Yottoy Prods., Inc. v Majestic Realty Assoc. LLC
2015 NY Slip Op 31376(U)
July 14, 2015
Supreme Court, New York County
Docket Number: 151032/2015
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - PART 42

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YOTTOY PRODUCTIONS, INC.,

Plaintiff

DECISION AND ORDER

-against-

INDEX NO.: 151032/2015

MAJESTIC REALTY ASSOCIATES LLC,

Defendants

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NANCY M. BANNON, J.

I. Background

The plaintiff, a toy design company that leases space for its general office in the building owned by the defendant, commenced this action seeking, inter alia, a judgment declaring that the defendant is in breach of the commercial lease for failing to fix a leak from the roof of the leased premises. The plaintiff now moves pursuant to CPLR 6301 for preliminary injunctive relief, enjoining the defendant from interrupting the plaintiff's electrical services based on the plaintiff's failure to pay rent or electrical charges. The plaintiff's does not dispute that it has not paid rent since April 2014 or additional rent, including electricity charges, since December 2013, but maintains that its obligation to pay rent and additional rent is abated due to the leak.

The defendant opposes the motion on the grounds that the parties' lease states that the defendant is to furnish electricity "[a]s long as Tenant is not in default in the payment of any rent beyond any applicable notice, cure and grace period." The defendant also cross-moves to dismiss the action pursuant to CPLR 3211(a)(8) and 311-a and Limited Liability Company Law (LLCL) § 303 on the grounds that it was improperly served with the summons with notice and the order to show cause and to dismiss the action pursuant to CPLR 3211(a)(1) and (a)(7) because the summons with notice identifies the incorrect building and address. The plaintiff's motion is denied and the defendant's cross-motion is granted in part.

II. Discussion

A. Preliminary Injunction

The plaintiff failed to establish its entitlement to a preliminary injunction in that it failed to make the requisite showing of (1) a likelihood of success on the merits, (2) irreparable injury absent the granting of preliminary injunctive relief, and (3) a balancing of the equities in the plaintiff's favor. See Nobu Next Door, LLC v Fine Arts Housing, Inc., 4 NY3d 839 (2005); Coinmach Corp. v Alley Pond Owners Corp., 25 AD3d 642 (2nd Dept. 2006). Although the plaintiff contends that rent and additional rent has been abated due to the leak in the roof, the plaintiff did not submit proof indicating that the leak persisted for each day that it failed to pay rent or electricity charges . Additionally, another action, a summary non-payment proceeding against the plaintiff, entitled *Majestic Realty Associates LLC v Yottoy Productions, Inc.*, Index No. L&T 68393/2014, wherein the defendant seeks recovery of base rent and additional rent, including electricity charges under the lease, had been pending in the Civil Court, New York County at the time the instant motion was filed. The affirmative relief sought by the plaintiff in this action essentially duplicates the defenses that would be raised in that landlord/tenant proceeding. Accordingly, the plaintiff failed to make the requisite showing of a likelihood of success on the merits. See Ahmed v C.D. Kobsons, Inc., 67 AD3d 467 (1st Dept. 2009).

The plaintiff correctly argues that loss of goodwill or reputation of a viable, ongoing business constitutes irreparable harm. See Waldbaum's, Inc. v Fifth Avenue of Long Island Realty Assocs., 85 NY2d 600 (1995); Second on Second Café, Inc. v Hing Sing Trading, Inc., 66 AD3d 255 (1st Dept. 2009). The loss of a particular location of a business may also render the resulting harm irreparable (see Oriburger,Inc. V B.W.H.N.V. Assocs., 305 AD2d 275 [1st Dept. 2003]), as would the loss of a valuable long-term leasehold. See Grand Manor Health Related Facility, Inc. v Hamilton Equities, Inc., 85 AD3d 695 (1st Dept. 2011); Masjid Usman, Inc. v Beech 140, LLC, 68 AD3d 942 (2nd Dept. 2009); Empire State Bldg. Assocs. v Trump Empire State Partners, 245 AD2d 225 (1st Dept. 1997). Indeed, "irreparable injury is presumed" upon the termination of a commercial lease. A-1 Entertainment, LLC v 27th St. Prop. LLC, 60 AD3d 516, 516 (1st Dept. 2009).

Here, however, the plaintiff makes no allegation that the defendant has terminated or intends to terminate the lease. Rather, the plaintiff merely alleges that the defendant has threatened to interrupt its electrical services and that it will lose significant revenue and potentially its entire business if electricity is shut off, even temporarily absent a preliminary injunction. Indeed, the plaintiff does not allege that the defendant has shut off the electricity in the past or that a loss of service would be of such a duration that its business is in actual

danger of being harmed. As the plaintiff's allegations of irreparable injury are merely speculative, the plaintiff failed to demonstrate irreparable injury in the absence of injunctive relief. See e.g. County of Suffolk v Givens, 106 AD3d 943 (2nd Dept. 2013); Rowland v Dushin, 82 AD3d 738 (2nd Dept. 2011); Pier 59 Studios, L.P. v Chelsea Piers, L.P., 19 AD3d 148 (1st Dept. 2005); 91st Street Co. v Robinson, 242 AD2d 502 (1st Dept. 1997).

Similarly, the plaintiff failed to demonstrate the balancing of equities in its favor inasmuch as it has not made the requisite showing that the harm to the plaintiff in not granting the injunction outweighs any harm that may come to the defendant in allowing the plaintiff to continue to occupy the premises rent-free. See Credit Index, L.L.C. v Riskwise Intern. L.L.C., 282 AD2d 246 (1st Dept. 2001). Although the plaintiff alleges that the defendant has threatened to shut off its electricity, plaintiff does not dispute that it has not paid rent since April 2014 or additional rent, including electricity charges, since December 2013 and, as discussed above, has not made an adequate showing that it is entitled to an abatement under the terms of the lease. The plaintiff, therefore, failed to show the balancing of equities in its favor and its motion seeking a preliminary injunction is denied.

B. Motion to Dismiss - CPLR 3211(a)(8)

"The method of service provided for in an order to show cause is jurisdictional in nature and must be strictly complied with." El Greco Soc. of Visual Arts. Inc. v Diamantidis, 47 AD3d 929 (2nd Dept. 2008). Pursuant to the order to show cause on the plaintiff's motion for a preliminary injunction, dated February 13, 2015 (Lobis, J.), the plaintiff was to personally serve the order and the summons with notice upon the defendant by February 16, 2015. According to CPLR 311-a, personal service on a limited liability company must be made by personally delivering a copy to any member, manager, authorized agent, or other person designated by the LLC to receive process. See CPLR 311-a. A properly executed affidavit of service is prima facie evidence of proper service. See Engel v Lichterman, 62 NY2d 943 (1984); Grinshpun v Borokhovich, 100 AD3d 551 (1st Dept. 2012).

According to plaintiff's counsel's affirmation of service, plaintiff's counsel served the order to show cause and summons with notice upon "Jane Doe", a person authorized to accept service on behalf of the defendant. See CPLR 311-a; LLCL § 303. Generally, a process server's affidavit of service constitutes prima facie evidence of proper service. See Grinshpun v Borokhovich, 100 AD3d 551 (1st Dept 2012). However, in opposition, the defendant submitted the affidavit of Katherine Jorquera, who states that she was the person to whom the order to show cause was delivered, but she was never asked whether she was authorized to accept

service on behalf of the defendant, is not authorized to accept service on behalf of the defendant, and is, in fact, not a member, manager, or any type of agent of the defendant. The defendant also submitted the affidavit of Fred Ohebshalom, the Manager of Challenger Properties, LLC, the sole member of the defendant, and the CEO of Empire Management Co., the defendant's managing agent for the building in which the offices leased by the plaintiff is located. Ohebshalom states that he is the only person to whom process for the defendant may be personally served. The papers submitted in support of and in opposition to the motion to dismiss pursuant CPLR 3211(a)(8), therefore, raise a factual issue as to whether proper service was effectuated, which requires an evidentiary hearing. See Engel v Boymelgreen, 80 AD3d 653 (2nd Dept. 2011); Tikvah Enterprises, LLC v Neuman, 80 AD3d 748 (2nd Dept. 2011). At the hearing, the plaintiff has the burden of proving, by a preponderance of the evidence, that service was properly made. See Persaud v Teaneck Nursing Center, Inc., 290 AD2d 350 (1st Dept. 2002). To the extent that counsel for the plaintiff is called as a witness at such hearing, the Court notes that such testimony may implicate the advocate-witness rule. See New York Rules of Professional Conduct, Rule 3.7 (22 NYCRR 1200.29).

C. Motion to Dismiss - CPLR 3211(a)(1); (a)(7)

The defendant seeks dismissal of the action on the grounds that the summons with notice identifies the incorrect building and address of the leased premises, as averred by Ohebshalom in his affidavit. The plaintiff contends that the reflection of the incorrect address was merely a typographical error and has been corrected by the filing of an amended summons with notice. The Court notes that the defendant has not served a demand for a complaint pursuant to CPLR 3012(b). In the absence of a complaint, the defendant's motion to dismiss pursuant to CPLR 3211(a)(1) and (a)(7) is premature. See McGee v Dunn, 75 AD3d 624 (2nd Dept. 2010). In addition, the defendant does not argue that it was prejudiced by the defect or would be prejudiced by disregarding it. See CPLR 2001; see also Green v City of New York, 103 AD3d 453 (1st Dept. 2013); Greenfield v Town of Babylon Dept. of Assessment, 76 AD3d 1071 (2nd Dept. 2010). Accordingly, the defendant's motion to dismiss pursuant to CPLR 3211(a)(1) and (a)(7) is denied without prejudice.

III. Conclusion

Accordingly, it is

ORDERED that the plaintiff's motion for a preliminary injunction is denied, and it is further,

ORDERED that the branch of defendant's cross-motion to dismiss the summons with notice on the ground of lack of personal jurisdiction (CPLR 3211[a][8]) is granted to the extent that a traverse hearing is ordered, and it is further,

ORDERED that the parties shall appear for the traverse hearing on October 21, 2015, at 2:30 p.m., and it is further

ORDERED that the defendants' motion is otherwise denied without prejudice.

This constitutes the Decision and Order of the court.

Dated: July 14, 2015

HON. NANCY M. BANNON JSC
J.S.C.