Xiu Lan Ni v Fortune Plaza LLC
2018 NY Slip Op 31081(U)
April 16, 2018
Supreme Court, Queens County
Docket Number: 700113/18
Judge: Allan B. Weiss

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **ALLAN B. WEISS** IA PART 2

XIU LAN NI

Plaintiff,

-against-

FORTUNE PLAZA LLC. and 113 PLUS 24 SANFORD AVE REALTY CORP.,

Defendants.

Index Number: 700113/18

Motion Date: 3/6/18

Motion Seq. No. 2

The following papers read on this motion by plaintiff Xiu Lan Ni for order granting a *Yellowstone* injunction enjoining defendants from terminating the lease agreement between the parties for the operation of a laundromat located at 133-24 Sanford Avenue, Flushing, New York 11355, and from instituting any proceedings in connection therewith or from otherwise interfering with plaintiff's quiet enjoyment of the subject premises.

	Papers Numbered
Order to Show Cause-Affirmation-Affidavit-Exhibits.....	EF 2-3
Opposing Affidavit-Exhibits.....	EF 7-26
Memorandum of Law.....	EF 30
Letter and Further Exhibit.....	EF 31
Reply Affirmation-Exhibits.....	EF 33-48

Upon the foregoing papers the motion is determined as follows:

133 Plus 24 Sanford Ave Realty Corp. acquired the real property known as 133-24 Sanford Avenue, Flushing, New York, from 133-24 Sanford Ave. Realty Corp., pursuant to a deed dated April 27, 1999. Said deed was executed by Mohammad A. Malik, as president of 133-24 Sanford Ave. Realty Corp. The subject real property is improved by a residential apartment building, with a ground floor commercial space.

On September 5, 2004, Mohammad A. Malik as president of 133 Plus 24 Sandford (sic) Ave. Realty Corp. entered into a commercial lease with Special Diner Inc., for the ground floor #1L, for use as a laundromat only. The lease term commenced on November 1, 2004 and ended on October 31, 2015. The 20 page rider attached to the leaser contains 86 paragraphs, and was signed by the landlord and the tenant.

On September 29, 2005, Special Diner Inc. sold its interest in the laundromat at the subject premises to Xiu Lan Xui, and a bill of sale was signed on October 4, 2005. Special Diner, Inc., with the consent of the property owner Sanford, assigned the subject lease to Ms. Xi, pursuant to a three page written agreement dated September 29, 2005 and executed on October 4, 2005.

A dispute arose between Sanford and Ms. Ni concerning water and gas bills and the issuance of a certificate of occupancy. In 2009, Sanford commenced a commercial holdover proceeding in Civil Court, Queens County (Index No. 63126 2019), that was settled pursuant to a stipulation dated July 2, 2009. Sanford thereafter moved for a judgment of possession and a warrant of eviction based upon an alleged breach of said stipulation and the tenant cross moved for an order directing the owner to provide access for the installation of submeters. The court therein, in a decision and order dated September 17, 2010, granted the motion and cross motion only to the extent that the tenant was given 30 days from the date of the order to apply for a certificate of occupancy, and the owner was directed to sign off on any documents the tenant needed and to provide access to install a new water meter for the water heating system.

In November 2010, Sanford moved for final judgment of possession and a warrant of eviction based upon the tenant's failure to comply with the stipulation of settlement. After a hearing, the court therein denied the landlord's motion and made certain determinations with respect to the rights of the parties. The Appellate Term, in an order dated February 23, 2015, modified the court's order by striking the various determinations with respect to the rights of the parties, as said determinations exceeded the court's limited declaratory judgment authority (*133 Plus 24 Sanford Ave. Realty Corp. v Ni,* 47 Misc3d 55 [App. Term, 2d Dept, 2d,11th & 13th Jud. Dists., 2015]).

Sanford thereafter moved for to restore the matter to the calendar for a trial/hearing on all issues not resolved in the Appellate Term's order. The court therein, following a hearing issued a decision and order dated September 28, 2015, determined that the tenant had complied with the stipulation of settlement and the order of September 17, 2010, by filing an application for an amended certificate of occupancy on October 13, 2010, which was disapproved on October 26, 2010. The court noted that there were many outstanding violations for the building through January 18, 2011, that were unrelated to the leased

premises and affected the issuance of the certificate of occupancy. The court found that the owner had not shown good cause for vacating the stipulation of settlement.

In 2015, Sanford commenced a commercial holdover proceeding against Xiu Lan Ni d/b/a Rong Cheng Laundromat Inc., and Xiu Lan Ni (Index No. 067322 2015), based upon an alleged failure to pay all charges for sewer and water usage of $50, 940.68, per the notice to cure dated April 17, 2015. Sanford terminated the lease by a notice dated May 14, 2015. The court therein, following a non-jury trial, in a decision and order dated February 10, 2016, determined that the respondents had defaulted under the lease and rider by failing to timely pay its water and sewer charges to the DEP or the landlord, and that the fact that they paid the disputed DEP bill of $50,940.68 after the commencement of the action, although the amount owed the owner was only $5,437.89, did not avoid forfeiture of the lease. The owner was granted a final judgment of possession, and the issuance of the warrant was stayed for five days. The execution of the warrant was stayed through May 31, 206, on the condition that the respondents remain current in use and occupancy payments of $3,390.47, and remain current in payments of additional use and occupancy for water, sewer and gas payments to the landlord within seven days of demand. A final judgment was entered on February 11, 2016.

The tenants filed an appeal from the final judgment entered on February 11, 2016, and thereafter moved for a stay pending the determination of the appeal, and the landlord cross moved for an order directing the appellants to pay use and occupancy at the monthly rate of $40,000, legal fees and costs. The Appellate Term, Second Department, in an order dated October 17, 2016, granted the tenants' motion on condition that the appeal be perfected by December 2, 2016, and directed that they pay to the landlord all arrears in rent/use and occupancy at the rate of $3,390.47, within 10 days of said decision and order, and to continue to pay the landlord use and occupancy at the same rate as it became due. The landlord's cross motion was denied.

While said appeal was pending, Sanford transferred ownership of the subject real property to Fortune Plaza LLC, pursuant to a deed dated March 13, 2017. Sanford, in a separate agreement dated March 13, 2107 assigned the leases and rents for said real property to Fortune Plaza LLC. Said assignment agreement was signed by Mohammad A. Malik, as president of Sanford, and by Mohammad A. Malik, as the sole member of Fortune Plaza LLC.

The Appellate Term, in a decision and order dated December 1, 2017, reversed the final judgment of possession and remitted the matter to the Civil Court for a final judgment dismissing the petition. The Appellate Term determined that where, as here, the basis for the landlord's termination of a commercial lease is an alleged default in rent, the predicate

notices must properly set forth the approximate good faith amount of rent owed, and that the trial court had, in effect, found that the landlord had overstated the amount of additional rent owed by $45,502.79, approximately nine times the amount due. The court therefore found that the notices were defective and did not operate to terminate the lease, and as the landlord failed to establish a proper termination of the lease, it failed to make out it its prima facie case ((*133 Plus 24 Sanford Ave. Realty Corp. v Xiu Lan Ni*, 57 Misc 3d 158[A], 2017 NY Slip Op 51668[U] [App Term, 2nd Dept, 2d, 11th & 13th Jud Dists 2017]). The Appellate Term, in a decision and order dated February 16, 2018, denied the landlord's motion for leave to appeal to the Appellate Division.

Ms. Ni is in receipt of a Thirty Day Notice terminating a a month to month tenancy, dated December 21, 2017. Said notice, addressed to Xiu Lan Ni d/b/a Rong Cheng Laundromat Inc., and Xiu Lan Ni, appears to have been issued by Sanford, the now prior owner of the subject leased premises, and the copy submitted to the court is not signed.

Ms. Ni was served with a separate Thirty Day Notice Terminating a month to month tenancy also dated December 21, 2017, addressed to Xiu Lan Ni d/b/a Rong Cheng Laundromat Inc., and Xiu Lan Ni, and issued by Fortune Plaza LLC as successor in interest to Sanford. Said notice of termination was served on December 28, 2017, by serving a person of suitable age and discretion at the subject laundromat and mailed to the subject premises on December 29, 2017. The Thirty Day Notice states that "[t]he Agreement of Lease dated September 5th, 2004 (the "Lease") which provides for a term of eleven (11) years terminated on October 31st, 2015 and any option to extend expired on your default of a condition precedent that you provide the Owner with a written notice of election to exercise said option by certified mail, return receipt requested, at least six (6) months prior to the expiration of the term of the lease".

Plaintiff commenced the within action for breach of contract by e-filing the summons and complaint on January 3, 2018. Defendants' assertion that this court lacks personal jurisdiction is premature, as plaintiff's time in which to serve the summons and complaint has not yet expired (CPLR 306-b). As the within motion for a Yellowstone injunction was timely served on counsel for the defendants on January 26, 2018, as directed by the court in the within order to show cause dated January 25, 2018, this court has jurisdiction to determine the within motion.

After the within action was commenced, Fortune Plaza LLC commenced a holdover proceeding in Civil Court in February 2018, against Xiu Lan Ni d/b/a Rong Cheng Laundromat, Inc., and Xiu Lan Ni, individually, predicated upon the Thirty Day Notice of Termination of the alleged month to month tenancy.

A Yellowstone injunction is a creation of case law originating the with the decision of the Court of Appeals in *First Natl. Stores v Yellowstone Shopping Ctr.* (21 NY2d 630 [1968]). The purpose of the Yellowstone injunction is to maintain the status quo so that a commercial tenant may protect its valuable property interest in its lease while challenging the landlord's assessment of its rights (*see Lexington Ave. & 42nd Street Corp. v 380 Lexchamp Operating, Inc.*, 205 AD2d 421[1st Dept 1994], *citing Post v 120 E. End Ave. Corp.*, 62 NY2d 19, 26[1984]). A Yellowstone injunction forestalls the cancellation of a lease to afford the tenant an opportunity to obtain a judicial determination of its breach, the measures necessary to cure it, and those required to bring the tenant in future compliance with the terms of the lease (*see Waldbaum, Inc. v Fifth Ave. of Long Is. Realty Assocs.*, 85 NY2d 600, 606 [1995]).

In order to obtain a Yellowstone injunction, the tenant must establish (1) the existence of a commercial lease, (2) the issuance by the landlord of a notice of default, notice to cure, or threat of termination of the lease, (3) an application for a TRO made prior to the expiration of the cure period, and (4) the tenant's desire and ability to cure any alleged default by means short of vacating the premises (*see Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assocs.*, 93 NY2d 508, 514 [1999]; *159 MP Corp. v Redbridge Bedford, LLC*, ___AD3d___, [2d Dept 2018], 2018 NY Slip Op 00537, 2018 NY App Div Lexis 557, 2018 WL 635946; *Korova Milk Bar of White Plains, Inc. v PRE Props., LLC*, 70 AD3d 646,647 [2d Dept 2018]; *Caldwell v American Package Co., Inc.*, 57 AD3d 15, 20 [2d Dept 2008]; *Xiotis Restaurant Corp. v LSS Leasing Ltd. Liab. Co., 50 AD3d 678, 679* [2d Dept 2008]; *Hempstead Video, Inc. v 363 Rockaway Assoc., LLP*, 38 AD3d 838, 839 [2d Dept 2007]).

Plaintiff asserts that the subject lease term was extended to October 31, 2020, pursuant the terms of the July 2, 2009 stipulation in the first Civil Court holdover proceeding. Paragraph 10 of said stipulation provides as follows: "Provided Respondents comply and are not in default through 10/31/15, owner agrees to extend the lease for five additional years upon the same terms and conditions of the current lease except the yearly increases shall be 7% (seven) for said additional term. Additional rents pursuant to original lease shall be condition of the additional 5 years as well; but water is paragraph 60 of the lease + paragraph 13 of the assignment".

Defendants, in opposition, asserts that the lease terminated on October 31, 2015, pursuant to both the July 2, 2009 stipulation and Article 16 of the assignment of the lease. Article or paragraph 16 of the Assignment provides as follows:

> "The Owner hereby grants to the Assignee an option to extend the term of the lease for an additional five (5) years on condition that the Assignee provide the Owner with notice of its election to exercise said option by certified mail, return receipt requested,

at least six (6) months prior to the expiration of the term of the lease. The rental for said option term shall be agreed upon by the parties on or before three (3) months prior to the expiration of the lease or the option shall be null and void."

Defendants assert that the lease, as modified by paragraph 16 of the Assignment, required plaintiff to provide the owner with notice of its election to exercise the option, by certified mail, return receipt requested, at least six months prior to its expiration, and that plaintiff never exercised said option. It is further asserted that as the July 2, 2009 stipulation states that the extension of the lease was "upon the same terms and conditions of the lease", plaintiff was required to exercise the option in the manner specified in paragraph 16 of the Assignment, and that it failed to do so. Defendants further assert that the lease was not extended pursuant to the terms of the July 2, 2009 stipulation, as the tenant was in default in the payment of the water/sewer account through October 31, 2015, defaulted in the payment of use and occupancy during the second holdover proceeding, and never paid the owner rent based upon the 7% increase set forth in the stipulation of settlement.

Defendants also state, among other things, that paragraph 86 of the rider to the lease provides as follows:

"Tenant waives his right to bring any plenary actions and/or declaratory action with respect to any provision of this Lease, and expressly agrees not to seek injunctive relief, which would stay, extend or otherwise toll any of the time limitations or provisions of the Lease, or any notice sent pursuant thereto. Any breach of this paragraph shall constitute a violation of a substantial obligation of the tenancy, and shall be grounds for the immediate termination of this Lease. It is further agreed that in the event injunction relief is sought, or if a "Yellowstone" injunction (First National Stores, Inc. v Yellowstone Shopping Centers, Inc., 21 N.Y. 2d 630) is sought, such relief shall be denied, and Landlord shall be entitled to recover the costs of opposing such an application or action, including its attorneys' fees actually incurred".

Plaintiff, in reply, asserts that the lease has not terminated and that the terms for renewing the lease forth in paragraph 10 of the July 2, 2009 stipulation of settlement, superceded the renewal provisions set forth in paragraph 16 of the assignment. It is therefore asserted that as of July 2, 2009, plaintiff was no longer required to exercise the option to renew in the manner specified in the Assignment. It is further asserted that the plaintiff does not owe the defendant any sums for the water bill; that the defendants failed to forward her payments to the water board; that she had overpaid the defendant for the water bill; that she has paid the water bill directly; and that she did not default in her rental payments during the pendency of the Civil Court action and appeal which resulted in the Appellate Term's order of December 1, 2017.

Here, the plain language of paragraph 86 of the lease rider reflects the parties' mutual intent to adjudicate disputes by summary proceedings. To the extent that plaintiff claims that the subject lease was extended and that she is not in breach of the same, she has waived any right she has to Yellowstone relief , pursuant to paragraph 86 of the rider to the lease (*see 159 MP Corp. v Redbridge Bedford, LLC, supra* [Yellowstone waiver not against public policy]; see also *Hamza v Alphabet Soup Assoc., LLC*, 2011 NY Slip Op 30973[U] [Sup Ct, NY County 2011] [Yellowstone waiver]; *Aloyts v 601 Tenant's Corp.*, 2007 WL 6938117 [Sup Ct, Kings County, 2007] [Yellowstone waiver]).

Accordingly, plaintiff's motion for a Yellowstone injunction is denied.

Dated: April 16, 2018

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J.S.C.