Fusulag Corp. v Bock Realty Corp.
2020 NY Slip Op 31727(U)
June 2, 2020
Supreme Court, Kings County
Docket Number: 520454/19
Judge: Leon Ruchelsman

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

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FUSULAG CORP.,

Plaintiff, Decision and order

- against - Index No. 520454/19

BOCK REALTY CORP.,

Defendant, June 2, 2020

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has once again moved seeking a Yellowstone injunction. The defendant has opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments, this court now makes the following determination.

As recorded in a prior order, the plaintiff maintains a lease concerning property located at 369-71 Flatbush Avenue in Kings County. On April 22, 2020 the defendant served a notice of default alleging the plaintiff violated various provisions of the lease concerning engaging in renovation work without the landlord's prior written approval, engaging in work without applicable permits and without the requisite insurance. The basis for the notice of default is the existence of four Notices of Violation issued by the Department of Buildings concerning unauthorized work at the premises. This motion seeking a Yellowstone followed wherein the plaintiff seeks to toll the default period so that they can cure any violations. The landlord opposes the motion arguing the defaults cannot be cured therefore the injunction must be denied.

Conclusions of Law

It is well settled that a commercial tenant is entitled to a Yellowstone injunction to preserve the status quo pending determination of its underlying dispute with its landlord only when it can demonstrate that it has both the desire and the ability to cure the alleged default by any means short of vacating the premises (see, First National Stores v. Yellowstone Shopping Center, 21 NY2d 630, 290 NYS2d 721 [1968]). Thus, a tenant seeking a Yellowstone must demonstrate that it holds a commercial lease, it has received from the landlord a notice of default, its application for a temporary restraining order was made prior to expiration of the cure period and termination of the lease, and it has the desire and ability to cure the alleged default by any means short of vacating the premises (see, 146 Broadway Associates LLC v. Bridgeview at Broadway LLC, 164 AD3d 1193, 84 NYS3d 241 [2d Dept., 2018]).

There can be little argument that if the tenant engaged in conduct that required prior landlord consent without such consent then an incurable breach would occur, especially where the breach cannot be undone (Zona, Inc., v. Soho Centrale LLC, 270 AD2d 12, 704 NYS2d 38 [1st Dept., 2000]). However, the tenant categorically denies that any unauthorized or improper construction was taking place at the premises, thus there was no consent needed. They assert there was a fire at the premises on

October 23, 2019 and that the tenants were merely cleaning the debris and the violations were mistakenly issued based on the erroneous belief that work was being performed. Indeed, following the fire the landlord served a notice of default based upon odors from the fire and debris at the premises. In response to that notice the tenant notified landlord the debris had been removed and concerning the odors noted that they had been "authorized by its insurer to proceed with interior demolition of the store that will abate any odor from the fire and our client will diligently pursue that work to completion" (see, Email dated December 6, 2019 12:20 PM from counsel to the tenant to counsel to the landlord). That representation, which only concerned removal of odors, can hardly be an admission the tenant was "going to restore the premises" (Affirmation in Opposition, ¶15). Thus, concerning the basis for the injunction sought here there are questions of fact whether the Building Code Violations refer to actual work being performed improperly or whether the tenant was merely cleaning up the premises following the fire as they assert. Thus, when there are questions of fact a Yellowstone should not be denied since that would be "tantamount to adjudicating the merits of the underlying case, which is beyond the scope of the application" (New York Classic Motors LLC v. 250 Hudson Street LLC, 2013 WL 5925541 [Supreme Court New York County 2013], W & G Wines LLC v. Golden Chariot Holdings LLC, 46

Misc3d 1202(A), 7 NYS3d 245 [Supreme Court Kings County 2014]).

Therefore, based on the foregoing the motion seeking a Yellowstone is granted.

On April 22, 2020 the court granted plaintiff's request seeking a temporary restraining order staying the tenant's cure period. On May 13, 2020 during the interim stay period the landlord sent the tenant a notice that stated in part that, "although the Landlord is currently stayed by the temporary restraining order signed by the Court from terminating your lease based upon the above defaults, upon the vacatur of the stay, the Landlord elects to terminate your Lease three (3) days after the stay is vacated (the 'Default Termination Date') as provided for in Article 17 of the Lease" (see, Letter dated May 13, 2020). Since the stay has not been vacated the letter is now moot. Further, a conditional peremptory termination letter cannot be served during a stay period to only take effect after the stay period ends because the party is exercising rights during the stay period which is improper.

Concerning the payment of rent, there is no dispute that pursuant to the lease if the premises are rendered "wholly unusable" the tenant need not pay rent. Whether the premises are wholly unusable is not a legal question but rather a factual one. If the premises are unusable, an easily verifiable reality, then the tenant is rightly suspended from paying rent. Whether

the landlord may have claims against the tenant for delaying the notification of such condition does not have any bearing on whether the premises are in fact unusable.

The tenant's request to amend the pleadings is granted.

Lastly, considering all the facts of this case the request for an undertaking in the amount of $9,000 is appropriate.

So ordered.

ENTER:

DATED: June 2, 2020
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC