Citiwindows LLC v 135 Kent Ave. Mgt. Corp.
2019 NY Slip Op 33374(U)
November 7, 2019
Supreme Court, Kings County
Docket Number: 503329/19
Judge: Leon Ruchelsman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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CITIWINDOWS LLC,

Plaintiff,

- against -

135 KENT AVENUE MANAGEMENT CORP.,

Defendant,

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Decision and order

Index No. 503329/19

mS # 283

November 7, 2019

PRESENT: HON. LEON RUCHELSMAN

The defendant has moved seeking essentially to vacate a Yellowstone injunction granted in a decision and order dated June 3, 2019 and to hold the plaintiff in contempt for failing to abide the terms of that order. The plaintiff has moved seeking another Yellowstone injunction for a further Notice to Cure filed by the landlord. The motions have been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing all the arguments, this court now makes the following determination.

As recorded in the prior order, on January 22, 2003 the plaintiff tenant entered into a lease with landlord concerning the rental of space located at 135 Kent Avenue in Kings County. A notice to cure was served on March 5, 2019 alleging six defaults. The court dismissed some of the defaults, granted a Yellowstone regarding one default and ordered the tenant to produce information they maintained insurance and paid all necessary taxes. These motions have now been filed. The defendant asserts the plaintiff has failed to present sufficient

evidence of insurance and tax payments. In addition, the defendant landlord has served another Notice to Cure and the tenant seeks Yellowstone in that regard.

The plaintiff has satisfied its burden of demonstrating that it has adequately paid all taxes and maintained requisite insurance. Therefore, the motion seeking contempt or to vacate the prior decision is hereby denied.

Concerning the new Notice to Cure, it is based upon two alleged violations. First, that the tenant has sublet space without consent of the landlord in violation of the lease and second that the tenant has not corrected a Department of Buildings violation issued.

Regarding the subtenant, the lease provides that without prior written consent of the landlord the tenant cannot sublease any space to any third party (see, ¶ 75.1). However, the lease provides that "landlord's consent shall not be required with any one sublease of the premises if, and only if, such sublease is (a) not to be or become effective within twelve (12) months following the Lease Commencement Date, and (b) for a term of twelve (12) months or less" (id). Thus, since this sublease is more than a year after the lease commencement date than any sublease for a term of twelve months or less does not require the landlord's consent. The tenant argues that since a lease has not been executed the twelve months have yet begun to run and thus no

violation exists. The landlord notes there is evidence the subtenant is already occupying the space, albeit without a lease, and that in itself constitutes a violation of the lease. However, there is scant language in the lease from which to conclude that occupying the space without a lease, for a short time, before entering into a lease for less than a year *per se* violates the lease. Alternatively, the actual lease entered into between the tenant and the subtenant might require an earlier termination date to accommodate the time already occupied by the subtenant. Further, the landlord may offer his consent to such lease which they shall not "unreasonably withhold" (id). For these reasons the landlord has failed to conclusively demonstrate that a violation has occurred or that even if such violation occurred it cannot be cured. Further analysis of the lease terms as well as the terms of an actual signed sub-lease are necessary before a determination can be made. Therefore, there are questions of fact whether a violation even occurred and if such violation did occur whether it can be cured by the tenant.

Likewise, the existence of the Department of Buildings violation, which the tenant concedes he must resolve, is being actively corrected by the tenant. The tenant has presented sufficient evidence they are aware of the violation and are taking active steps to have it cured. Therefore, the tenant has demonstrated he is willing and able to cure the violation.

Therefore, based on the foregoing the motion seeking a Yellowstone injunction is granted. The request for a bond is further denied.

So ordered.

ENTER:

DATED: November 7, 2019
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC