Schulman, Blitz & Williamson, LLP v VBG 990 AOA LLC
2018 NY Slip Op 31903(U)
August 7, 2018
Supreme Court, New York County
Docket Number: 155798/18
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** **PART** **12**
Justice

----------X

SCHULMAN, BLITZ & WILLIAMSON, LLP,

Plaintiff,

- v -

VBG 990 AOA LLC,

Defendant.

----------X

INDEX NO. 155798/18

MOTION DATE _____

MOTION SEQ. NO. 2

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 10, 14, 15, 18, 19, 20, 21 were read on this application for a *Yellowstone* injunction

By order to show cause dated June 25, 2018, plaintiff sought a *Yellowstone* injunction. I declined to sign the order on the ground that plaintiff's failure to procure sufficient insurance is not curable. (NYSCEF 27).

By order to show cause dated June 26, 2018, plaintiff sought the same relief, having returned with excerpts of insurance policies reflecting that it had the requisite additional $1 million in liability insurance coverage. It asked that, in view of its offer of evidence within a day of the first order to show cause, I issue a new order granting it interim *Yellowstone* relief. In these circumstances, I found that the interests of judicial economy warranted signing the new order.

I. BACKGROUND

By lease dated April 16, 2010, defendant landlord leased the demised premises to plaintiff tenant for a five year and two-month term, ending on June 30, 2015. The lease was renewed for a 10-year term, ending on June 30, 2025. Plaintiff is required to maintain both an "all risk" property insurance coverage and comprehensive general liability coverage, with limits of not less than $3 million combined single limit bodily injury and property damage liability. The lease also contains clauses: 1) permitting plaintiff to sublet the premises under specific conditions and only upon defendant's prior written consent; 2) providing that defendant's receipt of rent with knowledge of a breach of any lease covenant shall not be deemed a waiver of such breach and that no provision shall be deemed waived unless it is waived in writing; and 3) prohibiting oral modifications. (NYSCEF 55).

By 30-day notice to cure dated May 25, 2018, defendant advised plaintiff that it had violated:

(1) articles 11 and 45 of the lease by subletting the premises to at least five subtenants without requesting or obtaining defendant's prior written consent; and

(2) article 54 of the lease by failing to maintain the types and amounts of required insurance and to furnish defendant with proof thereof.

(NYSCEF 32). The notice also provides that plaintiff is

> hereby required to cure the aforementioned defaults by either removing all subtenants, licensees and occupants other than Tenant from the Premises or by requesting and obtaining Landlord's written consent in accordance with the requirement of Article 45 of the Lease on or before June 26, 2018, that being more than thirty (30) days from the service of this Notice upon Tenant . . .

(*Id.* [emphasis in original]). Additionally, plaintiff was put on notice that it is required to cure the insurance default

> by providing Landlord with certificates of insurance and/or copies of the insurance policies (and all required endorsement) evidencing that Tenant procured and maintained

> the types and amounts of insurance required by Article 54 of the Lease for the period 2012 through 2018 on or before June 26, 2018, that being more than thirty (30) days after the service of this Notice upon Tenant . . .

(*Id.* [emphasis in original]).

In support of the application, plaintiff's principal states that as its subtenant has no lease, "we are ready, willing, and able to remove them and thus cure any defects in our tenancy by any means short of vacating the premises." (NYSCEF 5).

II. CONTENTIONS

Plaintiff contends that in order to obtain *Yellowstone* relief, it need only allege that it is ready, willing, and able to cure the violations, and that once the issue is litigated and a judicial determination is rendered that it violated the lease, it is then given an opportunity to cure the violation. At oral argument of the motion, counsel stated the rule as he understood it: "you get [a *Yellowstone* injunction] every single time unless you're unable to cure. If it's impossible to cure, you don't get the *Yellowstone*." (NYSCEF 76).

Plaintiff also alleges that defendant waived its right to claim a violation of the lease based on subletting as it knew of the sublet and never raised the issue, even after collecting monthly rent. It denies having failed to maintain the requisite insurance, claiming that it had $3 million in coverage. (NYSCEF 29, 32).

Defendant argues that despite plaintiff's claim of a willingness to cure the subletting violation, it has done nothing to evict the subtenant, nor has it asked defendant to consent to the sublet. It denies having waived its right to rely on the sublet as a violation of the lease based on the no-waiver clause. In any event, defendant denies any waiver.

According to defendant, if plaintiff has the requisite insurance, no injunction is needed, and if it does not, the violation is incurable. It observes that plaintiff's insurance policy does not

comply with the lease as the business personal property insurance limit is too low and plaintiff failed to include the entire general liability policy with the motion.

As an alternative to denying the injunction, defendant seeks an order directing plaintiff to pay it its share of the subtenant's rent pursuant to the lease for the duration of the subtenant's occupancy of the premises in addition to paying ongoing use and occupancy and obtaining a bond in the amount of no less than $2,500,000, a "conservative estimate" of the damages incurred by defendant due to its inability to evict plaintiff during the pendency of the stay, as well as the legal fees, costs and lost rents. (NYSCEF 52).

III. 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.*).

The parties do not dispute that plaintiff never obtained defendant's consent before subletting and has not sought to remove the single remaining tenant. Plaintiff's reliance on defendant's alleged waiver implies that absent waiver, the violation is proven.

Given the lease prohibitions against waivers and oral modifications, defendant cannot be deemed to have waived its right to terminate the lease based on the violation of the clause

prohibiting sublets without its written consent. (*See Jefpaul Garage Corp. v Presbyt. Hosp. in City of New York*, 61 NY2d 442 [1984], and its progeny).

In contrast to the circumstances underlying the Court's decision in *Excel Graphics Tech., Inc. v CFG/AGSCB 75 Ninth Ave.*, 1 AD3d 65 (1st Dept 2003), *lv dismissed* 2 NY3d 794 (2004), and in light of the provision in the notice to cure permitting a cure, plaintiff's default here is curable. Thus, the issue is whether plaintiff has sufficiently demonstrated that it is ready, able, and willing to serve the subtenant with a 30-day notice of termination.

A plaintiff's allegation that it is ready, able, and willing to cure must be made in good faith. (*Linmont Realty, Inc. v Vitocarl, Inc.*, 147 AD2d 618, 620 [2d Dept 1989] [in absence of good faith showing of willingness to cure, *Yellowstone* injunction properly denied]). Thus, in *IP Intl. Prods., Inc. v 275 Canal St Assocs.*, the Court affirmed the trial court's denial of a *Yellowstone* injunction where the plaintiff's asserted willingness was "belied by its continued violation of the alterations provision of the lease, even as it purports to 'cure' defects." (139 AD3d 464 [2016]). That the plaintiff denies responsibility for the 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] [although denying responsibility for defaults, plaintiff evinced willingness to cure any defaults, "if found by the court"]).

Plaintiff offers no reason to believe that its allegation of willingness to cure is made in good faith. But for the provision in the notice to cure permitting the service of a notice of termination on the subtenant during the cure period, the default would have been incurable and injunctive relief unavailable. Moreover, plaintiff had only to serve its subtenant with a 30-day notice, a minimal effort given the potential loss of its leasehold. However, as the seven years remaining on the lease constitutes a significant interest, it is hereby

ORDERED, that plaintiff's motion for injunctive relief in granted on the following conditions:

(1) that plaintiff pay to defendant its share of the subtenant's rent going forward for the duration of the subtenant's occupancy of the premises; and

(2) that plaintiff pay to defendant ongoing use and occupancy; and it is further

ORDERED, that defendant's request that sanctions in the form of attorney fees for the unnecessary appearance on the first order to show cause is denied.

8/7/2018
DATE

BARBARA JAFFE, J.S.C.

HON. BARBARA JAFFE

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