SBA Monarch Towers I, LLC. v Hirakis
2017 NY Slip Op 31580(U)
June 9, 2017
Supreme Court, Queens County
Docket Number: 708532/2016
Judge: Marguerite A. Grays
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Memorandum

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE MARGUERITE A. GRAYS** IAS PART 4
Justice

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SBA MONARCH TOWERS 1, LLC.

Plaintiff(s),

-against-

PETER HIRAKIS,

Defendant(s).

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Index No.: 708532/2016

Motion Dated: April 18, 2017

Motion Cal. No.: 2

Motion Seq. No.: 3

Hon. Marguerite A. Grays

Plaintiff SBA Monarch Towers I, LLC has moved for a Yellowstone injunction.

I. The Plaintiff's Allegations

Defendant Peter Hirakis owns property known as 113-02/12 Springfield Blvd. Queens Village, New York. Plaintiff SBA Monarch Towers I, LLC, a wireless communications company, is the successor tenant under a 2007 site lease between defendant Hirakis, as landlord, and Omnipoint Communications, Inc., as tenant. Section 3 of the lease permits the use of the demised premises"for the transmission and reception of radio communications signals and for the construction, installation, operation [etc.] of related facilities, including without limitation, tower and base, antennas, microwave dishes, equipment shelters and/or cabinets and related activities." Section 7(f) of the site lease allows

unrestricted access to the leased premises "24 hours a day, 7 days a week" without interference from the defendant for the purpose of altering, replacing, expanding, enhancing, or upgrading the antenna facilities.

Defendant Hirakis has restricted the plaintiff's access to the leased premises to only certain hours of the day and has demanded that the plaintiff contact only him to open a locked access gate.

Plaintiff SBA brought the instant action for the purpose of, *inter alia*, obtaining a declaratory judgment that defendant Hirakis has breached the site lease by prohibiting unrestricted access to the leased premises, obstructing the access way to the leased premises, and interfering with necessary work on the antenna facilities.

While this action was pending, defendant Hirakis sent plaintiff SBA a "30 Days Notice to Tenant of Termination of Tenancy and Landlord's Intention To Recover Possession." Defendant Hirakis has demanded that SBA build a fence around the leased premises, and plaintiff SBA has denied that it has any obligation to build the fence.

II. Discussion

The Court notes initially that defendant Hirakis has chosen to represent himself pro se on the instant motion and has submitted opposition papers.

This Court has already determined, after a traverse hearing, that it has personal jurisdiction over defendant Hirakis in this action. Thus, there is no need to stay the determination of the instant Order to Show Cause. (See, decision of this Court dated June 8, 2017).

The defendant's objection that the plaintiff did not serve the instant Order to Show Cause in compliance with the service clause of the papers lacks merit. The papers required "personal service of this Order and the papers upon which it is based [to be] made on or before March 31, 2017." CPLR §308, " Personal service upon a natural person," permits such service to be made upon any of several specified methods. Dominic Dellaporte, a process server, swears that on March 29, 2017 he made personal service upon defendant Hirakis by delivering the papers to "Kally Hirakis Secretary/Daughter" and by mailing the papers to defendant Hirakis. Such service, known as substitute service, is permissible under CPLR §308(2) and is considered personal service. The service clause did not require in hand delivery to defendant Hirakis.

"The purpose of a Yellowstone injunction is to enable a tenant confronted by a notice of default, a notice to cure, or a threat of termination of the lease to obtain a stay tolling the running of the cure period so that, after a determination of the merits, the tenant may cure the defect and avoid a forfeiture of the leasehold ***" (*M.B.S. Love Unlimited, Inc. v. Jaclyn Realty Associates*, 215 AD2d 537, 538; *see, Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Associates*, 93 NY2d 508; *JT Queens Carwash, Inc. v. 88-16 N.-Blvd., LLC*, 101 AD3d 1089; *Trump on the Ocean, LLC v. Ash*, 81 AD3d 713). Having such a purpose, a Yellowstone injunction may issue even though the applicant has not made the usual tripartite showing for obtaining provisional relief (see, *Post v. 120 East End Ave. Corp.*, 62 NY2d 19; *Trump on the Ocean, LLC v. Ash, supra*; *225 East 36th Street Garage Corp. v. 221 East 36th Owners Corp.*, 211 AD2d 420; *Lexington Ave. & 42nd Street Corp.*

v. 380 Lexchamp Operating, Inc., 205 AD2d 421; *Matter of Langfur*, 198 AD2d 355; *Heavy Cream, Inc. v. Kurtz*, 146 AD2d 672). Whatever the merits of the case, the courts have routinely granted Yellowstone injunctions, and the plaintiff tenant is not required to show a probability of success on the merits (see, *Goldcrest Realty Co. v. 61 Bronx River Road Owners, Inc.*, 83 AD3d 129). A Yellowstone injunction is intended only to preserve the status quo, and it may be granted without consideration of the merits of the case (see, *440 East 62nd Street Owners Associates, L.P. v. 440 East 62nd St. Owners Corp.*, 217 AD2d 425; *144 East 40th Street Leasing Corp. v. Schneider*, 125 AD2d 195; *Ameurasia International Corp., v. Finch Realty Co.*, 90 AD2d 760; *Podolsky v. Hoffman*, 82 AD2d 763).

"A tenant 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 ***" (*Trump on the Ocean, LLC v. Ash, supra,* 716; *Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Associates, supra; JT Queens Carwash, Inc. v. 88-16 N.-Blvd., LLC, supra*; *Chai & Tantrakoon, Inc. v. Royal Realty Corp.*, 246 AD2d 398; *Lexington Ave. & 42nd Street Corp. v. 380 Lexchamp Operating, Inc., supra*). The plaintiff herein has made an adequate showing of its entitlement to a Yellowstone injunction (*see*, *Chai & Tantrakoon, Inc. v. Royal Realty Corp., supra*). Although factual issues may exist in this case, they do not in themselves preclude the issuance of a preliminary injunction (see, CPLR §6312[c]; *Egan v. New York Care Plus Ins. Co.*, 266 AD2d 600).

III. Disposition

The motion is granted. The parties may submit affidavits concerning the proper amount of the undertaking at the time of the settlement of the order to be entered hereon.

Settle Order.

Dated: JUN 09 2017

J.S.C.

FILED
JUN 20 2017
COUNTY CLERK
QUEENS COUNTY