Karr Graphics Corp. v Spar Knitwear Corp.
2018 NY Slip Op 31542(U)
June 18, 2018
Supreme Court, Queens County
Docket Number: 716442/17
Judge: Leonard Livote

SHORT FORM ORDER

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: Honorable **Leonard Livote** IAS TERM, PART 33
Acting Supreme Court Justice Commercial Div. Part A

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Karr Graphics Corp., Index No:716442/17
Plaintiff(s),

-- against -- Motion Date:01/30/18

Spar Knitwear Corp., Seq. No: 1
Defendant(s).

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The plaintiff has moved for a preliminary injunction, inter alia, prohibiting the defendant from commencing eviction proceedings against it.

I. The Allegations of the Plaintiff

Defendant Spar Knitwear Corp. (Spar or landlord) owns premises known as 22-19 41st Avenue, Long Island City, New York (the Spar premises). Pursuant to a written lease dated December 14, 2007, defendant Spar rented the second floor of the building to plaintiff Karr Graphics Corp. (Karr Graphics or tenant), a company engaged in specialty printing and graphic communications, and the tenant has conducted its business from the second floor of the Spar premises for about ten years. The plaintiff tenant sublet parts of the second floor to other commercial entities with the knowledge and consent of the defendant landlord.

The lease provided for a term of five years and gave Karr Graphics a renewal option for five more years. Article 106 of the lease stated in relevant part: " Lease Renewal. Provided Tenant is not in default in the performance of its obligations under the terms of this Lease , Tenant shall have the option to extend the term of this Lease for one period of five (5) years (the 'Option Period')." ¶ The Option Period shall commence on [the]5th anniversary of the Commencement Date. Tenant must exercise its option, if at all, in the following manner, ***Tenant must give notice of its exercise of Tenant's option not less than 270 days prior to the expiration of the Lease term herein, If Tenant is in

default beyond the applicable notice period upon its purported exercise of the option, Tenant's notice shall be void."

In or about February, 2012, Laurence Karr, representing the plaintiff tenant, met with Oren Pulka, the defendant landlord's vice-president, and the two reached an agreement to extend the initial term of the lease for five years in substitution for the exercise of the option at that time. However, the two also agreed that the plaintiff tenant would have the right to exercise the renewal option at the end of the five year extension of the initial term. The parties left unchanged that part of paragraph 106(A) of the lease which provided: " If Tenant is in default beyond the applicable notice period upon its purported exercise of the option, Tenant's notice shall be void."

The negotiators also agreed to protect the plaintiff tenant's option to renew by including the following provision (paragraph 6) in the written Lease Modification : "Tenant must give Owner notice of its exercise of Tenant[']s option not less than [sic] not earlier than 365 days but not later than 300 days prior to November 30, 2017 provided Landlord first notifies Tenant of the need to exercise the option not earlier than 365 days and not later than 300 days before November 30, 2017." In other words, the tenant did not have to notify the landlord about the exercise of the option unless that landlord first sent the tenant a reminder notice about the option. If the landlord sent the reminder on time, the Lease Modification created a window period from November 30, 2016 through February 4, 2017 during which the plaintiff tenant could notify the defendant landlord of the exercise of the option to renew.

Following the negotiations, the plaintiff tenant and the defendant landlord entered into a Lease Modification and Extension Agreement, dated April 5, 2012, extending the initial term through November 30, 2017. In reliance upon the executed Lease Modification, which potentially extended the duration of the tenancy to November 30, 2022, the plaintiff invested $653,000 into its business.

The Lease Modification contained a rent schedule for the extension period setting forth the annual and monthly rents for the period running from May 1, 2012 through

November 30, 2017 and another rent schedule setting forth the annual and monthly rents for the "Option Period" running from December 1, 2017 through November 30, 2022. The rents fixed in the Lease Modification for the option years are now significantly below market value. The landlord has recently advertised the third and fourth floors of the building for rent at a price of $23-$25 per square foot, which is more than double the rent set forth for the option years in the Lease Modification.

Article 17 of the lease allowed for a fifteen day notice period in the event the landlord alleged that the tenant was in non-monetary default of the lease or, in the event the alleged default could not be cured within the fifteen day notice period, an unspecified additional amount of time to cure provided the tenant showed good faith and diligence.

Despite the defendant landlord's knowledge of the plaintiff's subtenants for about nine years, the landlord sent an "Amended (15) Day Notice to Cure" dated September 1, 2016 which claimed that the plaintiff had defaulted on its lease obligations by subletting parts of the second floor. The landlord sent the default notice less than two months prior to the start of the window period.

The plaintiff tenant began an action in the New York State Supreme Court, County of Queens seeking to stay the running of the cure period (*Karr Graphics Corp. v. Spar Knitwear Corp.*, Index No. 711766/16.) The cure period was extended until June 1, 2017, and by that date the plaintiff tenant had succeeded in removing the subtenants. By May 30,2017 the plaintiff tenant had succeeded in removing all subtenants objected to by the landlord. By letter dated May 30, 2017 the plaintiff tenant notified the landlord that the alleged default had been cured, and on June 23, 2017 and July 20, 2017 the landlord's principals inspected the premises and confirmed the removal of the improper subtenants.

Even though the defendant landlord had not sent a reminder, by notice dated January 17, 2017 (the renewal notice), the plaintiff tenant informed the defendant

landlord that it was exercising the renewal option.

The defendant landlord sent a rejection notice dated February 15, 2017 claiming that the subtenancies had amounted to a default under the terms of the lease and that "[p]ursuant to the first paragraph of Article 106 of the Initial Lease Agreement, the Renewal Option is valid and in force and effect only if 'Tenant is not in default in the performance of its obligations under the terms of the Lease." The landlord further asserted that "such lack of default [was] a condition precedent to your right to exercise the extension option."

II. Discussion

The plaintiff began this case by the filing of a summons with notice on November 28, 2017, seeking, inter alia, declaratory and injunctive relief.

In order to obtain a preliminary injunction, the plaintiff tenant had to show (1) a likelihood of ultimate success on the merits, (2) irreparable injury if provisional relief is withheld, and (3) a balance of the equities in its favor. (*See, Aetna Insurance Co. v. Capasso*, 75 NY2d 860; *McNeil v. Mohammed*, 32 AD3d 829). The plaintiff successfully carried this burden.

In regard to the first requirement, the plaintiff established a likelihood of ultimate success on the merits by making a prima facie showing that it can prove one of its causes of action. (*See, McNeil v. Mohammed, supra; Trimboli v. Irwin*, 18 AD3d 866; *Four Times Square Associates, L.L.C. v. Cigna Investments, Inc.*, 306 AD2d 4.) The plaintiff established that it can prove a prima facie case for a judgment declaring that the exercise of its renewal option was valid and that the defendant is in breach of the lease by rejecting the exercise of the renewal option. The plaintiff's interpretation of the lease is plausible. The plaintiff relies on the last sentence of Article 106(A) of the lease which provides "If tenant is in default beyond the applicable notice period upon its purported exercise of the option, Tenant's notice shall be void." The plaintiff plausibly argues: "Given that we

timely and properly served the Renewal Notice during both the Window Period and during the cure period (which did not expire until June 1, 2017), we were not in default of the Lease "beyond the applicable notice period" as stated in section 106(A) and there would be absolutely no basis for Landlord to refuse to acknowledge our renewal rights." (Lawrence Karr affidavit ¶79.) It is true that the defendant offers a conflicting interpretation of the lease through the affidavit of Oren Pulka. For example, Pulka asserts: "The plain language of the Option is that the Option will be extinguished upon the occurrence of a default." (Oren Pulka affidavit ¶ 47) "Tenant could save its lease via a notice and cure period, but it would not have a cure period in which to preserve the right to renew the Lease." (Oren Pulka affidavit ¶ 61.) But it is not this court's function on a motion for a preliminary injunction to resolve possible ambiguities in the lease, especially where, as in the case at bar, the parties offer conflicting evidence concerning intent, or to determine which of the conflicting interpretations is correct. "[I]t is not for this court to determine finally the merits of an action upon a motion for preliminary injunction; rather, the purpose of the interlocutory relief is to preserve the Status quo until a decision is reached on the merits ***." (*Tucker v. Toia*, 54 AD2d 322, 325; *see, 2914 Third Sportswear Realty Corp. v. Acadia 2914 Third Ave., LLC*, 93 AD3d 573.)

In regard to the second requirement, the plaintiff demonstrated that equitable relief is a more efficient remedy than monetary damages. (*See, People by Abrams v. Anderson*, 137 AD2d 259; *Poling Transp. Corp. v. A & P Tanker Corp.*, 84 AD2d 796.) Moreover, there is a danger that absent a preliminary injunction, the plaintiff will lose its valuable leasehold interest. (*See,1414 Holdings, LLC v. BMS-PSO, LLC*, 116 AD3d 641; *Grand Manor Health Related Facility, Inc. v. Hamilton Equities, Inc.*, 85 AD3d 695 [" Without the injunction, plaintiff, which operates a residential health care facility, would be at risk of losing its valuable leasehold and incurring significant permanent damage to more than 30 years of hard-earned goodwill."]; *Concourse Rehab. & Nursing Ctr., Inc. v. Gracon Assocs.*, 64 AD3d 405.)

In regard to the third requirement, "[a] balance of the equities likewise favors the granting of preliminary injunctive relief to maintain the status quo pending the resolution of the action ***." (*Masjid Usman, Inc. v. Beech 140, LLC*, 68 AD3d 942, 943.)

III. Disposition

Accordingly, the motion is granted on condition that the plaintiff tenant pay to the defendant landlord the monthly sums established in the Lease Modification rent schedule for the appropriate option year.

Settle order.

The parties may submit affidavits concerning the appropriate amount for the undertaking at the time of the settlement of the order.

Dated: June 18, 2018

A.J.S.C.