

WCB Holdings, LLC v 421W14 Lessee, L.P.

2023 NY Slip Op 32674(U)

July 31, 2023

Supreme Court, New York County

Docket Number: Index No. 654326/2022

Judge: Melissa A. Crane

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MELISSA A. CRANE **PART** **60M**

Justice

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INDEX NO. 654326/2022

WCB HOLDINGS, LLC,

MOTION DATE 05/26/2023

Plaintiff,

MOTION SEQ. NO. 002

- v -

421W14 LESSEE, L.P., LONDON TRUST MEDIA
HOLDINGS, LLC

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 98, 104, 105, 106, 107, 108, 110, 124, 128

were read on this motion to/for DISMISS

On September 5, 2018, Landlord and Tenant entered into the Lease at issue whereby Tenant rented space from Landlord’s building located at 436 West 15th Street, New York, NY (the “Premises”). On March 26, 2019, Landlord and Tenant added the first amendment to the Lease (the “First Amendment”) whereby Tenant leased additional cellar space located at 421 West 14th Street, New York, NY. Tenant entered into the Lease with the plan to convert the Premises from an office to a restaurant. According to the Lease, Tenant undertook to use, occupy and operate the Premises solely as a “first-class, high quality and reputable full-service . . . restaurant and bar.” The Lease placed the expense of converting the Premises into a restaurant and bar solely on Tenant, except for limited construction funds Landlord would provide (the “Construction Allowance”).

According to the Lease, within 30 days after Landlord’s receipt of a request for disbursement of the Construction Allowance and all required documentation, and provided that all conditions to disbursement were still met (including the absence of a monetary default), “Landlord

shall pay to Tenant the amount shown on such Tenant's Request for the portions of Initial Tenant's Work reflected thereon." (Doc 79 [Lease] § 4.03[b]).

In the Lease, Landlord pre-approved Tenant's initial plans and designs. Only if Tenant chose to depart significantly from those plans did the Lease afford Landlord certain additional review and approval rights. Specifically, if the change qualified as an "Alteration," then Tenant had to submit detailed architectural, engineering and mechanical plans for Landlord's review and approval. According to the Lease, Landlord's consent to Tenant's Plans "may be withheld, granted and/or conditioned in Landlord's sole and absolute discretion." (Doc 79 [Lease] § 13.02). Additionally, if Landlord disapproved of Tenant's Plans, Tenant was required to resubmit plans until satisfactory to Landlord. Landlord reserved the right to immediately halt "any operation that is reasonably deemed hazardous or poses any potential danger to Tenant, the Premises or any other part of the facility." (Doc 79 [Lease] at pg. 119).

Here, the Landlord halted construction in Spring 2021 ostensibly due to allegedly hazardous conditions in connection with the construction project. Tenant alleges that Landlord imposed a series of onerous and extracontractual construction audits and information requests on Tenant and continued to require extra-contractual audits on Tenant through 2022. Tenant also alleges that Landlord's audits culminated in Landlord proposing a final construction budget to complete the project that doubled the expected costs to Tenant.

Having received default notices, and having been shut off from continuing to renovate, Tenant filed this action on November 15, 2022 initially seeking a Yellowstone injunction. On December 8, 2022, this court granted Yellowstone relief. On January 17, 2023, Tenant filed its amended complaint asserting ten causes of action. Landlord moved to dismiss. On May 26, 2023, the court dismissed the third cause of action for constructive eviction, the seventh cause of action

for promissory estoppel, and the tenth cause of action for fraud in the inducement (*see* Doc 122 [5/26/23 Interim Order]). The court reserved on the first and second causes of action for declaratory relief and permanent injunction respectively (*id.*). The court also reserved on the ninth cause of action for commercial tenant harassment (*id.*). This decision and order now addresses the three causes of action the court has not yet addressed.

Discussion

Tenant's theory that landlord agreed to a rent abatement underlies the cause of action for declaratory relief. However, the Lease contradicts this theory. The Lease contains a strict no waiver clause:

27.01 The failure of either party to insist in any one or more instances upon the strict performance of any one or more of the obligations of this Lease, or to exercise any election herein contained, shall not be construed as a waiver or relinquishment for the future of the performance of such one or more obligations of this Lease or of the right to exercise such election, but the same shall continue and remain in full force and effect with respect to any subsequent default, act or omission. No agreement hereafter made between Landlord and Tenant shall be effective to change, modify, waive, release, discharge, terminate or effect an abandonment of this Lease, in whole or in part, unless such agreement is in writing, refers expressly to this Lease and is signed by the party against whom enforcement of the change, modification, waiver, release, discharge or termination or effectuation of the abandonment is sought.

(Doc 79 [Lease] § 27.01)

Landlord did not waive the Lease's requirement of a written amendment. Tenant's alleged modification for a one-sided abatement of rent did not impose any additional obligations for Tenant to perform. Rather, these actions were consistent with preexisting obligations under the Lease or occurred well after Tenant failed to pay rent. Accordingly, the alleged rent abatement cannot serve as a reason to declare the notice of default void or improper. As there is no dispute the second default notice was served properly, the court dismisses the first cause of action for declaratory relief. To the extent the amount of rent due is contested, it does not relieve Tenant of the obligation to pay rent.

Meanwhile, Tenant's claim for permanent injunction also fails because it is dependent on Tenant's insufficient claim for declaratory judgment. Accordingly, the court dismisses the second cause of action as well.

However, the court denies that part of the motion to dismiss the claim for commercial tenant harassment. Section 22-902, *et seq.* of the New York City Administrative Code ("NYCAC") provides:

[C]ommercial tenant harassment is any act or omission by or on behalf of a landlord that (i) 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, and (ii) includes one or more of the following...10. Engaging in any other repeated or enduring acts or omissions that substantially interfere with the operation of a commercial tenant's business[.]

(NYCAC § 22-902)

The code explicitly indicates that the definition of commercial tenant harassment does not include "[a] landlord's lawful termination of a tenancy, lawful refusal to renew or extend a lease or other rental agreement, or lawful reentry and repossession" of the covered property (NYCAC § 22-902[b]). Therefore, the statute clarifies that the landlord's lawful exercise of its right to recover leased space is not harassment.

Landlord alleges that Tenant waived this provision. However, the code does not expressly provide that its provisions can be waived (*see* NYCAC § 22-902) and waiver of harassment protection would otherwise likely be void on public policy grounds. Moreover, at the time the parties entered into the Lease, Tenant had every reason to believe that Landlord would act in good faith and not stand in the way of the renovations. Therefore, Tenant did not waive this statutory protection.

Tenant pleads in the Amended Complaint that "Landlord has been interfering with Tenant's permitted repairs and construction activities and has prevented Tenant from opening its

business.” In the complaint, Tenant alleges affirmative actions that, at this stage adequately plead harassment, including “onerous and extracontractual construction audits and information requests on Tenant” and continuous ongoing prohibition from resuming the build-out of the premises. If Tenant is correct that Landlord unreasonably requested numerous extracontractual audits and unreasonably prohibited Tenant from resuming construction, arguably Landlord has substantially interfered with Tenant’s ability to begin operating their new restaurant business. Further, this action could reasonably cause Tenant to vacate or surrender rights under the Lease, because Tenant would be unable to use the space for its intended purpose (*see Prinkipas LLC v. Charlton Tenants Corp*, 2022 WL 3213248, at *5 [N.Y. Cty. Aug. 08, 2022] [in another case involving a restaurant build out, court denied dismissal of claim for commercial tenant harassment where Landlord allegedly withheld its consent for (1) the location of additional outdoor seats, (2) the façade permit and (3) approval of new plumbing lines]).

Indeed, it is worth noting that the Special Master the parties employed for the purpose of sorting out the construction issues has already determined that Tenant’s plans are sufficient for construction to resume. (see EDOC 145 “We find the construction documents submitted to date to be sufficient to allow the Tenant, WBC Holdings, LLC, to proceed with construction at this time”). This finding from the Special Master raises an issue of fact as to whether or not Landlord engaged in commercial tenant harassment by withholding its consent to construction in bad faith. Therefore, the court cannot dismiss this claim at this stage.

Accordingly, it is


ADJUDGED, DECREED AND DECLARED that the second default notice is valid; and
it is further

ORDERED THAT the court grants that part of the motion to dismiss the first and second causes of action; and it is further

ORDERED THAT the court denies that part of the motion seeking to dismiss the cause of action for commercial tenant harassment.

7/31/2023

DATE


MELISSA A. CRANE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE