

Sacred Brooklyn LLC v 1060 Bedford Retail LLC

2018 NY Slip Op 33316(U)

December 17, 2018

Supreme Court, Kings County

Docket Number: 523507/18

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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SACRED BROOKLYN LLC,

Plaintiff,

Decision and order

- against -

Index No. 523507/18

MS #2

1060 BEDFORD RETAIL LLC,

Defendant,

December 17, 2018

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking a preliminary injunction. The defendant has opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

The plaintiff is a tenant in defendant's premises located at 1060 Bedford Avenue in Kings County. Pursuant to a lease dated July 18, 2017 with defendant's predecessor the landlord was required to perform certain work before the obligation to pay rent commenced. Specifically, the lease provides that the landlord deliver the premises by February 18, 2017 or be charged a day and a half of rent for each day the work is not completed. On August 2, 2018 the parties entered into an amended lease which changed some of the terms including a new delivery date. However, the amendments provided that if the work landlord was required to perform was not completed by October 21, 2018 then the original delivery date including the original penalties would apply. Further deterioration of the relationship between the parties continued to grow. The basis of this deterioration

concerned an estoppel certificate and a Subordination, Non-Disturbance and Attornment Agreement [hereinafter 'SNDA'] the landlord requested the plaintiff to sign in efforts to secure funding from a lender, the Techers Federal Credit Union [hereinafter 'TFCU']. Indeed, on October 29, 2018 the defendants served the plaintiff with a Notice to Cure for failure to execute the estoppel agreement or the SNDA. The plaintiff responded by indicating that both the estoppel letter and the SNDA had been executed. Nevertheless, a Notice of Termination was sent to the plaintiff shortly thereafter. This motion seeking an injunction staying the termination has now been filed.. The defendant argues the plaintiff does not have clean hands since in truth the plaintiff was the cause of any of landlord's delays and the plaintiff did breach the lease by not doing its portion of the work in a timely manner and by failing to timely and unequivocally sign the estoppel certificate or the SNDA.

Conclusions of Law

It is well settled that to obtain a preliminary injunction the moving party must demonstrate: (1) a likelihood of success on the merits, (2) an irreparable injury absent the injunction; and (3) a balancing of the equities in its favor (Volunteer Fire Association of Tappan, Inc., v. County of Rockland, 60 AD3d 666, 883 NYS2d 706 [2d Dept., 2009]). In this case the basis for the

injunction is grounded in the fact it is alleged the failure to grant such relief will cause harm to the plaintiff since the lease will be terminated. Of course, the defendant denies these underlying facts supporting the injunctive relief and indeed there is disputed evidence presented supporting those allegations. Nevertheless, it is true that a preliminary injunction may be granted where some facts are in dispute and it is still apparent the moving party has a likelihood of success on the merits, (see, Borenstein v. Rochel Properties, 176 AD2d 171, 574 NYS2d 192 [1st Dept., 1991]). This is especially true where the denial of an injunction would disturb the status quo and render the continuation of the lawsuit ineffectual (Masjid Usman, Inc., v. Beech 140, LLC, 68 AD3d 942, 892 NYS2d 430 [2d Dept., 2009]). Thus, the moving party is not required to present 'conclusive proof' of its entitlement to an injunction and "the mere fact that there indeed may be questions of fact for trial does not preclude a court from exercising its discretion in granting an injunction" (Ying Fung Moy v. Hohi Umeki, 10 AD3d 604, 781 NYS2d 684 [2d Dept., 2004]).

The plaintiff has presented sufficient evidence it has a likelihood of success on the merits and will suffer irreparable harm if the injunction is not granted. Further, the granting of the injunction maintains the status quo so that no termination is effectuated until the lawsuit is resolved. The Notice of

Termination is based upon the plaintiff's executed estoppel certificate and SNDA agreement which contained tenant's "unilateral changes and was in form that was already rejected by Landlord's lender as not being reasonably acceptable to it, and which remained reasonably unacceptable to it" (see, Notice of Lease Termination dated November 12, 2018). Thus, the plaintiff has presented evidence it signed both the estoppel agreement and the SDNA agreement. The defendant does not dispute that but argues they were useless and without approval of the lender. However, there is specious evidence supporting their uselessness. Indeed, on August 30, 2018 the lender sent an email wherein it noted changes made "acceptable to TFCU" and included copies which "TFCU is prepared to execute" (see, Email from Karen Corteselli, dated August 30, 2018). Any further delay was noted because the TFCU sought to inspect the premises. Lastly, there is a dispute whether the documents submitted contained the legend 'not valid for use' however, that dispute does significantly undermine the plaintiff's assertions of compliance. Thus, it is true that Section 24.6 of the lease required the plaintiff to execute the estoppel certificate within ten days, however, the plaintiff notified the landlord and the lender that certain changes would have to be made. There was no objection to that delay and in fact all parties involved seemed to welcome them. Thus, the final execution of those documents was not a breach of

the lease but was in conformance with the lease. Further, to the extent any evidence exists demonstrating the plaintiff did in fact breach the lease, it surely does not demand a denial of the injunction and a disruption of the status quo. All questions of fact will be explored during the course of the litigation and the ultimate issue of the breach of the lease will be resolved. However, to preserve the status quo the motion seeking the preliminary injunction is granted.

So ordered.

ENTER:



DATED: December 17, 2018
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC

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KINGS COUNTY CLERK