1611 Bway LLC v Times Sq. JV, LLC
2018 NY Slip Op 31044(U)
May 30, 2018
Supreme Court, New York County
Docket Number: 652044/2018
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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1611 BWAY LLC,

Plaintiff,

-against-

TIMES SQUARE JV, LLC,

Defendant.

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DECISION AND ORDER
Index No.: 652044/2018

Motion Sequence No.: 001

O. PETER SHERWOOD, J.:

On this motion sequence 001, plaintiff, 1161 Bway LLC ("Tenant") seeks a *Yellowstone* injunction and a preliminary injunction tolling termination of a 35 year lease of commercial space on the street level of a major hotel located in the Times Square Area of New York City (the "Lease"). The Lease provides for the space to be used as "an upscale first-class dining restaurant and/or coffee bar" (Lease, ¶ 1.21, NYSCEF Doc. No. 4).

On April 30, 2018, the court denied plaintiff's request for a *Yellowstone* injunction but stayed defendant from taking steps to regain possession of the space, pending oral argument on the branch of the motion seeking a preliminary injunction.

The Lease was signed in 1995 and thereafter the premises was operated by the Tenant initially as a coffee shop and later as a "Charley O's" restaurant. In 2009, the Landlord and Tenant entered into a Joint Marketing Agreement in an unsuccessful attempt to market and lease the space. In 2011, the parties signed a "Ninth Lease Amendment" whereby the Landlord gave its consent to the Tenant subletting the space to "Caffebene, Inc" ("Subtenant") to operate a coffee bar.[1] The Sublease was signed at the same time.

[1] Under ¶ 19.3 of the Lease, the Tenant is authorized to sublet the space with the consent of the Landlord (who "shall not be unreasonably withhold or unduly delay its consent"). The sublet space may be used "solely as an upscale first-class dining restaurant".

In 2017, the Tenant commenced a rent nonpayment proceeding against Caffeebene and secured its eviction in October 2017. Since that time the space has been dark but the Tenant has continued to pay rent as it has become due.

On April 24, 2018, the Landlord served a Notice of Termination on the Tenant invoking the "Continuous Operation" provision of The Lease (¶ 8.4). That provision states in relevant part that:

> Continuous Operation. Tenant acknowledges that its continuous operation at the Demised Premises for the regular conduct of its business therein is of utmost importance to Owner in the renewal of other leases in the Building, in the renting of vacant space in the Building and in the maintenance of the character and quality of the Building. *Tenant therefore covenants and agrees that it will* with due dispatch and diligence promptly open for business in the Demised Premises and thereafter *continuously, actively and diligently operate such business in the whole of the Demised Premises . . . at least five (5) days per week, ten (10) hours per day. . . . Tenant further agrees that if it fails to so conduct continuously its business in the Demised Premises as hereinabove set forth . . . then such failure shall be deemed to render the Demised Premises vacant and deserted. . . .* Notwithstanding, any provision of this Section 8.4 to the contrary, Tenant shall be permitted to close the Demised Premises for a period of up to six (6) months, solely for the purpose of making alterations, repairs, renovations and additions to the Demised Premises.

Lease,§ 8.4 (*emphasis added*).

The Tenant maintains that it is not in default of the Continuous Operation clause because that clause does not require it to open and operate a restaurant during the period that it is marketing, negotiating and subletting the space to permitted subtenants under Article 19 of the Lease or at any time. The Tenant arrives at this conclusion by noting first, that the Lease does not define the term "its business", a phrase found in ¶ 8.4". Tenant's then argues that "its business" consists of both operation of restaurants and subletting restaurant spaces to non-affiliated entities. Thus, its efforts to market and sublet the space in its role as a sub-landlord operates as a wavier of any

objections to Tenant not personally occupying and operating the space during the marketing and subletting period.

The Tenant argues it is entitled to a *Yellowstone* injunction because it received a threat of termination of the Lease; the application for an injunction was made prior to expiration of any termination period set forth in the Lease; and it has the desire and ability to cure any defaults if it is determined a default exists. The Landlord replies, and the court agreed, that Tenant is not eligible for a *Yellowstone* remedy because ¶ 20.1 (d) of the Lease did not require service of any notice to cure or granting of any cure period to Tenant as a result of its "desertion" of the Premises (*see* Tenant Opp. Br. at 5, NYSCEF Doc. No. 20).

On that branch of the motion that seeks a preliminary injunction, under CPLR 6301, Tenant argues it has shown a likelihood of success on the merits because it has been continuously operating the space for years as a sub-landlord and by threatening to terminate the Lease, the Landlord is impeding its ability to sublet the space to prospective subtenants that would comply with the Permitted Use (¶ 1.21) clause of the Lease. The Tenant also argues that if the Lease is terminated, it will be irreparably harmed by loss of a valuable long term lease (*see* Tenant Br. at 13, NYSCEF Doc. No. 11). Finally, Tenant asserts that the equities favor it because grant of the preliminary injunction will maintain the status quo (*see id* at 13 citing *Second on Second Café, Inc. v Hing Sing Trading Inc.*, 66 AD 3d 255 [1st Dept 2009]) and termination of the Lease would result in loss to Tenant of a valuable long term leasehold without benefit of a judicial determination (*see id* at 14).

The Landlord responds that Tenant has not shown a likelihood of success or the merits. First, in violation of ¶ 8.4 of the Lease, the space remained dark for more than six months after it was vacated by subtenant, Cafebenne. Second, contrary to Tenant's claim the "business"

mandated by the Lease is the "Permitted Use of the Demised Premises" as "an upscale first-class dining restaurant and/or coffee bar" (Lease, ¶ ¶ 1.21 and 8.1). No other use is authorized (*see id*, ¶ 8.2). As to the claim of irreparable harm, the Landlord observes that Tenant has not occupied the space or done business there since 2011. Thus, Tenant cannot claim that it will suffer "irreparable harm" from the loss of "good will" if injunctive relief is denied and it is ultimately evicted (*see* Opp. Br. at 8). Accordingly, any loss the Tenant might suffer is purely financial and is fully compensable with money damages (*see 233 East 86th St. Corp. v Park East Apts., Inc.*, 131 Misc 2d 242 [Sup Ct NY Co 1986], aff'd 123 AD 2d 536 [1st Dept 1986] ["Potential loss of income from the rental of the street level store premises is compensable in dollars"]). Regarding balance of the equities, there is no cure period for the court to exercise its equitable powers to preserve and the Landlord is entitled to have the issues adjudicated through an expedited summary preceding process. Moreover, the New York City Civil Court is the preferred forum for resolving landlord-tenant issues, where the primary relief sought here is possession of the Premises (*see* Opp. Br. at 9, citing *Mabru Assoc. v White*, 114 AD 3d 554, 555 [1st Dept 2014]).

DISCUSSION

To obtain a preliminary injunction a moving party must prove: (a) a likelihood of success on the merits; (b) that it will suffer irreparable harm in the absence of injunction relief; and (c) that the equities favor the granting of the requested relief (*see Aetna Ins. Co. v Capasso*, 75 NY 2d 860, 862 [1990]; *W.T. Grant Co. v Srogi*, 52 NY 2d 496, 517 [1981]; CPLR 6301, *et. seq*). Here, the Tenant satisfies none of these. Accordingly, the request for an Article 63 preliminary injunction must be denied. Paragraph 20.1 (d) of the Lease does not provide for a cure period upon a default under ¶ 8.4 of the Lease. Neither the Ninth Lease Amendment nor the Lease recognizes subletting by the Tenant as a permitted "business". Were ¶ 8.4 interpreted to permit the Tenant to keep the

Premises dark for extended periods while it marketed the space in its role as a "sub-landlord", the very purpose of that paragraph as described in the first sentence would be defeated (The sentence roads: "Tenant acknowledges that its continuous operation at the Demised Premises for the regular conduct of its business therein is of the *utmost importance* to the Owner . . ." [*emphasis added*]). Further, the only "permitted use" of the space under the Lease is as "an upscale first-class dining restaurant and/or coffee bar" (Lease, ¶ 1.21).

Even if one were to accept the Tenant's farfetched argument that its "business" is subletting of the space, Tenant's request for a preliminary injunction would still fail because any injury that might be suffered would be entirely financial and thus compensable with a money award (*see 233 East 86th St. Corp.*, 131 Misc 2d 242). As such, Tenant cannot demonstrate irreparable harm.

Citing § 6 of the Ninth Lease Amendment (NYSCEF Doc. No. 10), Tenant attempts to read the Permitted Use provision out of the Lease. The effort fails. Under § 5, the Tenant or Subtenant is permitted to make alterations, including alterations that are so extensive as to require amendment of the certificate of occupancy. Under § 6 which states:

> At the end of the term of the Sublease, neither Landlord nor Tenant shall be required to restore the Premises, or any portion of the storefront, signs or other exterior portions of the Premises. Tenant shall deliver the Premises to landlord at the end of the Term [of the Lease in 2035] as, and in the manner required by the lease

Thus, § 6 merely relieves the Tenant and its leasee of any obligation to restore the space to its prior condition at the end of the term of the Sublease. This reading of the Ninth Lease Amendment is confirmed by § 7 which provides that:

> [e]xcept as herein amended, all of the other terms, provisions, conditions and agreements contained in the Lease, as amended, shall remain in full force and effect, it is being the intention of the parties to amend only the specific terms, provisions and conditions referred to herein.

The Ninth Lease Amendment does not alter the Permitted Use Clause and does not authorized the Tenant to conduct subletting of the space as "its business".

Accordingly, the Tenant having failed to carry its burden of showing any of the three conditions for grant of a preliminary injunction, the motion must be DENIED.

This constitutes the decision and order of the court.

DATED: May 30, 2018

ENTER,

O. PETER SHERWOOD J.S.C.