Wan Hao Rest. Inc. v New World Mall LLC
2021 NY Slip Op 31924(U)
February 16, 2021
Supreme Court, Queens County
Docket Number: 701454/2021
Judge: David Elliot

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT Justice

IAS Part 14

WAN HAO RESTAURANT INC.,
Plaintiff(s),

- against -

NEW WORLD MALL LLC,
Defendant(s).

Index No. 701454 2021

Motion Date February 9, 2021

Motion Cal. No. 23

Motion Seq. No. 1

The following papers read on this motion by plaintiff for an order: (1) enjoining defendant from taking any actions including, but not limited to, the commencement of summary proceedings for and/or to oust plaintiff from the premises located at the third floor of 136-20 to 136-30 Roosevelt Avenue and 40-17 to 40-21 Main Street, Flushing, New York (the premises), from disturbing the possession and rights of plaintiff to the premises, from taking steps to terminate the lease between the parties based on the Notice of Default dated January 21, 2021, and from serving any other Notices of Default and/or termination against plaintiff regarding nonpayment of rent during COVID-19; and (2) declaring the Notices to be a nullity or, in the alternative, staying the time to cure any default and providing plaintiff with an opportunity to cure.

	Papers Numbered
Order to Show Cause - Affirmation - Exhibits.....	EF2-16
Answering Affirmation - Exhibits.....	EF19-25
Reply.....	EF26-28

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff is the subtenant, and defendant the tenant (sublandlord), of the premises pursuant to an Agreement of Sublease dated March 26, 2014, and Amendment of Sublease dated July 27, 2015. Plaintiff is alleged to have expended significant sums of money over the years, amounting to $10 million, in order to operate as a first-class restaurant in Flushing. However, plaintiff was faced with a significant financial hardship on account of COVID-19, which resulted in, inter alia, closures of indoor dining for extended periods in New York City. Notwithstanding, defendant served upon plaintiff a Notice of Default, dated January 12, 2021, demanding payment of rent and late fees.

The Notice declares plaintiff in default of the sublease by reason of its failure to pay basic rent and additional rent for the months of May 2020 through and including January 2021, in the total amount of $889,703.27. The Notice requires plaintiff to cure the default by January 25, 2021 and that, in the event of a failure to cure, defendant will terminate the lease and plaintiff will be required to quit and surrender the premises.

As a first cause of action, plaintiff seeks a declaration that it is not in default as set forth in the Notice and that the default is a legal nullity, on the ground that numerous Executive Orders were issued, providing that no initiation or enforcement of proceedings for nonpayment may be commenced against tenants that have suffered due to the pandemic. Plaintiff cites to Governor Andrew Cuomo's Executive Order 202.28, as extended by EO 202.70 through January 1, 2021, as extended by EO 202.81 through January 31, 2021.

As a second cause of action, plaintiff seeks a *Yellowstone* injunction pending a hearing to determine whether plaintiff is in default pursuant to the Notice.

As a third cause of action, plaintiff seeks a permanent injunction, enjoining defendant from terminating the tenancy on account of the Notice.

In support of the motion, plaintiff's counsel argues that defendant has no viable basis to terminate the parties' lease. Plaintiff's restaurant was initially shut down in March 2020, and then defendant locked the building so that there was "virtually no access" to the restaurant in April 2020. Thereafter, business was virtually shut down until mid-summer, and indoor dining has again been closed to the public. Defendant was made aware of these circumstances but nevertheless "tormented" and "threatened" plaintiff to tender rent despite circumstances clearly beyond plaintiff's control, with defendant's ultimate goal being to repossess the premises. Notwithstanding, during this time, plaintiff did in good faith send defendant significant amounts of rent.

Counsel further avers that defendant is attempting to make an end run around the EOs issued by Governor Cuomo, which "prohibit[s] the initiation of a proceeding or enforcement of an eviction of any commercial tenant for nonpayment of rent or a foreclosure of any commercial mortgage for nonpayment of rent," by threatening termination of the lease based on nonpayment. Counsel acknowledges that the moratorium does not cancel rent payments, but "it does however provide relief and an extension to pay which Defendant herein has ignored by demanding rent and seeking enforcement for failure to tender that money, which should not be permitted at this time."

In support of plaintiff's request for a *Yellowstone* injunction, counsel contends that it is appropriate to grant such an injunction when a landlord seeks to terminate a lease upon a conditional limitation arising from the nonpayment of rent. Counsel further points out that, unlike the standard for a typical application for a preliminary injunction, inter alia, likelihood of success on the merits need not be demonstrated in order to be awarded a *Yellowstone* injunction.

Also submitted on this motion is the affidavit of Connie Zhang, managing member of plaintiff. Zhang explains that plaintiff operates one of the largest catering halls/Chinese restaurants in Flushing: the restaurant seats 840 people, caters large parties, and has 25 Karaoke rooms. However, on account of the effects of the pandemic, the restaurant is left with take-out business only, accounting for less than 5% of revenue. Zhang states that, despite the parties' verbal agreement to defer a portion of the rent obligation, which plaintiff has done from April to November 2020, defendant has continuously claimed that plaintiff is in default in order to repossess the premises and obtain a windfall of plaintiff's $10 million investment therein.

Zhang further states that the premises were fully shut to the public from March through July 2020 (and indeed plaintiff was locked out/denied access for five weeks during that time), and thereafter operating at 25% capacity since September 2020, and now fully shut down again to the public as of December. Finally, Zhang indicates that, if the court finds that the Notice is valid, plaintiff has the desire and ability to cure the default, plaintiff having made an application for the Paycheck Protection Program (PPP), "which it should get within the month."

In opposition to the motion, defendant submits the affidavit of Xiufeng Shi, manager and treasurer of 13620 NW Management Inc., the property manager and managing agent for defendant. Shi explains that defendant indeed recognized the impact the pandemic had on plaintiff's operations and, to that end and in good faith, offered plaintiff rent relief pursuant to a Rent Deferral Agreement, which plaintiff refused to sign. Instead, Zhang verbally agreed to the terms and refused to sign after defendant accepted initial payments due thereunder,

thereby vitiating defendant's prior predicate notices. Plaintiff's payments were, between April and November 2020, limited to paying one-half of base rent (not the required additional rent and management fee charges as required) and were sporadic. Further, of the four checks sent to defendant in November and December 2020, all of them bounced for insufficient funds. Rent has not been paid since, and plaintiff currently owes defendant the total amount of $1,001,978.83.

Shi also states that, instead of retracting its agreement to defer plaintiff's rent (despite plaintiff's refusal to sign the Rent Deferral Agreement), or reissuing default notices, defendant permitted plaintiff to use a portion of the roof for outdoor dining for a $100.00 per week license fee. Further, plaintiff remains open for take-out, delivery, sidewalk dining, and a food concession booth on Main Street. Moreover, indoor dining will be resumed on February 14, 2021, per a press release issued by the Governor's office.

Shi further details plaintiff's default under the parties' sublease and amendment of the sublease: (1) failure to pay the costs of additional security guards and a fire safety director since February 2020; and (2) failure to pay the costs for storage and removal of garbage and recyclables since February 2020.

Defense counsel argues that plaintiff is requesting that the court ignore its contractual obligations and permit it to use the premises "rent free" since the pandemic has affected its business, all to defendant's detriment. However, the sublease expressly allocates the risk of a loss related to a force majeure event or national emergency to plaintiff. Article 30 (a) of the sublease provides in relevant part, the following:

> "Other than with respect to the payment of Basic Rent or Additional Rent by Subtenant, Sublandlord and Subtenant shall not be required to carry out any of their obligations hereunder nor be liable for loss or damage for failure to do so, nor shall Sublandlord or Subtenant thereby be released from any of its obligations hereunder, where such failure arises by reason of delays caused by force majeure . . . or any cause whatsoever beyond Sublandlord's or Subtenant's control, as the case may be, including but not limited to, preemption due to a National Emergency or by reason of any rule, order or regulation of any department or subdivision thereof of any government agency or by reason of the condition of supply and demand which have been or are affected by war or other emergency."

Moreover, plaintiff ignores defendant's own financial obligations, which have not been abated or deferred. Defense counsel argues that the request for an injunction, thus, be

denied and, if not denied, conditioned on the payment of an undertaking and the payment of base rent and additional rent going forward.

Defense counsel further avers that plaintiff has failed to provide any evidence to support its request for a *Yellowstone* injunction, namely, that plaintiff has the desire or ability to cure the default of rent arrears which total more than $1 million.

In reply, Zhang submits a further affidavit, stating to have "recently received PPP money" and she will provide defendant with same. Zhang explains that plaintiff did not intentionally bounce the checks but was advised by an agent who works for defendant that the checks would not be deposited until Zhang advised that she had money in the account, which the agent did not do, only to use that as evidence against plaintiff.

Zhang also explains that plaintiff did not execute the Rent Deferral Agreement since it did not represent terms that were agreed upon and would have effectively shut down plaintiff's business upon one instance of default. Zhang also disputes the default amount. Finally, she argues that, if evictions are not permitted on account of the EOs, then the predicate notices should also not be permitted.

Counsel argues that a Notice of Default falls within the Governor's EO to the extent that it threatens termination of the lease with an enforcement of eviction due to nonpayment. Counsel also argues that serving a Notice to Cure during a period when plaintiff is unable to generate income due to the pandemic as well as the EO constitutes commercial harassment under the law and, to that end, plaintiff has served and filed an amended complaint adding such a cause of action.

Turning to the law, a *Yellowstone* injunction is a "creative remedy" for tenants that are faced with the threat of a lease termination; its purpose is to maintain the status quo so that a commercial tenant may protect its investment in the leasehold by obtaining a stay, tolling the cure period so that, if it receives an adverse determination on the merits of a landlord-tenant dispute, the tenant may still cure the default to avoid a forfeiture (*Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc.*, 93 NY2d 508 [1999]; *see 255 Butler Assoc., LLC v 255 Butler, LLC*, 173 AD3d 649 [2d Dept 2019]; *146 Broadway Assoc., LLC v Bridgeview at Broadway, LLC*, 164 AD3d 1193 [2d Dept 2018]; *Riesenburger Props., LLLP v Pi Assoc., LLC*, 155 AD3d 984 [2d Dept 2017]). A tenant requesting a *Yellowstone* injunction must demonstrate 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 prior to the expiration of the cure period; and (4) it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises (*see Graubard Mollen Horowitz*

Pomeranz & Shapiro v 600 Third Ave. Assoc., 93 NY2d 508 [1999]; *Good Fortune Rest., Inc. v Kissena Group, LLC*, 185 AD3d 1013 [2d Dept 2020]; *146 Boardway Assoc., LLC*, 164 AD3d at 1194; *Riesenburger Props., LLLP*, 155 AD3d at 985).

Though the issue of whether there was indeed a default under the parties' lease was thoroughly argued in the papers presented before the court (i.e., the appropriateness of the Notice notwithstanding the Governor's EOs placing a moratorium on, inter alia, commercial evictions during the pandemic for a certain period of time), the court notes that whether plaintiff is entitled to a *Yellowstone* injunction may be decided without consideration of the underlying merit of their arguments (*see* Daniel Finelstein & Lucas A. Ferrara, Landlord and Tenant Practice in New York § 16:177 [Dec. 2020 update]) [Note: online treatise].

That being said, plaintiff failed to provide evidence of its ability to cure its alleged default, thereby warranting denial of that branch of its motion (*see e.g.* Good Fortune Rest., Inc. v Kissena Group, LLC, 185 AD3d 1013 [2d Dept 2020]; *Definitions Personal Fitness, Inc. v 133 E. 58th St. LLC.*, 107 AD3d 617 [1st Dept 2013]; *Pergament Home Ctrs. v Net Realty Holding Trust*, 171 AD2d 736 [2d Dept 1991]). The court was presented only with conclusory statements from Zhang as to that issue, having claimed to have made an application for PPP money and, subsequently, having "recently received" the loan. However, plaintiff has not proffered anything to the court to substantiate these statements, such as, for example, a copy of the loan application, proof of approval of the loan, proof of deposit of funds, or the amount of funds sought/received. It is noted that, aside from the allegation that plaintiff is eligible for a PPP loan, plaintiff does not otherwise provide any indication that it maintains the ability to cure the alleged default.

As to the second branch of plaintiff's motion, which seeks an order declaring the Notice to be a nullity or, in the alternative, tolling the time to cure any default as may be found by this court, same is denied. This request is improper, as it seeks, in effect, final judgment on the merits of plaintiff's complaint, without having afforded defendant an opportunity to interpose an answer thereto.[1] Any request plaintiff also makes which seeks to enjoin defendant from serving any other Notices of Default "during COVID-19" is denied for the same reason. The court notes that a *Yellowstone* injunction merely forestalls a defendant from prematurely terminating a lease; it does not serve to alter the provisions of the lease or alter monies which may become due under the terms of the lease (see *Graubard Mollen Horowitz Pomeranz & Shapiro*, 93 NY2d at 515; *see also Trump on the Ocean, LLC v Ash*, 81 AD3d 713 [2d Dept 2011]).

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1. On January 25, 2021, the parties stipulated to an extension of time for defendant to answer the complaint to March 5, 2021. Thereafter, on February 3, 2021, plaintiff filed an amended complaint, adding a cause of action for commercial harassment.

Accordingly, plaintiff's motion is denied. However, the stay imposed by this court's January 22, 2021 order to show cause shall be continued for five days from the entry date of this order so as to allow plaintiff, if it be so advised, to pursue any remedies that may be available to it.

Dated: February 16, 2021

J.S.C.

FILED

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COUNTY CLERK
QUEENS COUNTY