SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 39

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205-215 LEXINGTON AVENUE ASSOCIATES LLC

Plaintiff,

- v -

201-203 LEXINGTON AVENUE CORP.,

Defendant.

INDEX NO. 655529/2017

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 32, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 47, 48, 49, 50, 51, 52

were read on this application to/for Injunction/Restraining Order

HON. SALIANN SCARPULLA:

Plaintiff 205-215 Lexington Avenue Associates LLC ("Tenant"), a tenant at 201-203 Lexington Avenue, also known as 205 Lexington Avenue, New York, New York ("Premises"), brings this action for declaratory and injunctive relief against its landlord, defendant 201-203 Lexington Avenue Corp. ("Landlord"), seeking a declaration that Tenant's notice to renew its long-term commercial ground lease at the Premises ("Lease"), given after the deadline to exercise the option to renew, was effective *nunc pro tunc*.

Tenant now moves, by order to show cause, for an order granting a *Yellowstone* injunction restraining Landlord from: (1) taking any action to terminate the Lease for the

Premises or refusing to renew the Lease; (2) commencing any legal proceeding against Tenant – summary, holdover, ejectment or otherwise – in the Civil Court of the City of New York or any other court; or (3) interfering with or interrupting Tenant's use and enjoyment of the Premises pursuant to the terms of the Lease pending the outcome of this action, including, but not limited to, by leasing the Premises to a new tenant, effective after February 27, 2018."

Background

Landlord entered into a long-term commercial ground lease with Tenant's predecessor in interest on February 27, 1963. Landlord also entered into an agreement with Tenant's predecessor in interest, dated April 25, 1966, which authorized the construction of six specified connection, or cut-throughs ("Cut-Through Agreement"), between the Premises and an adjoining building located at 215 Lexington Avenue ("215 Lexington"). The leasehold interest was subsequently transferred and assigned, with Tenant taking over the Lease on May 23, 2000.

The Lease's initial 55-year term expires on February 27, 2018. However, the Lease provides for two successive renewal terms of 22 years each. Pursuant to Article 21 of the Lease, to exercise its right to renew the Lease, Tenant must not be in default "in respect to a matter as to which notice of default has been given hereunder" and must, "at least twelve (12) months prior to the first renewal term [February 27, 2018, *i.e.* no later than February 27, 2017], . . . notify Landlord of its election to exercise the right to renew the term of this lease for the first renewal term." Upon renewal, Landlord would receive an adjustment in the rent equal to 6% of the fair market value of the Premises "considered

as vacant and unimproved, unencumbered by this lease" as of the commencement of the renewal term pursuant to section 21.02 of the Lease.

According to David Eshaghian ("Eshaghian"), the Tenant's managing member, when Tenant took over the Lease in 2000, the Premises had recently gone through a foreclosure sale, "was in dire need of repair and the vacancy rate was approximately 40%." He states that Tenant made major improvements to the premises over the course of the tenancy with the intention of retaining the Lease for the maximum term. Since 2000, Tenant has allegedly spent approximately $2.4 million on improvements to the Premises, of which $1.5 million was spent in the last 5 years, and approximately $425,000 in the five months preceding the instant action.[1] These improvements include, among other things, opening additional connections to 215 Lexington and constructing a sky bridge between the two buildings, repairing the façade, installing sprinklers, upgrading the elevator mechanicals, and most recently, renovating the lobby. As to the lobby renovation, Tenant allegedly spent: $23,700 on November 27, 2016 for architectural and consulting fees; $376,367 on May 2, 2017 for "Lobby Renovation & upgrade"; $21,376 on March 24, 2017 for light fixtures; and $13,400 on August 11, 2017 for automatic handicapped doors.

Tenant failed to issue its notice of renewal by February 27, 2017. Eshaghian states that this was due to "office failure caused by extenuating personal circumstance." He states that Tenant is "in essence a family business run predominantly by [him], [his]

[1] Tenant also submits evidence of improvements made to 215 Lexington, arguing that the improvements enhanced the collective value of the interconnected buildings.

daughter, and [his] spouse, together with a bookkeeper and a secretary" and that, at the time the notice of renewal was due, his adult son was facing serious health issues, which caused Eshaghian to let the renewal deadline lapse.

On May 3, 2017, Tenant received a "Notice of Lease Termination Date" ("Notice of Termination"), in which Landlord stated that, "in the absence of the required notice of election [of renewal], Landlord shall deem the Lease terminated as of February 27, 2018."[2] By letter dated May 5, 2017, Tenant attempted to exercise its option to renew the Lease for the first renewal term of 22 years, which Landlord rejected.

Negotiations failed and Tenant commenced this action. By order to show cause, dated September 19, 2017, Tenant's motion for a temporary restraining order was granted, enjoining Landlord from taking any action to terminate the Lease, commencing any legal proceeding against Tenant or interfering with Tenant's use and enjoyment of the Premises, including, by leasing the Premises to a new tenant after February 27, 2018, pending the outcome of this *Yellowstone*/preliminary injunction application.

Discussion

As a preliminary matter, a *Yellowstone* injunction is not available in the present circumstances. A "*Yellowstone* injunction only serve[s] to forestall [a landlord] from prematurely cancelling the lease during its initial term, in order to afford an opportunity for plaintiff to obtain a judicial determination of its breach and what would be required to cure it." *Waldbaum, Inc. v Fifth Ave. of Long Is. Realty Assoc.*, 85 N.Y.2d 600, 606

[2] Notably, while the Notice of Termination is dated May 2, 2017, the cover letter from Landlord's attorney is dated May 3, 2017.

(1995). Here, the issue is not an alleged default under the Lease and Landlord's threatened termination of the Lease, but Tenant's failure to meet a condition precedent to renew the Lease. "It is settled that the grant of *Yellowstone* relief does not obviate the necessity to satisfy [a] condition precedent to renewal . . . ." *Nobu Next Door v Fine Arts Hous.*, 3 A.D.3d 335, 336 (1st Dept 2004), *affd* 4 N.Y.3d 839 (2005). As such, Tenant cannot rely on a *Yellowstone* injunction to permit it to "cure" its failure to satisfy the Lease's condition precedent to renewal, a timely notice of renewal.

However, the Tenant also seeks a preliminary injunction pending the resolution of the instant action, and the Landlord disputes the Tenant's entitlement to this relief.

"A party seeking a preliminary injunction must clearly demonstrate (1) the likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the injunction is not issued; and (3) a balance of the equities in the movant's favor." *U.S. Re Cos., Inc. v Scheerer*, 41 A.D.3d 152, 154 (1st Dep't 2007).

First, the Tenant has made a sufficient showing of likelihood of success to warrant the issue of a preliminary injunction. Generally, when a tenant fails to provide notice of its intention to exercise an option within the time prescribed by contract, it forfeits the option. *135 E. 57th St. LLC v Daffy's Inc.*, 91 A.D.3d 1, 4 (1st Dep't 2011). However,

> "[e]quity will relieve a tenant from a failure to timely exercise an option in a lease to renew or purchase if (1) the tenant in good faith made substantial improvements to the premises and would otherwise suffer a forfeiture, (2) the tenant's delay was the result of an excusable default, and (3) the landlord was not prejudiced by the delay."

Id. (internal quotation marks and citation omitted). Tenant's recent expenditures on the lobby renovation—in particular, the $376,367 incurred on May 2, 2017, one day before it received the Notice of Termination and allegedly became aware of its failure to give timely notice of renewal—demonstrate that it made substantial improvements to the Premises with the intention of renewing the Lease, which may entitle it to protection against a forfeiture.[3]

To the extent that Landlord relies on *Baygold Assoc., Inc. v Congregation Yetev Lev of Monsey, Inc.*, 19 N.Y.3d 223 (2012) to argue that "[t]his narrow equitable doctrine" is not intended to protect an out-of-possession tenant that merely collects rents from subtenants, Landlord's reliance is misplaced. *Id.* at 228. In that case, the Court of Appeals based its decision on the fact that the out-of-possession commercial tenant "fail[ed] to make any improvements in anticipation of renewal and [did] not possess any good will in a going concern." *Id.* at 228-229. Here, unlike in *Baygold Assoc., Inc.*,

[3] I note that not every alleged improvement entitles Tenant to protection against forfeiture. For example, improvements dating back several years "have been effectively amortized and depreciated over the life of the lease," such that Tenant "has reaped the benefit of any initial expenditure." *Soho Dev. Corp. v Dean & DeLuca*, 131 A.D.2d 385, 387 (1st Dep't 1987) (internal quotation marks and citation omitted); *see also Trieste Group, LLC v Ark Fifth Ave. Corp.*, 13 A.D.3d 207, 207 (1st Dep't 2004) (finding no forfeiture from $67,000 worth of improvements "made three to five years before the initial lease term expired"). Nor can a tenant claim it will suffer a forfeiture because it made improvements required by the Lease. *See Kaplan v Amsterdam Video*, 266 A.D.2d 168, 169 (1st Dep't 1999) (finding that "[n]o equitable interest warranting protection against forfeiture [was] shown where the lease provided that the tenant was to bear the expense"). In addition, the good will that a tenant has created among its subtenants is not of the sort that creates an equitable interest in the leasehold, as the rule protects "interest in a 'long-standing location for a *retail business*.'" *135 E. 57th St. LLC*, 91 A.D.3d 1, 6 (1st Dep't 2011) (emphasis added) (citation omitted).

Tenant has "expended [substantial] monies on improvements" and therefore, is distinguishable. *Id.* at 228.[4]

Landlord argues that Tenant cannot demonstrate likelihood of success on the merits because it has unclean hands. Specifically, Landlord argues that, in contravention to Article 6 of the Lease, Tenant breached the Lease by making substantial alterations to the Premises without: (1) obtaining prior written Landlord approval of the individual projects; (2) obtaining prior written Landlord approval of the requisite architect or engineer detailed plans, specifications and cost estimates; and (3) furnishing to Landlord the requisite surety company performance bond. In addition, Landlord states that the additional cut-throughs, which Tenant created between the Premises and 215 Lexington, were in violation of the Cut-Through Agreement. Landlord claims that, under the Lease, it does not have the right to inspect the Premises and that Tenant concealed its alterations to the Premises. Landlord argues that Tenant may not rely on the alternations it made, in breach of the Lease and the Cut-Through Agreement, to procure equitable relief.

The argument is unconvincing. Section 14.01 of the Lease authorizes Landlord to enter the Premises "at all reasonable times for the purpose of (a) inspecting the same" and article 18 of the Lease further provides that, in the event of a breach of the Lease, the Landlord shall give Tenant written notice of the breach and an opportunity to cure, before

[4] Moreover, Tenant is not required to additionally demonstrate that it possesses good will in a going concern. *See Blumenthal v 162 E. 80th Tenants*, 88 A.D.2d 871, 872 (1st Dep't 1982) ("[A] forfeiture could result . . . where the tenant has made valuable improvements on the property *or* where he has a long-standing interest in that particular location.") (emphasis added).

declaring a default and terminating the Lease, which Landlord has never done. Tenant also avers that all the cut-throughs it made were authorized by the Cut-Through Agreement and Landlord does not provide any evidence to the contrary. Moreover, Landlord has "made no showing that [it] ha[s]been injured" by Tenant's alleged breaches, therefore, its contention that Tenant's "unclean hands bar it from obtaining the equitable relief of an injunction is . . . unavailing." *276-43 Gourmet Grocery, Inc. v 250 W. 43 Owner LLC*, 143 A.D.3d 432, 433 (1st Dep't 2016).

Tenant also demonstrates that its failure to give timely notice of its intention to renew the Lease was inadvertent, a result of its managing member's inattention because of a family crises. *See 135 E. 57th St. LLC*, 91 A.D.3d 1, 3 (1st Dep't 2011) (affirming a finding that tenant was entitled to equitable renewal where untimely renewal notice was due to "failure of [the tenant's] controller to calendar the renewal [date]"). There is also no evidence that the two-month delay in providing the notice of renewal prejudiced Landlord. *See Sy Jack Realty Co. v Pergament Syosset Corp.*, 27 N.Y.2d 449, 453 (1971) (finding that tenant's failure to give timely notice of renewal of its lease "neither harmed nor prejudiced the landlord," who "actually received notice before it took any steps to find another tenant or to lease the space"). Therefore, with regard to a showing of a likelihood of ultimate success on the merits, Tenant has demonstrated a *prima facie* right to equitable relief. *See Chrysler Realty Corp. v Urban Inv. Corp.*, 100 A.D.2d 921, 923 (2d Dep't 1984) (finding that the plaintiff demonstrated its likelihood of success on the merits, where plaintiff "show[ed] that it both made valuable improvements to the property and ha[d] a long-standing interest in the particular location" and where

defendant "failed to demonstrate any harm resulting from plaintiff's exercising its option approximately three weeks late").

Tenant also demonstrates that it may suffer irreparable injury because money damages are insufficient to make Tenant whole should it ultimately prevail due to the loss of its leasehold interest in the interim. *See London Paint & Wallpaper Co., Inc. v Kesselman*, 138 A.D.3d 632, 633 (1st Dep't 2016) (affirming grant of preliminary injunction, staying a summary holdover proceeding, because "[t]he loss of [the tenant's] valuable commercial leasehold interest as a result of being evicted before the enforceability of [its rights] was determined would render the ultimate relief inadequate").

Lastly, the balance of the equities favors Tenant, because "where plaintiff face[s] possible eviction by defendant[], the equities lie in favor of preserving the status quo." *Calo v Chui*, 254 A.D.2d 191, 192 (1st Dep't 1998). Landlord's argument that the issuance of a preliminary injunction will leave the Landlord "wholly unprepared to transition the Premises and without a tenant managing the Premises and paying rent" is unpersuasive, when Landlord did not notify Tenant of its failure to renew until more than two months after the renewal date and, has submitted no evidence to show that it has taken steps to assume control or to find a new tenant in that time. Ultimately, "the only possible harm to [Landlord], if [it] prevail[s] in the action, is a delay in receiving a market rate rent for the commercial space, which can be mitigated by an appropriate undertaking." *London Paint & Wallpaper Co., Inc. v Kesselman*, 138 A.D.3d 632, 633 (1st Dep't 2016).

For the foregoing reasons, Tenant's motion seeking a preliminary injunction is granted conditioned upon Tenant posting an undertaking. However, because neither party submits evidence of the current fair market use and occupancy rate for the Premises, I am unable to set an amount for Tenant's undertaking that is rationally related to Landlord's potential damages. *See London Paint & Wallpaper Co., Inc. v Kesselman*, 138 A.D.3d 632, 633 (1st Dep't 2016) ("If it is determined that the preliminary injunction was not warranted, defendants will be entitled to recover fair market value for plaintiffs' use and occupancy of the subject commercial space between the purported expiration of the lease term . . . and the final determination"). Unless the can parties agree on the fair market use and occupancy rate for the Premises, I direct that a hearing be held at which each side may submit evidence on that issue, to assist me in setting an appropriate undertaking.

In accordance with the foregoing, it is

ORDERED that counsel are directed to appear for a hearing in Room 208, 60 Centre Street, on March 8, 2018, at 10:00 AM; it is further

ORDERED that pending the hearing, the interim temporary restraining order remains in effect; it is further

ORDERED that after the hearing I will issue an order setting plaintiff's undertaking and granting plaintiff's motion for preliminary injunction.

This constitutes the decision and order of the Court.

2/28/18
DATE

SALIANN SCARPULLA J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT	REFERENCE