Cinema World Prods., Inc. v MBA-Brooklyn LLC.
2021 NY Slip Op 32704(U)
December 16, 2021
Supreme Court, Kings County
Docket Number: Index No. 503698/2021
Judge: Leon Ruchelsman
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

----------x

CINEMA WORLD PRODUCTS, INC.,

Plaintiff, Decision and order

- against - Index No. 503698/2021

MBA-BROOKLYN LLC., T. CO METALS, INC. &
John Does 1, 2, & 3,

Defendants, December 16, 2021

----------x

PRESENT: HON. LEON RUCHELSMAN

The plaintiffs have moved by order to show cause seeking a Yellowstone injunction and an injunction restraining defendant from terminating Plaintiff's lease. The defendants oppose 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 11, 1990 the plaintiff tenant entered into a lease with the defendant landlord concerning rental space located at 220 Dupont Street in Kings County. The lease was amended on March 27, 2002 and provided a termination date of April 30, 2011. Paragraph 8 of the second amendment provided that the tenant could extend the lease four times for five years each. To do so the second amendment required the tenant to notify the landlord one hundred and eighty days prior to the extension date. On April 22, 2021 the parties entered into a third amendment which extended the lease until April 30, 2021. Further, the third

amendment amended Paragraph 8 of the second amendment by replacing the four five-year options to renew with one ten-year option to renew. The third amendment also amended configurations of rent not relevant here and notably made no other changes to the second amendment. On October 20, 2020, within the one hundred and eighty days required by the second amendment, the tenant notified the landlord they sought to exercise the option to extend the lease for the ten-year period. Indeed, on that same date Richard Thypin, the principal of the landlord at the time, sent an email to tenant's counsel acknowledging the extension request and provided the proposed rents for the ensuing ten years. The tenant objected to the rental terms proposed and on November 10, 2020 the tenant issued a formal writing in the form of any email to Mr. Thypin expressing the rejection of the lease terms. The following day the landlord responded that the tenant had failed to properly exercise the option to renew by failing to provide notice one hundred and eight days prior to the renewal as outlined in the original lease and that consequently the option to renew was deemed null and void. The parties continued to negotiate a new lease and finally in February 2021 the tenant instituted this lawsuit. The amended complaint asserts the tenant validly exercised the option to renew and thus maintains a cause of action for breach of contract. The tenant

has now moved seeking a Yellowstone injunction and an injunction preventing the landlord from terminating the lease. The landlord has opposed the motion.

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]). While the precise facts of this case might not fit perfectly follow a standard Yellowstone pattern since no notice to cure or notice of default has been served, nevertheless, the core relief sought, namely a determination the plaintiff validly exercised the renewal option must be explored. Thus, in relevant part, CPLR §6301 allows the court to issue a preliminary injunction "in any action...where the plaintiff has demanded and would be entitled to a judgment restraining defendant from the commission or the continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff" (id).

It is well established that "the party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of the injunction and a balance of the equities in its favor" (Nobu Next Door, LLC v. Fine Arts Housing, Inc., 4 NY3d 839, 800 NYS2d 48 [2005], see also, Alexandru v. Pappas, 68 AD3d 690, 890 NYS2d 593 [2d Dept., 2009]). The Second Department has noted that "the remedy of granting a preliminary injunction is a drastic one which should be used sparingly" (Town of Smithtown v. Carlson, 204 AD2d 537, 614 NYS2d 18 [2d Dept., 1994]). Thus, the Second Department has been clear that the party seeking the drastic remedy of a preliminary injunction has the burden of proving each

of the above noted elements "by clear and convincing evidence" (Liotta v. Mattone, 71 AD3d 741, 900 NYS2d 62 [2d Dept., 2010]).

Paragraph 28 of the original lease states that "any notice by Tenant to Owner must be served by registered or certified mail addressed to Owner" (id). There is no dispute the option to renew was not served by registered or certified mail. Notwithstanding the admissions of the tenant and tenant's counsel that such failure was an inadvertent mistake there are questions whether the failure to serve such notice in the manner prescribed rendered the option renewal void. As noted, the notice was forwarded by telephone in full compliance with Paragraph 8 of the second amendment. Further, as noted, the landlord acknowledged such notice and even commenced the process outlined in Paragraph 8 by providing a rental schedule. Three weeks later upon discovery the tenant was unsatisfied with the lease terms presented retreated from its earlier endorsement of the notice presented and insisted upon the precise notice requirements of the original lease. However, there are serious questions whether the landlord's response to the tenant's option request constituted a waiver of any other formal notice requirements. Mr. Thypin has submitted an affidavit wherein he seeks to temper the impact of the email he sent on October 20, 2020 acknowledging the option request. He asserts that "in the phone call, the

attorney never notified me that the tenant was exercising the option to renew. Indeed, in October 2020, the attorney was trying to negotiate a rent reduction for the next six months of the current lease" (see, Affidavit of Richard Thypin, ¶ 12). However, the email subject line sent by Mr. Thypin that day states "Proposed Terms of 2021 Lease Extension, MBA - Brooklyn LLC" and the opening sentence of the email from Mr. Thypin states "per our discussion this morning, attached is a schedule of rent we would be looking for a ten year extension of the Lease" (see, email from Richard Thypin to Frank Taddeo, October 26, 2020 at 2:29 PM). There can be no reasonable examination of that email that does not unequivocally acknowledge the tenant's exercise of the option to renew. It is true the email further declines to afford any concessions to the tenant for the next six months and that might have also been a discussion between the parties earlier that day, however, that does not undermine the clear and unmistakable acceptance of the renewal option and a response to that request. Thus, there are surely questions whether the exercise of the option was proper under the circumstances. In any event, there is no reasonable view of the events which can lead to the conclusion the exercise of the option was void as a matter of law effectively ending the lease.

Therefore, considering all the criteria, the plaintiff has satisfied the necessary elements for an injunction maintaining the status quo until these issues are fully resolved. The request seeking an injunction preventing the landlord from taking any action to treat the lease as terminated is granted. As a consequence of this injunction, the landlord cannot take any action to market the property, contact real estate brokers or any other activity one would ordinarily take with vacant space. Of course, the tenant must continue to pay rent, at the current rate, during the pendency of the litigation. Any adjustments can be made when the lawsuit concludes. Thus, to the extent the tenant seeks a Yellowstone, such injunction is granted as noted.

In this vein, the plaintiff further seeks an order requiring the parties to submit to arbitration to resolve the issue of appropriate rent pursuant to the lease agreements. That request assumes the lease option has been properly exercised. However, as noted there are further questions that must be explored in that regard. Therefore, imposing that mandatory injunction requiring arbitration would effectively resolve the lawsuit in favor of the plaintiff. First, neither party has moved for summary judgement seeking such sweeping and final relief. More importantly, it is well settled that absent extraordinary circumstances a preliminary injunction is improper where to grant

such relief the movant would thereby obtain the ultimate relief the party would receive in a final judgement (Zoller v. HSBC Mortgage Corp. (USA), 135 AD3d 932, 24 NYS3d 168 [2d Dept., 2016]). Therefore, that portion of the relief sought is denied.

So ordered.

ENTER:

DATED: December 16, 2021
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC