Prince Fashions, Inc. v 60G 542 Broadway Owner LLC

2019 NY Slip Op 33361(U)

November 8, 2019

Supreme Court, New York County

Docket Number: 651255/2016

Judge: W. Franc Perry

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. W. FRANC PERRY** — *Justice* | **PART** **IAS MOTION 23EFM**

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PRINCE FASHIONS, INC.,

Plaintiff,

- v -

60G 542 BROADWAY OWNER LLC,

Defendant.

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INDEX NO. 651255/2016

MOTION DATE 09/12/2019

MOTION SEQ. NO. 005

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 005) 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 162
were read on this motion to/for RENEWAL/YELLOWSTONE.

In motion sequence number 005, plaintiff Prince Fashions, Inc. ("Plaintiff"), moves for the second time, pursuant to CPLR 2221(e), for an order granting renewal of the Court's decision denying Plaintiff's application seeking to toll the cure period related to Plaintiff's purported failure to maintain general liability insurance naming Plaintiff's landlord, defendant 60G 542 Broadway Owner, LLC ("Defendant"), as an additional insured between May 2015 and March 2016. Justice Braun denied Plaintiff's motion for a Yellowstone injunction on June 30, 2016, finding that Plaintiff had failed to procure the requisite liability insurance in favor of Defendant and that the failure to procure the insurance required under its commercial lease constituted an incurable default. Plaintiff seeks renewal on the grounds that it has now successfully obtained retroactive liability insurance in favor of Defendant for the alleged gap period between May 2015 and March 2016.

BACKGROUND

This action has an extensive litigation history including multiple supreme court actions, a civil court proceeding, a bankruptcy proceeding, and multiple appeals.[1] The court assumes familiarity with the record and highlights a summary of those facts and proceedings that are material to the determination of the instant motion.

In 1980, Plaintiff took possession of the first floor, basement, and vault areas (the "Premises") of the building located at 542 Broadway, New York, New York (the "Building"), pursuant to an assignment of a master lease, dated April 22, 1980 (the "Lease"), between Plaintiff and non-party 542 Holding Corp. ("542 Holding"). Under the Lease, Plaintiff was required, in pertinent part, to:

> maintain general public liability insurance in standard form in favor of Landlord 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 Landlord. Such policy or policies shall be delivered to the Landlord.

(Lease, NYSCEF Doc. No. 3, Art. 8).

On May 13, 2015, 542 Holding conveyed the Premises to Defendant pursuant to a Condominium Unit Deed that was recorded in the Office of the City Register of the City of New York on June 1, 2015 (the "Deed"). In the Deed, 542 Holding duly conveyed the Premises to Defendant together with "all the estate and rights of the Grantor in and to the [Premises]." (Deed, NYSCEF Doc. No. 21). In connection with the conveyance, 542 Holding also assigned Defendant all of its right, title, and interest in and to the Lease, pursuant to an Assignment and Assumption Agreement of Retail Master Lease (Assignment, NYSCEF Doc. No. 22).

[1] On May 29, 2019, Plaintiff filed a voluntary bankruptcy petition in the United States Bankruptcy Court for the Southern District of New York. On July 25, 2019, the bankruptcy court issued an order that partially lifted the automatic stay, under 11 U.S.C. § 362, permitting this court to hear and determine Plaintiff's motion to renew its Yellowstone application and permitting the civil court to determine a motion to intervene in the Holdover Proceeding.

On March 4, 2016, Defendant issued a Notice of Default to Plaintiff in which Defendant identified numerous defaults under the Lease, including, *inter alia*, Plaintiff's failure to maintain general liability insurance in favor of Defendant and Plaintiff during the period from May 2015 through March 2016 (Notice of Default, NYSCEF Doc. No. 27).

In response, Plaintiff commenced this action on March 10, 2016, by filing a summons and complaint seeking a declaration that Plaintiff was not in breach of the Lease and orders to show cause seeking a Yellowstone injunction tolling Plaintiff's time to cure the alleged defaults, to the extent they existed. Significantly, Plaintiff did not argue in its papers or at oral argument that it was ready, willing and able to cure the alleged insurance default by purchasing retroactive insurance coverage. Rather, Plaintiff argued that the liability insurance policies purchased by Plaintiff's subtenants which listed 542 Holding as an additional insured satisfied Plaintiff's obligations under the Lease.

On June 30, 2016, Justice Braun denied Plaintiff's orders to show cause noting that Plaintiff had failed to demonstrate its ability to cure the alleged default under the Lease; the Court found that Plaintiff's failure to maintain a general liability insurance policy naming Defendant as an additional insured from the time Defendant became the owner of the premises on May 19, 2015 through June of 2016 was an incurable default. When Plaintiff failed to cure its default or obtain interim relief tolling its time to cure, Defendant served Plaintiff with a Notice of Termination and Cancelation of Lease Renewal Option, terminating Plaintiff's tenancy effective July 5, 2016 (Notice of Termination, NYSCEF Doc. No. 25), and commenced a holdover proceeding against Plaintiff in New York County Civil Court on July 11, 2016 (the "Holdover Proceeding").

On July 25, 2016, Plaintiff appealed Justice Braun's denial of a Yellowstone injunction and, on April 18, 2017, the Appellate Division unanimously affirmed Justice Braun's decision.

The Appellate Division held that, because Plaintiff failed to obtain injunctive relief between July 1, 2016, the date of entry of Justice Braun's decision, and July 5, 2016, when Plaintiff's cure period expired, Plaintiff's lease was terminated, effective July 5, 2016, and the Appellate Division lacked the power to revive it. The Appellate Division also stated that were it to consider the merits of Plaintiff's arguments, it would reject them. (NYSCEF Doc. No. 4, pp. 7-8).[2] Plaintiff's subsequent motions for leave to reargue and to appeal to the Court of Appeals were denied.

While Plaintiff's appeal was pending, on August 5, 2016, Defendant filed a motion for summary judgment in the Holdover Proceeding seeking a final judgment of possession against Plaintiff and Plaintiff's undertenants. Plaintiff cross-moved to dismiss the petition. The motions were held in abeyance pending the determination of Plaintiff's appeal in this action.

Relying on the Appellate Division's decision affirming Justice Braun's denial of Plaintiff's application for a Yellowstone injunction, on September 20, 2017, Judge Samuels issued a decision and order in the Holdover Proceeding that granted Defendant's motion for summary judgment and denied Plaintiff's cross-motion to dismiss the petition. Judge Samuels struck Plaintiff's affirmative defenses, awarded Defendant a final judgment of possession, and directed a hearing on Defendant's attorneys' fees, a stay of the warrant of eviction, and to conduct an inquest against Plaintiff's non-appearing subtenants. (NYSCEF Doc. No. 123). However, on February 9, 2018, Judge Samuels issued an order, which Defendant appealed, granting Plaintiff leave to renew and reversing her September decision on the grounds (1) that her reliance on the Appellate Division's denial of Plaintiff's appeal of Justice Braun's Yellowstone injunction decision was in error as the Appellate Division had not made a

[2] In dictum, the Appellate Division rejected Plaintiff's arguments that (1) liability insurance policies naming Plaintiff's subtenants as insureds could satisfy Plaintiff's obligation under the Lease to maintain liability insurance in favor of Plaintiff and Defendant and (2) that Plaintiff could cure its failure to maintain continuous liability insurance coverage by purchasing prospective insurance coverage for the remainder of the period. (NYSCEF Doc. No. 74, pp. 8-10).

determination on the merits that Plaintiff had failed to obtain the requisite commercial liability insurance and was in default of the Lease and (2) Plaintiff's allegation that recently discovered evidence demonstrated that Defendant engaged in a conspiracy to deprive Plaintiff of its leasehold raised questions of fact that precluded summary judgment (NYSCEF Doc. No. 147).[3]

On October 31, 2018, the Appellate Term modified Judge Samuels' renewal decision to deny Plaintiff's motion to renew and grant Defendant's motion to dismiss certain affirmative defenses, and for summary judgment of possession, and remanded the matter to the Civil Court for a hearing on use and occupancy and reasonable attorneys' fees due to Defendant. The Appellate Term held that Defendant's motion for summary judgment of possession should have been granted based upon Defendant's "unrebutted showing that the tenant breached the insurance coverage requirements of the governing commercial lease agreement." The Appellate Term also found that "landlord [Defendant] had valid grounds for terminating [the] commercial [L]ease, based on tenant's [Plaintiff's] incurable default in obtaining insurance naming the landlord as an additional insured." (NYSCEF Doc. No. 1488). Plaintiff's motion seeking leave to appeal the Appellate Division's decision to the Court of Appeals was denied on May 14, 2019 (NYSCEF Doc. No. 48).

On March 18, 2019, despite the fact that the Lease had already been terminated, Plaintiff purchased a retroactive liability insurance policy in favor of 542 Holding and Defendant with an effective period from May 12, 2015 through May 12, 2016. Now, Plaintiff moves for the second

[3] In motion sequence number 004, Plaintiff sought to renew Justice Braun's June 2016 decision based on the same arguments presented to Judge Samuels, that newly discovered evidence established (1) that Defendant, 542 Holding, and the subject Co-op participated in a "sham" real estate transaction regarding the Premises as part of a conspiracy to steal Plaintiff's valuable leasehold and (2) that Plaintiff's alleged failure to maintain general liability insurance in favor of Defendant did not expose Defendant to potential liability because Defendant was required under the terms of its mortgage agreements to purchase its own liability insurance covering Defendant and the Premises. This Court found that the evidence and arguments raised by Plaintiff did not warrant renewal or modification of Justice Braun's decision and denied the motion on the record on May 31, 2018 (NYSCEF Doc. No. 135).

time, pursuant to CPLR 2221(e), to renew its motion seeking a Yellowstone injunction on the grounds that Plaintiff has now obtained retroactive insurance curing the prior default.

DISCUSSION

A motion for leave to renew shall be based upon new facts not offered on the prior motion. The new facts must be those that would change the prior determination or demonstrate that there has been a change in the law that would change the prior determination. (CPLR 2221[e][2]). Movant must provide reasonable justification for the failure to present such facts on the prior motion. (CPLR 2221[e] [3]). Any alleged new facts must accompany a party's application to renew (*Reyes v. Sequeira*, 64 A.D.3d 500, 512-13 [1st Dept 2009]). Here, Plaintiff fails to present any new facts or changes in the law that would alter the court's prior decision denying Plaintiff's motion for a Yellowstone injunction.

Plaintiff is not entitled to a Yellowstone injunction as the period to cure has expired. It is well settled that a tenant is not entitled to a Yellowstone injunction after the cure period has expired (*KB Gallery, LLC v 875 W. 181 Owners Corp.*, 76 AD3d 909 [2010]; *Retropolis, Inc. v 14th St. Dev. LLC*, 17 AD3d 209 [2005]; *Prince Fashions, Inc. v 542 Holding Corp.*, 15 AD3d 214 [2005]). Here, after the initial Yellowstone application was denied, the stay of the cure period was lifted, the cure period expired, and the Lease was terminated, effective July 5, 2016. Since Plaintiff's motion to renew its Yellowstone application was brought after this date, the Court cannot now grant Yellowstone relief in this case (*see 166 Enterprises Corp. v I G Second Generation Partners, L.P.*, 81 AD3d 154, 158 [1st Dept 2011] [holding tenant's motion to renew its application for a Yellowstone injunction, which was brought after the cure period had expired, should have been denied]). Moreover, a Yellowstone injunction cannot be afforded retroactive application in this case (*see SHS Baisley, LLC v Res Land, Inc.*, 18 AD3d 727, 728 [2d Dept

2005] [allowing retroactive relief as a result of errors by the court]; *compare T.W. Dress Corp. v Kaufman*, 143 AD2d 900 [1988] [lapse of Yellowstone TRO was not a mere technicality where the plaintiff's counsel failed to obtain an extension of the TRO and allowed the cure period to expire]).

Moreover, the retroactive insurance policy procured by Plaintiff after the Lease was terminated does not qualify as a new fact that was not offered on the prior motion that would change the Court's decision denying Plaintiff's motion for a Yellowstone injunction. To establish its entitlement to a Yellowstone injunction, tolling its time to cure the alleged insurance default, Plaintiff was required to demonstrate its willingness and ability to obtain sufficient retroactive insurance coverage at the time of its Yellowstone injunction motion, not three years hence (*see Great Wall 384, Inc. v 384 Grand St. Hous.*, 2016 N.Y. Slip Op. 32942[U] [Sup Ct New York Cnty 2016] [granting conditional 10 day Yellowstone injunction based on tenant's representation that it had the ability to obtain retroactive insurance to bridge the gap in coverage]; see *also Bliss World LLC v 10 W. 57th St. Realty LLC*, 170 AD3d 401, 401 [1st Dept 2019] ["None of these proposed cures involve any retroactive change in coverage, which means that the alleged defaults raised by the landlord are not susceptible to cure."]).

Here, Plaintiff never argued in its application for a Yellowstone injunction that it was ready, willing and able to remedy the alleged insurance default by purchasing a retroactive liability insurance policy in favor of Defendant. Rather, Plaintiff argued, *inter alia*, that (1) Defendant had waived its right to enforce insurance requirements set forth in the Lease through the inaction of its predecessor in interest, 542 Holding, and (2) insurance policies purchased by Plaintiff's subtenants provided sufficient coverage. The retroactive insurance policy purchased by Plaintiff after its Lease was terminated is not newly discovered evidence that can operate to alter the court's prior determination denying its Yellowstone application.

CONCLUSION

Accordingly, it is hereby

ORDERED that Plaintiff's motion to renew is denied in its entirety.

Any requested relief not otherwise discussed has nonetheless been considered by the Court and is hereby denied and this constitutes the decision and order of the Court.

11/8/19
DATE

Hon. Deborah A. Kaplan
Administrative Judge
Supreme Court, New York County
Civil Branch
W. FRANC PERRY, J.S.C.

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