Synod of Bishops of the Russian Orthodox Church Outside of Russia v Preschool of Am. (USA) Inc.
2022 NY Slip Op 32252(U)
July 11, 2022
Supreme Court, New York County
Docket Number: Index No. 652423/2021
Judge: Laurence Love
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LAURENCE LOVE** **PART** **63M**

Justice

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SYNOD OF BISHOPS OF THE RUSSIAN ORTHODOX CHURCH OUTSIDE OF RUSSIA

Plaintiff,

- v -

PRESCHOOL OF AMERICA (USA) INC.,

Defendant.

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INDEX NO. 652423/2021

MOTION DATE 07/14/2021, 02/25/2022, 02/25/2022, 03/29/2022

MOTION SEQ. NO. 002 003 004 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 40, 41, 42

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 43, 44, 45, 46, 47, 48, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 004) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 99

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

The following e-filed documents, listed by NYSCEF document number (Motion 005) 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111

were read on this motion to/for PREL INJUNCTION/TEMP REST ORDR.

Upon the foregoing documents, the motions are decided as follows:

Plaintiff as owner and commercial landlord of the real property located at 1190 Park Avenue, New York, NY 10128, and Defendant is commercial tenant of said premises. Plaintiff alleges that Defendant began occupying the premises in or about 2009 but was not formally the tenant under the lease until the lease was amended in 2019. Per the lease amendment, Defendant was required to pay plaintiff: (i) $46,638.18 per month in rent; (ii) one hundred percent of all property taxes assessed against the Building; and (iii) $55,550.72 per month for the period from

December 2019 through September 2020 as settlement payments arising out of an earlier non-payment proceeding. Pursuant to the lease, defendant was also required to maintain insurance covering the Premises. Defendant has allegedly breached the Lease Amendment by failing to pay rent, additional rent or settlement payments, and by failing to maintain insurance covering the Premises. In total, Defendant is alleged to owe approximately $1,308,662.33 in past due rent. Arising from same, plaintiff elected to terminate the lease effective on midnight of April 2, 2021 (see NYSCEF Doc. No. 7).

Plaintiff, Synod of Bishops of the Russian Orthodox Church outside of Russia ("Synod Bishops") now moves (mot. seq. no. 002) to dismiss defendant's counterclaims, pursuant to CPLR 3211(a)(1), CPLR 3211(a)(4), and CPLR 3211(a)(7), and Defendant – Preschool of America (USA) Inc.'s ("Preschool") cross-moves for leave to amend the answer with counterclaims per CPLR 3025(b); Defendant Preschool moves (mot. seq. no. 003) for summary judgment, pursuant to CPLR 3212(b), dismissing the complaint; and Synod Bishops moves (mot. seq. no. 004) pursuant to Real Property Law 220, to require defendant to pay use and occupancy for the subject premises *pendente lite*, and pursuant to CPLR 6301, seeking an injunction to i) mandating that defendant maintain a comprehensive general liability insurance policy for the building at 1190 Park Avenue, New York, New York 10128, ii) enjoining and restraining defendants from making any alterations to the building, the premises, or any portion thereof, iii) compelling defendant to remove the chains that it placed inside the premises, thereby preventing plaintiff from entering or passing through the premises, and iv) directing that defendant deliver to plaintiff all keys, codes and passcodes to the premises and that defendant permit plaintiff unfettered access to the premises; and Preschool moves (mot. seq. no. 005) for an Order i) preliminarily enjoining plaintiff from failing to deliver water to the premises situated at 1190 Park Avenue, New York, NY 10128, ii)

granting defendant access to the areas where the valves are situated at the premises that control the delivery of water, iii) enjoining plaintiff from failing to cure certain municipal violations that encumber the premises, iv) enjoining plaintiff from failing to provide elevator services to the premises, v) conditioning the payment by the tenant of use and occupancy upon plaintiff restoring water to the entire premises, and vi) granting defendant leave to amend the answer with counterclaims pursuant to CPLR 3025(b).

Plaintiff's verified complaint alleges causes of action for i) breach of contract, ii) declaratory judgment, iii) permanent injunction, and iv) trespass and seeks a total of $1,308,662.33, plus statutory interest, in relation to the real property at 1190 Park Avenue, NY, NY 10128, between a commercial owner – landlord, and tenant. Defendant's answer alleges counterclaims for i) declaratory judgment, ii) Yellowstone injunction/injunctive relief, iii) breach of contract – actual eviction, iv) "prima facie tort," and v) attorneys' fees (see NYSCEF Doc. No. 24).

DISMISSAL / LEAVE TO AMEND

Plaintiff seeks to dismiss Defendant's counterclaims and Defendant's cross – motion seeks leave to amend the answer with counterclaims per CPLR 3025(b).

CPLR 3025(b) states, "[A] party may maned his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances."

As leave to amend "shall be freely given," Plaintiff's motion to dismiss the counterclaims will be dismissed and Defendant is granted leave to amend the answer.

SUMMARY JUDGMENT / DISMISSAL

CPLR § 3212 (b) states that, "the [summary] motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party."

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (see *Leon v. Martinez*, 84 N.Y.2d 83 [1994]).

When considering a motion to dismiss under CPLR 3211(a)(7), a court must accept the factual allegations of the pleadings as true, affording the non-moving party the benefit of every possible favorable inference and determining "only whether the facts as alleged fit within any cognizable legal theory" (see *D.K. Prop., Inc. v. Natl. Union Fire Ins. Co. of Pittsburgh*, 168 A.D.3d 505; *Weil Gotshal & Manges LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267 [1st Dept. 2004]). "A cause of action for breach of a lease requires the same elements of a breach of contract: (1) the formation of a contract; (2) performance by the plaintiff; (3) defendants failure to perform; and (4) resulting damages" (see *Sosa v. 342 E. 53 Owners, Inc.*, 2020 NY Slip Op 32993[U],*5 [Sup. Ct. NY County 2020]).

In support of its motion, Ziming Shen, Sr., an Officer of Preschool, submits an affidavit which establishes as follows:

> "When Defendant arrived at the premises after the weekend on Monday, April 5, 2021, Defendant found that Plaintiff had illegally locked out Petitioners, one day before the cure period was set to expire. On April 6, 2021, Defendant contacted the New York City Police Department and peaceably re-entered the Premises after the NYPD officers responded to the scene. On or about April 10, 2021, Plaintiff damaged and removed the lock to the premises previously installed by petitioner and installed a new lock to the front door and placed a lock to the front gate to the premises effectively denying Defendant access to the premises. Defendant was peaceably in

> actual possession to the premises at the time of the forcible or unlawful entry of the premises by Plaintiff. On or about April 13, 2021, my wife Xiaoping Fan and I communicated with Lieutenant Chan of the NYPD 19th precinct who informed us that the officer had communicated with their legal department, and that the legal department's positions was the Defendant was authorized to re-enter the premises. Defendants initiated a proceeding in Civil Court, New York County, with the filing of a Petition on April 13, 2021, demanding an order (i) reinstating Petitioners to possession of the Premises; (ii) awarding Petitioner monetary damages, including treble damages; and (iii) awarding Petitioner punitive or exemplary damages. Index No. LT-301789-21/NY. In that proceeding, the Hon. Denis Dominguez, in a Decision and Order dated July 2, 2021, found that the Plaintiff's self-help eviction was illegal and breached the Lease because (i) Defendant is a small business under the protection of the COVID-19 Emergency Protection for Small Business Act of 2021, and (ii) Plaintiff failed to serve Defendant with predicate notices as per the Lease" (see NYSCEF Doc. No. 45 Pars. 13 15, 18, 22- 24).

Defendant argues that "the documentary evidence shows that plaintiff did not perform under the contract" (see NYSCEF Doc. No. 44 Par. 25). Defendant further argues that "it is undisputable that Plaintiff failed to perform its end of the bargain by (i) illegally utilizing self-help and locking Defendant out of the premises and (ii) failing to provide proper predicate notices to cure and of termination in accordance with the Lease" (see NYSCEF Doc. No. 44 Par. 29). Defendant further highlights Paragraph 17 of the Lease which requires Plaintiff to provide Defendant a 15-day cure period to remedy the default specified in the written 15-day notice to cure. The documentary evidence submitted establishes that Plaintiff served Defendant with a 15-day notice to cure alleged violations based upon abandonment of the Premises, dated March 17, 2021, and specifying a cure period of until September 6, 2021. In violation of this provision, Plaintiff alleges that on September 5, 2021, illegally evicted Defendant" (see NYSCEF Doc. No. 44 Pars. 31 – 32). As such, defendant has established a *prima facie* entitlement to judgment.

"Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact." *Zuckerman v City of New York*, 49 NY2d 557 (1980).

Nicholas A. Ohotin, Communications Director for Synod Bishops affirms,

> "[a]s part of the lease amendment, Plaintiff extended Defendant's lease and set a schedule for Defendant to repay the arrears that had accrued up to that time. In exchange for the lease extension and the payout period, Defendant agreed to provide Plaintiff with a personal guaranty of rent signed by one of its principals. Specifically, Article B(1)(j) of the lease amendment requires Defendant to provide Plaintiff with a personal guaranty of rent signed by Xiaping Fan. a/k/a Joanna Fan, on or before December 12, 2019, and the lease amendment also gives Plaintiff the right to terminate the Lease if Fan does not provide a guaranty. It is undisputed that Defendant never provided Plaintiff with Fan's personal guaranty. In April 2021, Plaintiff attempted to terminate Defendant's tenancy based on Defendant's failure to provide Plaintiff with a personal guaranty signed by Fan. After serving a notice stating that the lease was terminated, Plaintiff used self-help to remove Defendant from the premises. On July 9, 2021, the Civil Court entered an order directing Plaintiff to allow the Defendant back into the Premises. In reaching its decision, the Civil Court concluded that Plaintiff did not properly terminate the lease because Plaintiff did not give Defendant notice of its default and an opportunity to cure its default. To avoid the cost and uncertainty of an appeal, Plaintiff decided to accept the Civil Court's findings and give Defendant an additional opportunity to cure its default. To that end, on September 15, 2021, Plaintiff served a 15 Day Notice to Cure upon Defendant. The Notice to Cure notifies Defendant that it is in default for having failed to provide a guaranty signed by Fan, and for failing to maintain insurance, both of which are expressly required by the lease. By serving the Notice to Cure, Plaintiff acknowledged that – as of the date of the Notice to Cure – Defendant's tenancy was still in effect. As such, Plaintiff's second, third and fourth causes of action are moot because each such claim depends on a finding that Plaintiff already terminated the lease; and those branches of Defendant's motion which seeks dismissal of those claims are also moot (see NYSCEF Doc. No. 66 Pars. 5 – 8, 10, 13 – 15).

Through the affidavits submitted, questions of fact exist to the performance of the commercial contract between the parties. Further inquiry is required to establish, whether notices

to cures were issued by plaintiff, whether a court order was violated, and whether -plaintiff engaged in self-help.

PENDENT LITE / PRELIMINARY INJUNCTION /AMEND

Pursuant to RPL 220. "The landlord may recover a reasonable compensation for the use and occupation of real property, by any person, under an agreement, mot made by deed; and a parol lease or other agreement may be used as evidence of the amount to which he is entitled." "The award of use and occupancy during the pendency of an action or proceeding accommodates the competing interests of the parties in affording necessary and fair protection to both and preserves the status quo until a final judgment is rendered" (see *Eli Haddad Corp. v. Redmond Studio,* 102 A.D.2d 730 [1st Dept. 1984]).

Plaintiff seeks use and occupancy in an amount of $93,276.36 per month, pursuant to the Lease, until the date that Defendant is no longer in possession of the premises. Plaintiff submits a "settlement agreement and amendment to lease" that states a "settlement payment" of $55,550.72 (see NYSCEF Doc. No. 60 P. 3). A Decision and Order from the Civil Court between the parties states, "[t]he parties settled that case pursuant to a settlement agreement and amendment to lease, dated November 11, 2019. As per the Amendment, Petitioners agreed to pay $555,507.15 for past due real estate taxes, past due rent payments, and other amounts and fees due under the Lease. The Amendment extended the term of the Lease, commencing September 1, 2020 and expiring August 31, 2030. Accordingly, … Preschool of America (USA) Inc., is entitled to restore possession of the premises" (see NYSCEF Doc. No. 57). Said Decision and Order was dated July 2, 2021.

"To be entitled to a preliminary injunction, the moving party must demonstrate (1) a likelihood of success on the merits, (2) irreparable injury if provisional relief is not granted and

(3) that the equities are in his favor" (see *J.A. Preston Corp. v. fabrication Enterprises, Inc.*, 68 N.Y.2d 397, 406 [1986]).

In an Order dated July 9, 2021, the Civil Court issued a Decision and Order compelling Plaintiff to allow Defendant to return to the subject premises. (see NYSCEF Doc. No. 50 Pars. 3 – 7). Plaintiff exhibits the Civil Court Decision (see NYSCEF Doc. No. 57).

As described in Ziming Shen's affidavit. "Defendant disputes the amount of rental sums claimed due. Part of the reason the tenant fell in arrears on rent was contributed by the landlord's illegal conduct in resorting to self-help in locking out the tenant from the premises during a pandemic that delayed the re-opening of the school and impacted the tenant's business in generating income to pay rent. Defendant required a valid Certificate of Occupancy or Temporary Certificate of Occupancy for the premises to cause the NYC Department of Health to permit or allow a day care and preschool operation upon the premises. There were other reasons for the delay in causing [Department of Health] to approve the operation of a preschool caused by the landlord's conduct. The landlord, failed to give the tenant access to the basement to correct the water temperature entering the premises. Defendant denies that it made any alterations to the premises. Further, defendant has not denied the landlord access to the premises. A key for locks to doors and any access codes have been provided to the landlord. Further, the claim that defendant does not carry insurance is belied by the proof of insurance delivered to the landlord on October 7, 2021." (see NSYCEF Doc. No. 80 Par. 4, 18, 21, 23, 24, 26). Defendant provides a Certificate of Liability Insurance (see NYSCEF Doc. No. 84).

Plaintiff submits the alleged Certificate of Liability Insurance, and there is named "Insured – Metrokids Cradle (South End) Inc., 25 Market Street, New York, NY 10002" (see NYSCEF Doc. No. 84). Plaintiff's affirmation in opposition continues, "[d]efendant did not seek or obtain a

Yellowstone injunction and did not cure any of the defaults identified in the Notice to Cure. After the cure period expired, Defendant placed a certificate of liability insurance in Plaintiff's mailbox. The document indicates that an entity named Metrokids Cradle (South End) Inc. – not the Defendant – obtained insurance naming Plaintiff as additional insured. However, the coverage described in the certificate did not meet the minimum coverage requirements of the Lease, did not name Plaintiff as insured, did not name all other covered parties listed in the Lease, was not received by Plaintiff until *after* the cure period expired, and does not indicate that the Defendant had anything to do with maintaining the underlying policy. Indeed, despite its purported efforts, the Defendant remains uninsured. As such, Defendant did not cure its default with respect to insurance" (see NYSCEF Doc. No. 101 Pars. 23, 24).

Per the memorandum of law, "[t]he last monthly base rent due under the Lease was $46,638.18. Pursuant to Article 54 of the Rider to the Lease, Defendant agreed that, if it 'shall become a holdover tenant thereupon, the use and occupancy payable by [Defendant] hereunder shall be two (2) times the monthly installment of Fixed Rent was well as Additional Rent due and payable pursuant to this Lease for the month immediately preceding such expiration or termination.' Since Defendant continues to occupy the Premises upon expiration of the Lease, it is contractually obligated to pay $93,276.36 per month as use and occupancy, which is two (2) times more than the base rent of $46,638.18" (see NYSCEF Doc. No. 63 P. 10).

As the Court Order of July 2, 2021 establishes that Preschool of America was in possession of the premises, and that a settlement agreement was reached to pay past arrears, Defendant will be required to fulfill their obligation of the commercial contract along with the settlement agreement.

PRELIMINARILY INJUNCTION – WATER ACCESS

As described in the affidavit of Rong Rong Wang, administrative director of defendant, "[c]ommencing February 9, 2022 water was no longer being delivered to the sinks at the premises. The preschool utilizes several sinks at the premises. Prior to February 9, 2022 water was being delivered to these sinks at the premises. On February 22, 2022 after our lawyer intervened, water was partially restored to portions of the premises" (see NYSCEF Doc. No. 89 Par. 2).

However, Article 46 of the rider to the lease clearly provides that Plaintiff is not required to provide any services, including water supply, and that Defendant is solely responsible for installing and maintaining a water meter" (see NYSCEF Doc. No. 101 Par. 3). As the lease provides that Defendant is to maintain a water meter, and no specific acts or exhibits have been shown how plaintiff effected the water supply, Defendant's provisional remedy with regards to water cannot stand.

Upon a reading of all the motions and documents submitted it is now,

ORDERED that Plaintiff – Synod Bishops motion (mot. seq. no. 002) to dismiss defendant's counterclaims, CPLR 3211(a)(1), CPLR 3211(a)(4), and CPLR 3211(a)(7), is DENIED, and Defendant – Preschool' cross – motion for leave to amend the answer with counterclaims per CPLR 3025(b) is GRANTED and the proposed Answer with Counterclaims annexed to defendant's motion is deemed interposed; and it is further

ORDERED that Defendant – Preschool's motion (mot. seq. no. 003) for summary judgment, CPLR 3212(b), or to dismiss the complaint, CPLR 3211(a)(7) are DENIED; and it is further

ORDERED that the Order to Show Cause (mot. seq. no. 004) by Synod Bishops, per Real Property Law 220, to require defendant to pay use – and – occupancy for the subject premises

pendente lite is GRANTED, and Defendant – Preschool of America (USA) Inc. is to pay $93,276.36 per month as use and occupancy from the date of July 2, 2021; and it is further

ORDERED that plaintiff's Order to Show Cause, per CPLR 6301, to grant an injunction to i) mandate that defendant maintain a comprehensive general liability insurance policy for the building at 1190 Park Avenue, New York, New York 10128 is GRANTED, ii) to enjoin and restrain defendants from making any alterations to the building, the premises, or any portion thereof is GRANTED iii) to compel defendant to remove the chains that it placed inside the premises, thereby preventing plaintiff from entering or passing through the premises is GRANTED, and iv) to direct that defendant deliver to plaintiff all keys, codes and passcodes to the premises and that defendant permit plaintiff unfettered access to the premises is DENIED; and it is further

ORDERED that the Order to Show Cause (mot. seq. no. 005) by Preschool to i) preliminarily enjoin plaintiff from failing to deliver water to the premises situated at 1190 Park Avenue, New York, NY is DENIED, ii) to grant defendant access to the areas where the valves are situated at the premises that control the delivery of water is DENIED, iii) to enjoin plaintiff from failing to cure certain municipal violations that encumber the premises is DENIED, iv) to enjoin plaintiff from failing to provide elevator services to the premises is DENIED, v) to condition the payment by the tenant of use and occupancy upon plaintiff restoring water to the entire premises is DENIED, and vi) to grant defendant leave to amend the answer with counterclaims per CPLR 3025(b) is Denied as moot.

7/11/2022
DATE

LAURENCE LOVE, J.S.C.

CHECK ONE: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION
[ ] GRANTED [ ] DENIED [X] GRANTED IN PART [ ] OTHER

652423/2021 SYNOD OF BISHOPS OF THE vs. PRESCHOOL OF AMERICA (USA)
Motion No. 002 003 004 005