Urban Commons 2 W. LLC v Battery Park City Auth.
2022 NY Slip Op 33268(U)
September 28, 2022
Supreme Court, New York County
Docket Number: Index No. 656505/2022
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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URBAN COMMONS 2 WEST LLC, URBAN COMMONS 2 WEST II LLC, URBAN COMMONS 2 WEST III LLC, URBAN COMMONS 2 WEST IV LLC,

Plaintiffs,

- v -

BATTERY PARK CITY AUTHORITY DBA THE HUGH L. CAREY BATTERY PARK CITY AUTHORITY, BPC LENDER, LLC,

Defendant.

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INDEX NO. 656505/2022

MOTION DATE _____

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 35, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 61, 66, 67, 97, 98

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

Upon the foregoing documents, it is

Plaintiffs Urban Commons 2 West LLC, Urban Commons 2 West II LLC, Urban Commons 2 West III LLC, and Urban Commons 2 West IV LLC (collectively Tenant) move by Order to Show Cause (OSC) for a Yellowstone injunction:

1. ". . . tolling the [Tenant's] May 27, 2022 deadline . . .to cure the purported defaults under [the] lease dated January 1, 2000, between defendant Battery Park City Authority d/b/a Hugh L. Carey Battery Park City Authority, as lessor . . . and the Board of Managers of Millennium Point Condominium, as lessee . . . incorporated by reference through [the] sublease dated January 1, 2000, between the [Landlord] as sublessor and [Tenant] as sublessee…; and"

2. ". . . enjoining and restraining Landlord, and all persons known and unknown, acting on its behalf or in concert with it, in any manner or by any means, from taking any action to terminate the Hotel Unit Sublease, and/or otherwise interfering with [Tenant's] possession of the condominium unit…."

(NYSCEF 25, OSC.)

According to Tenant, "[t]his action arises from Defendant's refusal to cooperate with [Tenant's] plan to resurrect the failing former Ritz Carlton at the southernmost tip of Manhattan." (NYSCEF 36, Amended Verified Complaint (AVC) ¶ 1.)

On January 1, 2000, defendant Battery Park City Authority DBA the Hugh L. Carey Battery Park City Authority (Landlord) and Millennium BPC Development, LLC (Millennium) entered into a ground lease (the Ground Lease), a hotel lease (the Hotel Lease) and hotel sublease (the Hotel Sublease, and together with the Ground Lease, the Lease). (*Id*. ¶¶ 12-13; NYSCEF 6, Ground Lease; NYSCEF 7, Hotel Lease; NYSCEF 8, Hotel Sublease.) "[U]ntil March 29, 2018, the Hotel was operated by Ritz Carlton under the Ritz-Carlton brand pursuant to the Hotel Operator Management Agreement with Ritz Carlton." (NYSCEF 36, AVC ¶ 23.) On May 21, 2002, Millennium assigned the Hotel Lease and the Hotel Sublease to MPE Hotel I (Downtown New York) LLC and MPE Hotel I Tenant (Downtown New York) LLC. (NYSCEF 20, Plaintiff's Memorandum of Law, at 4, n 2) On March 29, 2018, Highgate Hotels, L.P. became the operator of the Hotel as The Wagner at Battery Park. (NYSCEF 36, Amended Complaint ¶ 34.) On September 20, 2018, Tenant secured a $96 million mortgage and acquired the Hotel for $147 million. (*Id*. ¶¶ 2, 42.) On June 25, 2019, Tenant proposed to the Landlord rebranding the Hotel to the Marriott Luxury Collection (the Marriott Brand). (*Id*. ¶ 55.) On August 2, 2019, Landlord rejected the Marriott Brand. (*Id*. ¶ 60.) On October 10, 2019, Tenant submitted an updated proposal. (*Id*. ¶ 71.) To date, Landlord has yet to respond. (*Id*. ¶¶ 72-88.) According to Tenant, Landlord pushed Tenant into financial distress in violation of the Hotel Sublease before the COVID-19 Pandemic. (*Id*. ¶ 90.)

The Hotel closed due to the COVID-19 Pandemic. (NYSCEF 36, Amended Complaint ¶ 90.) Tenant laid off its staff in March 2020, according to Landlord. (NYSCEF 29, Goldenberg aff ¶ 8.) Highgate terminated its hotel operator contract in December 2020. (NYSCEF 36, Amended Complaint ¶¶96, 97, 100; NYSCEF 32, Highgate Letter.)

On May 9, 2022, Landlord served Tenant with a notice of termination (May 9, 2022 Termination Notice) advising Tenant that the Hotel Unit Sublease would terminate on June 28, 2022, unless Tenant cured alleged defaults under the Ground Lease by May 27, 2022. (NYSCEF 5, May 9, Termination Notice.) Landlord asserted two defaults: (1) Tenant defaulted in payment of rent in the amount of over $10 million; and (2) Tenant abandoned the premises. (*Id.*) Tenant's last rent payment was February 18, 2020. (NYSCEF 29, Goldenberg aff, ¶7.)

On May 26, 2022, Tenant initiated this action. (NYSCEF 2, Complaint; *see also* NYSCEF 36, AVC.) Tenant seeks: (1) an injunction tolling Tenant's time to cure the purported defaults in the May 9, 2022 Termination Notice and "to enjoin and restrain [Landlord] from taking any action to terminate the Lease or interfere with [Tenant's] possession of the Hotel"; (2) "a declaratory judgment decreeing that [Tenant is] not in default of the Hotel Sublease or that [Landlord] is otherwise estopped from claiming a default by virtue of its own breaches"; (3) "a declaratory judgment decreeing that the [May 9, 2022 Termination Notice] is null and void and without any force and effect"; (4) "a declaratory judgment decreeing that" (a) "Under Section 2.9 of the Hotel Operator Agreement, 'regional variations' include the contemporary economic realities and hotel industry trends of New York City" and (b) Section 23.05 "does not require approval of

[Landlord] for [Tenant] to change the hotel brand to the [Marriott Brand]"; (5) "a declaratory judgment decreeing that" (a) "If no approval is necessary for [Tenant] to rebrand the Hotel, then [Tenant] may rebrand the Hotel to the [Marriott Brand] forthwith"; or (b) "Alternatively, if approval is necessary for [Tenant] to rebrand the Hotel, then [the Marriott Brand] satisfies the Ground Lease requirements and is therefore approved"; (6) "an order declaring the Repositioning Plan [as that term is defined in the AVC] approved under Section 32.02"; and (7) "an order declaring [Landlord] in breach of the Ground Lease" and a determination of money damages. (NYSCEF 36, AVC.)

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 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." (*225 E. 36th St. Garage Corp. v 221 E. 36th Owners Corp.*, 211 AD2d 420, 421 [1st Dept 1995] [citations omitted].) "[T]he tenant need not, as a prerequisite to the granting of a *Yellowstone* injunction, demonstrate a likelihood of success on the merits." (*Herzfeld & Stern v Ironwood Realty Corp.*, 102 AD2d 737, 738 [1st Dept 1984] [citations omitted].)

The purpose of a Yellowstone injunction is to permit a tenant to "obtain[] a stay of the cure period before it expire[s] to preserve the lease until the merits of the dispute [can] be settled in court." (*Post v 120 E. End Ave. Corp.*, 62 NY2d 19, 25 [1984].) "[T]he law does not favor [a] forfeiture." (*Herzfeld & Stern*, 102 AD2d at 738[internal quotation omitted].)

The first two Yellowstone requirements are not in issue. Rather, the motion is denied for failure to satisfy the other two prongs.

First, Tenant fails to establish an ability to cure. Tenant is a limited liability company whose only asset, according to Landlord, is the lease, which Tenant does not dispute. According to Tenant, the lease is worthless. (NYSCEF 4, Woods[1] aff, ¶ 26.) Tenant also fails to provide any financial documentation to establish that it has funds available. The court also rejects the letters of intent and proof of funds from commercial lenders and investors for loans and equity contributions, submitted on reply, as proof of Tenant's ability to cure: i.e., pay $10 million in past due rent. (NYSCEF 43, 45, 47, 49, 51.) Woods attests, "since 2019 and through today, Plaintiffs have been shopping for and negotiating offers from financial institutions for new lines of credit and investors for equity." (NYSCEF 37, Woods aff, ¶ 25). Tenant claims that the three submitted letters (NYSCEF 43, 45, and 49) are a representative sampling of 17 such proposals. (NYSCEF 37, Woods aff, ¶25.) The court's assessment is limited to the letters actually provided. However, one of the letters expired within 24 hours of its date, on June 24, 2022. (NYSCEF 43.) None of the remaining letters is accompanied by a sworn statement attesting to authenticity. Moreover, any plan depends on Landlord's consent, which Tenant claims has thus far been unreasonably withheld since October 10, 2019.

This catch 22 must be resolved against Tenant who did nothing to challenge Landlord's unresponsiveness for years. Tenant cannot use a Yellowstone injunction as a substitute for a declaratory judgment that it should have sought years ago. If Tenant genuinely believed that Landlord was acting contrary to the Lease in connection with its

[1] Taylor Woods is a managing member of Tenant. (NYSCEF 4, Woods aff, ¶ 1.)

rebranding or hotel operator requests, Tenant could have sought relief in 2019, well before the COVID-19 Pandemic. Tenant chose not to do so. Tenant's acknowledgement of this failure is fatal. (NYSCEF 98, tr at 15:10-12 [mot. seq. no. 001].) The court cannot say this application is timely.

Tenant has not paid rent since February 18, 2020. "The obligation of a commercial tenant to pay rent is not suspended if the tenant remains in possession of the leased premises, even if the Landlord fails to provide essential services." (*Towers Organization, Inc. v Glockhurst Corp., N.V.*, 160 AD2d 597, 599 [1st Dept 1990] [citation omitted]). "A Yellowstone injunction… does not provide a license to withhold payments which are not the basis of the dispute and is surely not appropriate where its only purpose is to delay performance of a contractual obligation after the time for performance has already expired." (*Boyarsky v Froccaro*, 125 Misc.2d 352, 357 [Sup Ct, Nassau County 1984] [internal citation omitted].)

Accordingly, it is

ORDERED that Tenant's motion for a preliminary injunction is denied and the TRO is vacated.

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9/28/2022
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE