

Law Offices of Michael A. Cervini v 8210 Roosevelt Ave., Inc.

2014 NY Slip Op 30295(U)

January 29, 2014

Sup Ct, Queens County

Docket Number: 3372/13

Judge: Robert J. McDonald

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

LAW OFFICES OF MICHAEL A. CERVINI,
MICHAEL A. CERVINI, P.C., and MICHAEL
A. CERVINI,

Index No.: 3372/13

Motion Date: 01/02/14

Plaintiff,

Motion No.: 51

- against -

Motion Seq.: 3

8210 ROOSEVELT AVENUE, INC.,

Defendant.

- - - - - X

The following papers numbered 1 to 21 were read on this motion by plaintiff for an order directing the defendant landlord to immediately restore heating service to the plaintiff's leased commercial premises at 40-09 82nd Street, Elmhurst, New York; or in the alternative, ordering the immediate suspension of rent obligation to offset the plaintiff's heating expenses; and the cross-motion of the defendant for an order pursuant to CPLR 3212 granting summary judgment to the defendant dismissing the plaintiff's complaint; and for an order granting summary judgment on defendant's counterclaims for rent and legal fees:

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Plaintiff, tenant, commenced the instant action for specific performance of a lease agreement and for damages for breach of contract by filing a summons and complaint on February 21, 2013, naming his landlord, 8210 Roosevelt Avenue, Inc., as defendant. In his complaint, the plaintiff, Michael A, Cervini, Esq.,

asserts that on April 18, 2011, he entered into two separate commercial lease agreements with the defendant, one lease for office space located on the third floor and one lease for office space on the second floor at 40-09 82nd Street, Elmhurst, New York. Plaintiff states that pursuant to certain provisions in the lease he was obligated to pay a monthly rent and the landlord was responsible to provide heat, hot water and electric service for the spaces he leased. Plaintiff states that since the inception of the tenancy the defendant has provided heat to the leased premises in accordance with the lease provisions. He states that during his tenancy he has complained about lack of heat on at least 20 occasions and each time the defendant would send a repair company or agent to restore the heat. Plaintiff asserts that he has paid all of his rent obligations in a timely manner, however, the landlord has not provided heat to the premises as agreed upon. Therefore, the plaintiff seeks specific performance of the lease agreement and an order directing the landlord to provide heat to the premises and also seeks money damages for breach of the lease agreements.

Pursuant to stipulation dated October 28, 2013, defendant was granted leave to serve and file a late answer to the complaint. Defendant served a verified answer with counterclaims on November 15, 2013.

In his order to show cause, dated November 12, 2013, plaintiff states that on October 16, 2013, the New York City Fire Department and National Grid sealed the heating system in his building because it was determined that due to a gas leak the boiler was unsafe. The New York City Building Department ordered the landlord not to operate the boiler until all hazardous conditions were repaired. As a result of the notice of unsafe condition, the heating system for his rental units were shut down and his offices stopped receiving any heat. Plaintiff submits affidavits from a subleasee, Odalis Encarnacion, stating that he sublet office space on the second floor of the subject building. He states that in the winter of 2012 and 2013 the radiator worked sporadically and the defendants plumber and heating company would come to her office on numerous occasions attempting to repair the radiator. He states that at the present time he is receiving no heat in his office. Plaintiff is now heating the units using electric space heaters.

Plaintiff claims that as the lease provides that the landlord must provide heat, that the court should issue an order requiring the defendant to provide a working heating system for his offices during the pendency of this action or in the alternative permit the plaintiff to suspend his rent obligation

to offset his costs in providing his own heating system. Plaintiff states that pursuant to NYC Building Code Title 27 Subchapter 12 Article 5 § 27-740 all habitable or occupied rooms or spaces shall be provided with means of heating with a minimum temperature for offices of 70 degrees Fahrenheit.

The defendant opposes the motion and cross-moves for an order dismissing the plaintiff's complaint and further seeks an order for rent and legal fees. In support of the cross-motion, defendant submits an affidavit from Israel Rosenbaum, who states that he is an agent of 8210 Roosevelt Avenue Inc. He contends that defendant is entitled to summary judgment dismissing the plaintiff's complaint because the leases entered into with the plaintiff do not require defendant to provide the plaintiff with heat, hot water or electricity. He states, to the contrary, the lease actually requires the plaintiff himself to provide these services. Mr. Rosenbaum cites paragraph 29 of the lease which state:

"As long as Tenant is not in default under any of the covenants of this Lease for the applicable grace period provided in this lease for the curing of such defaults, Owner shall provide: (b) heat to the demised premises when and as required by law, on business days from 8:00 a.m. to 6:00 p.m."

Counsel for defendant, David B. Rosenbaum, Esq. asserts that the leases to the premises do not require the defendant to provide hot water, electricity or heat at the premises and therefore plaintiff is not entitled to the relief sought in the motion or the complaint and defendant should be awarded summary judgment dismissing the complaint. Counsel argues that although the Housing Maintenance Code requires the landlord to provide heat in a dwelling used or occupied for living purposes, there is no comparable requirement for landlords of commercial spaces. Counsel argues, "any lack of heat within the premises is permissible and defendant is neither compelled to provide heat by the Leases or by law." Counsel also argues that the plaintiff is not entitled to a preliminary injunction as he has not demonstrated a likelihood of success on the merits, irreparable injury absent the granting of a preliminary injunction, and a balancing of equities in the movant's favor. Counsel argues that the plaintiff cannot show a likelihood of success on the merits because neither the lease nor the law require defendant to provide the relief sought and he argues, the defendant should not be required to perform obligations not called for in the lease.

In support of the cross-motion, defendant provides a affidavit from Daniel Siegel, a licensed professional engineer who states that the plaintiff's reliance on a 2008 Building Code is misguided. The engineer states that the subject building was constructed in 1925 and the most recent Certificate of Occupancy is from May 5, 1967. Mr. Siegel states that the newer building code was not adopted until 1968 and therefore the building only needs to comply with the 1916 or 1938 building code specifications which do not impose a minimum heat requirement. Counsel states that although the subject building was built with a central heating system, it is no longer in use.

Defendant also argues that there should be no setoff of rent by reason of the lack of heat because the tenant has remained in possession of the premises and cannot claim constructive eviction, and the lease at paragraph 4 states that the tenant shall not be entitled to a reduction of rent or a setoff by reason of any failure of the owner to comply with the covenants of the lease. Defendant also seeks counsel fees for services rendered in connection with the motion pursuant to paragraph 19 of the lease.

In order to demonstrate entitlement to a preliminary injunction, the movant must establish (1) a probability of success on the merits, (2) the danger of irreparable harm in the absence of injunctive relief, and (3) a balance of the equities in favor of the movant (see County of Suffolk v Givens, 106 AD3d 943 [2d Dept. 2013]; 306 Rutledge, LLC v City of New York, 90 AD3d 1026 [2d Dept. 2011]; Matter of Advanced Digital Sec. Solutions, Inc. v Samsung Techwin Co., Ltd., 53 AD3d 612 [2d Dept. 2008]). "A court evaluating a motion for a preliminary injunction must be mindful that the purpose of a preliminary injunction is to maintain the status quo, not to determine the ultimate rights of the parties (see Masjid Usman, Inc. v Beech 140, LLC, 68 AD3d 942 [2d Dept. 2009]; Matter of Wheaton/TMW Fourth Ave., LP v New York City Dept. of Bldgs., 65 AD3d 1051 [2d Dept. 2009]; Coinmach Corp. v Alley Pond Owners Corp., 25 AD3d 642 [2d Dept. 2006]).

Here, this court finds that the plaintiff has shown a probability of success on the merits in that the explicit terms of the lease at paragraph 29 clearly requires the defendant to provide heat to the plaintiff's leased premises on weekdays from 8:00 a.m. to 6:00 p.m. There is no dispute that the intent of the lease is that the lease provision requires the landlord to provide heat. Said intent can be inferred by the landlord's course of action in providing heat to the leased premises for the 2 ½ years since the inception of the plaintiff's tenancy. The

evidence shows that in prior years when there was a problem with the heat the landlord made efforts to repair the system and to provide heat to the tenant. It was not until the boiler was sealed by the Department of Buildings due to a gas leak that the defendant stopped providing heat to the plaintiff's premises. This court finds that it is disingenuous for the defendant to have provided heat to the plaintiff since the inception of the tenancy and now argue, because the boiler has been sealed and shut off due to violations and unsafe conditions, that he is not required to provide heat under the law and under the terms of the lease.

In addition, the threat to the plaintiff's leasehold due to the lack of heat and the possibility of constructive eviction in the absence of an preliminary injunction satisfies the irreparable harm requirement for a preliminary injunction. As there is no adequate remedy at law for a lack of heat, a balance of the equities favors the granting of preliminary injunctive relief to maintain the status quo pending the resolution of the action. The plaintiff's use of space heaters is not a safe or adequate remedy for the landlord's failure to provide heat (see Masjid Usman, Inc. v Beech 140, LLC, 68 AD3d 942 [2d Dept. 2009]; S.P.Q.R. Co., Inc. v United Rockland Stairs, Inc., 57 AD3d 642 [2d Dept. 2008]; Jiggetts v Perales, 202 AD2d 341[1st Dept. 1994]). The plaintiff has sufficiently shown that the loss of heat to his premises is far more burdensome to him and his business than any harm likely to be caused to the defendant by the imposition of a restraining order, requiring the landlord to repair the boiler. The defendant has failed to demonstrate any prejudice as a result of the preliminary injunction.

Further, as the evidence submitted by both parties raise questions of fact regarding the interpretation of paragraph 29 of the lease, what building codes apply, whether the covenant of quiet enjoyment requires the landlord to provide heat to the tenant and whether the landlord has a legal obligation to provide heat to the premises, the defendant's motion for an order granting summary judgment dismissing the plaintiff's complaint is denied. Defendant's application for counsel fees is also denied.

Accordingly, for all of the above stated reasons, it is hereby,

ORDERED, that the defendant, 8210 Roosevelt Avenue, Inc. is directed forthwith to replace or repair the boiler and provide the plaintiff with heat to his leased premises with a minimum temperature of 70 Fahrenheit, and it further,

ORDERED, that until such time that heat has been restored to the premises, the plaintiff shall deposit his rental payments into an attorney's escrow fund.

Dated: January 29, 2014
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.