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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN J.S.C. Justice

PART 11

C&E 608 Fifth Avenue Holding, Inc.

- v -

Swiss Centers, Inc.

INDEX NO. 100245/06

MOTION DATE

MOTION SEQ. NO. 1

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | |
| Answering Affidavits — Exhibits | |
| Replying Affidavits | |

Cross-Motion: ~~☒~~ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross-motion are determined in accordance with the annexed decision and order.

FILED
JUL 18 2006
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: July 7, 2006

HON. JOAN A. MADDEN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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C & E 608 FIFTH AVENUE HOLDING, INC. d/b/a
C & E FIFTH AVENUE HOLDING, INC. d/b/a
CHALANO & CO.,

INDEX NO. 100245/06

Plaintiff,

-against-

SWISS CENTER, INC.

Defendant.



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JOAN A. MADDEN, J.:

In this action involving a dispute between a commercial tenant and landlord, plaintiff tenant is moving by order to show cause for a Yellowstone injunction: 1) staying, tolling and extending the expiration of the cure period in the Notice of Default dated December 21, 2005; and 2) restraining and enjoining defendant landlord, its employees, agents, servants, representatives and all other persons acting on its behalf from terminating plaintiff's lease based on the Notice of Default dated December 21, 2005, and commencing any action or proceeding to obtain possession of the premises and otherwise attempting to gain possession of the premises. Defendant landlord opposes the motion and cross-moves for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the complaint based on documentary evidence and for failure to state a cause of action.

Plaintiff C & E 608 Fifth Avenue Holding, Inc. d/b/a C & E Fifth Avenue Holding, Inc. d/b/a Chalano & Co. (hereinafter "C & E") occupies street level retail space and second floor

office space in the building located at 608 Fifth in Manhattan, pursuant to a lease dated December 16, 1994, as amended, between defendant Swiss Center as landlord, and plaintiff's predecessor, as tenant. The lease term expires in 2011. On May 3, 2005, C & E's President Elliot Cohen wrote to Swiss Center requesting written approval for proposed new signs to be installed on the interior of the windows so as to be visible from the exterior of the premises. After receiving no response from Swiss Center, Cohen sent a second letter dated May 26, 2005, stating that he was still waiting for Swiss Center's approval.

By letter dated July 6, 2005, C & E's attorney informed Swiss Center that "[a]s more that two months have passed since Chalano [C & E] first requested written approval for certain signage, Swiss Center, Inc. is in default of Article 41 of the Lease. . . . As the lease is silent as to Chalano's remedies for Swiss Center's default of the lease, unless Swiss Center, Inc. provides a reasonable objection to Chalano's proposed signage on or before July 16, 2005, Chalano shall install such signage and reserve its right to seek damages for Swiss Center, Inc.'s intentional default of the terms of the lease." By letter dated July 22, 2005, C & E's attorney informed Swiss Center that it had not responded to C & E's three previous letters, and again requested a response.

In November 2005, C & E installed the proposed signs in the upper interior portion of the windows facing the sidewalk, so as to be visible from the exterior of the premises. On or about December 21, 2005, Swiss Center served C & E with a Notice of Default dated December 21, 2005, stating that C & E was default under the lease, "[s]pecificially, in violation of Articles 35, 41 and 45 of the Lease and paragraphs 5 and 9 of the Rules and Regulations attached to the Lease, you have placed signs in the upper windows at the front of the Premises without the

Landlord's consent."[1] The notice further provided that "pursuant to Article 17 and 61 of the Lease, you are hereby required to cure the aforementioned violations of the Lease on or before January 17, 2006 . . . and that upon your failure to cure the aforementioned violations, the Landlord will terminate your tenancy." On January 11, 2006, plaintiff secured the instant Order to Show Cause seeking a Yellowstone injunction tolling the expiration of the period to cure the alleged lease violations.

The purpose of a Yellowstone injunction is to "maintain the status quo so that a commercial tenant, when confronted by a threat of termination of its lease, may protect its investment in the leasehold by obtaining 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 Avenue Assocs., 93 NY2d 508, 514 (1999). "As such, it may be granted on less than the normal showing required for preliminary injunctive relief." Lexington Avenue & 42nd St. Corp. v. 380 Lexchamp Operating, Inc., 205 AD2d 421, 423 (1st Dept. 1994). In order to obtain a Yellowstone injunction, a tenant must demonstrate that: 1) it holds a commercial lease; 2) it received from the landlord a notice to cure, a notice of default, or a threat that the lease would be terminated; 3) it requested injunctive relief prior to the expiration of the cure period and 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. Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Avenue Assoc., supra.

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[1]It is not disputed that Swiss Center sent C & E a prior Notice of Default dated March 16, 2005, stating that "in violation of Articles 35 and 45 of the Lease and paragraphs 5 and 9 of the Rules and Regulations, you have placed signs in the upper windows at the front of the Premises without the Landlord's consent," and requiring C & E to cure the violation by April 6, 2005. It is also not disputed that C & E removed the signs within the cure period.

C & E has made a sufficient showing to be entitled to Yellowstone relief. It undisputed that C & E holds a commercial lease and received a notice from Swiss Center that the lease would be terminated if it did not cure certain defaults by removing the unapproved signs. Moreover, by the instant order to show cause, C & E has made a timely application for injunctive relief prior to the expiration of the cure period. C & E has further established its desire and ability to cure the alleged lease violations. C & E' s President, Elliot Cohen submits an affidavit that C & E "is able to and is willing to cure the default." Based on the foregoing, plaintiff is entitled to a Yellowstone injunction.

Turning to Swiss Center's cross-motion, Swiss Center seeks dismissal of the complaint pursuant to CPLR 3211(a)(1) and (7) based upon documentary evidence consisting of the lease, and for failure to state a cause of action.

On a pre-answer motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must liberally construe the complaint, accept as true the facts as alleged in the complaint and any submissions in opposition to the motion, and accord plaintiff the benefit of every possible favorable inference. See 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 NY2d 144, 151-152 (2002); Leon v. Martinez, 84 NY2d 83, 87-88 (1994); Gorelik v. Mount Sinai Hospital Center, 19 AD3d 319 (1st Dept 2005), lv app den 6 NY3d 707 (2006). The motion must be denied if from the four corners of the complaint, "factual allegations are discerned which taken together manifest any cause of action cognizable at law." 511 West 232nd Owners Corp. v. Jennifer Realty Co., supra (quoting Polonetsky v. Better Homes Depot,Inc., 97 NY2d 46, 54 [2001]); see also Gorelik v. Mount Sinai Hospital Center, supra.

Moreover, dismissal under CPLR 3211(a)(1) is warranted only if defendant submits documentary evidence conclusively establishing a defense to the asserted claims as a matter of law. See 511 West 232nd Owners Corp. v. Jennifer Realty Co., supra; Gorelik v. Mount Sinai Hospital Center, supra.

Swiss Center contends that the complaint must be dismissed based upon the clear and express language in Article 41 of the lease, which gives it "unfettered" discretion to approve, disapprove or ignore C & E's requests to install signs on the interior windows of the premises. The Court does not agree.

Under New York law, a covenant of good faith and fair dealing is implied in all contracts, including commercial leases. See 511 West 232nd Owners Corp v. Jennifer Realty Co., supra at 153; Dalton v Educational Testing Service, 87 NY2d 384, 389 (1995). "This covenant embraces a pledge that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'" Id (quoting Dalton v. Educational Testing Services, supra at 389). "The exercise of an apparently unfettered discretionary contract right breaches the implied obligation of good faith and fair dealing if it frustrates the basic purpose of the agreement and deprives plaintiffs of their rights to its benefits." Hirsch v. Food Resources, Inc., 24 AD3d 293, 296 (1st Dept 2005); see Tradewinds Financial Corp. v. Refco Securities, Inc., 5 AD3d 229, 231 (1st Dept 2004); Richbell Information Services, Inc. v. Jupiter Partners, L.P., 309 AD2d 288, 302 (1st Dept 2003). In other words, where the contract calls for the exercise of discretion, the duty of good faith and fair dealing "includes a promise not to act arbitrarily or irrationally in exercising that discretion." Dalton v.

Educational Testing Service, 87 NY2d 384, 389 (1995); see Kaszier v. Kaszier, 298 AD2d 109, 110 (1st Dept 2002).

The first paragraph of Article 41 of the lease gives C & E the right to place signs on the on the interior of the windows and doors of the premises to be visible from the exterior of the premises. Specifically, the first paragraph of Article 41 provides that C & E

> shall not erect, place or maintain any sign, advertisement or notice visible from the exterior of the demised premises except on the window glass and the entrance door or doors of the demised premises. Any such sign, advertisement or notice shall be of such size, color, content and style as LANDLORD shall prior to the erection or placing thereof have approved in writing.

While this provision does not explicitly prohibit Swiss Center from acting unreasonably in withholding or delaying its approval,[2] Swiss Center nevertheless has an implied obligation to exercise good faith and act reasonably in responding to C & E's requests and reaching a determination as to whether to approve the "size, color, content and style" of the signs C & E was proposing to place on the interior windows of the premises. See Dalton v. Educational Testing Service, supra; 1-10 Industry Assocs, LLC v. Trim Corporation of America, 297 AD2d

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[2]In contrast, the second paragraph of Article 41 which governs C & E's right to place a sign on the *exterior* of the premises, includes specific language that Swiss Center's approval's shall not be unreasonably withheld or delayed. The second paragraph provides in pertinent part as follows:

> TENANT may at its own cost and expense erect a dignified sign or symbol in conformity with the architectural design of the exterior of the building to be place on the exterior of the demised premises. Before erecting any such sign or symbol TENANT shall secure LANDLORD'S approval in writing of the design, material, size and location thereof, *which approval shall not be unreasonably withheld or delayed*, and TENANT shall likewise secure LANDLORD'S approval in writing of the manner of its attachment to the building so that it does not damage the exterior marble. [emphasis added]

630, 631 (2nd Dept 2002). Taking the allegations in the complaint as true, as the court must on a motion to dismiss pursuant to CPLR 3211, issues of fact exist as to whether Swiss Center's exercise of discretion in failing to respond to C & E's repeated requests in writing for approval of the proposed signs, was arbitrary, irrational or not made in good faith. See Tradewinds Financial Corp. v. Refco Securities, Inc., supra at 231; Kaszier v. Kaszier, supra.

Based upon the foregoing, the lease by itself does not conclusively establish as a matter of law, a defense to C & E's claim for a declaratory judgment that it is not in default of the lease for installing the signs without Swiss Center's prior written approval. Swiss Center, therefore, is not entitled to dismissal of the complaint.

Accordingly, it is hereby

ORDERED that plaintiff's motion for a Yellowstone injunction is granted, and the expiration of the period for plaintiff to cure any alleged defaults pursuant to defendant's Notice of Default dated December 21, 2005 is stayed and tolled; and it is further

ORDERED that defendant, its employees, agents, servants, representatives and all other persons acting on defendant's behalf are restrained and enjoined from terminating plaintiff's lease based on the Notice of Default, and from commencing any action or proceeding to obtain possession of the premises and otherwise attempting to gain possession of the premises based on the Notice of Default; and it is further

ORDERED that defendant's cross-motion to dismiss the complaint is denied; and it is further

ORDERED that defendant shall serve and file an answer within 15 days of the date of this decision and order; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on July 27, 2006, at 9:30 a.m., Part 11, Room 351, 60 Centre Street.

The Court is notifying the parties by mailing copies of this decision and order.

DATED: July 7, 2006 ENTER:

J.S.C.