

O'live Organic Spa LLC v Christos Realty Inc.

2012 NY Slip Op 32828(U)

November 14, 2012

Sup Ct, New York County

Docket Number: 103226/2012

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS
Justice

PART 58

O'LIVE ORGANIC SPA LLC and OLIVE TAN SPA, LLC,

INDEX NO. 103226/12

Plaintiff,

MOTION DATE _____

-v-

MOTION SEQ. No. 001

CHRISTOS REALTY INC.,

Defendant.

MOTION CAL NO. _____

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

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits...

1, 2

Answering Affidavits - Exhibits

3, 4

Replying Affidavits

5

CROSS-MOTION: YES NO

Upon the foregoing papers, it is ordered that this motion is:

FILED

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

NOV 26 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated:

11/14/12


DONNA M. MILLS, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

FILED

NOV 26 2012

NEW YORK
COUNTY CLERK'S OFFICE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 58**

O'LIVE ORGANIC SPA LLC and OLIVE TAN
SPA, LLC,

Plaintiffs,

-against-

CHRISTOS REALTY INC.,

Defendant.

INDEX NUMBER 103226/2012

Mot. Seq. 001

DECISION & ORDER

DONNA MILLS, J.:

In this action regarding the prospective termination of a commercial lease, plaintiffs O'live Organic Spa LLC (Organic Spa) and Olive Tan Spa, LLC (Olive Tan) move, by order to show cause, to vacate defendant Christos Realty Inc.'s (Christos) 15-day notice of default, dated June 27, 2012 (the Default Notice), to stay execution of the Default Notice, and enjoin Christos from taking any action to terminate Olive's lease; in brief, a request for an injunction pursuant to *First Natl. Stores v Yellowstone Shopping Ctr.*, 21 NY2d 630 (1968) (*Yellowstone*). Christos opposes and cross-moves to dismiss the complaint, pursuant to CPLR 3211 (a) (1) and (3), or, in the alternative, impose certain conditions upon the granting of the injunction.

Background

Christos is the landlord of a building located at 112 East 23rd Street, New York County. Olive Tan is a tenant, occupying commercial space known as Suite 302 (the Premises), pursuant to a lease, dated July 15, 2011 (the Lease). Motion, Ex. A. Olive Tan was operating a tanning facility in New Jersey when it executed the Lease, and it formed Organic Spa when it moved into the Premises.

Under the terms of the Lease

"64. A. . . . 'Permitted Use' shall mean a tanning spa for the application of an organic tanning spray on individuals but not the use of tanning beds. The Permitted Use shall also include the giving of spa type deep tissue massages and facials and the retail sale of associated tanning products. . . .

B. . . . Tenant shall procure all licenses and permits required for Tenant's particular use or occupancy of the Demised premises and the business being conducted therein.

C. Tenant agrees to observe and obey all laws, ordinances, regulations and orders issued by any governmental or administrative agency affecting the Premises and/or Tenant's use thereof. . . . Tenant agrees that it shall use the Premises subject to all requirements of law and to Tenant obtaining at its sole cost and expense all necessary permits and licenses therefore."

On or about June 30, 2012, plaintiffs received the Default Notice from the landlord, charging that they are operating a full service spa, and otherwise not complying with the terms of the Lease. *Id.*, Ex. B. The Default Notice charges that plaintiffs are breaching the lease by not complying with all applicable laws and regulations, not having the proper licenses, using tanning beds not just tanning spray, operating a full service spa instead of a tanning salon, not having registered with New York's Department of State, assigning and/or subletting the Premises without the landlord's prior written approval, and not obtaining the proper insurance coverage. Most of the alleged violations are based on the terms of the Lease's paragraph 64.

Plaintiffs commenced the instant action on July 10, 2012, asserting causes of action (1) to vacate the Default Notice; (2) to stay of execution of the Default Notice; (3) for a declaratory judgment on their alleged default; (4) for reimbursement of reasonable attorney's fees, costs and disbursements; (5) for attempted retaliatory lease termination and eviction; and (6) for partial and actual eviction.

Plaintiffs contend that Christos instigated this dispute over nonexistent or trivial issues, because the landlord subsequently leased space in the same building to another tenant, with a non-compete clause, offering "similar spa type services." *Emad Aff.*, ¶ 8. Christos allegedly asked plaintiffs to move, but they refused when no compensation was offered them for relocating. *Id.* The Default Notice followed soon thereafter.

Plaintiffs argue that the provisions in the Lease that permit them to offer massages, facials and retail products vitiate the charge that they are violating the Lease by operating a full service spa. They submit a copy of Organic Spa's New York State license "to operate an

appearance enhancement business" (Motion, Ex. C), and state that this "is a copy of all requisite licenses for the services being provided by Plaintiffs" (Emad Aff., ¶ 10). Additionally, they submit a copy of Organic Spa's certificate of authorization to collect sales and use taxes.

Motion, Ex. D.

Plaintiffs establish that their rent has been paid consistently by checks from "O'LIVE ORGANIC SPA LLC" at "112 E 23RD ST., STE. 302," by submitting copies for every month from November 2011 through June 2012. *Id.*, Ex. E. They maintain that, since Olive Tan and Organic Spa "are owned and operated solely" by Monika Emad (Emad), there has been no assignment of the Lease. Emad Aff., ¶ 12. Finally, they submit a copy of a certificate of liability insurance, naming Christos as an additional insured, for a policy issued to Olive Tan Spa LLC d/b/a O'live Organic Spa LLC, for the period September 22, 2011 to September 22, 2012. Motion, Ex. F. This certificate is dated June 11, 2012, and is attached to a letter sent to Christos by plaintiffs' former counsel on the same day, rebutting the allegations in the Default Notice. *Id.* A filing receipt for Organic Spa's articles of organization, dated August 10, 2011, is included in this exhibit, but not separately referenced by plaintiffs.

Christos opposes the instant motion, and offers its cross motion for dismissal of the complaint, on three main grounds:

1. Olive Tan does not have the legal capacity to sue because it is not authorized to do business in New York.
2. Olive Tan's placing of Organic Spa into occupancy created a de facto assignment of the Lease without Christos's consent.
3. Plaintiffs continue to perform services at the Premises without proper licensing.

Christos claims that it first became aware of irregularities concerning the occupancy of the Premises when it received a certificate of insurance from plaintiffs that identified Organic Spa as the only insured at the Premises. Cross Motion, Ex. H. Then, a check of the Department of State's Division of Corporations' web site found a registration for Organic Spa, but not Olive Tan. *Id.*, Exs. F, G. Christos argues that Olive Tan, the tenant under the Lease, a business not

registered in New York, placed Organic Spa, a registered business, into occupancy of the Premises, creating a de facto assignment without the prior written approval of Christos.

Meanwhile, according to Christos, plaintiffs continue to advertise a variety of services, such as light therapy and microdermabrasion, not authorized by the Lease. Additionally, plaintiffs do not display, or give evidence of possessing, valid licenses for the services they offer. Finally, Christos claims that plaintiffs appear to be violating New York City zoning law and health codes by operating a physical culture establishment (PCF) without a permit.

Christos maintains that it served plaintiffs a notice of default on May 29, 2012, containing explicit detail of all of their defaults. While Christos withdrew this notice because of an addressing error, plaintiffs took no action in response to its content, with the exception of obtaining a corrected certificate of insurance, an indication to Christos that plaintiffs have no intention of curing their defaults.

Discussion

Legal Capacity to Sue

Christos notes that New York's Limited Liability Company Law (LLC) § 808 (a) provides that a

"foreign limited liability company doing business in this state without having received a certificate of authority to do business in this state may not maintain any action, suit or special proceeding in any court of this state unless and until such limited liability company shall have received a certificate of authority in this state."

Christos contends that Olive Tan is not registered in New York, and, therefore, lacks the capacity to bring this action for a *Yellowstone* injunction. *See Pergament Home Ctrs. v Net Realty Holding Trust*, 171 AD2d 736 (2d Dept 1991); *RMS Residential Props., LLC v Naaze*, 28 Misc 3d 843, 849 (Dist Ct, Nassau County 2010) ("The court cannot, however, grant any relief to petitioner because petitioner is not authorized to conduct business in this state as required by Limited Liability Company Law § 808 [a].")

Plaintiffs, in reply, produce a certificate of authority for Olive Tan, dated September 14,

2012, issued under LLC § 805. File Affirm., Ex. F. This, admittedly, is months after commencement of the instant action, but meets the requirement of LLC § 808 (a). *See Hot Roll Mfg. Co. v Cerone Equip. Co.*, 38 A.D.2d 339, 340-341 (3d Dept 1972) ("To be prohibited from maintaining an action, however, is different from being prohibited from commencing an action. Hence, it has been held that such a corporation, after commencing an action, could obtain authority and, thereafter, maintain a lawsuit"). Consequently, Olive Tan has the legal capacity to bring this action.

De Facto Assignment

Christos claims that there has been a de facto assignment of the Lease from Olive Tan to Organic Spa, in violation of the Lease. Generally, acceptance of rent by a landlord may waive assertion of a default for recognized conduct, in this case the alleged assignment of the Lease. *Atkin's Waste Materials v May*, 34 NY2d 422, 427 (1974) ("When rent is accepted with knowledge of particular conduct which is claimed to be a default, the acceptance of such rent constitutes a waiver by the landlord of the default"). Apparently, every rent payment to Christos was made by Organic Spa, not Olive Tan. However, the Lease particularly barred waiver under these circumstances. Paragraph 11 provides that:

"If this lease be assigned, or if the demised premises or any part thereof be underlet or occupied by anybody other than Tenant, Owner may, after default by Tenant, collect rent from the assignee, under-tenant or occupant, and apply the net amount collected to the rent herein reserved, but no such assignment, underletting, occupancy or collection shall be deemed a waiver of this covenant, or the acceptance of the assignee, undertenant or occupant as tenant . . ."

See Kunze v Arito, Inc., 48 AD3d 272, 274 (1st Dept 2008) ("Defendant did not waive objection to the untimely renewal by accepting rent; the lease expressly provided that acceptance of rent is not a waiver of the landlord's rights"). Here, Christos did not waive its right to give prior approval to an assignment of the Lease by accepting rent from Organic Spa. However, the court finds that there was no assignment of the Lease.

Emad signed the Lease for Olive Tan on July 22, 2011. She filed the articles of organization for Organic Spa on August 10, 2011. She received a certificate of authority from

New York's Department of Taxation and Finance for Organic Spa to collect sales and use taxes on October 14, 2011. Rent checks for the Premises were issued to the landlord by Organic Spa at least from November 1, 2011 through June 1, 2012. Christos sent the Default Notice on June 27, 2012. Plaintiffs filed its complaint and brought the instant motion for a *Yellowstone* injunction on July 10, 2012. Christos filed its cross motion to dismiss the complaint on September 4, 2012. Olive Tan was "authorized to do business in this state" on September 14, 2012, pursuant to LLC § 805.

Plaintiffs never explain why they are nominally two entities, when Olive Tan might have simply secured a New York certificate of authorization, as it eventually did. Christos, on the other hand, fails to establish that Emad's choice of name on the door and checkbook constituted an assignment of the Lease from one entity to the other, in violation of the Lease. Prudently, Christos repeatedly refers to a "de facto assignment." However, there was no assignment here merely because Emad chose one of her two business names to put on the door. *Mail & Express Co., Inc. v Parker Axles, Inc.*, 204 App Div 327, 328 (1st Dept 1923) ("the use of a name other than the granted or legal corporate title of one party in an agreement with another party is wholly immaterial to the validity of a contract between the corporation using the symbol and the other party in any suit upon that contract").

In any event, Olive Tan is now authorized to do business in New York, and declares that it will pay the rent instead of Organic Spa, if needed. File Reply Affirm., ¶ 14.

Proper Licenses

The third significant objection to plaintiffs' application for relief is the alleged absence of proper licensing for the services they perform on the Premises. The landlord claims that its on-site manager inspected the Premises "to determine whether Olive [Tan] had posted valid licensing. None were apparent." Tsoumpas Aff., ¶ 21. Christos charges that eight employees named on Organic Spa's web site as performing specialized services, as of August 24, 2012 (Cross Motion, Ex. O), are not licensed to conduct these services.

Indeed, plaintiffs only submit a business license for Emad with their motion (Motion, Ex. C), although they expansively describe the one piece of paper as "a copy of all requisite licenses for the services provided by Plaintiffs" (Emad Aff., ¶ 10). However, attached to their reply papers, plaintiffs submit copies of New York licenses or registrations, for the type of services at issue, for four individuals, two of whom were previously named on Organic Spa's web site. File Affirm., Exs. A, B, C, D. Plaintiffs conclude from this submission that "all of Plaintiffs' employees maintain the requisite licenses under New York State law." *Id.*, ¶ 7. While the web site listed Emad as "Owner / Reiki Practitioner," only her business license is provided here; no other occupational license or registration is submitted for her.

"A *Yellowstone* injunction maintains 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 Ave. Assoc., 93 NY2d 508, 514 (1999). "In granting *Yellowstone* injunctions to avoid a forfeiture of the tenant's interest, courts have generally accepted far less than the showing normally required for the grant of preliminary injunctive relief." *Garland v Titan W. Assoc.*, 147 AD2d 304, 307 (1st Dept 1989). Besides meeting procedural requirements, the commercial tenant seeking a *Yellowstone* injunction must demonstrate that "it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises." *Empire State Bldg. Assoc. v Trump Empire State Partners*, 245 AD2d 225, 228 (1st Dept 1997). Plaintiffs have met the timing requirements, secured the necessary insurance coverage, given evidence of being properly licensed, not assigned the lease improperly, and argued that other claimed violations of the Lease are addressable. Therefore, they are granted a *Yellowstone* injunction tolling the cure period so that, if there is an adverse determination on the merits, plaintiffs may cure the defaults and avoid a forfeiture.

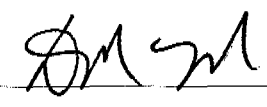
Accordingly, it is

ORDERED that plaintiffs O'live Organic Spa LLC and Olive Tan Spa, LLC's motion is granted to the extent that execution of defendant Christos Realty Inc.'s notice of default, dated June 27, 2012, is stayed, and defendant is hereby enjoined from taking any action to terminate plaintiffs' lease, pending a resolution of this action on the merits, on the condition that plaintiffs continue to make timely payments of the rent as required by the parties' lease; and it is further

ORDERED that defendant Christos Realty Inc.'s cross motion to dismiss the complaint, pursuant to CPLR 3211 (a) (1) and (3), is denied.

DATED: November 14, 2012

ENTER:



J.S.C.

DONNA M. MILLS, J.S.C.

FILED

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