SMG Auto. Holdings v AAF Real Estate, LLC
2020 NY Slip Op 33119(U)
September 23, 2020
Supreme Court, Kings County
Docket Number: 510650/20
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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SMG AUTOMOTIVE HOLDINGS AND ZACAHRY SCHWEBEL,

Plaintiffs, Decision and order

- against - Index No. 510650/20

AAF REAL ESTATE, LLC, KINGS AUTOMOTIVE HOLDINGS, LLC, GARY FLOM and VENIAMIN NILVA,

Defendants, September 23, 2020

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PRESENT: HON. LEON RUCHELSMAN

The plaintiffs have moved seeking a Yellowstone injunction. The defendants have 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 February 7, 2017 the plaintiff entered into a sublease with sublessors Flom and Nilva, representatives of defendant Kings Automotive Holdings LLC concerning property located at 2318 Flatbush Avenue in Kings County. That sublease followed an asset sale agreement dated September 15, 2016 entered into between Kings and the plaintiffs. The defendant AAF Real Estate LLC is the owner and landlord of the property. Pursuant to the sublease the plaintiff secured the option to purchase the property and that option had been a key component of the lease between Flom, Nilva and the landlord. Thus, the plaintiff paid monthly payments to the landlord. In early 2020 a dispute arose concerning the actual monthly rental amount and other issues. The landlord informed plaintiff that a week before the sublease

was executed the sublessors and the landlord amended the lease which increased the rent, cancelled the option to purchase the property in year nine of the lease, required the tenant to pay for the refurbishing of a trailer on the property and pay for a guaranty. Indeed, on May 14, 2020 the landlord served a notice of default upon the plaintiff. The notice was based upon the plaintiff's failure to pay additional rent, the failure to pay to refurbish the trailer and the failure to provide a guaranty. The plaintiff has moved seeking a Yellowstone injunction arguing either the noted defaults are baseless or that in any event they can readily be cured.

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 Statute of Frauds provides that "a contract for the leasing for a longer period than one year...is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged, or by his lawful agent thereunto authorized by writing" (General Obligations Law §5-703(2)). Further, pursuant to the prime lease itself, the lease provides that "this writing contains the entire agreement between the parties hereto. No modifications, alterations, changes, waiver or estoppel to this lease or any of the terms hereof shall be valid or binding unless in writing and signed by a duly authorized officer of the party to be charged" (see, Lease dated October 2, 2012, ¶75).

The defendants argue the modifications to the lease were written and the writing consists of an email dated February 1, 2017 sent by the attorney for Kings to the attorney for the

landlord. Indeed, at 3:39 PM on February 1, 2017 an email was sent from counsel for Kings to counsel for the landlord with eight modifications. Three of the modifications directly required the plaintiff to modify its conduct, the remaining four required the tenant to modify its conduct and the last modification concerned the release of security and is not the subject of this lawsuit. That email was not signed by the landlord or the plaintiff.

Michael Ferraro, the managing member of the landlord submitted an affidavit wherein he acknowledged that he signed a Consent of Waiver of Lien prepared by the plaintiff's lender and that by executing such document the plaintiff was able to sublease the premises. Mr. Ferraro asserts that "I would never have signed this "Consent" had I not previously worked out an agreement with Kings to modify our Lease in a number of specific ways. My oral agreement with Tenant's principals was confirmed point for point in a writing drafted by Kings' attorney based upon legal language worked out between my lawyer and Kings' lawyer on February 1, 2017. The clear intention of both Landlord and Tenant was to modify the Lease on the agreed-to terms' (see, Affidavit of Michael Ferraro, ¶4). However, defendant Flom executed a 'Seller's Certification Regarding Representations, Warranties and Covenants' dated February 7, 2017 which stated that "all representations, warranties and covenants of Buyer

contained in the ASA are and remain true and correct as of the date hereof" (see, Certification). Although the certification states the warranties of the 'buyer' remain true, clearly this certification signed by Flom as the Assistant Operating Manager of Kings, the seller, intended to include warranties of the seller. Indeed, paragraphs 6 and 8 referenced in the certification refer to seller's warranties. Lastly, the seller cannot warrant and guaranty promises of the buyer. In any event, this certification warranties that all representations contained in the asset agreement have not changed. This directly contradicts the February 1 2017 email with contained numerous changes including changes to rental payments. Thus, Kings promised the plaintiff there would be no changes to the agreement and then agreed with the landlord to consent to such changes.

Further, as noted paragraph 75 of prime lease prohibited modifications unless signed by "a duly authorized officer of the party to be charged" (see, Lease dated October 2, 2012, ¶75). The email was only sent by counsel for Kings. It is true that for purposes of the Statute of Frauds a representative and an attorney of a party can 'sign' on behalf of the party by sending an email which contains the printed name of the representative at the bottom of the email (see, Williamson v. Delsener, 59 AD3d 291, 874 NYS2d 41 [1st Dept., 2009]). Thus, the landlord is certainly correct that the language used in the lease "is

classic Statute of Frauds phraseology which the Landlord and the Tenant clearly considered when they entered into their agreement" (see, Memorandum in Opposition, page 2). However, there are certainly questions whether counsel for Kings is a duly authorized officer of Kings. The defendants insist Kings and the landlord intended the email to constitute valid modifications. However, those intentions, however, sincere, cannot avoid the plain language of the lease which required the signature of a duly authorized officer of Kings. Further, while the defendants assert in Reply that plaintiff's counsel was made aware of the modifications (see, Reply Affirmation, ¶2) and an email sent by counsel to the plaintiff to counsel for Kings at the end of January 2017 supports the plaintiff's knowledge of such modifications, there are questions whether a necessary written execution by a duly authorized officer of Kings was ever properly made. In addition, there are inconsistencies as well in the plaintiff's position arguing it 'overpaid' rent for three years yet acknowledging such rental increases were intended. The plaintiff's consistent payment of increased rent for three years without complaint further raises questions whether that course of conduct established an acknowledgment of the increased rent sought.

These inconsistencies demonstrate that when the questions of fact are resolved the plaintiff may very well be responsible

for the increased rent as well as the other conditions contained in the modification. At that juncture the plaintiff is surely ready, willing and able to cure any defaults.

It is true that the plaintiff's objections to the modifications are primarily directed at Kings and the inconsistencies noted relate to the conduct of Kings. However, considering the factual arguments presented by the defendants that the modifications were "closely negotiated and shared with all parties including SMG's transactional counsel" (see, Reply Affirmation, ¶2) surely the plaintiff maintains the privity and the right to seek a Yellowstone injunction.

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

So ordered.

ENTER:

DATED: September 23, 2020
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC