

200 Tribeca Rest. LLC v 200 Church St. Assoc. LLC
2022 NY Slip Op 33741(U)
November 1, 2022
Supreme Court, New York County
Docket Number: Index No. 652833/2022
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

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200 TRIBECA RESTAURANT LLC

Plaintiff,

- v -

200 CHURCH STREET ASSOCIATES LLC,

Defendant.

-----X

INDEX NO. 652833/2022

MOTION DATE 10/19/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

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

Plaintiff’s motion for a preliminary injunction is denied and defendant’s cross-motion to dismiss is granted.

Background

Plaintiff brings this case to prevent defendant (its landlord) from acting on a default notice. It claims that it was negotiating with defendant about settling the issue of past arrears but that defendant decided at the last moment not to enter any agreement with plaintiff.

Plaintiff explains that it runs a restaurant in a commercial space owned by defendant and that it has tried to open up an outdoor section for its restaurant since before the pandemic started. Plaintiff blamed the building’s condo board for blocking its effort to create a sidewalk café in 2019. It later commenced an action in 2019, although that lawsuit was ultimately discontinued in 2020 in light of the fact that sidewalk seating was generally permitted as part of the city’s response to the outbreak of COVID-19.

Plaintiff complains that defendant has not fixed pipes and other infrastructure-related issues, but it does acknowledge that defendant sent it a demand for rent in July 2022 that set a deadline of August 10, 2022 for plaintiff to pay the arrears. It claims that this notice disregarded the parties' settlement talks with respect to resolving the parties' disputes. Plaintiff argues that on August 9, 2022, before the period to cure had expired, its principal believed that the default notice would be withdrawn only to discover by the end of that day that the default notice would be enforced.

Plaintiff now moves for injunctive relief to prevent defendant from acting based upon that notice. It claims that it invested millions in re-branding and renovating the restaurant and that it can pay back the arrears once the new restaurant (which is now open) becomes profitable. It argues that any arrears it may owe is offset by defendant's breaches of lease, including failing to cooperate with the 2019 request for a sidewalk café permit.

Defendant cross-moves to dismiss. It claims that plaintiff expressly waived and released defendant from any claims for money or damages, that the rent obligations are independent of any of the landlord's obligations under the lease and that plaintiff alleged in the previous case that defendant had nothing to do with preventing the first request for a sidewalk cafe. Defendant argues that plaintiff's causes of action for harassment and for breach of the implied covenant of good faith and fair dealing fail to state claims for relief.

In reply, plaintiff insists it is entitled to relief in the form of a preliminary injunction or a Yellowstone injunction.

Discussion

"A preliminary injunction substantially limits a defendant's rights and is thus an extraordinary provisional remedy requiring a special showing. Accordingly, a preliminary

injunction will only be granted 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 W. Side SRO Law Project*, 86 AD3d 18, 23, 924 NYS2d 35 [1st Dept 2011] [citations omitted]).

The Court denies the motion for a preliminary injunction. The fact is that plaintiff failed to demonstrate a likelihood of success on the merits. As an initial matter, the fact that the parties were negotiating a potential resolution of plaintiff’s failure to pay rent is not a basis to grant injunctive relief. The Court cannot force defendant to settle the case.¹ And plaintiff did not cite a sufficient basis for its assertion that the default notice was defective.

Moreover, the Court observes that in the 2019 case, *plaintiff alleged* that “Landlord is being named herein as a nominal defendant to this action having fully consented to and approved of Tenant’s sidewalk café application, as its designee under the Governing Documents” (NYSCEF Doc. No. 3, ¶ 11). Therefore, plaintiff has no viable basis to claim that it can seek an offset from defendant, the landlord, based upon defendant’s purported refusal to cooperate with that 2019 request for a sidewalk café. The Court observes that this 2019 complaint is verified. Certainly, plaintiff cannot now claim that this legal filing has no bearing on its ability to seek relief against defendant for something it previously admitted it had no claim against defendant. Although plaintiff emphasizes that the 2019 case was voluntarily discontinued, plaintiff did not adequately explain why the Court should disregard plaintiff’s own sworn pleading which contains a full-throated acknowledgement that defendant did nothing to stop the sidewalk café effort.

¹ The Court observes that it held a settlement conference at oral argument on the instant motion and although the parties appeared to agree on the framework of an agreement, they never uploaded anything with this Court and so the Court must issue a decision on the motion.

Even if plaintiff could sidestep its own statements, the fact is that the lease documents expressly state that defendant was not in default of the lease (which required that it cooperate with plaintiff's effort to get a sidewalk café permit). In the February 2021 second amended lease (in which the parties agreed to a reduction in rent), plaintiff expressly agreed that "Tenant hereby certifies to Landlord that (i) the Lease is in full force and effect and has not been further modified or amended, (ii) Landlord is not now in default under the Lease, Tenant knows of no event which, with notice or the passage of time or both would constitute such a default by Landlord, and (iii) Tenant has made no demand against Landlord and has no present right to make such demand with respect to charges, liens, defenses, counterclaims, offsets, claims, or credits against the payment of rent or additional rent or the performance of Tenant's obligations under the Lease" (NYSCEF Doc. No. 20, ¶ 10[c]).

Although plaintiff insists that this is not a waiver, the Court disagrees. Plaintiff signed this agreement in February 2021 stating that defendant was not in default. It cannot now allege that defendant was actually in default of the lease back in 2019. Plaintiff's contention at oral argument that somehow, this provision only applied to the present, makes little practical sense. That would mean that the agreement would only apply to the actual day upon which it was signed. A plain reading of this agreement suggests otherwise; it clearly provides that defendant was not in default for any prior claims arising out of the lease.

With respect to the pipe issue, the Court finds that it does not compel the Court to issue injunctive relief. Plaintiff failed to submit any evidence that this pipe issue prevents it from running the restaurant. In fact, it is only mentioned once in the verified complaint (NYSCEF Doc. No. 1, ¶ 9). The Court cannot issue the extraordinary remedy of injunctive relief based upon a vague claim about pipe issues.

Cross-Motion to Dismiss

Plaintiff asserts causes of action for declaratory judgment that the default notice is defective, a permanent injunction that the default notice is unenforceable, tenant harassment based on the default notice, breach of contract with respect to the sidewalk café issue as well as breach of the implied covenant of good faith and fair dealing.

As discussed above, the injunctive relief claims (the first two causes of action) are completely without merit. As is the third cause of action for tenant harassment. Plaintiff admits it has not paid the rent for some time and fails to allege a sufficient reason to justify this failure. And it is not harassment for a landlord to seek rent, particularly where the tenant does not deny there is a significant balance owed. That defendant allegedly backed away from a settlement may upset plaintiff but it is not a basis for this Court to enjoin defendant. The Court recognizes that plaintiff maintains it spent millions to refurbish and renovate the restaurant and does not want to lose that investment. But the Court cannot force defendant to accept less than it believes it is owed.

Similarly, the remaining causes of action are also without merit. Plaintiff did not cite a sufficient basis for a breach of contract claim with respect to the lease. The verified complaint only focuses on defendant's failure to cooperate with respect to the sidewalk café (NYSCEF Doc. No. 1 at 11-12). But plaintiff swore in a 2019 verified complaint that the defendant did, in fact, cooperate. That forecloses plaintiff's ability to claim that here. Plus, the second amended lease contains a clear provision where plaintiff agreed that defendant was not in default of the lease. No other viable basis for a breach of contract claim is contained in the verified pleading.

And the fifth claim related to good faith and fair dealing is equally unavailing. This claim also cites the sidewalk permit issue as well as defendant's "desire to collect purported rent" as

the basis for this cause of action. Of course, defendant is entitled to collect rent and plaintiff does not specifically argue why defendant is not entitled to collect rent. That plaintiff thinks defendant is using the instant effort to remove plaintiff from the premises and get a new tenant in with more favorable terms is not a defense to not paying what plaintiff owes.

Summary

Clearly, plaintiff is upset that it re-branded its restaurant at great expense and now faces a potential eviction (assuming defendant decides to pursue eviction). Unfortunately, plaintiff never entered into an agreement whereby its arrears were forgiven. The rent demand notice cites unpaid rent from well before the pandemic and insists that plaintiff owes nearly \$400,000 as of the date of the notice. Plaintiff does not deny that it has to pay the rent. Instead, it attempts to rehash an old argument from years ago about an unsuccessful attempt to get a sidewalk café permit despite the fact that it alleged that defendant had nothing to do with that dispute. Apparently, the condo board was the obstacle.

Nothing contained in this motion suggests that the Court should enjoin defendant from enforcing its default notice. And plaintiff failed to state a cognizable cause of action against defendant.

Accordingly, it is hereby

ORDERED that plaintiff's motion for injunctive relief is denied and all temporary injunctive relief is hereby vacated immediately; and it is further

ORDERED that defendant’s cross-motion to dismiss is granted, the complaint is dismissed and the Clerk is directed to enter judgment in favor of defendant and against plaintiff along with costs and disbursements upon presentation of proper papers therefor.

11/1/2022

DATE



ARLENE P. BLUTH, 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