Shack Collective Inc. v Dekalb Mkt. Hall LLC

2020 NY Slip Op 32192(U)

July 6, 2020

Supreme Court, Kings County

Docket Number: 506326/20

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8
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THE SHACK COLLECTIVE INC.,
Plaintiff, Decision and order

- against - Index No. 506326/20

DEKALB MARKET HALL LLC,
Defendant, July 6, 2020
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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has 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.

On May 3, 2016 the plaintiff tenant entered into a license agreement with landlord concerning the license of certain space located at 445 Gold Street in Kings County. A notice to terminate was served on March 4, 2020 alleging one issue. Specifically, the landlord noted that pursuant to the license agreement the plaintiff was required to maintain a Restaurant Letter Grade of 'A' as determined by the New York City Department of Health. In September 2019 the restaurant received a grade of 'C' prompting the termination. The plaintiff has moved seeking a Yellowstone injunction arguing the plaintiff is diligently working with the Health Department to alter that Letter Grade and that consequently the plaintiff has satisfied the elements necessary for a Yellowstone injunction.

Conclusions of Law

A Yellowstone injunction is a remedy whereby a tenant may obtain a stay tolling the cure period "so that upon an adverse determination on the merits the tenant may cure the default and avoid a forfeiture" (Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assocs., 93 NY2d 508, 693 NYS2d 91 [1999], First National Stores v. Yellowstone Shopping Center Inc., 21 NY2d 630, 290 NYS2d 721 [1968]). For a Yellowstone injunction to be granted the Plaintiff, among other things, must demonstrate that "it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises" (Graubard, supra).

Thus, a tenant seeking a Yellowstone must demonstrate that: (1) it holds a commercial lease, (2) it has received from the landlord a notice of default, (3) its application for a temporary restraining order was made prior to expiration of the cure period and 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 (see, Xiotis Restaurant Corp., v. LSS Leasing Ltd. Liability Co., 50 AD3d 678, 855 NYS2d 578 [2d Dept., 2008]).

The landlord argues the plaintiff does not maintain a commercial lease rather merely holds a license which provides for no Yellowstone injunction at all. Whether an agreement is a

license or a lease is not determined by how the parties refer to the document or how the document refers to itself (Union Square Park Community Coalition Inc., v. New York City Department of Parks and Recreation, 22 NY3d 648, 985 NYS2d 422 [2014]). Rather, the nature of the agreement must be "gleaned from the rights and obligations set forth therein" (id). Generally, a license only confers a non-exclusive, revocable right to enter the land of the licensor to perform an act Miller v. City of New York, 15 NY2d 34, 255 NYS2d 78 [1964]). Thus, the agreement between the parties provides far more rights to the tenant than mere entry to perform acts. It specifies the space of the area under consideration and it is for a specific amount of time. However, the agreement does indicate that the landlord maintains some supervisory powers delineating the methods of the rendition of services including the menu and hours of operation. Consequently, there are questions of fact which require further analysis whether the agreement under discussion is a lease and the Yellowstone considerations may apply.

Even if the agreement is a lease the tenant can still not succeed in obtaining a Yellowstone injunction. The agreement provides that the plaintiff must "maintain at the Licensed Area a Restaurant Letter Grading grade of 'A'" (see, Agreement, §7(a)). Further, Article 18 of the agreement provides that if there is any "change in the quality or caliber of the operation of

Licensee's business in the Licensed Area" then such termination may follow upon seven day notice. Thus, the agreement did not provide an opportunity for the tenant to cure any default. The tenant has not presented any basis why the clause of the agreement should not be enforced as written. Without the ability to cure the tenant cannot succeed in an injunctive relief.

Therefore, the motion seeking a Yellowstone injunction is denied.

So ordered.

ENTER:

DATED: July 6, 2020
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC