170 Tillary Corp. v Gold Tillary Realty LLC
2022 NY Slip Op 33202(U)
September 19, 2022
Supreme Court, Kings County
Docket Number: Index No. 510354/2022
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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170 TILLARY CORP.,

Plaintiff, Decision and order

- against - Index No. 510354/2022

GOLD TILLARY REALTY LLC,

Defendant, September 19, 2022

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking a Yellowstone injunction. The defendant has opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments, this court now makes the following determination.

On October 7, 1999 the plaintiff tenant entered into a lease with landlord concerning the rental of space located at 170 Tillary Street in Kings County. A notice to cure was served on December 23, 2021 alleging eleven defaults. The first default alleged the plaintiff failed to remove various Department of Building violations. The second default alleged the plaintiff failed to timely file loft board registration. The third default alleged the plaintiff violated Article 3 of the lease and Articles 44 and 46 of the rider to the lease. The fourth default alleged the plaintiff failed to secure landlord's prior written consent regarding the renovation of an elevator at the premises. The fifth and sixth defaults alleged the plaintiff failed to notify the landlord of an accident that occurred at the premises. The seventh, eight and ninth defaults alleged the plaintiff

failed to maintain adequate insurance. The tenth default, which appears to be repetitive of the third default alleged the above insurance failures exposed the defendant to liability. The eleventh default alleged the insurance company notified the defendant the policy would not be renewed. In addition, on December 23, 2021 the defendant served a fifteen day demand for rent. The plaintiff has moved seeking a Yellowstone injunction arguing either the noted defaults are baseless or that in any event they can readily be cured.

Conclusions of Law

A Yellowstone injunction is a remedy whereby a tenant may obtain 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. Assocs., 93 NY2d 508, 693 NYS2d 91 [1999], First National Stores v. Yellowstone Shopping Center Inc., 21 NY2d 630, 290 NYS2d 721 [1968]). For a Yellowstone injunction to be granted the Plaintiff, among other things, must demonstrate that "it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises" (Graubard, supra).

Thus, a tenant seeking a Yellowstone must demonstrate that: (1) it holds a commercial lease, (2) it has received from the

landlord a notice of default, (3) its application for a temporary restraining order was made prior to expiration of the cure period and termination of the lease, and (4) it has the desire and ability to cure the alleged default by any means short of vacating the premises (see, Xiotis Restaurant Corp., v. LSS Leasing Ltd. Liability Co., 50 AD3d 678, 855 NYS2d 578 [2d Dept., 2008]).

Many of the defaults are disputed by the plaintiff as constituting defaults. Thus, the plaintiff does not assert that it unequivocally is unwilling to cure any defaults (Metropolis Westchester Lanes Inc., v. Colonial Park Homes Inc., 187 AD2d 492, 589 NYS2d 570 [2d Dept., 1992]), but rather no such defaults exist. Therefore, the court will examine the defaults and if such are found to exist, the plaintiff will undoubtedly cure them (see, ERS Enterprises, Inc., v. Empire Holdings LLC, 286 AD2d 206, 729 NYS2d 23 [1st Dept., 2001]).

First, it is true as noted by the defendant, that a Yellowstone injunction is not proper to toll the service of a notice of nonpayment (Top-All Varieties, Inc. v. Raj Dev. Co., 151 AD2d 470, 542 NYS2d 259 [2d Dept., 1989]). However, where the landlord serves a notice to cure an alleged default which threatens the termination of the lease then a Yellowstone injunction is proper to maintain the status quo and prevent a forfeiture of the leasehold (Purdue Pharma, LP v. Ardsley

Partners LP, 5 AD3d 654, 774 NYS2d 540 [2d Dept., 2004]). That is true whether the issue concerns utility costs as in Purdue Pharma (supra) or late fees. In this case the fifteen day notice demanding the payment of rent states that the failure to cure will result in actions whereby the plaintiff will "surrender up the possession of said premises to the Landlord, in default of which the Landlord will commence summary proceedings under the Statute to recover the possession thereof" (see, Fifteen Day Notice [NYSCEF #8]). The fifteen day notice does not demand the payment of rent, rather it merely demands the payment of late fees which are disputed by the tenant. The issues of the appropriateness of these late fees must be litigated and should the landlord prevail the tenant will pay them. Thus, an injunction concerning the rent demand, which only concerns late fees, is proper and the motion seeking a Yellowstone in this regard is granted.

Turning to the other notices to cure, the defendant focuses upon three defaults, namely the failure to notify the landlord of work prior to its commencement, the failure to notify them of any accidents and the failure to maintain adequate insurance.

Concerning the repairs of the elevator, a settlement agreement between the landlord and the tenant dated January 9, 2019 required the tenant to resolve all outstanding violations which included the elevator. Thus, that agreement is explicit

notice of such repairs. Further, there are surely questions whether in any event the landlord was aware of the repairs being undertaken which would obviate the need for any express written notice.

Concerning inadequate insurance, it is true that in JT Queens Carwash Inc., v. 88-16 N. Boulevard, LLC, 101 AD3d 1089, 956 NYS2d 536 [2d Dept., 2012] the court held that the failure to maintain requisite insurance is an incurable default demanding a denial of a Yellowstone injunction. However, in Great Wall 384 Inc., v. 384 Grand Street Housing, 2016 WL 5672959 [Supreme Court New York County 2016] the court held that a conditional Yellowstone was proper where the tenant "offers the ability to protect the landlord for the period in default" by either securing retroactive insurance or by posting a bond for the amount of the deficient insurance. Thus, a distinction must be drawn between situations where no insurance existed at all (Kyong Sik Kim v. Idlywood NY LLC, 66 AD3d 528, 886 NYS2d 337 [1st Dept., 2009]) and situations where insurance existed but some deficiency likewise exists (see, Federated Retail Holdings Inc., v. Weatherly 39th Street LLC, 32 Misc3d 247, 920 NYS2d 896 [Supreme Court New York County 2011], see, also, Discount Columbia LLC v. Bogopa-Columbia Inc., 2017 WL 2909360 Supreme Court Kings County 2017]). Therefore, where a "tenant agrees either to bond the defendant for losses incurred as a result of a

purportedly insured claim or states that it can secure retroactive insurance to protect the landlord, a cure is possible" (Lex Retail LLC v. 71st Street Lexington Corp., 2020 WL 2557862 [Supreme Court New York County 2020]).

Likewise, the tenant has agreed to indemnify the landlord concerning any accidents that occurred on the premises rendering the landlord in the same position they would find themselves if such notice had been provided. Consequently, the plaintiff can surely cure any of these alleged defaults.

Therefore, the motion seeking a Yellowstone injunction is conditionally granted upon evidence presented to the court of either retroactive insurance or the posting of a bond protecting the landlord for any claims in excess of the coverage amounts and for a statement regarding indemnification absolving the landlord of any liability from any claims related to accidents on the property.

So ordered.

ENTER:

DATED: September 19, 2022
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC