Overtime Partners, Inc. v 320 W. 31st Assoc., LLC
2018 NY Slip Op 30807(U)
May 2, 2018
Supreme Court, New York County
Docket Number: 650901/2018
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 39

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OVERTIME PARTNERS, INC.,

Plaintiff,

- v -

320 WEST 31ST ASSOCIATES, LLC,

Defendant.

INDEX NO. 650901/2018

MOTION DATE 2/26/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15

were read on this application to/for PREL INJUNCTION/TEMP REST ORDR

HON. SALIANN SCARPULLA:

In this commercial landlord-tenant action plaintiff Overtime Partners, Inc. ("Overtime") moves for a preliminary injunction to compel defendant 320 West 31st Associates, LLC ("Associates") to accept a proposed sublessee. After two-and-a-half days of hearings on the preliminary injunction motion, I gave the parties notice that, pursuant to CPLR 3212 (c), and because of the unique circumstances in this action and the exigency of the dispute, I was converting the motion for preliminary injunction into one for summary judgment on the claims for a declaratory judgment and permanent injunction.

Background[1]

Overtime Partners, LLC, an affiliate of Overtime, owns the premises located at West 31st Street (the "Premises"). By an Agreement of Lease dated as of December 12, 2017, Overtime Partners LLC leased the Premises to Associates for a term of ninety-nine years, with an option to renew (the "Ground Lease"). On that same date, Associates and Overtime entered into an Agreement of Master Lease, by which Associates leased the Premises back to Overtime (the "Master Lease).

Prior to execution of the Ground Lease and Master Lease, Overtime had leased the Premises to TCI College, which lease expired on December 31, 2017 with an option to extend ("TCI Lease"). Because Overtime and Associates were negotiating the Ground Lease in contemplation of TCI College's continued tenancy, the Master Lease term tracks the TCI tenancy.

The Master Lease has a term commencing on December 12, 2017 ("Master Lease Commencement Date"), and terminating on December 21, 2021, unless terminated earlier for the reasons set forth in the Master Lease. As is relevant here, the Master Lease incorporates by reference certain provisions of the TCI Lease, but specifically excludes part of the permitted use provision under the terms of the TCI Lease.

The Master Lease provides that Overtime would initially pay a monthly base rent of $300,000, together with real estate taxes and other charges, and the rent charges escalate during the four-year lease term. Additionally, Overtime was required to pay

[1] The background section of this decision is taken from the pleadings, the documents submitted by the parties, and the testimony I took at the preliminary injunction hearing.

Associates a security deposit in the amount of $10,324,003.94, from which Associates may draw down for certain payments due ("Security Deposit"). By reference to the TCI Lease, Overtime waived money damages for causes of action regarding Associates' consent to Overtime actions, and Overtime's sole remedy is "an action or proceeding to enforce the relevant provision, or for specific performance, injunction or declaratory judgment[.]"

With respect to subletting the Premises, Paragraph 9(A) of the Master Lease provides:

> (ii) [Overtime] shall not enter into any Sublease, or permit any party to use or occupy all or any portion of the Premises, without (in each instance) the prior written consent of [Associates] which consent Master Landlord may withhold or condition in its sole and absolute discretion if such agreement or permission extends beyond the date that is five (5) years after the Master Lease Commencement Date and otherwise shall not unreasonably withhold, condition or delay (subject, in any event, to Section 9(B) below).

Paragraph 9(B) of the Master Lease provides that:

> [Overtime] shall have the right to enter into a Sublease for all or any portion of the Premises or to amend, modify or supplement any Sublease (but, in each case, only with the prior written consent of [Associates], not to be unreasonably withheld, delayed or conditioned so long as (i) [Associates] is reasonably satisfied as to the creditworthiness and business reputation of the Subtenant thereunder, (ii) [Associates] is reasonably satisfied that such Sublease adequately protects the interests of [Associates] as set forth in this Master Lease . . . .

Further, paragraph 9(C) provides that "before [Overtime] enters into a Sublease pursuant to Section 9(B) above (or, if earlier, within fifteen (15) Business Days after [Overtime] requested [Associates'] consent to such new Sublease), [Associates] shall have the right to terminate this Master Lease with immediate effect upon written notice to

[Overtime]." In addition to the foregoing, any sublease of the Premises must contain the covenants set forth in Paragraph 9(B) of the Master Lease.

After experiencing financial difficulty, TCI College failed to pay rent and never signed the contemplated lease extension. Accordingly, in September 2017 Overtime began negotiating with Touro College ("Touro") as TCI College's replacement tenant. By the end of September 2017, Touro had provided Overtime with a proposed sublease and an initial round of financial statements, which Overtime exchanged with Associates. Because Associates raised concerns regarding certain terms of the proposed sublease, negotiations continued. The credible evidence shows that Associates was fully apprised of and even participated in these negotiations as the parties entered the Ground Lease and Master Lease in mid-December 2017.

On December 14, 2017, Overtime provided Associates with a second proposed sublease with Touro. Around this time, Touro engaged a consultant to provide an opinion regarding the Premises' suitability for Touro's potential tenancy, including whether Touro could occupy the Premises under the current zoning and what, if any, upgrades were required to bring the building up to Code. Associates, meanwhile, was in the process of negotiating a long-term lease with other non-party replacement tenants.

Eventually, on January 11, 2018, Associates responded to the proposed sublease sent to it in December 2018. Associates stated that, even though Overtime had not yet made a formal request for consent, and that Associates "underst[ood] that separate financial statements may not be feasible," Associates nevertheless specifically requested "three years of audited consolidated financial statements" to evaluate Touro's

creditworthiness. Overtime and Touro further negotiated terms to address Associates' concerns, and ultimately entered a sublease on January 23, 2018 ("Touro Sublease").[2]

Overtime notified Associates the next day that it entered the Touro Sublease, and that it was formally requesting Associates' consent pursuant to the Master Lease ("Formal Request"). In requesting Associates' consent, Overtime provided the Touro Sublease and resubmitted Touro's requested consolidated financial statements for the years 2015, 2016, and 2017. In its letter, Overtime requested Associates' consent by February 15, 2018.

On January 31, 2018, Associates responded that it needed further clarification regarding Touro's financial statements. Specifically, Associates stated that it was unable "to evaluate the financial standing and creditworthiness of [Touro] . . . because . . . [the financial statements] are consolidated with non-subtenant entities." Associates also raised a concern regarding a recent commercial condominium Touro purchased with bonds, which was not reflected in its financial statements. Besides Touro's creditworthiness, Associates raised no other concern in response to Overtime's Formal Request.

The next day, on February 1, 2018, Touro addressed each of Associates' financial concerns in a letter from its Senior Vice President and Chief Financial Officer, Melvin

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[2] Touro's proposed use in the Touro Sublease is narrower than the Master Lease's broad, general use provision, which mainly requires that the tenant legally occupy the building and use it for legal purposes. Master Lease §4; TCI Lease Art. 5. The Touro Sublease complies with and provides more restrictions than the Master Lease's use clause by restricting Touro's use of the Premises "for school or college purposes . . . and/or for general office use." Touro Sublease Art. 5.

Ness ("Ness"). Touro explained that the party to the Touro Sublease is "the parent entity of substantially all of the operating entities . . . under common governance" and "only prepares consolidated financial statements." The letter explained that the financial statements disclosed the commercial condominium Touro purchased as a subsequent event and further detailed the negligible impact it had on Touro's financial standing. At bottom, the letter reiterates Touro's secure financial condition and overall creditworthiness.

Subsequently, on February 6, 2018, Associates and Touro spoke over the phone to further ameliorate Associates' financial concerns. A representative of Touro, Jeff Rosengarten ("Rosengarten"), testified that during the conversation, Touro emphasized its willingness to help Associates evaluate Touro's financial statements, and that Associates suggested the possibility of a guaranty.

Despite Touro's submission of the requested financial records, Associates retained a financial consultant to evaluate Touro's creditworthiness. Overtime also retained an accountant in early 2018 from PricewaterhouseCoopers Advisory Services LLC, David Daly ("Daly"), to conduct a financial analysis of Touro's financial data and history ("PwC Analysis").

On February 12, 2018, Touro offered "to have Touro University (California) and Touro University Nevada guaranty the obligations of Touro College . . . as they have the most significant cashflow outside of the Touro College corporate entity." Associates, nevertheless, continued to withhold consent and delayed further discussions until

February 23, 2018, when Touro participated in a second conference call with Associates' financial consultant.

Associates' financial consultant indicated that he still had not yet completed his analysis for Associates, but he would do so shortly thereafter. Believing that Associates was stalling while negotiating with another potential subtenant, Overtime filed this lawsuit on February 26, 2018. In its complaint Overtime alleges that Touro is a creditworthy and reputable not-for-profit educational institution that meets the requirements under the Master Lease as a proposed subtenant and that by delaying and withholding consent to the sublease, Associates is breaching the Master Lease. Overtime also alleges that by wrongfully withholding consent to the sublease while negotiating with another tenant, Associates is securing payment at Overtime's expense, because Associates can deduct any monthly rent payments not made by a subtenant from Overtime's Security Deposit.

Finally, Overtime alleges that it has started repairs to the HVAC system, elevator, and roof in preparation of Touro's tenancy, expending approximately $700,000.00 to date. Based on the foregoing Overtime asserted four causes of action: (1) declaratory judgment seeking a declaration that Associates breached the Master Lease by refusing to consent to the Touro Sublease; (2) permanent injunction against Associates compelling it to consent to the Touro Sublease; (3) breach of contract seeking reimbursement for rent payments; and (4) breach of contract seeking reimbursement for performing alterations to the Premises.

By order to show cause dated February 26, 2018, Overtime filed the summons and complaint and sought a preliminary injunction compelling Associates to consent to the Touro Sublease. At the initial application on the order to show cause, Associates argued, among other things, that I should deny the preliminary injunction because Overtime's motion for preliminary injunction sought the ultimate relief in the action. At that time, I ordered a factual hearing to determine whether Associates unreasonably withheld and delayed consent.

On the first hearing date of April 5, 2018, counsel for Associates raised a jurisdictional issue. According to counsel for Associates, Associates was never properly served with the summons and complaint and therefore, no jurisdiction existed over Associates. I noted then that it is my usual practice to ask defendant's counsel if he/she would accept service of the summons and complaint attached to an order to show cause for a preliminary injunction. However, because at the parties' initial appearance I simply set the order to show cause down for a hearing, I did not have a court reporter record our scheduling discussion. In an abundance of caution, I ordered counsel for Overtime to serve the summons and complaint on Associates in court, and I offered counsel for Associates the opportunity to adjourn the hearing to avoid any prejudice. Counsel for Associates declined and opted to proceed with the hearing.

In its supplemental opposition papers, Associates again raises the jurisdictional issue, which I reject for the reasons stated on the record. In any event, Associates never raised the issue in its March 2, 2018 letter to the court, in its first set of opposition papers submitted on April 4, 2018, or during the numerous phone calls that the parties had with

me, and Associates has made several substantive appearances in the action since this action was commenced.

The parties eventually completed two-and-a-half days of factual hearings in which I heard nine witnesses testify, specifically: (1) Rosengarten; (2) Touro's pre-litigation building consultant, John Geraci ("Geraci"); (3) a representative of Overtime, Andrew Edelman ("Edelman"); (4) a broker involved in the negotiation of the Ground Lease and Master Lease; (5) Daly; (6) one of Touro's current landlords, John Silverman; (7) a representative from Associates, John Saraceno ("Saraceno"); (8) Associates' post-litigation building consultant, Evan Bray ("Bray"); and (9) Associates' post-litigation building cost estimator, Alex Pamboris ("Pamboris").

At the conclusion of testimony, I asked the parties to explore settlement, and gave them a short period to do so. The parties returned to court on April 12, 2018 without having settled. For the reasons stated on the record on April 12, 2018, I gave the parties notice that I would convert the motion for preliminary injunction to one for summary judgment, pursuant to CPLR 3212 (c), once Associates submitted its answer. On April 25, 2018, Associates filed its answer, and I now convert the motion for preliminary injunction to one for summary judgment.

Discussion

Pursuant to CPLR 3212 (c), a court may order an immediate trial of an issue of fact raised by a motion when appropriate for the expeditious disposition of the controversy. In this action, because I already held a hearing on the only factual issue in dispute, I now utilize the procedure set forth in CPLR 3212 (c) to determine Overtime's

causes of action for declaratory judgment and permanent injunction on summary judgment.[3]

In its declaratory judgment claim, Overtime seeks injunctive relief to command Associates to provide consent to the Touro sublease. "To be entitled to an injunction, a party must show that there was a violation of a right or threatened violation, that there is no adequate remedy at law, that serious and irreparable harm will result absent the injunction, and that the equities are balanced in his or her favor" *Islamic Mission of Am., Inc. v Mukbil Omar Ali*, 152 A.D.3d 573, 575 (2d Dep't 2017). As previously stated on the record, Overtime has already established irreparable harm absent an injunction because it has no right to money damages under the Master Lease, yet it is obligated to continue paying rent even as Associates allegedly unreasonably withholds or delays consent.[4] Therefore, resolution of this action turns on the factual issue of reasonable consent and a balancing of the equities.

Pursuant to the Master Lease, the only grounds upon which Associates was permitted to withhold its consent to the Touro Sublease were the creditworthiness and

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[3] *See also* Proposed Commercial Division Rule 9-a Immediate Trial or Pre-Trial Evidentiary Hearing, available at https://www.nycourts.gov/rules/comments/PDF/CDRule9-a.pdf ("Subject to meeting the requirements of . . . 3212(c), parties are encouraged to demonstrate on a motion to the court when a pre-trial evidentiary hearing or immediate trial may be effective in resolving a factual issue sufficient to effect the disposition of a material part of the case.").

[4] At the same time, I dismissed Overtime's third and fourth causes of action for breach of contract on the record because Overtime is unable to claim money damages pursuant to the terms of the Master Lease.

business reputation of Touro, or if the Touro Sublease did not adequately protect Associates' interests.

After hearing the testimony, I find that Associates knew that Overtime was negotiating a sublease with Touro in the fall of 2017. And while Associates raised a host of concerns with the Touro Sublease at the hearing before me, until Associates' service of the order to show cause, the only substantive issue Associates raised with Overtime as to the Touro Sublease was the financial creditworthiness of Touro.

Regarding creditworthiness, Touro provided a provided a written response the next day to Associates' January 31, 2018 letter requesting additional financial information, and it also made itself available at Associates' convenience to respond to any other concerns. By promptly addressing Associates' issues and subsequently offering to issue a guaranty from two of its affiliates on February 12, 2018 (in response to Touro's consolidated financial statements), Touro remedied each of Associates' concerns raised in the January 31, 2018 response letter. At that time, there was no longer a reasonable ground to withhold consent based on Touro's creditworthiness and business reputation.[5]

Associates, nevertheless, argues that it was not afforded a "reasonable period of time" to perform a financial analysis to determine whether to accept the Touro Sublease.

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[5] *Contra 200 Eighth Ave. Rest. Corp. v Daytona Holding Corp.*, 293 A.D.2d 353, 353 (1st Dep't 2002) (affirming reasonableness finding where "the proposed assignee did not timely tender adequate financial background information to enable defendant to ascertain whether it would be a financially responsible tenant").

Under the Master Lease consent is not to be unreasonably withheld or delayed. Reasonableness "should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby." *Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 13 N.Y.3d 398, 404 (2009).

I find that the period between when Overtime made its Formal Request to when it commenced this lawsuit was a reasonable period in the context of this dispute and the Master Lease. Section 9(C) of the Master Lease provides that "within fifteen (15) Business Days after [Overtime] requested [Associates'] consent to [a] Sublease [pursuant to section 9(B)], [Associates'] shall have the right to terminate this Master Lease . . .." Because Associates is permitted fifteen business days to determine to buy out the Master Lease instead of consenting to a sublease, that same fifteen business day period is a reasonable period for Associates to determine whether to consent to a sublease.[6]

Moreover, Associates received financial statements from Touro months before Overtime's Formal Request, yet more than fifteen business days passed from the date Overtime made its Formal Request to when it brought this lawsuit. Associates' failure to timely complete a financial analysis is due to its own conduct and not due to either Overtime's or Touro's conduct. From the outset, Overtime and Touro were forthcoming and cultivated an open dialogue. It is also worth noting that Associates never called its

[6] Notably, Associates let its right under section 9(C) lapse after completing a "financial analysis [and determining] it didn't make sense to recapture and terminate [the Master Lease]." Hr'g Tr. 339:4 -5, Apr. 9, 2018. Had Associates made an equally concerted effort to analyze Touro's creditworthiness, its financial consultant could have timely completed a creditworthiness analysis.

financial consultant to challenge either the PwC Analysis or Daly, who testified that Touro was creditworthy.

Associates also argues that it reasonably withheld consent because: (1) it feared that Touro may holdover at the end of its lease term, thereby possibly jeopardizing its ability to develop the property into a residential unit under Real Property Tax Law § 421-a; and (2) Touro's proposed use and occupancy of the building would be illegal because it would not comply with the necessary zoning and safety code regulations

These additional "concerns" only arose ***after*** Associates unreasonably delayed and withheld consent and after the litigation was commenced. Associates has failed to proffer any evidence to the contrary,[7] and I will not consider these additional concerns in determining the reasonableness of Associates' pre-litigation conduct. *See generally Astoria Bedding, Mr. Sleeper Bedding Ctr. Inc.*, 239 AD2d at 776. Even considering these issues, I find that Associates unreasonably delayed and withheld consent to the Touro Sublease for the reasons elucidated below.

First, Associates' assertion that Touro ***might*** hold over past the end of its lease term is entirely speculative. [8] I credit Rosengarten's testimony that Touro has never held

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[7] There was no testimony to show that Associates had any knowledge of zoning or safety code issues prior to the commencement of this litigation, and both of Associates' zoning and safety code expert witnesses, Bray and Pamboris, were first hired and first inspected the Premises in the latter half of March 2018.

[8] Between the day Associates closed on the Master Lease and the commencement of this lawsuit, Saraceno "concluded that the fact that [Touro was] waiting this long to make a deal, that they were clearly someone who did not appreciate the holdover risk and that this was someone that I was concerned about being a holdover risk to me and to our

over beyond any of its leases and that it will vacate the Premises upon the expiration of the Touro Sublease. Considering Rosengarten's credible testimony, Associates' unsupported and subjective fear is not a reasonable basis for Associates to refuse to consent to the Sublease. *See, e.g.*, *Ontel Corp. v Helasol Realty Corp.*, 130 A.D.2d 639, 639–40 (2d Dep't 1987); *American Book Co. v Yeshiva Univ. Dev. Found., Inc.*, 59 Misc.2d 31, 33-34 (Sup Ct, NY County 1969).

Associates' second assertion, that Touro would not comply with the necessary zoning and safety code regulations, is equally unsupported. I found credible Rosengarten's testimony that Touro would do whatever is legally required of it to amend the certificate of occupancy and to bring the building up to code; Geraci's testimony (a city regulatory approval specialist who has been working with Touro since mid-December 2017) that any required zoning changes or repairs could be expedited and accomplished before Touro needs to occupy the Premises; and Edelman's testimony that Overtime would enforce the Touro Sublease and require Touro to be in full compliance with the laws, codes, and regulations before Touro occupies the Premises.[9]

Considering this credible testimony, Associates' post-litigation purported concern that Touro will breach the Touro Sublease by violating the legally applicable zoning and

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building because in my experience you don't wait until five months before your expiration to move a 150,000 school." Hr'g Tr. page 317:4-10, Apr. 9, 2018.

[9] Additionally, Overtime is currently making repairs to the Premises' elevators, HVAC system, and roof.

safety code requirements is entirely speculative[10] and does not provide a reasonable basis to withhold consent. *See, e.g.*, *Ontel Corp.*, 130 A.D.2d at 639–40; *American Book Co.*, 59 Misc.2d at 33-34.

Finally, the balance of equities tips in Overtime's favor. Generally, "[t]he balancing of the equities requires the court to determine the relative prejudice to each party accruing from a grant or denial of the requested relief." *Barbes Rest. Inc. v ASRR Suzer 218, LLC*, 140 A.D.3d 430, 432 (1st Dep't 2016).

Here, if the injunction is not granted, Overtime will continue to suffer harm every month that the Premises remains vacant and Overtime is left without any legal recourse under the terms of the Master Lease. *See Aon Risk Services v Cusack*, 34 Misc. 3d 1205(A) (Sup Ct, NY County 2011) (granting injunctive relief where the underlying agreement acknowledged that injunctive relief would be appropriate). Associates, alternatively, bears no financial risk or prejudice as its asserted hardship is speculative and unsupported. *See New England Sec. Corp. v Stone*, 33 Misc. 3d 1237(A) (Sup Ct, Kings County 2011) (balance of equities favored movant where opposition's asserted hardship was speculative and unsupported).

When further considering Touro, an academic institution providing education and career-training opportunities to the underserved communities of New York City, the harm

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[10] Bray, Associates' building code expert witness, never spoke to Overtime or Touro about Touro's proposed use of the Premises. Pamboris, Associates' cost estimator expert witness, did not testify that Touro would be required to update the Premises under the most recent building code; rather, he merely calculated the cost of doing so at Associates' request.

to Overtime and Touro clearly outweighs any harm to Associates. *See Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 N.Y.3d 839, 840 (2005) (determining whether to grant or deny a provisional injunctive relief requires the court to weigh a variety of factors).

Accordingly, in declaring that Associates unreasonably delayed and withheld consent, I grant injunctive relief as the balance of equities favors commanding Associates to consent to Touro Sublease.

In accordance with the foregoing, it is

ADJUDGED and DECLARED that, pursuant to the terms of the Master Lease dated December 12, 2017, defendant 320 West 31st Associates, LLC unreasonably withheld and delayed consent to the proposed sublease entered on January 23, 2018;

ORDERED AND ADJUDGED that defendant 320 West 31st Associates, LLC is directed to provide written consent to the proposed sublease entered on January 23, 2018 and expeditiously to take all necessary steps to effectuate such consent pursuant to the terms of the Master Lease.

This constitutes the decision, order and judgment of the court.

May 2, 2018
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED			[ ]	NON-FINAL DISPOSITION	
	[X]	GRANTED	[ ]	DENIED	[ ]	GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ]	SETTLE ORDER			[ ]	SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ]	DO NOT POST			[ ]	FIDUCIARY APPOINTMENT	[ ] REFERENCE