BC Wireless, Inc. v Asrr Suzer 238 LLC
2020 NY Slip Op 33114(U)
September 23, 2020
Supreme Court, New York County
Docket Number: 156747/2020
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. BARBARA JAFFE**, ***Justice*** — **PART** **IAS MOTION 12EFM**

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BC WIRELESS, INC.,

Plaintiff,

- v -

ASRR SUZER 238 LLC, AS SUCCESSOR IN INTEREST TO 218 MADISON COMPANY,

Defendants.

---X

INDEX NO. 156747/2020

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2-26 were read on this motion for injunction/restraining order.

By order to show cause, plaintiff moves for a *Yellowstone* injunction, staying and tolling the notice to cure dated July 29, 2020, and enjoining defendant from terminating plaintiff's lease for the premises located at 218 Madison Avenue, Store No. 1, New York, New York, or commencing an action or proceeding to recover possession based upon said notice. Defendant opposes.

I. PERTINENT BACKGROUND

Plaintiff has been a tenant of the premises for the past 19 years, having initially rented it for a 10-year term in August 2002, and renewing it for another 10-year term in 2011. Plaintiff, a wireless telephone retail company, sells cellular telephones and accessories and rents mailboxes; to supplement its income it also provides passport and visa photography services. (NYSCEF 3, 6).

Paragraph 17 of the lease provides that a default thereunder does not include the failure to pay rent and additional rent, and permits defendant to terminate the lease for certain defaults

after the issuance of a 15-day notice to cure, followed by a five-day notice of cancellation of the lease. (NYSCEF 6).

In paragraph 31, defendant acknowledges having received plaintiff's security deposit, and provides that if plaintiff defaults under the lease, including the failure to pay rent and additional rent, defendant may apply the security toward an overdue amount. (*Id.*).

Pursuant to paragraph 9, if the demised premises are partially damaged or rendered partially unusable by fire or other casualty, the rent and additional rent shall be apportioned from the day following the casualty, and if damaged or rendered wholly unusable by casualty, the rent and additional rent "shall be proportionately paid up to the time of the casualty and thenceforth shall cease until the date when the demised premises shall have been repaired and restored by defendant (or sooner reoccupied in part by [plaintiff] then rent shall be apportioned . . ." (*Id.*).

The lease also includes a non-waiver clause, and a clause requiring plaintiff to obtain and maintain certain insurance. (*Id.*).

In 2015, the premises was sold to defendant from the predecessor landlord. (NYSCEF 3).

By notice dated July 29, 2020, defendant served tenant with a 15-day notice of default, providing that plaintiff had defaulted as follows:

(1) by failing to maintain the full amount of the security deposit, as plaintiff was required to maintain a deposit equal to three months of the current base rent, and given plaintiff's failure to pay monthly base rent from April 2020 to July 2020, defendant used the deposit toward plaintiff's unpaid obligations. Defendant thus demands that plaintiff cure the default by replenishing the security deposit in the sum of $14,758.50;

(2) by violating the permissible use and occupancy of the premises, which the lease

defines as the "retail sale of cellular phones and mailbox rentals and for no other purpose," by providing services for passport and visa photography. Plaintiff must therefore cure the default by ceasing to provide passport and visa photographs;

(3) by posting unapproved signs in the storefront advertising the photography services, which must be removed;

(4) by failing to provide evidence that plaintiff renewed its insurance policies as required; and

(5) by failing to provide evidence that it obtained plate glass insurance.

(NYSCEF 7).

II. CONTENTIONS

A. Plaintiff (NYSCEF 3)

Plaintiff contends that it has cured or intends to cure its default, or that it has not actually defaulted under the terms of the lease.

As a default under the lease does not include the payment of rent and/or additional rent, plaintiff maintains that its alleged failure to replenish the security deposit does not constitute a default. It claims to have already provided the requisite insurance policies to defendant. And, it alleges that from the inception of its tenancy and with the full knowledge of defendant and its predecessor, it has been providing passport and visa photography services, and that any objection thereto was waived by defendant and its predecessor years ago.

Plaintiff moreover asserts that the lease permits it to withhold the payment of rent in the event of a "casualty," and that having been forced to close due to the Covid-19 pandemic by various New York City, State, and federal orders, it was required to vacate the premises on March 22, 2020. It was not until June 22, 2020 when plaintiff was able to re-enter the premises

and commence partial use with 50 percent occupancy restrictions.

Additionally, plaintiff alleges that during recent protests in New York City, on or about June 1, 2020, the premises was broken into and ransacked, resulting in extensive property damage. While defendant was aware of the possibility of such damage, plaintiff accuses it of having failed to protect the premises properly, also complains that defendant has not maintained the premises, as required by the lease. Last winter, heat and hot water were not provided by defendant nor did it address or eradicate a rat infestation or collect trash collected from the building. Plaintiff observes that there are currently eight open Department of Buildings (DOB) violations on the building, seven of which are classified as immediately hazardous and must be corrected immediately. (NYSCEF 10).

Plaintiff opines that defendant's actions are motivated by its desire to leave the New York real estate market and sell the building (NYSCEF 3), and that as plaintiff is the sole remaining tenant in the building, defendant has embarked in a bad faith attempt to evict plaintiff for unwarranted reasons. To the extent that it has violated the permissible use clause of the lease, plaintiff asserts that it can cure it by ceasing its photography services and removing the signs advertising same. Moreover, it is prepared and able to take all necessary steps to cure all alleged violations.

B. Defendant (NYSCEF 18, 26)

Defendant argues that there is no dispute that plaintiff is required to replenish its deposit, and that plaintiff is unable to demonstrate an ability to do so, as evidenced by the fact that it took plaintiff two weeks after oral argument on the motion to post an undertaking in the amount of the required deposit.

Moreover, whether or not plaintiff's rent is overdue is irrelevant as it is not the basis of

the notice to cure, and plaintiff cannot cure its illegal use of the premises as it is an integral part of its business. And, given the no-waiver clause in the lease, there is no merit to plaintiff's claim that defendant and its predecessor waived their right to object to the illegal use.

According to defendant, it attempted to repair the damage but plaintiff insisted that it file a claim with its own insurance carrier rather than defendant's and take care of it itself. (NYSCEF 18).

Defendant contends that the DOB violations referenced by plaintiff were issued to plaintiff as a result of plaintiff's improper work, and that any DOB violations issued to defendant were caused by plaintiff's trespass into other parts of the building and call to the DOB to complain about the conditions. It asserts that plaintiff, once it learned of its intent to sell the building, attempted to take advantage of the situation by requesting an exorbitant sum to end its lease early and vacate the premises. Thus, it maintains, plaintiff's commencement of the instant action and request for a *Yellowstone* injunction are made in bad faith. (*Id.*).

III. ANALYSIS

A party seeking a stay of the period within which an alleged default must be cured until the merits of the dispute are resolved in court and to avoid the forfeiture of a substantial leasehold interest, must demonstrate that it: (1) holds a commercial lease; (2) received from the landlord either a notice of default, a notice to cure, or a threat of termination of the lease; (3) requested injunctive relief prior to the termination of the lease; and (4) is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises. (*Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assocs.*, 93 NY2d 508, 514 [1999]).

Defendant concedes that plaintiff meets the first three requirements for obtaining a

Yellowstone injunction. Thus, the sole issue is whether plaintiff is prepared and maintains the ability to cure the alleged default. It is the movant's burden to "convince the court of his desire and ability to cure the defects by any means." (*Jemaltown of 125th St., Inc. v Leon Betesh/Park Seen Realty Assocs.*, 115 AD2d 381, 381 [1st Dept 1985]). That the movant denies a default is not dispositive, as long as it evinces a good faith willingness to cure. (*Artcorp. Inc. v Citirich Realty Corp*. 124 AD3d 545, 546 [1st Dept 2015]).

Here, the only default set forth in the notice to cure which would permit the termination of the lease is plaintiff's use of the premises, and related advertising for, photography services. Plaintiff asserts that it is ready, willing and able to cease the use and advertising therefor, and is thus able and willing to cure the alleged default, despite its contention that such use is permitted by waiver. Defendant's failure to provide a basis for its allegation that plaintiff cannot forgo such use raises no issue.

To the extent that the lease may be terminated based on plaintiff's failure to replenish the security deposit, an issue which need not be determined yet, plaintiff likewise states that it is able and willing to do so, and has since posted an undertaking in the amount of the deposit. (NYSCEF 17). Nor need plaintiff's alleged failure to pay rent or the meaning and applicability of the casualty provision in the lease be addressed on this motion. As defendant does not address plaintiff's assertion that it supplied a copy of its insurance policies to defendant, it is deemed admitted.

IV. CONCLUSION

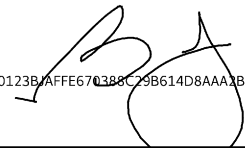
Accordingly, it is hereby

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

ORDERED, that the notice to cure dated July 29, 2020 is hereby stayed and tolled, and

defendant is enjoined from terminating plaintiff's lease for the premises located at 218 Madison Avenue, Store No. 1, New York, New York or commencing an action or proceeding to recover possession based upon said notice; and it is further

ORDERED, that the parties notify the court within 30 days of the date of this order by email to cpaszko@nycourts.gov as to the status of this proceeding.



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9/23/2020
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BARBARA JAFFE, J.S.C.

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION	
	[X] GRANTED	[ ] DENIED	[ ] GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER	
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