

East 54th Operating LLC v Brevard Owners, Inc.

2023 NY Slip Op 33101(U)

September 8, 2023

Supreme Court, New York County

Docket Number: Index No. 154045/2023

Judge: Arlene P. Bluth

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

PRESENT: HON. ARLENE P. BLUTH **PART** **14**

Justice

-----X

EAST 54TH OPERATING LLC

Plaintiff,

- v -

BREVARD OWNERS, INC.,

Defendant.

-----X

INDEX NO. 154045/2023

MOTION DATE N/A

MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

Plaintiff’s motion for injunctive relief restraining defendant from taking any action to terminate or cancel the commercial lease at issue here and from attempting to evict plaintiff or otherwise evict plaintiff from the garage is granted as described below. Plaintiff is also granted leave to amend its complaint.

Background

This case concerns a parking garage which defendant (the landlord) claims is structurally unsound, filled with cracks, and in dire need of repair. Previously, this Court ordered that plaintiff had to vacate the garage so that defendant could complete the allegedly necessary and urgent repairs (NYSCEF Doc. No. 76 at 8). This Court observed that “Although the parties disagree about how quickly those repairs need to be completed, this Court prefers not to invite a prolonged dispute about that fact. A lengthy delay to explore the many ways in which the construction might be theoretically completed is of little concern in light of the extensive repairs and the serious consequences if those repairs are not promptly completed” (*id.*). In other words,

as this Court noted, “defendant need not wait for the garage to collapse or get close to that point before it is entitled to access to make these repairs” (*id.* at 5).

The Court conditioned the aforementioned injunctive relief granted to defendant on the posting of a bond (*id.* at 8). The Court also granted plaintiff a *Yellowstone* injunction and tolled the relevant cure period conditioned on plaintiff posting a bond (*id.* at 8-9).

Now, plaintiff seeks an additional *Yellowstone* injunction related to additional notices of default sent by defendant. According to plaintiff, these notices include complaints about charging too much for parking, charging residents of the building more than the general public to park, plaintiff’s refusal to provide access for the planned repair work, plaintiff’s alleged refusal to shut down its business while the work is done and that plaintiff told its customers that it would not be closing the garage for the repairs.

Plaintiff seeks injunctive relief to preserve the status quo. It also demands that any undertaking the Court requires it to post should be limited to the continued payment of rent. Finally, plaintiff seeks leave to amend the complaint to include certain default notices.

In opposition, defendant admits it sent three additional notices of default in June 2023 (although it acknowledges it withdrew the fourth notice of default and portions of the second notice). It points out that the Court’s order requiring plaintiff to post a bond has been stayed pending appeal and that no bond has been posted by plaintiff.

In reply, plaintiff claimed that the defendant did not adequately refute its arguments that it is ready, willing, and able to cure any defaults should the Court find that the plaintiff is in default of the lease.

Discussion

In the moving papers, plaintiff observed that although it was granted a temporary stay of this Court's order (which, among other things required plaintiff to vacate the premises while repairs were completed), the preliminary injunction application remained pending before the appellate court. On September 7, 2023, the Appellate Division, First Department concluded that "It is ordered that the motion is granted to the extent of staying enforcement of that portion of the order on appeal requiring plaintiff-appellant to vacate the subject premises, on the condition that the appeal is perfected for the December 2023 Term of this Court."

As a preliminary matter, based on this order, the Court grants plaintiff a *Yellowstone* injunction to the extent that the additional default notices that sought to hold plaintiff in default for not leaving the premises (so that defendant could perform the purportedly urgently needed repairs) are stayed pending further order of this Court or the Appellate Division. The Court also grants injunctive relief with respect to the remaining portions of the subsequent default notices as plaintiff demonstrated that it is willing and able to cure any alleged defaults.

No mention is made by the First Department with respect to the portion of this Court's previous order requiring the posting of the \$1.5 million bond. In any event, the Court finds that plaintiff's continued payment of rent is a sufficient undertaking solely for purposes of the injunctive relief sought in this motion, as the Appellate Division has effectively stayed the making of repairs as previously directed.

The Court also grants the branch of the motion that seeks leave to amend as amendment must be granted freely (CPLR 3025[b]). To the extent that the order to show cause sought legal fees and costs, that request is denied.

Summary

The Court grants the branches of the instant motion that seek a *Yellowstone* injunction in their entirety. The instant dispute about who is responsible for the repairs to the garage (and who must pay) remains undecided and plaintiff insists it is ready, willing, and able to cure a default should the Court find it is responsible.

Given that the Appellate Division, First Department has found that plaintiff need not vacate the premises, it is therefore reasonable to toll the cure periods for the subsequent default notices related to plaintiff's temporary vacatur (including the vacatur itself, comments about closing and access for the repairs). How this affects the repairs, including when, how and who will perform them, is unclear. Nothing prevents defendant (if it wishes) from making another application that seeks access to perform the repairs that conforms with the appellate court's ruling, to the extent that making repairs under that ruling is a possibility.

The other issues relating to the prices charged is another matter that can be cured and plaintiff is entitled to a stay of these cure periods as well. Moreover, given the procedural posture of this case, the Court prefers that the status quo be maintained while the parties seek relief before the Appellate Division.

Accordingly, it is hereby

ORDERED that plaintiff's motion for a *Yellowstone* injunction is granted and defendant is hereby restrained from taking any action to terminate or cancel the parties' commercial lease dated January 27, 2012 and from commencing any proceedings to evict plaintiff from the two-level garage premises located at 245 East 54th Street in Manhattan until further order of this Court or the Appellate Division, First Department; and it is further


ORDERED that this injunctive relief is conditioned on plaintiff’s continued payment of rent (which shall serve as the undertaking for this relief); and it is further

ORDERED that the cure periods for the subject default notices are tolled until further order of this Court; and it is further

ORDERED that plaintiff is granted leave to amend is granted, and the amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof and plaintiff shall upload the proposed amended complaint as a separately e-filed document on NYSCEF on or before September 14, 2023; and it is further

ORDERED that the defendant shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that the Court will schedule a conference for January 17, 2024 (in light of the pending appellate practice). By January 10, 2024, the parties are directed to upload 1) a discovery stipulation signed by all parties, 2) a stipulation of partial agreement that identifies the areas in dispute or 3) letters explaining why no agreement can be reached. Based on these submissions the Court will assess whether or not an in-person conference is necessary. The failure to upload anything by January 10, 2024 will result in an adjournment of the conference.

<p><u>9/8/2023</u> DATE</p>			 <hr/> ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE