188 Ave. A Take Out Food Corp. v Lucky Jab Realty Corp.
2020 NY Slip Op 34311(U)
December 21, 2020
Supreme Court, New York County
Docket Number: 653967/2020
Judge: John J. Kelley

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **IAS MOTION 56EFM**

Justice

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188 AVE. A TAKE OUT FOOD CORP. and TARIK FALLOUS

Plaintiffs,

- v -

LUCKY JAB REALTY CORP.,

Defendant.

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INDEX NO. 653967/2020

MOTION DATE 11/06/2020

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 2, 14, 15, 16, 17, 18, 19, 20, 26, 27, 28, and 32 (Motion 001)

were read on this motion to/for YELLOWSTONE INJUNCTION.

This is an action for a judgment declaring that the defendant landlord may neither compel the plaintiff 188 Ave. A Take Out Food Corp. (hereinafter the tenant) to replenish a security deposit that the defendant drew down to cover allegedly unpaid rent, nor evict that plaintiff from a commercial leasehold for failing to replenish the security deposit. The plaintiffs move for a *Yellowstone* injunction (*First National Stores, Inc. v Yellowstone Shopping Center, Inc*., 21 NY2d 630 [1968]) prohibiting the defendant from terminating the subject lease, and from commencing or continuing any attempts to terminate the lease or evict the tenant from the leased premises pending disposition of the action. In the order to show cause initiating the motion, dated August 24, 2020, this court temporarily restrained the defendant from commencing or continuing any such attempts, pending hearing of the motion. The motion is granted, and the defendant is enjoined, pending the disposition of this action, from seeking to terminate the subject commercial lease or evicting or taking any steps to evict the tenant from the leasehold. In addition, the period for replenishing the tenant's security deposit, as otherwise set forth in the lease, is tolled pending disposition of the action.

The tenant entered into a commercial lease with the defendant on May 1, 2017 for the purpose of operating an indoor dining restaurant in the defendant's premises. On March 16, 2020, Governor Andrew Cuomo issued Executive Order 202.3 that, in relevant part, suspended indoor dining within the State of New York until further notice to prevent the spread of the COVID-19 pandemic. In accordance with the Executive Order, the tenant suspended its indoor restaurant operations, and has not employed the premises for such purposes at least until November 2020.

On March 17, 2020, the courts were closed due to the COVID-19 pandemic. On March 22, 2020, the courts suspended all electronic and non-electronic filings in all pending actions and proceedings. The court lifted the suspension on electronic filings on May 5, 2020, and reopened for non-electronic filings on June 10, 2020. The tenant partially reopened for take-out service in mid-May, but could not sustain its business, so it closed down again until mid-July, when it reopened solely for outdoor dining services.

During April 2020, the defendant, without express permission from the plaintiffs, drew down the sum of $14,935.00 from the tenant's security deposit, and applied it to allegedly outstanding rent. In May 2020, and again in June 2020, July 2020, and August 2020, the defendant similarly drew down the sum of $15,383.05 from the tenant's security deposit and applied it to allegedly outstanding rent. On August 7, 2020, the defendant served a 15-day notice upon the plaintiffs, demanding that the tenant replenish the security deposit, and notifying the plaintiffs that "if Tenant fails to replenish the Security Deposit on or before August 24, 2020, Landlord will terminate this Lease pursuant to Article 17(1) of the Lease."

The plaintiffs commenced this action on August 20, 2020, seeking a judgment declaring that they did not owe rent to the defendant from March 2020 forward by virtue of the fact that the premises were rendered partially unusable due to a "casualty," a term that was left undefined in the lease, but construed by the plaintiffs to include the state of emergency in New York engendered by the COVID-19 pandemic and consequent suspension of all indoor dining for

several months. The complaint also seeks a judgment directing the defendant to replenish the tenant's security deposit and pay a rent credit to the tenant. Simultaneously with the commencement of the action, the plaintiffs made the instant motion for a *Yellowstone* injunction prohibiting the defendant, pending the disposition of the action, from taking any steps to terminate the lease or evict the tenant from the leasehold based on any failure by the plaintiffs to replenish the security deposit. In the order to show cause initiating the motion, the court temporarily restrained the defendant, pending the hearing of this motion, from "terminating the lease . . . instituting any action or proceeding in connection with terminating the lease . . . and enforcing any remedy upon the alleged defaults contained in the Replenishment Demand." This court further tolled the alleged period for curing the claimed defaults in the tenant's replenishment of the security deposit pending hearing of this preliminary injunction motion.

"The purpose of a *Yellowstone* injunction is to allow a tenant confronted by a threat of termination of the lease to obtain a stay tolling the running of the cure period so that after a determination on the merits, the tenant may cure the defect and avoid a forfeiture of the leasehold" (*Hopp v Raimondi*, 51 AD3d 726, 727 [2d Dept 2008]). An applicant for a *Yellowstone* injunction must establish that,

> "(1) it holds a commercial lease; (2) it received from the landlord either a notice of default, a notice to cure, or a threat of termination of the lease; (3) it requested injunctive relief prior to the termination of the lease; and (4) it 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. Assoc.*, 93 NY2d 508, 514 [1999], quoting *225 E. 36th Street Garage Corp. v 221 E. 36th Owners Corp.*, 211 AD2d 420, 421 [1st Dept 1995]; *see 3636 Greystone Owners, Inc. v Greystone Bldg.*, 4 AD3d 122 [1st Dept 2004]).

> "Since courts cannot reinstate a lease after the lapse of time specified to cure a default, an application for *Yellowstone* relief must be made not only before the termination of the subject lease--whether that termination occurs as a result of the expiration of the term of the lease, or is effectuated by virtue of the landlord's proper and valid service of a notice of termination upon the tenant after the

> expiration of the cure period--but must also be made prior to the expiration of the cure period set forth in the lease and the landlord's notice to cure"

(*Korova Milk Bar of White Plains, Inc. v PRE Props., LLC*, 70 AD3d 646, 647 [2d Dept 2010] [citation and internal quotations marks omitted]). The plaintiffs commenced this action and sought *Yellowstone* relief both within the cure period and the term of the lease.

It is well settled that a plaintiff need not admit responsibility for the alleged default set forth in a notice to cure in order to establish entitlement to relief under *Yellowstone*, provided that the plaintiff remains willing and able to cure, should a default be found (*see Artcorp Inc. v Citirich Realty Corp*., 124 AD3d 545 [1st Dept 2015]; *Boi To Go, Inc. v Second 800 No. 2 LLC*, 58 AD3d 482 [1st Dept 2009]). If the default is not susceptible to cure, the *Yellowstone* application will be denied (*see Zona, Inc. v Soho Centrale,* 270 AD2d 12, 14 [1st Dept 2000]). Nonetheless, a tenant is not required to prove its ability to cure *prior* to obtaining a *Yellowstone* injunction (*see WPA/Partners v Port Imperial Ferry Corp.,* 307 AD2d 234, 237 [1st Dept 2003]), only that it will be able to cure in the future.

On May 7, 2020, Governor Andrew Cuomo issued an executive order that provided, in relevant part, that

> "[t]here shall be no initiation of a proceeding or enforcement of either an eviction of any residential or commercial tenant, for nonpayment of rent or a foreclosure of any residential or commercial mortgage, for nonpayment of such mortgage, owned or rented by someone that is eligible for unemployment insurance or benefits under state or federal law or otherwise facing financial hardship due to the COVID-19 pandemic for a period of sixty days beginning on June 20, 2020"

(Executive Order 202.28, May 7, 2020). The governor extended the term of that moratorium pursuant to Executive Order 202.48, which provided that

> "[t]he directive contained in Executive Order 202.28, as extended, that prohibited initiation of a proceeding or enforcement of either an eviction of any residential or commercial tenant, for nonpayment of rent or a foreclosure of any residential or commercial mortgage, for nonpayment of such mortgage, is continued only insofar as it applies to a commercial tenant or commercial mortgagor, as it has been superseded by legislation for a residential tenant, and residential mortgagor, in Chapters 112, 126, and 127 of the Laws of 2020"

(Executive Order 202.48, Jul. 6, 2020). Pursuant to Executive Order 202.64, dated September 18, 2020, the governor extended the moratorium as to commercial tenants until October 20, 2020. On October 20, 2020, the governor issued an executive order extending the moratorium on the "eviction of any commercial tenant for nonpayment of rent . . . through January 1, 2021" (Executive Order 202.60, Oct. 20, 2020).

Consequently, even if the court were not inclined to grant *Yellowstone* relief, it would nonetheless be obligated to grant a preliminary injunction prohibiting the defendant from seeking to evict the tenant at least until January 1, 2021. The court concludes, however, that *Yellowstone* relief is also warranted here.

To obtain a preliminary injunction, a movant must demonstrate, by clear and convincing evidence, (1) a likelihood of success on the merits, (2) irreparable injury if a preliminary injunction is not granted, and (3) a balance of equities in its favor (*see* CPLR 6301; *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]; *Doe v Axelrod*, 73 NY2d 748, 750 [1988]). The decision whether to grant a preliminary injunction rests in the sound discretion of the Supreme Court (*see Doe v Axelrod*, 73 NY2d at 750).

The plaintiffs have established a likelihood of success on the merits of their claim that the tenant is not obligated to the defendant for rent for the months of March through August 2020, and it is not obligated to replenish the security deposit equal to the rent otherwise owed for those months, even if the lease, by its terms, authorized the defendant to draw down the deposit to cover rent.

Paragraph 9(b) of the subject lease recites that

> "[i]f the demised premises are partially damaged or rendered partially unusable by fire or other casualty, the damages thereto shall be . . .at the expense of Owner, and the rent and other items of additional rent. . . . shall be apportioned from the day following the casualty according to the portion of the demised premises which is usable."

Paragraph 9(c) provides that

> "[i]f the demised premises are totally damaged or rendered wholly unusable by fire or other casualty, then the rent . . . shall be proportionately paid up to the time of the casualty and then shall cease until the date that the demised premises shall be . . . restored by Owner."

The term "casualty," as employed in a lease, is generally defined as an "accident" or an "unfortunate occurrence," that is, something other than a "common occurrence" constituting a "sudden or unexpected" event or series of events (*Blue Water Realty, LLC v Salon Mgt. of Great Neck, Corp.*, _____AD3d_____, 2020 NY Slip Op 07450, *1 [1st Dept, Dec. 10, 2020]; *see 45 Broadway Owner LLC v NYSA-ILA Pension Trust Fund*, 107 AD3d 629, 631 [1st Dept 2013]; *IQ Originals v Boston Old Colony Ins. Co.*, 85 AD2d 21, 22 [1st Dept 1982], *affd* 58 NY2d 651 [1982]). The plaintiffs have established that they are likely to succeed on their claim that the COVID-19 epidemic, and the consequent state-mandated suspension of indoor dining at restaurants, constituted a sudden, unexpected, unfortunate set of circumstances and, hence, a "casualty" within the meaning of the lease that rendered the premises unusable for a period of time, and thus relieved the tenant of its obligation to pay rent. Consequently, the plaintiffs have shown a likelihood that they will prevail on their argument that, even if the lease otherwise permitted the defendant to draw down the security deposit to cover unpaid rent and rent arrears, under the unique circumstances of this case, the defendant was not authorized to do so here. The plaintiffs would clearly suffer irreparable harm in the potential loss of a leasehold in the absence of the injunction. Moreover, the balance of equities favors the plaintiffs here, as any loss sustained by the defendant would be compensable by money damages. Hence, the issuance of a *Yellowstone* injunction is warranted.

The plaintiffs have also established a likelihood of success on the merits of their claim that they are not obligated to replenish the security deposit but, instead, the defendant is obligated to do so. They have established the likelihood that they will prevail on this claim even if the defendant lawfully drew down the security deposit to cover rent.

The plaintiffs note that the lease, at Paragraph 31, provides that the "Tenant has deposited with Owner the sum of $72,500.00 for faithful performance and observance of the Tenant of the terms provisions and conditions of this Lease," and that although that paragraph permits the defendant to draw down from the security deposit in certain limited circumstances, it does not obligate the plaintiffs to replenish the security even where the deposit is legally drawn down.

A security deposit "provides a fund from which the landlord can draw for unpaid rent or damages and which puts the landlord into the status of a secured creditor" (*Markowitz v Landau*, 171 AD2d 564, 565 [1st Dept 1991]). Generally, a landlord is entitled to retain a deposit in escrow until the expiration of the lease absent the lease stating otherwise, and "an action for the return of security is premature where the term has not yet expired" (*Wingett v Bartoloni*, 2005 NY Slip Op 51176[U], 8 Misc 3d 134[A] [App Term 2d Dept, 9th & 10th Jud Dists 2005]; *see also Fifth Ave. Ctr., LLC v Dryland Properties, LLC,* 149 AD3d 445, 445 [1st Dept 2017]). While usually nothing will prevent a landlord from applying the security deposit to the arrears, "interest on the arrears should not [be] calculated prior to the application of a credit for the security deposit" (*Wooster 76 LLC v Ghatanfard*, 68 AD3d 480, 481 [1st Dept 2009]; *see 88 Third Realty, LLC v Bekiyants*, 2018 NY Slip Op 33340[U], 2018 NY Misc. LEXIS 6509, *24-25 [Sup Ct, N.Y. County, Dec. 21, 2018]).

Generally, commercial leases do not permit tenants voluntarily to offset their obligations to pay rent or additional rent with their security deposits, at least until a landlord has secured a judgment against the tenant in a nonpayment proceeding (*see Ring v Anabil USA, Inc.*, 29 AD3d 408 [1st Dept 2006]). Conversely, some leases, such as the one in dispute, expressly permit a landlord to apply a security deposit to cure a tenant's default arising from nonpayment (*see Fifth Ave. Ctr., LLC v Dryland Props., LLC,* 2020 NY Slip Op 30015[U], 2020 NY Misc LEXIS 30, *5 [Sup Ct, N.Y. County, Jan. 2, 2020]; *413 W. 14 Assoc. v Santorelli,* 2011 NY Slip Op 32105[U], 2011 NY Misc LEXIS 3792, *5 [Sup Ct, N.Y. County, Jul. 29, 2011] [Gische, J.]).

Leases can also be drafted to obligate a tenant to replenish a security deposit when the landlord properly draws it down (*see 413 W. 14 Assoc. v Santorelli,* 2011 NY Slip Op 32105[U], 2011 NY Misc LEXIS 3792, *5 [tenant that permanently vacated premises need not replenish security deposit that had been applied to rent obligations despite a lease term requiring replenishment, since security deposit constitutes liquidated damages held in escrow, and tenant had no further obligations to secure]; *cf. 75 Broad, LLC v Ramgopal*, 2018 NY Slip Op 32820[U]; 2018 NY Misc LEXIS 5128, *14 [Sup Ct, N.Y. County, Nov. 7, 2018] [replenishment is required where express terms of lease and guarantee provide that the replenishment amount accrues prior to the tenant's vacatur of the leasehold]).

In the subject lease, there is no provision compelling the tenant to replenish a security deposit that the landlord drew down to cover allegedly unpaid rent. The plaintiffs correctly assert that such an obligation cannot be implied into the terms of the lease. "It is well settled that no additional liability or requirement will be imposed upon a tenant by interpretation unless it is clearly within the provisions of the instrument under which it is claimed" (*67 Wall St. Co. v Franklin Natl. Bank*, 37 NY2d 245, 249 [1975]). To the extent that there are any ambiguities in the terms of the lease in this regard, the terms must be construed against the drafter of the instrument (*see Alphonse Hotel Corp. v 76 Corp.*, 273 AD2d 124, 124 [1st Dept 2000]; *Rapid-American Corp. v Olympic Tower Assoc.*, 157 AD2d 589, 590 [1st Dept 1990]), here, the landlord. In any event, inasmuch as the plaintiffs have established, by virtue of the lease's casualty clause, that they are likely to succeed on their claim that they did not owe rent during the duration of the state-mandated suspension of its business activities, they are also likely to succeed on their claim that the defendant was not entitled to draw down the security deposit in the first instance.

In addition, the plaintiffs have also established a likelihood of success on the merits of their claim that the defendant violated Admin. Code of City of N.Y. (Ad Code) § 22-902(a) by

engaging in commercial harassment of a commercial tenant that has been adversely affected by the COVID-19 pandemic. As relevant here, Ad Code § 22-902(a)(11)(ii) provides that

> "[a] landlord shall not engage in commercial tenant harassment. Except as provided in subdivision b of this section, commercial tenant harassment is any act or omission by or on behalf of a landlord that (i) would reasonably cause a commercial tenant to vacate covered property, or to surrender or waive any rights under a lease or other rental agreement or under applicable law in relation to such covered property, and (ii) includes one or more of the following:
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> *****
>
> "threatening a commercial tenant based on . . . the commercial tenant's status as a person or business impacted by COVID-19."

Pursuant to Ad Code § 22-902(a)(11)(c)(i), "a business is 'impacted by COVID-19' if . . . it was subject to seating, occupancy or on-premises service limitations pursuant to an executive order issue by the governor or mayor during the COVID-19 period," where the term "COVID-19 period" is defined as

> "March 7, 2020 through the later of the end of the first month that commences after the expiration of the moratorium on enforcement of evictions of any tenant, residential or commercial, set forth in executive order number 202.8, as issued by the governor on March 20, 2020 and extended thereafter"

(Ad Code § 22-902[a][11][a][i]). Ad Code § 22-903(a) creates a private right of action permitting a tenant to commence an action in the Supreme Court for a judgment "restraining the landlord from engaging in commercial tenant harassment and directing the landlord to ensure that no further violation occurs" (Ad Code § 22-903[a][1]) or awarding "such other relief as the court deems appropriate, including but not limited to injunctive relief, equitable relief, compensatory damages, punitive damages and reasonable attorneys' fees and court costs" (Ad Code § 22-903[a][3]). The plaintiffs established the likelihood that they will prevail on this claim by showing that (a) the tenant is a commercial tenant "impacted by COVID-19," as that term is defined in the Ad Code, as the tenant was subject to the Governor's executive orders limiting seating, occupancy, and on-premises services between March 7, 2020 and January 1, 2021, (b) the defendant, in serving a notice to cure in August 2020, based on the tenant's failure to replenish

an existing security deposit, and thus during a period when the defendant knew that the tenant was unable to generate any revenue precisely because of the executive orders, committed an act that would reasonably cause the tenant either to vacate its commercial leasehold or surrender its rights under the lease, and (c) the tenant seeks injunctive and equitable relief to remedy the defendant's service of the notice to cure, as authorized by the Ad Code.

Accordingly, it is

ORDERED that the plaintiffs' motion for the issuance of a *Yellowstone* injunction is granted, and pending final adjudication of this matter, the defendant and its agents are hereby enjoined and restrained from terminating or cancelling the lease between the defendant and the plaintiff 188 Ave. A Take Out Food Corp. and also from taking any action to evict that plaintiff from the leased premises based upon the grounds alleged in the subject Notice to Cure Default, dated August 7, 2020, and that plaintiff's time to cure any alleged defaults under the lease is hereby tolled; and it is further,

ORDERED that the plaintiffs shall comply with all obligations under the lease other than the obligation to pay rent and any additional rent in a timely manner in connection with those months when the operation of their indoor dining restaurant business has been mandatorily suspended by law or by Executive Order of the Governor of the State of New York or the Mayor of the City of New York; and it is further,

ORDERED that the parties shall appear remotely, via the Microsoft Teams application, for a preliminary conference on February 26, 2021, at 11:45 a.m.; the court shall schedule the conference and email invitations to counsel containing links to permit counsel to access the preliminary conference.

This constitutes the Decision and Order of the court.

12/21/2020
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE