Eastern Athletic, Inc. v Congregation Beth Elohim
2021 NY Slip Op 32450(U)
November 24, 2021
Supreme Court, Kings County
Docket Number: Index No. 527047/21
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

EASTERN ATHLETIC, INC.,

Plaintiff, Decision and order

- against - Index No. 527047/21

CONGREGATION BETH ELOHIM,

Defendant, November 24, 2021

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 April 18, 1985 the plaintiff tenant entered into a lease with landlord concerning the rental of space located at 17 Eastern Parkway in Kings County. The defendant landlord asserts that it entered into a contract to purchase property insurance for the building commencing the end of August 2021 and that the insurance company only agreed to insure the property on the express condition a swimming pool owned by the tenant plaintiff on the sixth floor of the building would be drained. The plaintiff did not agree to drain the pool and consequently the property did not have any insurance. The landlord served a notice of default pursuant to Article 6 of the lease which provides that "tenant shall not do or permit any act or thing to be done in or to the demised premises which is contrary to law, or which will invalidate or be in conflict with public liability,

fire or other policies of insurance at any time carried by or for the benefit of Owner" (see, Lease ¶ 6). The landlord argues the tenant's failure to accommodate the landlord's ability to obtain insurance constituted a default which is incurable. The plaintiff moved seeking 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 defendant argues the plaintiff's failure to drain the pool violated Article 6 of the lease and that even if the pool was ultimately drained, the failure to do so when requested renders the default incurable. The defendant argues that the failure to drain the pool on or before August 31, 2021 invalidated the insurance policy "the moment that policy began to run, because the pool was not "drained *for the duration of the policy period*"" (see, Affirmation in Opposition, ¶ 19).

The defendant argues that even though the lease contemplated the use of plaintiff's pool in article 2 of the Lease such accommodation was subject to the landlord's rights "reserved under Article 6 of the Lease, that any such use-regardless of whether or not permitted under the lease-would not invalidate the Congregation's insurance for the Building or otherwise interfere with the Congregation's ability to insure the Building" (see, Affirmation in Opposition, ¶ 11). However, Article 6 only deals with fire insurance and not any other insurance at all. The introduction to the Article states it involved "Requirements of Law, Fire Insurance, Floor Loads" (id). Indeed, a careful review of the contents of the provisions of Article 6 do not involve liability or property insurance at all.

The Article first requires the tenant to comply with all rules and regulations promulgated by the New York Board of Fire Underwriters. Next, the Article prohibits the tenant from maintaining anything on the premises prohibited by the Fire Department and further orders an adjustment of fire insurance premiums if the tenant does anything to increase such fire insurance premiums. The Article does contain language supported by the defendant that states, as noted, that "tenant shall not do or permit any act or thing to be done in or to the demised premises which is contrary to law, or which will invalidate or be in conflict with public liability, fire or other policies of insurance at any time carried by or for the benefit of Owner requires some positive act or activity which frustrates the owner's ability to maintain insurance" (id). Thus, the language "other policies of insurance" most probably refers to fire insurance, the subject of the article as a whole. It is improbable that contained within a large article dealing with fire insurance there is a passing reference to "other policies of insurance" which conclusively refers to liability insurance and thus govern the outcome in this case. While further litigation in this regard is surely necessary it does not defeat the application for a Yellowstone at this time since there are surely questions whether Article 6 even references liability insurance at all.

Even if Article 6 does deal with liability insurance, the language of Article 6 specifically notes that the "tenant shall not do or permit any act or thing to be done" to the premises. Failing to drain the pool is not an act that was done to the premises, rather, it was a failure to act, which can hardly be considered a breach of the provision. Thus, the failure to drain the pool could not have been an "act" which invalidated the insurance policy. The defendant argues that "Article 6 of the Lease expressly reserved the Congregation's right to insure its valuable Building and that right is a condition of Eastern Athletic's use of the subject Premises" (see, Affirmation of Michael Pensabene in Opposition, ¶ 11). However, Article 6 does not intertwine or condition the tenant's use of the premises with the landlord's right to insure the building. Rather, Article 6 merely prohibits the tenant from committing any act that would invalidate any insurance policy. Continuing to maintain the pool is simply not an act that invalidated any insurance. Of course, this leads to an inescapable and circular question of fault. The landlord could not secure insurance, which the tenant may not frustrate, because of the pool's continued existence, yet the pool's continued existence is not a violation of the lease and not an act of frustration by the tenant. This reality results in an impossible situation for the landlord. They cannot secure insurance and cannot force the tenant to facilitate such

insurance. By the same token, the tenant's passive refusal cannot be a cause of landlord's problems although as long as the pool is not drained no insurance is possible. In any event, the above demonstrates that it is premature to conclude the default is incurable since it is possible no such default even exits.

Therefore, based on the foregoing, the motion seeking a Yellowstone is granted. Since the pool has been drained in any event the motion seeking a bond is denied. To be sure, the issues of damages incurred survives any Yellowstone analysis, however, those issues will develop throughout discovery. As noted, the motion seeking a Yellowstone injunction is granted.

So ordered.

ENTER:

DATED: November 24, 2021
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC