Cross County Savings Bank v Jakubek
2013 NY Slip Op 32566(U)
October 18, 2013
Sup Ct, Kings County
Docket Number: 501928/2013
Judge: Carolyn E. Demarest

At an IAS Term, Part Com 1 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 16th day of October, 2013.

PRESENT:

HON. CAROLYN E. DEMAREST,
Justice.

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CROSS COUNTY SAVINGS BANK,

Plaintiff,

- against -

EDWARD JAKUBEK,

Defendant.

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DECISION AND ORDER

Index No. 501928/13

The following numbered papers read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	5
Opposing Affidavits (Affirmations)	7
Reply Affidavits (Affirmations)	18, 20
Plaintiff's Supplemental Affirmation	21
Other Papers	

Plaintiff Cross County Savings Bank (Cross County, or the Bank), the tenant of the first floor and partial basement space of a certain building owned by defendant Edward Jakubek (Jakubek), moves, by Order to Show Cause, for an order, pursuant to CPLR 6301, granting a preliminary injunction enjoining and staying defendant from terminating the parties' lease agreement and instituting summary proceedings to recover possession of the subject premises.

BACKGROUND AND CONTENTIONS

In September of 2002, plaintiff, described by its president Anthony Milone (Milone) as a small community bank which serves the needs of the diverse local residential community, entered into a 20-year lease agreement (the Agreement, or the Lease) with defendant, for the first floor and a portion of the basement at 175 Bedford Avenue (the Building). The Building is located in the Williamsburg section of Brooklyn, New York, and plaintiff sought to use the leased premises as a bank branch.[1] The Agreement, which commenced on October 1, 2002, consists of both a "Standard Form of Store Lease" (the printed Lease), which is a prepared document in a form issued by The Real Estate Board of New York, Inc., and a Rider (the Rider), which contains 35 additional paragraphs some of which are, in certain ways, tailored to the specific use of the demised premises as a bank, and which, among other provisions, includes the schedule of rental payments with periodic adjustments, as negotiated by the parties[2] By its express terms as set forth in its first paragraph, the Rider is to prevail and supercede the printed Lease in the event that any of its provisions are in conflict.

Both the printed Lease and the Rider were signed by Milone, acting on behalf of plaintiff, and Jakubek, on September 24, 2002.

According to Milone, the Bank, in order to accommodate the needs for the branch, had to extend the rear portion of the building in order to increase its square footage. He asserts that the Bank spent over $800,000 in renovating and furnishing the premises.

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[1]While the Agreement does not specifically set forth a definition of "demised premises," it is clear from their context that the words refer to the space specifically leased to the Bank. The Building also contains residential apartments that are not the subject of the Agreement.

[2]By way of example, Paragraphs 2(B) and 2(C) of the Rider, when read together, restrict and/or condition the right of the Owner to enter those parts of the demised premises used as "vaults, safes or other enclosures where money, securities, or other valuables are kept."

On or about January 22, 2013, a fire broke out in the Building. Milone avers that there was damage to the structure of the building due to the fire, but damage to the Bank, caused primarily by water used by the New York City Fire Department, was confined to a limited area in the front of the building. He indicates that it would not require much time to repair the damage to the Bank's portion and replace the fixtures.

Contending that although, under the terms of the Lease, it was not required to pay rent while the premises were unavailable for its use, plaintiff asserts that it nevertheless tendered the rent for February 2013 to Jakubek. Additionally, it sent Jakubek a letter, dated February 14, 2013, (1) advising him that the Bank faced possible regulatory action if it failed to reopen the branch as soon as possible, and (2) requesting a statement of his intentions. In response, by letter dated February 18, 2013, Jakubek indicated that while the cause of the fire was still under investigation, he had been advised by three architects that he should consider demolishing the building, but that he would comply with the provision in the Lease which entitled him 45 days to give notice of his intention to do so. Thereafter, by letter dated March 4, 2013, Jakubek advised plaintiff, through Milone, that the serious fire damage rendered the building wholly unusable, and that pursuant to Paragraph 9 of the printed Lease, he was electing to terminate the Lease as of April 19, 2013.[3]

Plaintiff commenced the instant proceeding by filing a summons dated April 12, 2013 and verified complaint dated April 16, 2013, in which causes of action for declaratory judgment and permanent injunction were set forth. On April 17, 2013, plaintiff, by order to

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[3]Paragraph 9(d) provides: "[i]f the demised premises are rendered wholly unusable or (whether or not the demises premises are damaged in whole or in part) if the building shall be so damaged the Owner shall decide to demolish it or to rebuild it, then, in any of such events, Owner may elect to terminate this lease by written notice 45 days after such fire or casualty." The 45-day period set forth was an alteration by the parties to the original language of the printed Lease.

show cause, obtained a temporary restraining order from this court staying termination of the lease, pending a hearing of the within motion.

