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

----------x

JACK G. COURT STREET LLC,

Plaintiff, Decision and order

- against - Index No. 500395/2022

16 COURT STREET BROOKLYN OWNER LLC,

Defendant, May 24, 2023

----------x

PRESENT: HON. LEON RUCHELSMAN Motion Seq. #4

The defendant has moved pursuant to CPLR 3211 seeking to dismiss the amended complaint filed by the plaintiff. The plaintiff 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.

As recorded in a prior order, on January 12, 2007 the plaintiff tenant entered into a lease with landlord concerning the rental of space located at 16 Court Street, suite 2211 in Kings County. On April 22, 2022 the court granted a Yellowstone injunction staying any termination of the lease while the parties litigated whether a renewal option was validly exercised. On January 23, 2023 the plaintiff filed an amended complaint which included a claim for harassment pursuant to New York City Administrative Code §22-902. The harassment claim is based upon a notice served upon the tenant on November 1, 2022 seeking additional rent, a notice served on December 28, 2022 that reiterated the notice served the previous month and the original notice served on December 31, 2021. The landlord has now moved

seeking to dismiss the harassment claim on the grounds the claim fails to state any cause of action. As noted, the motion is opposed.

Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the complaint as true, whether the party can succeed upon any reasonable view of those facts (Ripa v. Petrosyants, 203 AD3d 768, 160 NYS3d 658 [2d Dept., 2022]). Further, all the allegations in the complaint are deemed true and all reasonable inferences may be drawn in favor of the plaintiff (BT Holdings, LLC v. Village of Chester, 189 AD3d 754, 137 NYS2d 458 [2d Dept., 2020]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, Redwood Property Holdings, LLC v. Christopher, 211 AD3d 758, 177 NYS3d 895 [2d Dept., 2022]).

Pursuant to New York City Administrative Code §22-902(a) a landlord engages in harassment when the landlord acts in any manner that "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" (id). Further, the landlord must engage in fourteen specific enumerated acts contained within

the statute. The fifth act states the landlord commits harassment by "repeatedly commencing frivolous court proceedings against a commercial tenant" (id). Further, the tenth act states the landlord commits harassment by "engaging in any other repeated or enduring acts or omissions that substantially interfere with the operation of a commercial tenant's business" (id).

However, as noted both those alleged acts also require the reasonable likelihood that such acts would cause the tenant to vacate or surrender the premises. Considering the Yellowstone injunction already granted and the fact the tenant could always seek additional Yellowstone injunctions, the mere service of two notices to cure, in this case, did not amount to any harassment as defined by the statute. First, a notice to cure or a notice to terminate is not a "court proceeding" since it does not involve the court at all. Likewise, the mere service of a notice to cure and even a subsequent notice to cure does not constitute any activity that substantially interferes with the operation of the tenant's business. Moreover, the service of a notice to cure is not an "enduring" act in any event. Rather, a notice to cure is a notice that a provision of the lease requires attention on behalf of the tenant (see, Waldbaum, Inc. v. Fifth Avenue of Long Island Realty Associates, 85 NY2d 600, 627 NYS2d 298 [1995]). Thus, if an obligation of the tenant remains unaddressed the

landlord can serve a notice to cure and if the breaches are not cured or if a Yellowstone injunction is not secured then the landlord can move to evict the tenant. Therefore, the mere service of two notices to cure does not constitute harassment as defined by the statute. The case cited by the tenant One Wythe LLC v. Elevations Urban Landscape Design Inc., 67 Misc3d 1207(A), 126 NYS3d 622 [Civil Court Kings County 2020] does not hold that the service of notices to cure, even if frivolous, constitute harassment. Rather, that case stated that the repeated commencement of frivolous court proceedings could constitute harassment. As already explained, notices to cure are not court proceedings and their production, even if frivolous, which the court does not even confirm, cannot constitute harassment.

Therefore, based on the foregoing the motion seeking to dismiss the harassment cause of action is granted.

The motion seeking to dismiss the remaining causes of action is denied at this time.

So ordered.

ENTER:

DATED: May 24, 2023
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC