Julianna Collection Corp. v VBG 990 AOA Member LLC
2018 NY Slip Op 31898(U)
August 9, 2018
Supreme Court, New York County
Docket Number: 153218/2018
Judge: Barbara Jaffe
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. BARBARA JAFFE**, *Justice* **PART** 12

---X

JULIANNA COLLECTION CORP.,

Plaintiff,

- v -

VBG 990 AOA MEMBER LLC and VBG 990 AOA LLC,

Defendants.

---X

INDEX NO. 153218/2018

MOTION DATE

MOTION SEQ. NO. 1

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 3, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33

were read on this application for *Yellowstone* relief

By order to show cause, dated April 10, 2018, plaintiff seeks a *Yellowstone* injunction based on a five-day notice to cure by which defendants alleged certain defaults. (NYSCEF 14). By stipulation dated May 30, 2018, the parties resolved all but the one alleged default addressed here. (NYSCEF 31).

I. FACTUAL AND PROCEDURAL BACKGROUND

By assignment and assumption of lease dated November 19, 2010, plaintiff acquired a leasehold interest in the premises (NYSCEF 8), which term expires on November 30, 2025. In paragraph eight of the lease, plaintiff agrees that

> at [its] sole cost and expense, to maintain general public liability insurance in standard form in favor of Owner and Tenant against claims for bodily injury or death or property damage occurring in or upon the demised premises, effective from the date Tenant enters into possession and during the term of this lease. Such insurance shall be in an amount and with carriers acceptable to the Owner. Such policy or policies shall be delivered to the Owner.

(*Id.*).

By letter dated January 11, 2018, addressed to the tenant of the demised premises, defendant advised that the prior owner of the premises had conveyed all of its right, title, and interest in the premises to VBG 990 AOA LLC, and requested that the tenant amend the insurance policies required pursuant to the lease to include the new owner as an additional insured. (NYSCEF 18).

By letter dated February 6, 2018, addressed to the former lessee of the premises, defendant VBG 990 AOA LLC introduced itself and asked, among other things, that "you update[e] your Certificate of Insurance in accordance with Article 8 of the Lease." (NYSCEF 19).

By letter dated February 20, 2018, plaintiff's counsel furnished a copy of the certificate of insurance "naming the new landlord as Certificate Holder." The certificate does not reflect defendant's name as certificate holder or as an additional insured. (NYSCEF 20).

By letter addressed to plaintiff's counsel dated March 5, 2018, counsel for defendant advised that it had hired a risk management expert to review all insurance policies maintained by tenants. It thus requested that plaintiff, as required by paragraph eight of the lease, deliver to it copies of the insurance policies for the past six years no later than March 12, 2018. Although it acknowledged receipt of plaintiff's certificate of liability insurance, it observed that the prior owner is listed as the certificate holder instead of "VBG 990 AOA LLC c/o Vanbarton Group

LLC" and asked that certain additional insureds be included. It also required that plaintiff deliver the updated policies to it by no later than March 31, 2018. (NYSCEF 21).

By letter dated March 23, 2018, addressed to plaintiff, defendant advised, among other things, that in accordance with its expert's recommendation, it was updating plaintiff's liability insurance requirements, thus requiring plaintiff to obtain appropriate policies and deliver them to defendant no later than March 31, 2018, with time being of the essence. It also observed that plaintiff had not delivered copies of its insurance policies for the past six years or an updated certificate of liability insurance reflecting the new owner as certificate holder along with its related entities as additional insureds. (NYSCEF 22).

On April 5, 2018, plaintiff received a five-day notice from defendant VBG 990 AOA Member, LLC, advising that had it failed to deliver copies of insurance policies for the period from 2012 to the present, in violation of paragraph eight of the lease, and that it failed to comply with the terms set forth in defendant's January 11 and March 23 letters. (NYSCEF 23).

By letter dated April 9, 2018, plaintiff's counsel sent to defendant a copy of a certificate of liability insurance reflecting that plaintiff is the insured, that defendant is the certificate holder, and that defendant and the other entities are the additional insureds. The coverage period for the general liability policy is from April 6, 2018 to April 6, 2019. The umbrella policy and worker's compensation policy periods are, respectively, from March 30, 2018 to March 30, 2019, and from April 9, 2018 to April 9, 2019. (NYSCEF 11).

By affidavit dated April 10, 2018, an officer of plaintiff corporation states that he seeks to avoid forfeiture of the lease which has 14 years remaining on it and alleges that defendant "was pressuring [it] to accept a buyout of the remaining 7+ years on the Lease." Thus, he claims that the notice to cure constitutes a pretext to force plaintiff to sell. He otherwise relies on the

aforementioned certificate which "materially" complies with defendant's demands, and that should it be insufficient, it is "prepared to correct it forthwith." (NYCSEF 5).

At oral argument on the motion, plaintiff distinguished this case from those where a failure to maintain insurance coverage is incurable due to a break in coverage and a lease provision requiring a particular type of insurance at a particular level, observing that pursuant to the lease in issue, all that is required is a general public liability policy in standard form in favor of owner and tenant with no particular amount mentioned. Defendant disagreed, noting that the certificate of insurance that plaintiff ultimately sent on April 9 reflects a gap in general liability coverage in that defendant is not named as an additional insured until April 6, 2018. (NYSCEF 29).

II. ANALYSIS

A commercial tenant may obtain a stay of the period within which an alleged default must be cured until the merits of the dispute can be resolved in court and to avoid the forfeiture of a substantial leasehold interest. (*First Natl. Stores v Yellowstone Shopping Ctr.*, 21 NY2d 630 [1968]; *Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assocs.*, 93 NY2d 508, 514 [1999]). To obtain a stay, the movant

> must demonstrate that (1) it holds a commercial lease; (2) it received from the landlord either a notice of default, a notice to cure, or a threat of termination of the lease; (3) it requested injunctive relief prior to the termination of the lease; and (4) it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises.

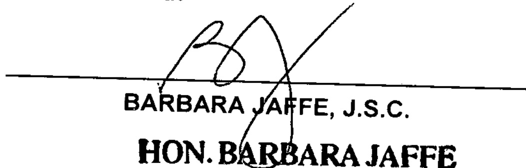
(*Id.*). That a plaintiff denies a default is not dispositive, as long as it evinces a good faith willingness to cure. (*Art Corp. Inc. v Citirich Realty Corp.* 124 AD3d 545, 546 [1st Dept 2015]). In the insurance context, however, a default may be incurable. (*Kim v Idylwood, NY, LLC*, 66 AD3d 528, 529 [1st Dept 2009]).

Here, plaintiff neither asserts nor demonstrates that it provided defendant with a certificate of insurance reflecting coverage of defendant from January 11, when it advised that it had become owner of the premises. Consequently, the gap in coverage renders the default is incurable.

Accordingly, it is hereby

ORDERED, that plaintiff's motion for injunctive relief is denied.

8/9/2018
DATE



BARBARA JAFFE, J.S.C.
HON. BARBARA JAFFE

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