In the present application, plaintiff contends that while Jakubek's notice stated that as Owner, he had the right to terminate the lease under Paragraph 9 of the printed Lease, said notice was silent with regard to paragraph 33 of the Rider, which was prepared by Jakubek's attorney, and which states: "[s]upplementing Paragraph 9 of the printed form of this Lease, and notwithstanding any provision therein to the contrary, if, as a result of fire or other casualty the demised premises shall be damaged in whole or in part, Owner agrees to commence the repair thereof within 90 day [sic] following such destruction. Thereafter, if Owner fails to complete such repair within 365 days of such destruction, Tenant may terminate this lease by giving Owner written notice...." Thus arguing that, in the context of the rapidly rising property and rental values in Williamsburg, Jakubek is acting in bad faith by seeking to capitalize on the casualty by terminating the lease which is now less than favorable to his interests, plaintiff seeks injunctive relief in order to, at the very least, preserve the status quo pending a conclusive determination on whether demolition is required.

In opposition, defendant provides a letter and affidavit he received from an architect, William R. Spade (Spade), and a letter from a structural engineer, Bruce Mawhirter (Mawhirter), each recommending demolition of the subject premises. He asserts that in light of the "profound" damage to the building, he has decided, in accordance with Paragraph 9 of the printed Lease, to demolish the building and terminate plaintiff's lease. With respect to plaintiff's reliance on the language of Paragraph 33 in the Rider, defendant argues that the provision deals only with damage limited to the leased premises, not the building, and can in no way be read to apply where the damage was to the entire building, or to restrict the right

of the Owner to demolish the building under such circumstances. He denies acting in bad faith, and annexes a copy of a notice, published by the Bank after the fire, advising its customers that it was closing the branch at 175 Bedford Avenue.

In reply, plaintiff characterizes defendant's opposition as self-serving, and the opinions of his engineer and architect as conclusory. Reiterating its position that Jakubek is using the fire as a pretext to terminate the Bank's tenancy and seek higher rents, it disputes defendant's representation that the Building must be demolished, noting that there has been no finding by any agency of New York City, such as the Fire Department or the Department of Buildings, directing same. It further notes that defendant has provided no appraisal from his insurance carrier. Finally, in response to defendant's contention that it has closed the branch, plaintiff states that it was required by state and federal regulations to advise its customers of same, but that it has not abandoned the premises. In this vein, plaintiff asserts that a forced relocation would cause it irreparable harm due to a loss of its customers in the immediate area of the branch, and submits that the equities here favor the Bank, which has a right to rely on the superceding language of Paragraph 33 of the Rider.

Additionally, following oral argument and the directive of this court, plaintiff was given the opportunity to conduct its own investigation of the condition of the Building and have the opportunity to engage the services of an architect and engineer. After obtaining defendant's consent to allow access, plaintiff engaged the services of an architect and an engineer, both of whom conducted on-site inspections. James Katsarelis, Architect, opines in his letter dated May 28, 2013, that while the third floor and roof of the building have been severely damaged and require replacement, he did not observe evidence of damage to the base building structure at the second and first floors, and concludes that the building is not a candidate for razing. Similarly, on behalf of Hyke Engineering and Management, P.C.,

Gene Hu, a licensed professional engineer, reports that the third floor has been structurally compromised, and while the first and second floors sustained extensive water damage, the visible load-bearing elements on the first and second floors appeared to have little to no cross-sectional loss as compared to what was observed on the third floor and roof. Accordingly, he opines that at the present time, absent some testing and without removing finish materials to reveal structural conditions, there is not enough evidence of damage that would warrant razing the entire building.

Further, plaintiff states that it served subpoenas duces tecum on defendant's insurer (Tower Insurance Group/Hermitage Insurance [Tower]), and broker (Global Facilities, Inc.).[4] An e-mail response from Tower's attorney to plaintiff's counsel states that Tower "is not in possession of information suggesting that the premises needs to be demolished." Additionally, plaintiff alleges, based on reports annexed to its papers, that (1) Antonucci Consulting Corporation, Tower's construction consultant, would perform complete repairs that total $245,221.79, and (2) ALJO Consulting Corp., the construction company hired by defendant's public adjuster, states that the total cost to repair the premises would be $357,391.90, and that the total cost to repair the first floor would be $17,481.67. Plaintiff notes that neither report recommends demolition.

DISCUSSION

CPLR 6301 provides, in relevant part, that "[a] preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant

[4]Plaintiff states that defendant's public adjuster, Michael Maltaghati, could not be served.

from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff." The purpose of CPLR 6301 is to preserve the status quo and to prevent dissipation of property which may make a judgment ineffectual (*see Rattner & Associates v Sears, Roebuck & Co.,* 294 AD2d 346 [2002]).

A party seeking preliminary injunctive relief has the burden of demonstrating (1) a likelihood of ultimate success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) that a balancing of equities favors the movant's position (*Walter Karl, Inc. v Wood*, 137 AD2d 22, 26 [1988]); *see also W. T. Grant Co. v Srogi*, 52 NY2d 496, 517 [1981]). A preliminary injunction is a drastic remedy, which should be exercised "sparingly" (*Town of Porter v Chem-Trol Pollution Servs., Inc.,* 60 AD2d 987, 988 [1978]) and the moving party's burden of proof is "particularly high" (*Council of City of New York v Giuliani,* 248 AD2d 1, 4 [1998], *lv to appeal dismissed in part, denied in part* 92 NY2d 938 [1998]).

It is axiomatic that in the absence of ambiguity, an agreement should be enforced according to its terms (*see Madison Avenue Leasehold v Madison Bentley Associates LLC,* 30 AD3d 1 [2006] [in dissent]). Thus, in examining the interplay between the language of Paragraph 9(d) of the printed Lease and that of paragraph 33 of the Rider, the court must heed the Court of Appeals' mandate, that "[w]hen interpreting contracts, when parties set down their agreement in a clear, complete document, their writing should ... be enforced according to its terms," particularly in the context of real property transactions, "where commercial certainty is a paramount concern, and where . . . the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length," and that "courts may not by construction add or excise terms, nor distort the meaning of those used

and thereby make a new contract for the parties under the guise of interpreting the writing" (*Vermont Teddy Bear Co., Inc. v 538 Madison Realty Corp.*, 1 NY3d 470, 475 [2004] [citations and internal quotation marks omitted]). Moreover, since both the printed Lease and the Rider are inseparable from one another, the court must avoid an interpretation that would produce a result that is absurd (*see In re Lipper Holdings, LLC*, 1 AD3d 170 [2003]) or commercially unreasonable (*see Elsky v Hearst Corp.*, 232 AD2d 310 [1996]).[5]

In the absence of Paragraph 33 of the Rider, the parties would clearly be bound by the landlord's right to elect under the terms of Paragraph 9(d) in the printed Lease, such as was the case in *Mawardi v Purple Potato, Inc.* (187 AD2d 569, 570 [1992]). In *Mawardi,* the plaintiff was the owner of a building containing four retail establishments, one of which was occupied by the defendant's restaurant. A fire which occurred at the building forced the restaurant and two adjoining stores to close down. The plaintiff then sent a notice of termination of the restaurant's tenancy pursuant to paragraph 9(d) of the lease, which, as here, provided that the landlord "may terminate the lease if the premises are wholly unusable or if the building is so damaged that the owner decides to demolish or rebuild it." After a hearing, Supreme Court granted the plaintiff's application for a permanent injunction and a declaratory judgment, finding the premises to be wholly unusable and the plaintiff's decision to demolish to be reasonable and in good faith. In affirming, the Appellate Division, Second Department, noted that "[i]n leases containing this language, the landlord has a broader range of discretion than in leases that require total or substantial destruction"] [*id.* at 570]).

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[5]Hypothetically, in the present factual context, such an absurd result interpreting the present Agreement would eventuate through enforcement of the language in Paragraph 21 of the printed Lease ("[u]pon the expiration *or other termination* of the term of this lease, Tenant shall quit and surrender to Owner the demised premises, "broom clean...."), and reiterated in Paragraph 22 of the Rider ("[t]enant shall on the last day of the term, *or upon any sooner termination thereof, whether by reason of Tenant's default or otherwise,* surrender and deliver to Owner the premises broom clean....") (emphasis provided).

In the case at bar, however, the full intent of the parties to the Agreement cannot be determined without taking Paragraph 33 of the Rider into account. While defendant, in opposing the relief sought by plaintiff, argues that the plaintiff seeks to impress an irrational meaning to the Agreement upon this court, where repairs to the leased space would be required even where the building were to be rendered structurally unsound, he is silent on the question of plaintiff's own recourse in such an event where the plaintiff has expended substantial amounts of monies on renovating the leased space for its unique business purposes, and has negotiated a long term lease in order to facilitate its business goal of establishing a continuing presence at that location. Thus, in the context of the governing language set forth in Paragraph 1 of the Rider, plaintiff, in seeking a preliminary injunction, justifiably relies on the language of Paragraph 33, where, without precondition and irrespective of the extent of the damage caused by the fire, defendant agreed to undertake repairs and vest plaintiff with the ultimate right to terminate the Lease.

Moreover, even in the absence of the language set forth in Paragraph 33, the discretion conferred by Paragraph 9(d) of the printed Lease is not unfettered, and the Owner's right to elect is subject to a consideration of whether he is acting reasonably and in good faith (*see Adams Drug Co. v Knobel,* 64 NY2d 768 [1985]; *Old Line Co. v Getty Sq. Department Store, Inc.,* 66 Misc 2d 825, 828 [1971]; *Matter of Noah's Ark, Div. of Eckmar Corp. v Geib,* 56 Misc 2d 800 [1968], *affd* 31 AD2d 886 [1969]; *but see Pig Restaurant, Inc. v Odelia Enterprises Corp.,* 244 AD2d 196, 196-197 [1997] [after trial, Special Referee found to have properly determined that landlord could terminate lease after the demised premises were rendered "wholly unusable" after a fire, and since the lease provision was written in the disjunctive, there was no need for defendant to indicate whether it intended to rebuild or

restore the premises]).[6] The reasonableness of the owner's action hinges on a determination of the extent of the damage. Thus, for example, it has been held that termination of the lease was justified where a fire, among other things, caused the building's roof to cave in, a structural wall to be listing and in danger of collapse, and the Fire Department ordered the building vacated as imminently perilous to life, as the fire damage was sufficiently extensive so as to satisfy all bases for termination as set forth in the lease and Rider (*Barrow v Lenox Terrace Dev. Assoc.*, 79 AD3d 457 [2010]). On the other hand, it has been opined, in the context of an identically-worded termination provision as contained in Paragraph 9 herein, that where fire causes only partial damage, the landlord had no right to evict, and it is only when the premises are totally damaged or rendered wholly unuseable that the landlord can elect to evict (*Victory Taxi Garage, Inc. v Butaro,* 16 Misc 3d 875, 877 [2007] [application for preliminary injunction granted to the extent of continuing TRO pending determination, in summary proceeding in Civil Court, of the extent of fire damage and owner's concomitant responsibility under lease]).

The extent of the damage at the present time has not been conclusively determined. Plaintiff's reliance on the language of Paragraph 33, in the context of its present application, must follow the same standards of commercial reasonableness and good faith as previously discussed. For this reason, where the documentary submissions fail to conclusively resolve the competing claims of the parties, the court, for the purpose of determining whether plaintiff has demonstrated a likelihood of success on the merits, directs that an evidentiary

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[6]Indeed, it is well settled that "[w]ithin every contract is an implied covenant of good faith and fair dealing" (*Aventine Inv. Management, Inc. v Canadian Imperial Bank of Commerce*, 265 AD2d 513, 513-14 [1999]).

hearing be held before granting or denying plaintiff's application for a preliminary injunction.

At the present time, the court reserves decision on the issues of irreparable injury and the balancing of the equities. Accordingly, it is

ORDERED that the parties shall contact chambers to schedule a hearing, and provide the court with a list of witnesses intended to be called. The provisions of the court's Temporary Restraining Order shall remain in full effect until said hearing.

This constitutes the Decision and Order of the court.

E N T E R,

J. S. C.

HON. CAROLYN E. DEMAREST