US Sunergy Corp. & Rosewood, Inc. v CH Gowanus, LLC
2017 NY Slip Op 30272(U)
February 7, 2017
Supreme Court, Kings County
Docket Number: 509092/2016
Judge: Sylvia G. Ash
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At an IAS Term, Comm-11 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 7th day of February, 2017.

PRESENT:

HON. SYLVIA G. ASH,

Justice.

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US SUNERGY CORP. & ROSEWOOD, INC.,

Plaintiff,

- against -

CH GOWANUS, LLC,

Defendant(s).

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DECISION AND ORDER

Index # 509092/2016

Mot. Seq. 1, 2

The following papers numbered 1 to 6 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1 - 4
Opposing Affidavits (Affirmations)	
Reply Affidavits (Affirmations)	5, 6

After oral argument and upon the foregoing papers, Plaintiffs' motion seeking a *Yellowstone* injunction is hereby GRANTED and Defendant's cross-motion to dismiss the complaint is DENIED.

Background

Plaintiffs are the tenants of the premises known as 94 9th Street, 1st floor, in Brooklyn, New York (hereinafter referred to as the "Premises"). Plaintiffs entered into a lease agreement with Defendant's predecessor-in-interest on or around August 28, 2012 for a ten-year lease term ending on August 31, 2022. Plaintiffs sell kitchen cabinets and countertops to primarily wholesale customers which is the undisputed stated purpose in the lease for which the Premises were rented.

Plaintiffs received a Notice of Default dated May 11, 2016, which describes Plaintiffs' breach of the lease agreement as follows:

(a) In breach of Section 4(A) of the Lease, Tenant is manufacturing within the Demised Premises contrary to express provisions of Section 4(A) of the Lease which provides that the Demised Premises "shall be solely used for wholesale and retail selling of cabinets and granite counters and for no other purpose."

(b) In breach of Section 4(B) of the Lease, Tenant is using the Demised Premises contrary to Legal Requirements by engaging in the retail sale of merchandise from within the Demised Premises;

(c) In breach of Section 4(C) of the Lease, Tenant is using the Demised Premises contrary to the certificate of occupancy which is for manufacturing use only.

Plaintiffs, in seeking the instant *Yellowstone* injunction, argue that they have at all times been in compliance with the terms of their lease which restricts their use of the Premises for retail sales only. They argue that Defendant's Notice of Default is defective due to its contradiction - it alleges that Plaintiffs are violating the Certificate of Occupancy by occupying the Premises in accordance with the Lease while at the same time alleging that Plaintiffs are violating their Lease by occupying the Premises in accordance with the Certificate of Occupancy.

Plaintiffs further submit that, when they took occupancy of the building, only one tenant used its space for manufacturing purposes. The other uses by tenants include the displaying of art and the storage of food and beverage carts. Plaintiffs also argue that, despite filing applications with the Department of Buildings for construction permits, Defendant has never attempted to amend the Certificate of Occupancy even though, currently, there are no manufacturing tenants in the building. It is Plaintiffs' position that Defendant is doing everything in its power to cause Plaintiffs to vacate the Premises before the end of their lease term because they are one of the few remaining tenants in the building.

Finally, Plaintiffs state that they are ready and willing to cooperate with Defendant to obtain an amendment of the Certificate of Occupancy and to do whatever is necessary in order to keep their leasehold interest.

In opposition and by way of cross-motion to dismiss the complaint, Defendant contends that the Certificate of Occupancy for the building, dating from 1954 and 1957, specifies that the building must be used for manufacturing purposes only and the fact that the lease restricts Plaintiffs' use of the premises to retail sales is largely irrelevant. As such, Defendants argue that Plaintiffs' "defaults" are incurable and therefore, the complaint must be dismissed.

Discussion

"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. As...*, 93 NY2d 508, 514 [Ct App 1999]). "The party requesting a *Yellowstone* injunction 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 the 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'" (*Id. quoting 225 E. 36th St. Garage Corp. v 221 E. 36th Owners Corp.*, 211 AD2d 420, 421 [1st Dept 1995]). Morever, the "ability" to cure can be supplanted by a willingness to do whatever is necessary to cure the default paired with a potential means to cure said default (*see Marathon Outdoor, LLC v Patent Constr. Sys. Div. of Harsco Corp.*, 306 AD2d 254, 255 [2d Dept 2003]).

"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 West Assoc.*, 147 AD2d 304, 307 [1st Dept 1989][*citing Post v 120 E. End Ave. Corp.*, 62 NY2d 19, 26 [1984]]). "The mere threat of termination and forfeiture of the lease has been held sufficient to justify maintenance of the status quo by injunction" (*Id.*). A *Yellowstone* injunction is appropriate in circumstances where there is not a sufficient basis to evaluate whether a tenant actually has violated its lease (*see Boi To Go, Inc. v Second 800 No. 2 LLC*, 58 AD3d 482, 482 [1st Dept 2009]).

Here, Plaintiffs have satisfied all of the aforementioned criteria in support of its application for a *Yellowstone* injunction. Moreover, based on the "Catch-22" nature of the Notice of Default, it is not clear whether Plaintiffs are even in default of the subject lease. To the extent that it can be said that Plaintiffs are in default of their lease because their retail business (which is the only permissible use pursuant to the lease) contravenes the allowed use under the Certificate of Occupancy, Plaintiffs may still cure said violation by obtaining a Letter of No Objection from the Department of Buildings or an amendment to the Certificate of Occupancy. Under these circumstances, Plaintiffs are entitled to a *Yellowstone* injunction.

Accordingly, it is hereby

ORDERED that Plaintiffs' motion seeking a *Yellowstone* injunction is GRANTED and that Plaintiffs shall post an undertaking in the amount of $1,000.00 within 30 days; and it is further

ORDERED that Defendant's motion to dismiss the complaint is DENIED.

This constitutes the Decision and Order of the Court.

E N T E R,

Sylvia G. Ash, J.S.C.