Xo Rest. v 58 Elizabeth NY LLC
2017 NY Slip Op 31229(U)
June 8, 2017
Supreme Court, New York County
Docket Number: 151302/2017
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

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XO RESTAURANT, INC.,

Plaintiff,

-against-

58 ELIZABETH NY LLC,

Defendant.

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Index No. 151302/2017
Motion Seq: 001

DECISION & ORDER

HON. ARLENE P. BLUTH

Plaintiff's motion, brought by order to show cause, for *inter alia* a Yellowstone injunction enjoining and restraining defendant and its employees from taking steps to terminate plaintiff's tenancy based on a notice of default dated January 24, 2017 is granted.

Background

This action arises out of defendant 58 Elizabeth NY LLC's (Landlord) notice of default dated January 24, 2017 regarding plaintiff's tenancy for a ground floor premises located at 146 Hester Street, New York, New York. Plaintiff contends that it operates a restaurant at this location and has invested $300,000 into the premises. Plaintiff wants time to cure the defaults alleged in the January 24 default notice.

In opposition, the Landlord, who acquired title to the property in May 2016, contends that plaintiff is not willing and able to cure the lease defaults and insists that plaintiff is illegally using the courtyard. Landlord argues that the HVAC equipment located in the courtyard violates the terms of plaintiff's lease. The Landlord argues that it is immaterial whether the previous owner allowed plaintiff to use the courtyard because plaintiff's lease contains a merger clause which the

Landlord argues prevents any agreements not contained in the four corners of the lease. The Landlord contends that it will suffer significant prejudice by allowing the HVAC equipment to exist in the courtyard because the equipment impedes egress and ingress to the property.

In reply, plaintiff observes that the HVAC equipment was in place when plaintiff entered into its existing lease with a previous owner in 2007. Plaintiff argues that the courtyard is not a common space and the only people who have access to the courtyard are those associated with plaintiff or the landlord. Plaintiff insists that the HVAC equipment is part of the demised premises and notes that the lease contains a rider in which plaintiff agreed to maintain and repair cooling units. Plaintiff also contends that it has removed the front awning and front sign to the restaurant (also part of the notice of default) and is prepared to move the air conditioner to a location on the premises agreed to by a previous owner (Mr. Serafin).

Discussion

"It is well settled that in order to obtain a *Yellowstone* injunction, the moving party 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" (*225 East 36th Street Garage Corp. v 221 East 36th Owners Corp.*, 211 AD2d 420, 421, 621 NYS2d 302 [1st Dept 1995] [citations omitted]).

"A Yellowstone injunction maintains that status quo so that a commercial tenant, when confronted by a threat of termination of its lease, may protect is 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. Assocs.*, 93 NY2d 508, 514, 693 NYS2d 91 [1999]).

"The purpose of a *Yellowstone* injunction is to maintain the status quo so that the tenant may challenge the landlord's assessment of its rights without the tenant, during the pendency of the action, forfeiting its valuable property interest in the lease. As such, it may be granted on less than the normal showing required for preliminary injunctive relief" (*Lexington Ave. & 42nd St. Corp. v 380 Lexchamp Operating*, 205 AD2d 421, 423, 613 NYS2d 402 [1st Dept 1994].

Here, it is undisputed that plaintiff meets the first three elements for a Yellowstone injunction. The only prong in dispute is whether plaintiff is prepared and maintains the ability to move the HVAC equipment. Plaintiff insists that it is willing to "take whatever steps are necessary to cure" (affirmation in support, ¶ 25). Plaintiff also contends that it has "removed the front awning and front sign to the restaurant . . . and is prepared to move the air conditioner to a location on the premises that was already agreed to by the landlord Mr. Serafin as indicated by documents on file with the DOB" (reply affirmation at 7). That is sufficient to grant plaintiff's motion– plaintiff has allegedly cured two of the three issues raised in the notice of default and is able to move the HVAC equipment if required. Plaintiff is granted the opportunity to challenge the Landlord's assessment that the location of the HVAC equipment breaches the lease without forfeiting the lease.

The Landlord's opposition amounts to an opposition on the merits– the Landlord insists that plaintiff has breached the lease by continuing to have the HVAC equipment in the courtyard. The references to the merger clause in plaintiff's lease also relate to the underlying merits of plaintiff's complaint rather than whether plaintiff should be granted a Yellowstone injunction.

Although the Landlord insists that plaintiff has not shown a willingness to cure the default, this argument is based on the Landlord's conclusion that the location of the HVAC equipment constitutes a breach. However, there may be a final determination that plaintiff has not breached the lease and does not need to move the HVAC equipment at all. In any event, plaintiff should not have to forfeit its interest in the restaurant while the Court considers the parties' contentions.

The Landlord's request that plaintiff post an undertaking is denied. As long as plaintiff continues to comply with the obligations in the lease, other than those in dispute in this litigation, there is no need for an undertaking. The Landlord has not demonstrated that it will suffer damages if plaintiff's motion is granted. The Landlord's vague reference to the fact that residential tenants of the property "may" have difficult exiting the property in an emergency situation is not enough to require plaintiff to post the requested $500,000 undertaking. An undertaking should not serve as a windfall for the Landlord.

Accordingly, it is hereby

ORDERED that plaintiff's motion for a Yellowstone injunction is granted conditioned upon plaintiff's compliance with all of its obligations in the lease, including the payment of rent, except for those items set forth in the January 24, 2017 Notice (plaintiff alleges everything else has already been cured except for the location of the HVAC units). The parties must be prepared to discuss settlement and all outstanding discovery issues at the next conference, which is scheduled for August 3, 2017 at 2:15 p.m.

This is the Decision and Order of the Court.

Dated: June 8, 2017
New York, New York

ARLENE P. BLUTH, JSC