ABDO Fitness Corp. v 14th St. HK Realty Corp.
2022 NY Slip Op 33507(U)
October 14, 2022
Supreme Court, New York County
Docket Number: Index No. 653043/2022
Judge: Margaret Chan

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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ABDO FITNESS CORP.,

Plaintiff,

- v -

14TH STREET HK REALTY CORP. and 14TH STREET REALTY ASSOCIATES, LLC

Defendants.

INDEX NO. 653043/2022

MOTION DATE 08/24/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 74 were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

Plaintiff – a commercial tenant – operates a fitness center on 14th Street in the city, state, and county of New York. Plaintiff moves by order to show cause to enjoin defendants – landlord – from interfering with plaintiff's rights under its two leases and to exercise its renewal option extending both leases for an additional five years. Defendants oppose the motion.

Background

Plaintiff is the owner of a health club that occupies a commercial space leased from defendants (NYSCEF # 1 – Complaint, ¶ 1). In November of 2012, plaintiff entered a lease agreement with defendants for a space known as Store #'s 6 and 7 (*id.*, ¶ 7; NYSCEF # 62 – the 2012 Lease). In December of 2018, plaintiff also did business as IG-Fit, and under IG-Fit, entered into a lease for another of defendants' spaces known as Store # 8 set to commence January 15, 2019 (NYSCEF # 1, ¶ 11; # 63 – the 2019 Lease). Both the 2019 Lease and the 2012 Lease (the Leases) were for a term ending on October 31, 2022, subject to plaintiff's option to renew through October 31, 2027 (the Renewal Options) (NYSCEF # 1, ¶'s 9; 12).

Plaintiff's Renewal Options were subject to plaintiff not being in default of the Leases beyond the applicable grace periods (NYSCEF # 2, ¶ 69; # 3, ¶ 41). The 2012 Lease states that the option to renew for a five-year term is granted "provided Tenant is not in material default of any terms and conditions of this Lease beyond applicable grace periods at the time Tenant exercises its option . . . ." (NYSCEF # 60 at 1; # 2 – 2012 Lease – at 10). The 2019 Lease's renewal right states that if tenant is in default beyond any cure period when tenant sends in the renewal notice, the renewal notice is void (NYSCEF # 3). The 2019 Lease required the renewal notice to

be sent by certified mail at least nine months prior to the expiration of the initial lease term while the 2012 Lease only required twelve months' written notice without the certified mail requirement (*id.*).

On September 9, 2021, via a letter to the management company for defendants, Stellar Management, plaintiff notified Smajilje Srdanovic, the Director of Management Facilities, and Maria Mammano that plaintiff will renew both leases. The letter also referenced the parties' earlier phone call regarding plaintiff's intent to renew the Leases (NYSCEF # 1, ¶ 57; # 48). Plaintiff's General Manager, Dejan Savic, recounts that he met with Srdanovic and another Stellar employee, Bobby Guttenberg, on September 22, 2021, to review their calculations of the arrears. Thereafter, plaintiff delivered three checks totaling $17,658.06 bringing plaintiff current and rendering plaintiff in full compliance with the Leases (NYSCEF # 1, ¶'s 27-29; # 50 – Savic aff, #'s 4-7). Plaintiff adds that because defendants did not acknowledge the renewal notices, plaintiff again sent the renewal notices for each Lease by certified mail on July 21, 2022 (NYSCEF #1, ¶ 37; NYSCEF # 6 – copies of renewal notices only). On August 8, 2022, plaintiff received an email from Srdanovic, which email served as a formal notice of denial on the renewal of the Leases (NYSCEF # 1, ¶ 38). Defendants deny receiving the Mailed Renewal Notice. Indeed, Srdanovic avers that he only learned about the renewal notices in August 2022 (NYSCEF # 61 – Srdanovic Aff, ¶ 14). Plaintiff claims that since May of this year, defendants has been actively seeking new tenants and has advertised the rental availability of plaintiff's leased premises (*id.*, ¶ 39). Plaintiff also claims that because of defendants' action, plaintiff has not paid rent since May (NYSCEF # 74 at 11:6-25).

Plaintiff admits that it fell behind in rent payments due to the New York State Emergency Order at the onset of the COVID-19 pandemic (NYSCEF # 1, ¶ 15). To address the closure of the premises and reduced business, plaintiff and defendants entered into a rent abatement agreement sometime in March of 2021[1] (NYSCEF # 66 – the Abatement Agreement). Plaintiff acknowledged that at the time of the Abatement Agreement, plaintiff owed defendants $410,484.26 and $124,907.17 under the 2012 Lease and the 2019 Lease, respectively (the Unpaid Rent) (*id.*, ¶ 5). Plaintiff agreed to release its security deposits to defendants, subject to replenishment on or before July 1, 2021, and to make a $100,000 lump sum payment (the Compromise Amounts) (*id.*). Defendants agreed to deem the Unpaid Rent abated, waived, and forgiven, conditioned on plaintiff's "full, complete and timely performance" under the Leases (*id.*, ¶'s 5; 7).

The Abatement Agreement further provides that if plaintiff defaults on its payments during the period between January 1, 2021 and June 30, 2021, then the

[1] The Abatement Agreement is dated December 31, 2020. Plaintiff states that the parties entered the agreement in or about March 2020 (NYSCEF # 1, ¶ 17). Defendants' rent ledgers credit plaintiff with $301,265.34 for the 2012 Lease as of March 11, 2021 and $119,712.17 for the 2019 Lease as of March 22, 2021 (NYSCEF # 65 at 17).

forgiveness would be automatically withdrawn and the Unpaid Rent would be due within five days of defendants' provision of written notice of default to plaintiff (*id.* ¶ 7). Defendants do not dispute that they received the Compromise Amounts and they do not allege that they ever provided written notice of default to plaintiff.

Defendants also allege that plaintiff failed to satisfy the open governmental violations. Defendants allege that there are fifteen violations open to date totaling $47,884.10.

Discussion

"A preliminary injunction substantially limits a defendant's rights and is thus an extraordinary provisional remedy requiring a special showing . . . [It] will be granted only when the party seeking such relief demonstrates a likelihood of ultimate success on the merits, irreparable injury if the preliminary injunction is withheld, and a balance of equities tipping in favor of the moving party" (*1234 Broadway LLC v West Side SRO Law Project*, 86 AD3d 18, 23 [1st Dept 2011], citing *Doe v Axelrod*, 73 NY2d 748 [1988]). "With respect to likelihood of success on the merits, the threshold inquiry is whether the proponent has tendered sufficient evidence demonstrating ultimate success in the underlying action" (*id.*). The existence of triable issues of fact does not require the denial of a preliminary injunction when the movant meets its burden of establishing that the three prerequisites for injunctive relief have been met (*Bell & Co, P.C. v Rosen*, 114 AD3d 411, 411 [1st Dept 2014]; CPLR 6312 [c]).

For the reasons below, plaintiff's motion is granted to a limited extent. Plaintiff has tendered sufficient evidence demonstrating its entitlement to a preliminary injunction.

1. Likelihood of Ultimate Success on the Merits

Plaintiff has shown that each Lease provides plaintiff with a Renewal Option to extend the term through October 31, 2027, and that plaintiff timely mailed a notice of renewal as required by the 2012 Lease. Plaintiff has also sufficiently alleged at this juncture that forfeiture may result if plaintiff's recent alterations to the leased space, allegedly in excess of $1 million and made in reliance on the Renewal Options, would be lost due to plaintiff's failure to send the 2019 Lease renewal notice via certified mail (NYSCEF # 43, ¶'s 6-7).

Defendants argue that there would be no forfeiture if plaintiff lost the privilege of renewal. This is without merit. Defendants wholly fail to substantiate their assertion that "all or some"[2] of the expenditures plaintiff alleges to have incurred in 2019 should have been completed in 2012 (NYSCEF # 61, ¶ 48).

As for plaintiff's failure to send the renewal notice by certified mail, as required by the 2012 lease (but not the 2019 lease), defendants have not identified

[2] Even putting aside the lack of substantiation, defendants' use of the qualifier "some" renders their argument as such of questionable reach.

any prejudice to them (*see e.g. J. N. A. Realty Corp. v Cross Bay Chelsea, Inc.*, 42 NY2d 392, 398 [1977] [noting that where no prejudice lies against a landlord, a tenant "should not be denied equitable relief from the consequences of his own neglect or inadvertence if a forfeiture would result"]; *see also Madangsui, Inc. v Crystal Properties LLP*, 55 Misc 3d 1201(A) [Sup Ct, NY County 2017] [finding a likelihood of success on the merits to support a preliminary injunction, including on account that, although tenant "did not technically comply with the written notice requirements" of the lease, the landlord was aware prior to the renewal notice deadline that the tenant sought a lease extension]).

