Aqua Duck Flea Mkt. LLC v 612 Wortman Ave., LLC
2022 NY Slip Op 33209(U)
September 19, 2022
Supreme Court, Kings County
Docket Number: Index No. 522161/2019
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

AQUA DUCK FLEA MARKET LLC,

Plaintiff, Decision and order

- against - Index No. 522161/2019

612 WORTMAN AVENUE, LLC,

Defendant, September 19, 2022

PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking a Yellowstone injunction. The defendant has cross-moved seeking the right to terminate the lease. The motions have been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing all the arguments, this court now makes the following determination.

On June 12, 2013 the parties entered into an amended lease and numerous amended leases thereafter for space located near Montauk Avenue, Cozine Avenue, Fountain Avenue and Wortman Avenue in Kings County. The space is used as a pedestrian flea market. A notice to cure was served on May 10, 2019 alleging defaults relating to cracks, worn patches and an uneven drainage system. 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. The defendant has cross-moved seeking to terminate the lease on the grounds the plaintiff does not seek to cure the defects.

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]).

Article 7.01 of the lease states that the tenant "shall, at its sole cost and expense, take good care of the Premises including, without limitation, paving and curbing, and shall keep

the same in good order and condition" (id). The defendant asserts the only way in which the tenant can cure the defects and restore the lot is to completely repave and regrade the lot and that such improvements would cost over one million dollars. The plaintiff asserts that it has made all the necessary repairs and will continue to make repairs as they become necessary, however, repaving the entire lot is beyond what is required pursuant to the lease. Thus, contrary to the arguments of the defendant, the plaintiff does not assert that it unequivocally is unwilling to cure any defaults (Metropolis Westchester Lanes Inc., v. Colonial Park Homes Inc., 187 AD2d 492, 589 NYS2d 570 [2d Dept., 1992]), but rather the default alleged requiring a complete repaving of the lot is not a default under the lease.

The plaintiff submitted an expert affidavit of Anthony DiProperzio who concluded that "the subject property is not in a state of disrepair which would require the total demolition of the asphalt surfaces and replacement with new due [sic] to the use of the property by the Tenant as a flea market since 2013 and that the Tenant has performed reasonable repairs in order to maintain the property in reasonable good order and condition" (see, Expert Report of Anthony DiProperzio, page 1). Thus, a contrary expert report that disputes the one submitted by the plaintiff or isolated statements within Mr. DiProperzio's report that the defendant argues demonstrates a consensus regarding the

need for a total repaving of the lot are really questions of fact that require further inquiry and discovery. However, those considerations do not affect the injunction to which the plaintiff is entitled. Furthermore, it cannot be concluded at this juncture that the tenant, based upon language in the lease requiring the tenant to make all repairs, must provide a brand new paved lot at a cost of over one million dollars. A repair by its very terms cannot mean something new. There can be questions of fact whether something so damaged that is beyond repair must be replaced as new, however, those questions, as noted, do not demand a denial of the Yelloswtone injunction.

Therefore, based on the foregoing the motion seeking a Yellowstone injunction is granted. The cross-motion is consequently denied.

So ordered.

ENTER:

DATED: September 19, 2022
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC