

Front St. Rest. Corp. v 27 Old Fulton St. LLC

2016 NY Slip Op 30817(U)

April 13, 2016

Supreme Court, Kings County

Docket Number: 9612/2015

Judge: Lawrence S. Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part Comm-4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 13th day of April, 2016

PRESENT:

HON. LAWRENCE KNIPEL,
Justice.

-----X

FRONT STREET RESTAURANT CORP.
d/b/a TORO,

Plaintiff,

- against -

Index No. 9612/15

27 OLD FULTON STREET LLC, et ano.,

Defendants.

-----X

The following papers numbered 1 to 6 read herein:

Notice of Motion/Order to Show Cause/
 Petition/Cross Motion and
 Affidavits (Affirmations) Annexed _____

Opposing Affidavits (Affirmations) _____

Reply Affidavits (Affirmations) _____

_____ Affidavit (Affirmation) _____

Other Papers _____

Papers Numbered

1 - 2, 3 - 4

5 6

Upon the foregoing papers, plaintiff Front Street Restaurant Corp. d/b/a Toro moves, by way of order to show cause, for a Yellowstone injunction enjoining defendant 27 Old Fulton Street, LLC (27OFS) from terminating plaintiff's commercial lease for the property at 27 Old Fulton Street in Brooklyn. 27OFS cross-moves for an order, pursuant to

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CPLR 2221, for renewal and/or reconsideration of the orders of this court dated September 11, 2015 and November 19, 2015.

Plaintiff commenced this proceeding seeking injunctive relief and damages for conversion, breach of contract, interference with business relations and harassment. On July 1, 2008, plaintiff and 27OFS entered into a ten-year commercial lease for the premises located at 1 Front Street in Brooklyn. 27OFS served upon plaintiff a thirty-day notice to cure, dated June 10, 2015, stating that plaintiff violated the lease by assigning, subletting or permitting others to use the premises without the written consent of 27OFS, creating safety violations and making unauthorized alterations to the premises. The notice provided that the defaults must be cured by July 31, 2015 or the lease will be terminated. 27OFS served a separate notice to cure on plaintiff, dated June 30, 2015, wherein 27OFS states that plaintiff violated the lease by failing to maintain sprinkler repair service and by failing to maintain workers' compensation insurance. The June 30, 2015 notice to cure directed plaintiff to cure the defaults by July 31, 2015 or the lease will be terminated. By extension agreement dated July 29, 2015, 27OFS agreed to extend the cure periods in both notices to August 3, 2015. On said extended cure date, plaintiff presented an ex parte order to show cause and temporary restraining order (TRO), to Justice Kenneth P. Sherman, who granted the TRO enjoining 27OFS from terminating the lease or commencing any summary proceedings until the hearing and determination of the order to show cause.

On August 7, 2015, the return date of plaintiff's order to show cause, this court extended the TRO through August 14, 2015 "subject to" plaintiff's delivery of \$10,000.00 to 27OFS's attorney by 5:00 PM on August 10, 2015. On August 14, 2015, this court issued an order vacating the TRO based on plaintiff's failure to comply with the August 7, 2015 order. In the mean time, on August 12, 2015, a five-day notice of termination was served on plaintiff by 27OFS based on plaintiff's failure to comply with the cure requirements in the notices to cure. The notice of termination states that the lease shall terminate on August 19, 2015. On August 17, 2015, plaintiff filed a second order to show cause wherein it sought, essentially, vacatur of the August 7, 2015 and August 14, 2015 orders and a Yellowstone injunction enjoining 27OFS from terminating the lease and commencing summary proceedings. On September 11, 2015, this court issued an order granting plaintiff's motion to vacate the August 7, 2015 and August 14, 2015 and "reinstating" the TRO issued on August 3, 2015. By order dated November 19, 2015, this court granted plaintiff a Yellowstone injunction and enjoined 27OFS from "terminating the lease pursuant to the notices to cure" pending the resolution of this action.

On November 20, 2015, 27OFS served plaintiff with a ten-day notice of default upon plaintiff for "failure to pay rent and additional rent." The notice, dated November 17, 2015, stated that should plaintiff fail to pay the amounts set forth therein by December 10, 2015, an "event of default" shall occur and 27OFS will pursue its rights under the lease including the issuance of a notice of termination. Upon the alleged failure of plaintiff to comply with

the ten-day notice of default, 27OFS served plaintiff with a five-day notice of termination, dated December 11, 2015, stating that the lease shall terminate on December 31, 2015.

On December 30, 2015, plaintiff brought another order to show cause seeking to enjoin 27OFS from terminating the lease as the result of the alleged nonpayment of rent and additional rent. On January 4, 2016, 27OFS cross-moved for renewal and/or reconsideration of the September 11, 2015 and November 19, 2015 orders.

The court will first address the cross motion of 27OFS. While 27OFS designates its cross motion as seeking renewal and or /reconsideration, insofar as no new facts appear to be alleged, the cross motion is essentially one for reargument (*see Maroney v Hawkins*, 50 AD3d 862 [2d Dept 2008]). “Motions for reargument are addressed to the sound discretion of the court which decided the original motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision” (*Ito v 324 E. 9th St. Corp.*, 49 AD3d 816, 817 [2d Dept 2008]; *see E.W. Howell Co., Inc. v S.A.F. La Sala Corp.*, 36 AD3d 653, 654 [2d Dept 2007]; *Carrillo v PM Realty Group*, 16 AD3d 611 [2d Dept 2005]).

In its cross motion, 27OFS argues that when plaintiff failed to pay the \$10,000.00 by August 10, 2015 as directed by the August 7, 2015 order, the TRO lapsed, and 27OFS was free to serve its notice of termination. 27OFS maintains that once the notice of termination was served, this court was without power to issue a Yellowstone injunction.

“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]). “To obtain a Yellowstone injunction, the tenant must demonstrate that (1) it holds a commercial lease, (2) it received from the landlord either a notice of default, a notice to cure, or a threat of termination of the lease, (3) it requested injunctive relief prior to both the termination of the lease and the expiration of the cure period set forth in the lease and the landlord’s notice to cure, and (4) it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises” (*Barsyl Supermarkets, Inc. v Avenue P Assoc., LLC*, 86 AD3d 545, 546 [2d Dept 2011]). “Since courts cannot reinstate a lease after the lapse of time specified to cure a default . . . , an application for Yellowstone relief must be made not only before the termination of the subject lease—whether that termination occurs as a result of the expiration of the term of the lease, or is effectuated by virtue of the landlord’s proper and valid service of a notice of termination upon the tenant after the expiration of the cure period—but must also be made prior to the expiration of the cure period set forth in the lease and the landlord’s notice to cure” (*Korova Milk Bar of White Plains, Inc. v PRE Props., LLC*, 70 AD3d 646, 647 [2d Dept 2010] [internal quotation marks and citation omitted]).

27OFS fails to demonstrate how this court overlooked or misapplied law and facts when it reinstated the August 3, 2015 TRO by the September 11, 2015 order and ultimately granted a Yellowstone injunction in the November 19, 2015 order. 27OFS does not dispute that the August 3, 2015 TRO was initially timely made. According to this court's August 7, 2015 order, the TRO was to "remain in effect through 8/14/15." While the extension was made "subject to" the payment of \$10,000.00 by August 10, 2015, the order was not self-executing as there is no language which expressly states that the TRO would automatically cease upon the failure of plaintiff to make the payment by August 10, 2015. Accordingly, the purported termination by 27OFS on August 12, 2015 is ineffective as it was made while the TRO was still in effect. While the TRO was subsequently vacated by the August 14, 2015 order, 27OFS did not serve another notice of termination. Contrary to the argument of 27OFS, any lapse in the cure period created by the August 14, 2015 order did not preclude this court from considering plaintiff's August 17, 2015 order to show cause insofar as they sought to vacate the August 7, 2015 and August 14, 2015 orders of this court creating the lapse in the TRO. This court ultimately decided that those orders should be reconsidered, and the intent of the September 11, 2015 order was to vacate and nullify those orders creating a lapse in the cure period and to deem the cure period uninterrupted from August 3, 2015 through the time this court decided whether a Yellowstone injunction shall issue. The "Yellowstone rule is equitable in nature, and in equity the erroneous denial of a timely sought temporary toll or the inadvertent failure to continue one already granted, should not result in

the forfeiture of a leasehold” (*Mann Theatres Corp. of Cal. v Mid-Island Shopping Plaza Co.*, 94 AD2d 466, 477 [2d Dept 1983], *affd* 62 NY2d 930 [1984]).

As a result, 27OFS’s cross motion is denied.

Plaintiff’s December 30, 2015 order to show cause for a Yellowstone injunction is based on the ten-day notice of default for failure to pay rent and additional rent, dated November 17, 2015, as well as the five-day notice of termination, dated December 11, 2015.

Where a commercial tenant is not paying rent, the landlord may bring a nonpayment proceeding pursuant to Real Property Actions and Procedure Law § 711 (2). The landlord may otherwise chose to treat the tenant’s failure to pay rent as a breach of the lease, serve the tenant with a notice of default or notice to cure, and if the tenant fails to cure, terminate the lease and bring a holdover proceeding pursuant to Real Property Actions and Procedure Law § 711 (1).

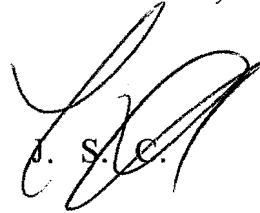
A rent nonpayment proceeding is separate from a holdover summary proceeding and carries its own distinct cure provisions, thus obviating the need for Yellowstone relief (*see Hollymount Corp. v Modern Business Assocs.*, 140 AD2d 410 [2d Dept 1988]; *Parksouth Dental Group v. East Riv. Realty*, 122 AD2d 708 [1st Dept 1986]). Where the landlord serves the tenant who has not paid rent with a notice of default or notice to cure, the tenant may obtain a Yellowstone injunction (*see Lexington Avenue & 42nd Street Corp. v 380 Lexchamp Operating, Inc.*, 205 AD2d 421 [1st Dept 1994]).

The November 17, 2015 notice served by 27OFS is not a simple demand for rent but a notice of default and/or notice to cure containing a threat of termination of the lease. Therefore, plaintiff may seek a Yellowstone injunction in this instance. The December 30, 2015 order to show cause was brought following the expiration of the cure period specified in the November 17, 2015 notice and following the service of the notice of termination. However, the court finds the November 17, 2015 notice to cure is deficient in that it did not provide sufficient detail, i.e. specific paragraphs in the lease with which plaintiff had allegedly failed to comply, to alert plaintiff of its alleged defaults (*cf. ShopRite Supermarkets, Inc. v Yonkers Plaza Shopping, LLC*, 29 AD3d 564 [2d Dept 2006]; *King Party Ctr. of Pitkin Ave. v Minco Realty.*, 286 AD2d 373 [2d Dept 2001]). Specifically, no lease provisions or other detail is provided which spells out plaintiff's obligation to pay the sum allegedly due to "MGNY Consulting Corp.," the three separate unspecified charges for legal fees in the amounts \$9,122.12, \$7,560.00 and \$10,396.64 or the additional "attorneys fees for Brian Kennedy, Esq." in the amount of \$7,489.00. Insofar as the notice to cure is insufficient to appraise plaintiff as to the contractual basis for these charges, this court finds that plaintiff's application for a Yellowstone injunction was timely made (*see Cohn v White Oak Coop. Hous. Corp.*, 243 AD2d 440 [2d Dept 1997]). "[E]quity abhors forfeitures of valuable leasehold interests,' and equitable relief is warranted by way of a Yellowstone injunction to preserve the commercial tenant's ability to cure a default after a determination of the merits" (*Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 355 [1st Dept 2005] [citations omitted]).

Accordingly, plaintiff's December 30, 2015 order to show cause for a Yellowstone injunction enjoining 27OFS from terminating the lease pursuant to the November 17, 2015 notice to cure and December 11, 2015 notice of termination is hereby granted.

The foregoing constitutes the decision and order of the court.

E N T E R,



J. S. C.

HON. LAWRENCE KNIPEL
SUPREME COURT JUSTICE

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