As to plaintiff's default in timely rent payments, defendants rely on *Ahmed v C.D. Kobsons, Inc.* (67 AD3d 467, 468 [1st Dept 2009]) and *Jefpaul Garage Corp. v Presbyterian Hosp. in City of New York* (61 NY2d 442, 445 [1984]) for the idea that a tenant's default precludes lease renewal. This is unavailing. In finding a lack of success on the merits, the trial court in *Ahmed*, noting the tenant's history of late rent payment, found it significant that the landlord had advised in a letter the tenant that "late payment of rent would affect his ability to renew his lease" (*Ahmed v C.D. Kobsons, Inc.*, 24 Misc 3d 1208(A) [Sup Ct, NY County 2009] *aff'd* 67 AD3d 467 [1st Dept 2009]). Similarly, in *Jefpaul*, the court made clear that the landlord had, per the lease, "advised plaintiff that it had 15 days to cure" late rent payments and then "served another notice to cure" (61 NY2d at 445). Defendants have failed to allege they sent any such notice. Furthermore, plaintiff's alleged a long course of conduct of late payment raises the possibility that defendants have waived strict compliance with timely payments (*see* NYSCEF #'s 64-65 – Rent Ledgers; NYSCEF # 61, ¶'s 6; 38 ["From the inception of each tenancy Plaintiff and IG-Fit have continually failed to timely pay base rent"]; *see also Madison Ave. Leasehold, LLC v Madison Bentley Assocs. LLC*, 30 AD3d 1, 3, *affd* 8 NY3d 59 [2006] ["landlord's practice of accepting the proffered rent payments, without protest, over a period of three years, constitutes a course of conduct effecting a waiver of the timely payment covenant"]).

Counsel for defendants at oral argument asserted: "The fact that allegedly we never brought [plaintiff's various Lease defaults] up really doesn't have any impact" (NYSCEF # 74 – Tr at 15:6-7). Defendants are mistaken. The Renewal Options foreclose renewal only if plaintiff's defaults are "beyond applicable grace periods" or "continued beyond any cure period" at the time of plaintiff's renewal notice (NYSCEF # 62, § 69; NYSCEF # 63, § 41). Defendants have not excluded the possibility that the impact of defendants' putative failure to send notice of defaults would mean that plaintiff's applicable cure periods had not begun and could therefore not have terminated (NYSCEF # 62, § 17; NYSCEF # 63, §'s 17; 70).

Defendants argue that as of September 9, 2021, plaintiff owed $155,525.64 and $398,153.73 for the 2019 and 2012 Leases, respectively (NYSCEF # 60 – Opp at 7-8). These numbers are inconsistent with the ledgers defendants themselves have supplied. The ledgers show that on that date, plaintiff owed $35,813.47 and

$96,888.39 (NYSCEF #'s 64-65).[3] Further, the Abatement Agreement provided that the abatement amounts would "accelerate and be due in full" within five days of defendants' written notice of default to plaintiff. Defendants have not alleged it sent such notice. The rent ledgers indicate that the chargebacks occurred on July 27, 2022, well after plaintiff's September 9, 2021 notice (NYSCEF # 64 at 6; # 65 at 19). Accordingly, defendants have not established that the arrears at the time of plaintiff's renewal notice should properly include the withdrawn abatement amounts or otherwise sufficiently raise questions of fact as to plaintiff's allegation that after the parties met to reconcile arrears on September 7, 2021, plaintiff paid $17,658.06 in satisfaction of arrears.

Defendants allege that plaintiff failed to acquire "any and all permits, licenses, temporary certificates of occupancy, etc. necessary" to lawfully operate (NYSCEF # 60 at 9). Despite alleging this broadly, and despite defendants' opposition papers indicating that defendants' affidavit detailed such failures (*id.*), all that defendants articulate is plaintiff's failure to obtain a temporary certificate of occupancy for the 2019 Lease space. Under Section 17 of the 2019 Lease, such putative violation could be curable, including via diligent efforts if not curable within the grace period, after defendants provide written notice to plaintiff of the violation, which notice has not been alleged (*see e.g. Vill. Ctr. for Care v Sligo Realty & Serv. Corp.*, 95 AD3d 219, 220 [1st Dept 2012] ["where defaults are incapable of being cured within [the grace period], and all that the terms of the lease require from the tenant is commencement of diligent efforts to cure the defaults within the allotted time," injunctive relief is not necessarily barred]).

Defendants' allegation regarding governmental violations caused by plaintiff is similarly unavailing given the lack on the record of any notice of default. Furthermore, while defendants allege there are fifteen open violations to date totaling $47,884.10, the document defendants rely upon only indicates there are fourteen such violations totaling said amount, and nine of such violations are in defendants' name (NYSCEF # 68). Defendants' conclusory assertion that "irrespective of the named Respondent... all such violations arose as a result of [plaintiff's] acts or omissions in the premises" is unavailing on this record to clarify whether the violations necessarily involve the commercial space plaintiff is renting or that plaintiff necessarily caused or is responsible for such violations (NYSCEF # 61, ¶ 8; *see e.g. Vanguard Diversified, Inc. v Rev. Co.*, 35 AD2d 102, 104 n 1 [2d Dept 1970] [finding that tenant may have retained renewal option despite certain violations, including on account of testimony that violations were structural in nature and therefore the responsibility of the landlord]).

2. Irreparable Injury

Respecting irreparable injury, defendants' argument that plaintiff's alleged loss of income and investment from denial of its renewal option amounts to money

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[3] Plaintiff disputes the legitimacy of the rent ledgers (NYSCEF # 74 at 6:8-14).

damages is unavailing. The First Department has held that termination of commercial space gives the presumption of irreparable injury, which is not rebutted here (*A1 Ent. LLC v 27th St. Prop. LLC*, 60 AD3d 516 [1st Dept 2009]).

3. Balance of Equities Tipping in Favor of Plaintiff

Plaintiff argues that in 2019, it invested $1 million into developing the space with the understanding that it would have the renewal term (NYSCEF # 43, ¶ 7). As discussed above, defendants' conclusory dispute of the possibility of forfeiture is not persuasive. Accordingly, plaintiff has sufficiently demonstrated entitlement to equitable relief (*see e.g. Vill. Ctr. for Care*, 95 AD3d at 222 [noting the "public policy against the forfeiture of leases"]; *see also PMB Soho, LLC v Soho Thompson Realty, LLC*, 2015 WL 1623800 [Sup Ct, NY County 2015] ["the harm to [tenant] not granting the injunction and allowing [landlord] to proceed with an eviction far outweighs any harm that may come to [landlord] in allowing [tenant] to continue operating"]).

Injunction; IG-Fit

For the foregoing reasons, plaintiff has made the requisite showing for a preliminary injunction. However, plaintiff is not a named party to the 2019 Lease, which is between defendants and IG-Fit. Plaintiff asserts that plaintiff was doing business as IG-Fit at the time of entry of the 2019 Lease (NYSCEF # 43, ¶ 7). Plaintiff has not explained, however, why relief under that Lease may be granted in the present procedural posture of this action or without an amendment to the complaint to include IG-Fit. Accordingly, injunctive relief shall not issue at this time respecting the 2019 Lease.

Undertaking

Defendants request that should the court grant an injunction, then it be conditioned upon plaintiff's posting an undertaking pursuant to CPLR 6312 and further conditioned upon plaintiff's payment of arrears and ongoing rent. Plaintiff has admitted not to having paid rent since May of this year because defendants were actively seeking new tenants (NYSCEF # 74 at 11:6-25). Plaintiff has also stated that it "will continue to pay" rent and "honor the terms of" the Leases that would factor into any continued entitlement to equitable relief (NYSCEF # 43, ¶ 27; *see e.g. PMB Soho, LLC*, 2015 WL 1623800 [finding an injunction particularly appropriate where tenants keep current on rent]). Defendants' request to be heard as to the amount of the undertaking is granted, as indicated below.

Conclusion

In view of the above, it is

ORDERED that ABDO Fitness Corp.'s motion for a preliminary injunction is granted to the extent that pending further order of the court, defendants 14th Street HK Realty Corp and 14th Street Realty Associates, LLC are enjoined from denying ABDO Fitness Corp.'s rights under the lease agreement that the parties entered into in November 2012 (NYSCEF # 62); and it is further

ORDERED that ABDO Fitness Corp.'s motion for a preliminary injunction respecting the lease agreement that the parties entered into in December 2018 (NYSCEF # 63) is denied without prejudice; and it is further

ORDERED that defendants shall have until October 21, 2022, to file a three-page maximum letter regarding their request for an undertaking, including an amount for the undertaking, pursuant to CPLR 3212 (b), and plaintiff shall thereafter have until October 26, 2022, to file a responsive letter, no more than three-pages and indicate plaintiff's ability to promptly pay any rent arrears.

10/14/2022
DATE

MARGARET CHAN, J.S.C.

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