintiff of it, nor did it send a bill or any kind of calculation of it. It denies having received rent statements from defendant since defendant took over ownership of the premises, and asserts that it could not determine how much was owed absent such a statement or a calculation. It contends that if it owes any rent, it is entitled to discovery to ascertain the correct amount.

According to plaintiff, BSREP reneged on a binding court-ordered stipulation that was agreed upon during a summary nonpayment proceeding commenced by BSREP against plaintiff in 2018, by which it was agreed that the parties would negotiate to amend the lease to provide that plaintiff would pay BSREP a fixed monthly amount of no more than \$6,000 for electricity charges. Although plaintiff sent BSREP a copy of the amendment, BSREP refused to sign it, which plaintiff disregards, claiming that defendant is nonetheless bound by it and that any amount it seeks here for electricity charges in excess of \$6,000 per month is invalid.

C. Reply (NYSCEF 50)

Since it took over as landlord, defendant alleges that plaintiff has not paid its base rent, additional rent, or use and occupancy, and denies that plaintiff's claims related to the pandemic constitute a valid defense to the failure to pay rent and as plaintiff's grocery store constituted an essential business and was permitted to stay open during the pandemic. It also denies having waived its entitlement to collect real estate payments based on predecessor landlords' alleged failure to do so, especially given the no-waiver clause in the lease.

Nor does defendant's alleged failure to send plaintiff rent bills and a calculation constitute a defense to its non-payment, plaintiff maintains, especially as defendant sent plaintiff a copy of its rent ledger and bills in 2020. Defendant also asserts that even though the lease does

not require that plaintiff receive a monthly rent bill, defendant has sent one every month.

Defendant denies that it is bound by the stipulation between plaintiff and BSREP, and observes that the lease amendment was never signed. Moreover, defense counsel contends that he attempted to obtain the amendment from plaintiff once defendant took over the lease, but that instead, plaintiff requested a new lease, and that while they attempted to negotiate it, a new lease was never signed.

While it is entitled to recoup the rent owed by plaintiff to BSREP, defendant does not seek it on this motion.

III. ANALYSIS

Defendant establishes, *prima facie*, through affidavits and business records, that plaintiff owes it unpaid rent and additional rent.

In opposition, plaintiff fails to raise a triable issue. Given the no-waiver clause in the lease, there is no merit to its argument that defendant is bound by its predecessors' purported failure to charge it for electricity. The pandemic, to the extent asserted as a defense to nonpayment, is also not a defense (*Valentino USA, Inc. v 693 Fifth Owner LLC*, AD3d , 160 NYS3d 858 [1st Dept 2022] [claim based on frustration of purpose fails where purpose of the contract not "completely thwarted"]), nor is defendant's alleged failure to send plaintiff a calculation of overdue rent or bills or notices, and it is, in any event, negated by defendant's proof that it did so.

The stipulation between plaintiff and BSREP does not require BSREP or defendant to cap its monthly electricity charges to plaintiff at \$6,000 or less a month. Rather, the parties agreed to attempt to negotiate an amendment to the lease, which admittedly did not occur.

IV. CONCLUSION

Accordingly, for all of these reasons, it is hereby

ORDERED, that defendant’s motion for partial summary judgment is granted as to unpaid rent owed to it since 2019, and defendant is directed to submit a proposed order and judgment by e-filing and by email to cpaszko@nycourts.gov, copied to all sides, within 30 days of the date of this order.

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4/6/2022
DATE

BARBARA JAFFE, 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