

Steven Bldg. Supply Inc. v Davrich Realty Corp.

2023 NY Slip Op 33120(U)

August 24, 2023

Supreme Court, Kings County

Docket Number: Index No. 512844/2023

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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STEVEN BUILDING SUPPLY INC.,

Plaintiff,

Decision and order

- against -

Index No. 512844/2023

DAVRICH REALTY CORP., CLAY PROPERTIES
LLC, SOURCE RESIDENTIAL LLC, LEE
HYMOWITZ, Esq., as Escrowee, and STEVEN
HELLER, individually,

Defendant,

August 24, 2023

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PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #2 & #3

The defendants have moved and cross-moved seeking to reargue a decision and order dated June 20, 2023. The plaintiff has opposed the motion. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

The facts were adequately recited in the prior order. In that order, the court granted that injunction holding that a Yellowstone was appropriate in this case. The defendants now move seeking to reargue that determination. Davrich moves seeking reargument asserting the court erred in concluding the subtenant was entitled to more than one extension. Clay Properties argues a Yellowstone is inappropriate in this context.

Conclusions of Law

A motion to reargue may be granted upon the showing that the court overlooked or misapprehended the facts or law or for some

other reason mistakenly arrived at its earlier decision (Bethel Springvale Nursing Home Inc., v. Gleason, _AD3d_, 192 NYS3d 692 [2d Dept., 2023]). Thus, the party must demonstrate that the court overlooked some point of law or fact and consequently made a decision in error.

Paragraph 2 of the sublease states that "the term ("Term") of this Sublease shall commence on January 1, 2018 (the "Commencement Date") and end on December 31, 2019 (the "Expiration Date"), unless sooner terminated pursuant to the terms hereof or of the Sublease. This Sublease shall be binding on the parties hereto. Sublandlord shall have the right to cancel said sublease upon 120 days written notice to subtenant. Landlord shall have the right to cancel upon 120 days' notice during the term of the lease or any extensions or options. Subtenant shall have an option to renew the sublease for an additional 2-year period at a monthly rent of \$1,500 per month. Any additional or subsequent extensions will be at 3% increase per annum" (see, Sublease, ¶2 [NYSCEF Doc. No. 6]).

Davrich insists that provision only permits one lease extension and that "the reference in the lease to "additional or subsequent extensions or options" was to explicitly give the Sublandlord the right to terminate the lease during the 2-year renewal period, as the preceding sentence only provided that the "Sublandlord shall have the right to cancel said sublease

upon 120 days written notice to subtenant" without explicitly stating the right to do so during the 2-year renewal period" (see, Memorandum in Support, page 5 [NYSCEF Doc. No. 90]). It is true that the above provision allows the sublandlord to terminate the lease by providing 120 days notice to the subtenant and that the landlord could also terminate the lease by providing 120 notice to the subtenant "during the term of the lease or any extensions or options" (id). The sublandlord's right to terminate and the landlord's right to terminate both appear to permit termination in middle of the lease as long as 120 days notice is provided. This actually comports with the opening sentence of the provision which states the terms of the sublease "unless sooner terminated pursuant to the terms hereof or of the Sublease" (id). It is surely unusual to permit termination during a lease term, however, the lease expressly provides for such a scenario. However, that does not support Davrich's argument at all that only one extension is contemplated. The above provision twice mentions more than one extension. The above provision does state that "Subtenant shall have an option" to renew which indicates one extension, however, the lease could not have written "options" in that sentence because the rental price was fixed for the first term. Indeed, reading the last two sentences only confirms that more than one lease extension was contemplated. The last two sentences state that for the first

renewal option the monthly rent will be \$1,500 and that "any additional or subsequent extensions will be at 3% increase per annum" (id). Davrich has failed to explain the meaning of the last sentence if only one extension was contemplated. Davrich argues that interpreting the last sentence to permit additional or subsequent extensions "creates a new lease for the parties under the guise of interpreting the writing therein contrary to New York law" (see, Memorandum in Support, page 5 [NYSCEF Doc. No. 90]). However, that argument is untenable. The fact the number of extensions is not stated and thus theoretically the lease could be renewed indefinitely is tempered by the provision that any lease extension can be terminated by providing 120 days notice of such proposed termination. Moreover, the very last sentence provides a three percent increase per annum for each lease extension. Thus, Davrich's arguments the plain meaning of the lease actually creates a new unenforceable lease is unavailing. In any event, the court did not mean to foreclose any further litigation about the meaning of that provision. Rather, in the context of the Yellowstone sought there was surely sufficient evidence to support such a conclusion.

Turning to the motion seeking to reconsider the Yellowstone, as noted, the lease appears to permit termination at any time as long as 120 days notice is provided. While that might render the right of first refusal provision contained in Section 3.2 of the

lease hollow since the lease can be terminated at any time, again, the clear terms of the lease speak for themselves. Thus, there is really no basis upon which the plaintiff can seek to maintain a tenancy. Further, there has been no notice to cure which has been presented. The notice of termination, as noted, was in full compliance with the lease and there are no grounds presented upon which the plaintiff can appropriately seek any stay. To the extent the plaintiff maintains any action for damages against the defendants, for failing to notify them of such offers pursuant to 3.2 of the sublease, such relief is not foreclosed by the cancellation of the Yellowstone. Thus, the plaintiff is certainly correct that the provision regarding the right of first refusal and the provision regarding termination of the sublease "are neither connected, nor dependent, nor contingent on one another" (see, Affirmation in Opposition, page 6 [NYSCEF Doc. No. 101]). Consequently, while the plaintiff may pursue claims for the defendant's violation of 3.2 of the sublease, the plaintiff has really failed to explain why it is entitled to a Yellowstone injunction. Whether the plaintiff's claims will withstand further motion practice remains to be seen, however, at this juncture the Yellowstone is improper.


Therefore, based on the foregoing, the motion seeking reargument is granted to the extent the motion seeks reconsideration of the Yellowstone granted. Upon reargument, the

motion seeking to vacate the Yellowstone injunction is granted.

So ordered.

ENTER:

DATED: August 24, 2023
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC