Ernst Klein 6th Ave. Foods Inc. v 50 Murray St. Acquisition LLC
2018 NY Slip Op 32136(U)
August 30, 2018
Supreme Court, New York County
Docket Number: 161439/2017
Judge: Margaret A. Chan
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARGARET A. CHAN** **PART** **33**

Justice

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ERNST KLEIN 6TH AVE. FOODS INC.,

Plaintiff,

- v -

50 MURRAY STREET ACQUISITION LLC,

Defendant.

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INDEX NO. 161439/2017

MOTION DATE

MOTION SEQ. NO. 001; 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81

were read on this motion to/for PREL INJUNCTION/TEMP REST ORDR.

Upon the foregoing documents, the motions are granted.

Plaintiff, a commercial tenant at 53 Park Place, in the city, state, and county of New York, moves, in motion sequence 001, for a *Yellowstone* injunction to enjoin and restrain defendant landlord from terminating the parties' lease and to toll the cure period pending this litigation and for ten days thereafter for the three default notices issued on December 18 and 22, 2017. Plaintiff seeks the same tolling relief for the default notice dated May 17, 2018 and to set the matter down for a hearing on the propriety of the default notices in motion sequence 002. Defendant opposes both motions.

FACTS

Plaintiff operates a food market under the name "The Amish Market" on the ground floor and portions of the mezzanine and basement in a twelve-story building that houses 115 high-end luxury residential units at 53 Park Place. The previous tenant of the premises was Potato Farms, LLC, d/b/a Zeytuna, who had a twenty-year lease with former owner Lionshead 53 Development. When Potato Farms was adjudged bankrupt, the Chapter 11 Trustee assigned the lease to plaintiff effective February 1, 2013. Defendant landlord, 50 Murray Street Acquisition, LLC, is the successor-in-interest of previous owner, Lionshead 53 Development.

Motion sequence 001 deals with three default notices:

(1) the November 29, 2017 default notice arose from a violation order issued by the New York City Fire Department (FDNY) for failure to maintain "all Required Means of Egress" and required immediate corrective action (NYSCEF doc. no. 9);

(2) the December 18, 2017 default notice is for plaintiff's operation of a hydraulic elevator without proper governmental approvals certifications, and registration with the Department of Buildings (DOB) (NYSCEF doc. no. 13);

(3) another December 18, 2017 default notice relates to plaintiff's operation and maintenance of (i) two functioning cooling towers, and failure to remove a third defunct cooling tower resulting in a violation issued by the DOB; (ii) installation and/or maintenance, without defendant's consent or governmental approval, the following: grease traps in the cellar hallway; a water pump in the sub-cellar boiler room outside the demised premises; signage on the building façade; holiday decorations and lighting which impaired access to the building; a sidewalk café along West Broadway; and locks on doors restricting access to premises; and (iii) failure to deposit the original liability insurance policy with defendant (NYSCEF doc. no. 14).

Plaintiff claims that many of the defective conditions in the default notices were in place prior their lease effective date of February 1, 2013. Plaintiff claims that it has cured the defaults or has taken steps to show good faith efforts to do so. To wit, plaintiff replaced the locks with the approved-locks on the doors and has a clear means of egress as indicated in the photographs included in the motion (NYSCEF doc. nos. 10 and 12), and it ceased operating the hydraulic elevator as indicated by a "do not use" sign posted thereon (NYSCEF doc. no. 15). To show that the cooling towers are operational, in good working conditions, and meets New York City regulations, plaintiff submits an affidavit by Leroi Yaffey, President of NuChem Corporation, whose technicians inspected the two functional cooling towers, and a Mechanical Contractor who will inspect the defunct cooling tower and take corrective action (NYSCEF doc. nos. 7 and 18). On the insurance policy related defaults, plaintiff presents an affidavit by Angeline Thomas, an Assistant Vice President with HUB International Northeast Limited (HubNE) to show that the liability insurance policy, listing defendant as additional insured, was sent to defendant's representative on December 27, 2017 (NYSCEF doc. no. 17). Plaintiff asserts that the remaining defaults are not defaults as the previous landlord had given consent to those installations (NYSCEF doc. no. 23 – Conte Aff at p 2) and noted that six out of the fifteen-day cure period were weekends and holidays.

Defendant, in contrast, asserts that the defaults have not been cured. On the November 29, 2017 default notice, access was still unavailable from the outside, and while the blockage was removed from the first floor, that blockage was transferred to the mezzanine to block the egress there. On the December 18, 2017 default notice regarding the elevator, defendant finds plaintiff's representation that it stopped using the elevator to be insufficient. On the December 18, 2017 default notice regarding the cooling towers, defendant is not satisfied because: (1) there is no evidence the prior owner permitted the installation; (2) the NuChem's certificate for one of the two operating towers does not cure the default; (3) testing showed evidence of Legionnaire's Disease, and although NuChem certifies that the water is safe, NuChem is not licensed or registered in New York city or state; (4) the problem of the running water spilling onto the roof causing damage was not addressed; (5) no maintenance program was provided; and (6) no plans were provided as to the removal of the remaining defunct cooling tower.

As for the other violations such as signage, there is no evidence that the prior owner consented to the signage. Defendant, and not the prior owner, had applied to the DOB for a non-illuminated awning. And defendant finds no reason to believe that plaintiff would refrain from putting up holiday signage without authorization given that plaintiff had not removed its temporary signage – a poster offering a discount and a neon beer sign inside the window – despite plaintiff's assertion that it had been removed (NYSCEF doc. no. 26 – Bistricer Aff, ¶ 29 and exh.4).

Defendant asserts that plaintiff's evidence of a prior approval for installation of the grease trap and water pump outside the demised premises does not actually speak to that. The evidence does not show the traps and water pump to be outside the demised premises. Aside from the location and the number of traps, defendant complains that the traps are in poor condition.

On the allegation that plaintiff operates a sidewalk café, defendant presents one photograph depicting three white rectangular tables on the sidewalk alongside the one side of the premises, and one photograph of a group of construction workers outside the premises, five of them stood on the sidewalk, two perched on the ledge of the exterior building wall and one sitting on a park bench in front of the premises (NYSCEF doc. nos. 31-33).

Defendant also finds fault with the insurance policy coverage upon examining the insurance certificates that plaintiff provided. Defendant states the coverage does not meet the requirements under paragraph 53 of the lease rider. Defendant also complained about spending months to get plaintiff to finally comply and laments the process to enforce compliance in subsequent years. (NYSCEF doc. no. 26 at ¶ 35). Finally, defendant denies that it received all copies of the keys from plaintiff.

Motion sequence 002 deals with the default notice dated May 17, 2018, but delivered on May 23, 2018, alleging plaintiff's failure to pay Additional Rent under the lease in the amount of $45,199.13 (NYSCEF doc. no. 60). The amount has increased to $51,301.06 as of June 1, 2018, with the addition of a boiler obstruction repair and late charges (NYSCEF doc. no. 69 – Bistricer Aff, ¶ 7).

Plaintiff claims that the Additional Rent consists of expenses defendant allegedly incurred for which no prior notice of the charges was given to plaintiff. Defendant responds that the Additional Rent consists of summonses and charges for sampling for Legionella from plaintiff's cooling towers, penalties imposed by the FDNY, installation of a replacement sewage system and other work related to the cooling tower and the replacement of a pump, and charges for the review of plaintiff's lease and assignment. These charges were the result of plaintiff's failure to perform as required under the lease, and thus, constitutes Additional Rent are treated as Fixed Rent.

DISCUSSION

As to motion sequence 001, plaintiff meets the criteria to warrant granting its motion for a Yellowstone injunction. "A tenant is entitled to a *Yellowstone* injunction where it has demonstrated that (1) it holds a commercial lease, (2) it has received a notice of default, notice to cure or concrete threat of termination of the lease from the landlord, (3) the application for a temporary restraining order was made and granted prior to the termination of the lease, and (4) it has the desire and ability to cure the alleged default by any means short of vacating the premises" (*Stuart v D&D Associates*, 160 AD2d 547, 548 [1st Dept 1990]). There is no dispute that plaintiff satisfies the first three factors. Plaintiff has satisfied the fourth factor as it has cured most of the defects. Further, at oral argument on the motions, it was undisputed that plaintiff has made substantial steps to cure the remaining defects (the holiday signage, the location of the grease traps, and the dismantling of the inactive cooling tower), but these defects require more time to cure than given by landlord in the initial default notices. Plaintiff have shown the requisite willingness to address the remaining issues and therefore has satisfied all the requirements for a *Yellowstone* injunction.

As to motion sequence 002 regarding the nonpayment of additional rent, plaintiff's motion is likewise granted. A *Yellowstone* injunction is available for alleged non-payment of rent or additional rent (*see 363 Greystone Owners, Inc. v Greystone Building*, 4 AD3d 122, 123 [1st Dept 2004]). As above, there is no dispute as to the first three *Stuart* factors. Additionally, there is no dispute that plaintiff is able to pay the alleged additional rent, satisfying the fourth *Stuart* factor. However, plaintiff disputes the propriety of the additional rent and the process by which landlord made its demand. This dispute can be resolved at a conference.

Accordingly, it is ORDERED that plaintiff's motion for a Yellowstone injunction is granted; it is further

ORDERED that Landlord and its agents are restrained from taking any action to terminate the lease; it is further

ORDERED that the time to cure the above-stated four notices of default is tolled until ten days after resolution of this action; and it is further

ORDERED that the parties shall appear in Part 33 on September 26, 2018 at 9:30 AM for a status conference to determine the amount of rent owed based on the May 17, 2018 default notice.

This constitutes the decision and order of the court.

8/30/2018
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE