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12 Wooster St. Tenants Corp. v 12 Wooster St. Leasing Corp.
2020 NY Slip Op 34145(U)
December 9, 2020
Supreme Court, New York County
Docket Number: 655780/2020
Judge: Arthur F. Engoron
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 37EFM

----------X

12 WOOSTER STREET TENANTS CORP.

Plaintiff,

- v -

12 WOOSTER STREET LEASING CORP.,

Defendant.

INDEX NO. 655780/2020

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION AND ORDER

----------X

HON. ARTHUR F. ENGORON:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 18, 19, 20, 21, 22, 23

were read on this motion for EQUITABLE RELIEF.

Upon the foregoing documents, defendant's cross-motion to dismiss is granted, and the instant action is dismissed, without prejudice, on the ground of "prior action pending."

Background

Plaintiff, 12 Wooster Street Tenants Corp. ("Landlord"), is a cooperative corporation that owns 12 Wooster Street, New York, NY ("the Building"). Defendant, 12 Wooster Street Leasing Corp. ("Tenant"), was the sponsor of the offering plan by which Landlord became a cooperative corporation. The 100+-year-old Building is a five-story walk-up consisting of residential units on floors two through five and commercial space on the ground floor and basement. On or about January 1, 1985, Landlord and Tenant entered in a lease agreement ("the Lease") whereby Tenant leased the commercial space of the Building ("the Premises").

Sometime in 2019, Landlord's Board of Directors voted to install an elevator in the Building. Landlord alleges that the decision to install an elevator was based in part on the Building's staircase being unsafe. Landlord further alleges that it has already spent in excess of $400,000.00 in soft costs (engineering, etc.) towards the elevator installation.

Pursuant to the permit issued by the New York City Department of Buildings, installation of the elevator will require the Building to be vacant during construction. Initially, Landlord alleged that the construction will take approximately one year and that every occupant of the Building, other than Tenant, has temporarily relocated so that the elevator installation can proceed (and/or because the staircase is unsafe). (Just recently, Landlord said Tenant

might only have to relocate for approximately half a year.) However, due to Tenant's refusal to vacate the Premises, the elevator installation has been put on hold.

On September 4, 2020, Tenant initiated an action against Landlord in this Court (Supreme Court, New York County), seeking a declaratory judgment and injunctive relief to prevent Landlord from interfering with Tenant's rights to use of the Premises ("the Other Action"). Subsequently, Landlord sent Tenant a notice to cure, dated October 22, 2020, advising Tenant that it had breached the Lease by, inter alia, failing to provide Landlord with access to the Premises in connection with the elevator installation and demanding that Tenant cure its violations and provide continuing access on or before October 23, 2020 in order to avoid termination of the Lease ("the Notice to Cure"). Landlord notes that Tenant failed to comply with the Notice to Cure.

On or about October 19, 2020, before the Notice to Cure period had expired, Tenant filed a motion by Order to Show Cause in the Other Action, seeking preliminary injunctive relief to enjoin Landlord from, inter alia, commencing any proceeding to terminate the Lease based upon the Notice to Cure and interfering with Tenant's right of possession of the Premises, and to stay and toll Tenant's time to cure the alleged defaults claimed in the Notice to Cure (a so-called "Yellowstone injunction").

Prior to Justice Carol Ruth Feinman signing the Order to Show Cause in the Other Action, Landlord served Tenant with a notice to terminate, dated October 26, 2020, advising Tenant that the Landlord had elected to terminate the Lease as of November 16, 2020 ("the Notice to Terminate"). Additionally, on October 28, 2020, Landlord commenced the instant action against Tenant, seeking, inter alia, injunctive relief to enjoin and restrain Tenant from blocking access to the Premises and interfering with construction. Essentially, Landlord is attempting to obtain an order requiring Tenant to vacate the Building until the elevator project is complete, expected to last at least a year, but possibly as little as six months, without any compensation and/or abatement.

The next day, on October 29, 2020, Hon. Carol Ruth Feinman signed an Order to Show Cause in the Other Action, granting Tenant's request for a temporary restraining order enjoining Landlord from terminating the Lease and from commencing any proceeding to terminate the Lease based upon the Notice to Cure and ordering that Tenant's right to cure the alleged default be tolled pending the hearing of Tenant's application. The return date for that Order to Show Cause is currently scheduled for December 18, 2020.

On October 30, 2020, Landlord moved by Order to Show Cause in the instant action to compel Tenant to grant Landlord access to all portions of the Premises during the construction of the elevator installation and to enjoin Tenant from interfering with said construction (i.e., to vacate, as indicated above). On November 6, 2020, this Court signed Landlord's Order to Show Cause.

On or about November 24, 2020, pursuant to CPLR 3211(a)(1), (4), and (7), Tenant cross-moved to dismiss the instant action. In opposition, and in support of its cross-motion,

Tenant argues that the elevator installation is not a "repair" or an "improvement" in the context of the Lease (see below). Tenant also contends that forcing it to vacate the Premises is a violation of its right to quiet enjoyment. Tenant further argues that this action must be dismissed, as there is a "prior action pending" (i.e., the Other Action) that involves the same issues. Lastly, Tenant contends that there is no evidence that the stairway is dangerous or cannot be made safe.

In reply, Landlord argues that the elevator installation is necessary and will benefit Tenant and that Tenant's Yellowstone application in the Other Action is time-barred because it was "initiated" after the expiration of Tenant's cure period as set forth in the Notice to Cure. Landlord also points to an expert affidavit in its reply papers claiming that the stairway is unsafe.

Discussion

"In order to obtain injunctive relief, a plaintiff must establish: (1) a likelihood of success on the merits of the pending action, (2) irreparable injury absent such relief, and (3) a balancing of the equities in favor of the relief sought." Amarant ex rel. Mercury Beach-Maid v D'Antonio, 197 AD2d 432, 434 -35 (1st Dept 1993).

The law on the dismissal of a complaint pursuant to CPLR 3211 is clear and well-settled. Dismissal pursuant to CPLR 3211(a)(1) is warranted where the documentary evidence submitted conclusively establishes, as a matter of law, a defense to the asserted claims. Leon v Martinez, 84 NY2d 83, 88 (1994); accord; Warberg Opportunistic Trading Fund, L.P. v GeoResources, Inc., 112 AD3d 78, 82-83 (1st Dept. 2013) ("[d]ismissal under CPLR 3211(a)(1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law"). Dismissal pursuant to CPLR 3211(a)(4) is warranted where "there is another action pending between the same parties for the same cause of action in a court of any state … ." Dismissal pursuant to CPLR 3211(a)(7) is warranted where, after accepting the facts alleged as true and according plaintiff the benefit of every possible favorable inference, the court determines that the allegations do not fit within any cognizable legal theory. Leon v Martinez, supra, 84 NY2d at 87-88; see also EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 (2005) ("[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus" in determining a motion to dismiss for failure to state a cause of action). A complaint survives a motion to dismiss for failure to state a cause of action if it gives the court and the parties "notice" of what is intended to be proved and the material elements of a cause of action. CPLR 3013.

The Lease states that Tenant will provide "access" to the Premises for Landlord to make "repairs" and "improvements" to all parts of the Building, with no abatement of rent or other compensation for any inconvenience or discomfort arising therefrom; however, the Lease does not go into detail about the extent of such "access." Normally, and to this Court, "access" does not contemplate a possible year-plus-long eviction without any compensation. Landlord argues that the Lease contemplates installation of an elevator. However, the form Lease states only, in generic language, that Landlord may prescribe and

regulate which elevator and entrances shall be used by Tenant and that Landlord will furnish elevator service if the Building contains an elevator.

At best for the Landlord, the Lease is ambiguous as to whether Landlord can force Tenant to vacate the Premises for an extended period of time. In any event, this Court need not and does not reach the merits of that issue, as Tenant has demonstrated that the Other Action involves the same parties and the same issue, i.e., whether Landlord has the right to evict Tenant from the Premises during an elevator installation.

Furthermore, it appears that Tenant has made out the elements required for a Yellowstone injunction in the Other Action. "A Yellowstone injunction maintains the status quo so that a commercial tenant, when confronted by a threat of termination of its lease, may protect its investment in the leasehold by obtaining 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, 514 (1999). Here, Tenant has established that it holds a commercial lease; it received a Notice to Cure; it requested injunctive relief on October 19, 2020, prior to the cure period deadline set forth in the Notice to Cure; and it is prepared and maintains the ability to cure the alleged default. 225 E. 36th St. Garage Corp. v221 E. 36th Owners Corp., 211 AD2d 420, 421 (1st Dept. 1995) ("It is well settled that in order to obtain a Yellowstone injunction, the moving party must demonstrate that: (1) it holds a commercial lease; (2) it received from the landlord either a notice of default, a notice to cure, or a threat of termination of the lease; (3) it requested injunctive relief prior to the termination of the lease; and (4) it is prepared and maintains the ability to cure the alleged default by any means short of vacating [i.e., totally abandoning] the premises.").

While this Court is sympathetic to Landlord and its uphill, protracted, expensive, and frustrating battle against a recalcitrant tenant, to install an elevator, the appropriate forum for determination of the issues herein is to have the parties proceed to a resolution in the litigation before Hon. Carol Ruth Feinman (if the parties cannot settle the matter, which this Court attempted to foster, but unsuccessfully)

This Court has considered Landlord's other arguments and finds them to be unpersuasive and/or non-dispositive.

Conclusion

Motion to dismiss granted. The Clerk is hereby directed to enter judgment dismissing this action not on the merits and, therefore, without prejudice.

12/9/2020
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
[ ] GRANTED [X] DENIED [ ] GRANTED IN PART [ ] OTHER

APPLICATION:	☐ SETTLE ORDER		☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN		☐ FIDUCIARY APPOINTMENT	☐ REFERENCE