POMODORO GRILL, INC. v. I.M.V. 1290, LLC

2015/3872.

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2015 NY Slip Op 51352(U)

POMODORO GRILL, INC., SAHA MED GRILL LLC, and SAMI MINA, Plaintiffs, v. I.M.V. 1290, LLC, IMBURGIA BROTHERS HOLDINGS, LLC, FRANK S. IMBURGIA, JEV 1290 LLC, JAMES E. VERDI, TEAM FSI, INC., and FSI ACOUSTICAL SYSTEMS, LLC., Defendants.

Supreme Court, Monroe County.

Decided August 13, 2015.

Attorney(s) appearing for the Case

NIXON PEABODY LLP, Christopher D. Thomas, Esq., 1300 Clinton Square, Rochester, New York 14604, Attorneys for Plaintiffs.

PHILLIPS LYTLE, LLP, Chad W. Flansburg, Esq., 28 East Main Street, Suite 1400, Rochester, New York 14614, Attorneys for Defendants.

MATTHEW A. ROSENBAUM, *J.*

The parties were in Court in June over similar issues which resulted in the Court's decision dated June 12, 2015.

Plaintiffs again, by Order to Show Cause, seek an order granting a Yellowstone Injunction pursuant to CPLR 6301 and *First National Stores, Inc. v. Yellowstone Shopping Center,* 21 N.Y.2d 630 (1968), based on additional alleged lease violations which resulted in Defendant serving default notices, that:

> 1. Stays and tolls the expiration of the cure period set forth in the Notice of Default dated June 18, 2015 (the Mechanic's Lien Notice), the Notice of Default dated June 25, 2015 (the Sign Notice), and the Notice of Default dated July 15, 2015 (the Fire Code Notice), all of which relate to the premises commonly known as 1290 University Avenue, Rochester, NY 14607 (the Premises), pending the Court's determination of Plaintiffs Pomodoro Grill, Inc's (Pomodoro) and Saha Med Grill LLC's (Saha) rights under the respective leases relating to the Premises and in regard to each of the above-referenced Notices;
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> 2. Temporarily, preliminarily and/or permanently enjoins and restrains Defendants' their employees, members servants, agents, attorneys, affiliates, partners and all other persons acting on their behalf from:
>
> a. Holding a Special Meeting, presently scheduled for (tomorrow), July 23, 2015, at 10p.m., to remove Plaintiff Sami Mina as a Manager of IMV and/or to approve capital contributions to be used to fund the first $250,000 in Renovation Funds to be provided to Pomodoro under Section 6(a) of the Lease;
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> b. Terminating or attempting to terminate the Lease Agreement dated July 24, 2014, between Pomodoro and IMV, regarding the Premises (the Lease) and/or terminating or attempting to terminate Pomodoro's leasehold interest and/or tenancy in the Premises based upon the Sign Notice, and or the Fire Code Notice;
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> c. Terminating or attempting to terminate the Lease Agreement between Saha and IMV, regarding the Premises (the Saha Lease), and/or terminating or attempting to terminate Saha's leasehold interest and/or tenancy in the Premises based upon the Mechanic's Lien Notice;
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> d. Evicting or ejecting Pomodoro and/or Saha from the premises on the basis of the Mechanic's Lien Notice, the Sign Notice, and/or the Fire Code Notice during the pendency of this action;

e. Removing the disputed sign that Pomodoro has placed along University Avenue during the pendency of this action;

f. Taking any action to interfere with Pomodoro's and/or Saha's occupancy and/or possession of the Premises; and

3. Awards Plaintiffs such other and further relief as this Court deems just and proper.

Defendants oppose and submit that Tenant's motion for a Yellowstone Injunction must be denied and the TRO cancelled since the cure period had expired rendering the Yellowstone application untimely.

Defendants also oppose Plaintiff's application to enjoin the Special Meeting on the basis that the meeting already occurred, Plaintiff failed to serve the OTSC with TRO prior to the meeting and Plaintiff Mina participated in the meeting. Defendants further oppose Plaintiff's motion to amend the complaint as such amendments are "futile and would only result in needless litigation."

In the alternative, Defendants assert that if the Court were to grant a Yellowstone Injunction, it should be conditioned and limited to the following:

1. Saha posting a bond in the amount of $47,514.68, an undertaking for the mechanic's lien.

2. Pomodoro posting a bond in the amount of $250,000 which is rationally related to the amount of damages IMV may incur due to the injunction.

Facts:

The parties have been disingenuous in their dealings with each other regarding lease agreements stemming from apparent dissension among the principals (Mina, Verdi and Imburgia) of a partnership I.M.V. which owns the building where Plaintiff Mina owns and operates Pomodoro, a long established Rochester eatery, and a newly formed casual dining venue, Saha Med Grill LLC. On the prior motion, this Court set forth the facts relating to the partnership and the long established Pomodoro Grill, Inc. Subsequent to that decision, the parties attempted to resolve their differences, but apparently the communication fizzled and the parties re-instituted their disingenuous behavior which now includes Saha Med Grill, LLC.

During the prior motion, Plaintiff Mina claimed that Defendants (Landlord) breached the lease by failing to timely repair the floors, and provide the necessary funding to complete the renovations. Plaintiff further submitted that without his consent as an owner/manager of I.M.V., Imburgia contracted with his construction company to install the floors, which were not done properly and had to be redone by another contractor. Plaintiff alleged that both Imburgia and Verdi were self dealing, by retaining their own companies, without his consent to perform services for I.M.V which work was to be paid for by the $3 million loan I.M.V. had with Canandaigua Bank.

Mina further alleged that Pomodoro did not pay rent nor did I.M.V. seek to collect it, due to I.M.V.'s own default in failing to repair the floors and provide the funding for renovations. Mina claimed that after he fired FSI for its "grossly delayed and defective work," and without prior notice, on March 30, 2015 IMV sent Pomodoro a 10 day notice to cure demanding $34,031.25 for base and additional rent. (Complaint dated 4/09/15 ¶76-82).

Defendants in opposition thereto, submitted that pursuant to the lease agreement, Tenant was to commence paying Rent on the entire 12,945 square feet "on January 1, 201[5], regardless of whether renovations are complete." (Def. Ex B Lease Opening Para.). Section 2(a) provides, "Regardless of the foregoing, Tenant shall commence paying its share of Additional Rent and Real Estate Taxes on October 1, 2014; and commence paying Base Rent on than [sic] January 1, 2015." The Tenants agreement to commence paying rent was also memorialized in a signed Tenant Estoppel Certificate with Canandaigua Bank, 4. "Tenant has accepted and is occupying the entire premises demised to it under the Lease (the "*Premises*") and all improvements to the Premises required by the Lease have been completed by Landlord in accordance with the Lease..... 6. Minimum base rent payable effective January 1, 2015 is in the amount of $16,181.00 per month." (Def Ex. C). The lease also provided that Plaintiff was to pay rent without "offset, deduction or demand." (Sections 3(b), 4(a), 41).

The Court on that motion granted the Yellowstone Injunction holding,

> Under the circumstances here, the positions the Parties have undertaken may be the result of their discord with one another under the operating agreement for I.M.V. Although Plaintiff can not suspend the rent under the terms of the lease, even if Defendants breach the lease by failing to provide funding, the Court under its equitable authority considering the substantial property interest of Plaintiff, grants the Yellowstone Injunction but subject to conditions.

The Court directed plaintiff to "make payment directly to the Landlord of past due arrears and future monthly Base Rent, Additional Rent and Taxes that become due under Sections 3-5 of the Lease for that actual use and occupancy, and the remainder payable in escrow ..." (citations omitted). The Court advised the parties, that if they could not agree to the allocation, a referee would be appointed to make the determination.

In regards to the renovation costs, this Court noted that the lease provided, "Landlord shall provide Tenant with Two Hundred Fifty Thousand ($250,000) dollars, towards Tenants renovation costs. In the event Tenant requires monies to complete the renovation work, Tenant may request up to an additional Two Hundred and Fifty Thousand ($250,000) Dollars, which will be funded by Landlord via member cash call on part of the Landlord and evidenced by a promissory note from tenant...." The Defendants claimed that FSI, Defendant Imburgia's construction company had completed $118,986.19 not including the floor work which was the Landlord's responsibility. This Court determined that even assuming the figure was accurate, there was an additional $131,013.81 available for renovations. The parties were advised that if they could not agree to the allocation, the Court would appoint a referee "to determine what portion of the $118,986.19 is attributable to the Plaintiff, if any, and a mechanism to provide the additional required funding." Plaintiff's request seeking the additional $250,000 loan was denied without prejudice, as "neither party has submitted sufficient proof to resolve the issue as a matter of law." The lease did not provide for an additional cash call on the initial $250,000 nor were there any restrictions regarding distribution of that initial $250,000 in funding. In regards to the initial $250,000 the parties shall comply with the lease and this Court's prior decision.

Plaintiff on this motion submits that Defendants have continued to file "seriatim" default notices on Pomodoros and now on Saha Med Grill LLC. Plaintiff submits that Defendants served two default notices on Pomodoro for fire code violations, and the installation of the a sign. Defendants also served a default notice on Saha Med Grill based upon a Mechanics Lien filing by Defendant Imburgia's construction company, FSI, in the amount of $38,624.66.

Special Meeting:

Judge Fisher in this Court's absence signed an Order to Show Cause dated July 23, 2015 which restrained, among other things, Defendants from holding a Special Meeting on July 23, 2015 at 10 p.m. The alleged purpose of the Special Meeting was to remove Plaintiff Sami Mina as a Manager of IMV, and/or to approve capital contributions to be used to fund the first $250,000 in Renovation Funds to be provided to Pomodoro under Section 6(a) of the Lease.

Defendant's Counsel submits that Defendants did not refuse to abide by the Court's Order since the parties, by prior stipulation dated June 26, 2015, agreed to reschedule the noticed meeting for July 23, 2015, a fact of which he claims Plaintiff failed to advise the Court. (Flansburg letter dated August 6, 2015). Counsel Flansburg further submits that he advised Plaintiff at 6:42 p.m. by email that absent receipt of the signed OTSC with TRO Defendants were going forward with the Special Meeting. (Flansburg Letter dated August 6, 2015). Counsel submits that Plaintiff's attorney did not object to the meeting going forward as scheduled.

On July 22, 2015 Mr. Flansburg advised the Court that he was aware an OTSC with TRO was being submitted by Plaintiffs, and requested an opportunity to appear and oppose the TRO. There is no dispute that Counsel Flansburg received an unsigned copy of the OTSC and participated in a phone conference with Judge Fisher on July 23, 2015 objecting to the TRO. The OTSC was signed July 23, 2015. The OTSC provided that it could be served by "overnight delivery and/or personal delivery to counsel for Defendants together with the papers upon which it is granted on or before July 23, 2015." The order was personally delivered on July 24, 2015 which is consistent with or produces the same result as "overnight delivery" sent on July 23, 2015. (Thomas letter date July 27, 2015). Plaintiff's Counsel Thomas by letter dated August 13, 2015 submits that at the conclusion of the phone conference, Judge Fisher advised that he would rule on the OTSC, but did not indicate how he would rule. Counsel Thomas was not notified by the Court or Clerk's Office that the OTSC had been signed until the next day. Regardless, neither attorney contacted the Court to check on the status of the OTSC, and both attorneys knew of the content of the OTSC and that it was pending signature with the Court.

Since the Court directed in the OTSC that service occur on or before July 24, 2015, the OTSC was timely served. Although holding the meeting would not constitute contempt under the circumstances, the parties had sufficient knowledge of the Court order or pending Court order for the stay to be effective. (See *McCormick v. Axelrod,* 59 N.Y.2d 574, (1983). This is unlike the situation where an OTSC with TRO is submitted ex-parte and the party to be restrained has no knowledge thereof until served.

The order was signed on July 23, 2015 and required service by July 24, 2015. Holding the meeting after the OTSC was signed on July 23, 2015, but before service in compliance with the OTSC on July 24, 2015, in light of the conference with the Court and the parties specific knowledge of the TRO provision held the meeting at the risk that it would be set aside. The Court determines that the Special Meeting is a nullity, and the business conducted thereat vacated on the basis that it violated the Court's stay order. Since the meeting was a nullity, the Court does not reach the merits of the business conducted thereat.

Yellowstone Injunction:

A Yellowstone Injunction permits a tenant "confronted by a threat of termination of a lease to obtain a stay tolling the running of the statutory cure period so that, after a determination of the merits of any action arising under the lease, a tenant may cure the defect and avoid forfeiture of the leasehold. (Citations omitted, *Hempstead Video, Inc. v. 363 Rockaway Assoc., LLP,* 38 A.D.3d 838, (2nd Dept., 2007); *First Natl. Stores v. Yellowstone Shopping Etr.,* 21 N.Y.2d 630 (1968).

> A tenant seeking Yellowstone relief must demonstrate that: (1) it holds a commercial lease, (2) it has received from the landlord a notice of default, notice to cure, or threat of termination of the lease, (3) its application for a temporary restraining order was made prior to expiration of the cure period and termination of the lease, and (4) it has the desire and ability to cure the alleged default by any means short of vacating the premises. Hempstead Supra.

"An application for *Yellowstone* relief must be made not only before the termination of the subject lease.... but must also be made prior to the expiration of the cure period set forth in the lease and the landlord's notice to cure." (*Korova Milk Bar v. PRE Props,* 70 A.D.3d 646, (2nd Dept., 2010).

Although Defendants contend that Plaintiff's application for a Yellowstone Injunction is untimely which negates one of the four criteria, the default notices against Pomodoro Grill are vacated as corrected prior to the default or de minimis as set forth below. In regards to Saha, even assuming the Yellowstone application was untimely, Saha has met the standard for injunctive relief pursuant to CPLR 6301 by establishing a likelihood of success on the merits, irreparable injury if the injunction is not granted and a balancing of equities in its favor. (*Doe v. Axelrod,* 73 N.Y.2d 748, (1988). Plaintiff Saha has disputed the lien filing by FSI which is a company operated by Defendant Imburgia, one of Plaintiff's partners in the ownership of the property being leased to Saha. Although under the lease Saha was required to discharge the lien "forthwith" as more fully set forth below, the lien was filed by an entity controlled by Plaintiff's partner's business, while said partner continued to be at odds with Plaintiff, and the lien was allegedly for a change work order which was admittedly not signed by Plaintiff. The enforcement under the circumstances, especially since defendants admit that the change order was not agreed to in writing, would be patently unfair. Plaintiffs have spent a substantial amount of money developing the space for their restaurant.

As the Court in its prior decision noted, Plaintiff Mina and Defendants are involved in a partnership which owns and manages the subject property and leases a portion of it to Mina for his restaurant Pomodoro and Saha which the former has operated at the site for a substantial number of years. There is a partnership disagreement between Mina and partner Defendants Verdi and Imburgia, which has culminated in alleged improprieties and accusations between them. (Affidavits of the Parties). The mechanic's liens filed against Saha by Defendant Imburgia's company, FSI and is vehemently disputed by Plaintiff.

"Equity demands that their right to cure be preserved so that if they prevail on the merits their success will be more than a hollow victory." (*Garland v. Titan West,* 147 A.D.2d 304, (1st Dept., 1989).

The Court under its equitable authority considering the substantial property interest of Plaintiffs, the ongoing dispute between the parties, grants the Yellowstone Injunction but subject to conditions set forth below. (*Garland, supra*).

Mechanic's Lien Filing Against Saha Med Grill LLC.:

> Defendant Imburgia's company FSI filed the Mechanic's Lien on April 29, 2015 for restaurant build out work allegedly performed but not paid for. Plaintiff claims the parties agreed to construction work in the amount of $255,232, but that Defendant FSI attempted to increase the price to $323,624.66 for a proposed change order not approved by Saha. On June 18, 2015 IMV sent Saha a Notice of Default pursuant to Section 7(d) of the Saha I.M.V. 1290 lease based upon Saha's failure to discharge the Mechanic's Lien within 20 days. On July 20, 2015 I.M.V. sent Saha a Termination Notice. Saha denies breach of the lease by failing to discharge the lien because the lien is improper, fraudulent and was filed in retaliation by FSI. (Proposed amended complaint dated 7/22/15 ¶124-136). Plaintiff submits that Defendants waited more than 9 months, and in retaliation for the filing of this action, they filed the mechanic's lien and default notice. (Mina aff'd No.37).

Defendants in opposition have submitted an affidavit of Josh Myers, the construction manager for FSI who admits that the parties initially agreed to a contract in the amount of $255,232, but that Mr. Mina requested additional construction of a pergola, lighting, power, ceramic tile, pine ceiling and a roof over the freezer/cooling increasing the contract $68,392.66 to $323,624.66. He further admits that Mr. Mina did not sign the change order, but nevertheless orally agreed to the change and more importantly never objected to the work being performed. (Myers aff'd dated 8/3/15). Mr. Mina apparently made a partial payment, but the alleged amount currently owed is $38,624.66 for which Defendant FSI has filed the mechanic's lien. Defendants also submit that Cellea Electric has also filed a lien for electrical work not paid for by Mr. Mina. The lien is in the approximate amount of $8890.02.

The lease provides that the "tenant shall be obligated to deliver, upon Landlord's request, written, unconditional waivers of mechanics' and material-mens' liens against the Premises from all proposed contractors, subcontractors, laborers and material suppliers for all work and materials in connection with any alteration." (Def. Ex B Lease Alterations Section 6(3)). Section 7(c) provides, "the tenant shall not suffer any mechanic's lien to be filed against the Property by reason of work, labor, services or materials performed or furnished to the Tenant or to any one holding the Premises through or under the Tenant. If any such mechanic's lien shall at any time be filed against the Property, the Tenant shall forthwith cause the same to be discharged of record by payment, bond, order of a court of competent jurisdiction or otherwise, but the Tenant shall have the right to contest any and all such liens."

Contrary to Plaintiff's assertion, the lease is clear that if a lien is filed, Tenant shall "forthwith" cause the same to be discharged. Although the lease provides that the Tenant may seek an order from a Court of competent jurisdiction, nothing contained in the lease provides that the Tenant is not required to post a bond during the pendency of any Court action.

Accordingly, Tenant shall forthwith post a bond or may tender the full amount allegedly owed of $47,514.68 to his attorney, Mr. Thomas, to be held in escrow pending a determination of the liens.

Fire Code Violations:

On July 15, 2015 IMV served Pomodoro with a Notice of Default alleging Pomodoro's failure to cure two fire code violations issued on June 17, 2014, over one year prior to the notice.

Defendants now concede that the fire code violations have been remedied based upon "Pomodoro's representations," and on July 29, 2015 defendants withdrew this notice of default. (Def. Ex. V). It is noted by the Court that the notice was not withdrawnlexis until after the order to show cause was signed. Clearly, it would appear axiomatic that confirmation of whether the fire code violations, served over a year before, had been remedied could have been verified by Defendants long before the default notice was served.

Accordingly, based upon Defendants' concession, the default notice regarding the fire code violations is vacated.

Pomodoro's Sign:

Plaintiff Mina submits that in 1992 Pomodoro installed a $25,000 ground sign near the entrance of the property, which was in place when IMV purchased the property. (Aff'd #42-45). Plaintiff claims that on or about August 15, 2014, Verdi requested permission to temporarily remove the sign for landscaping purposes. Plaintiff claims he consented on the condition the sign be returned, and Verdi agreed thereto. (#46-48). Verdi denies this claim. Plaintiff further claims that Defendant destroyed the sign without his permission, so he placed an A-frame sign, in its place, which was also used on the property at the time IMV purchased the property and entered into the lease with Pomodoro. (#49-54). Plaintiff has commissioned a new ground sign, which he claims is substantially similar to the A-frame sign. (#56-58). The parties met to resolve the issue, but were unable to reach resolution, and Plaintiff claims in retaliation thereto Defendant served the default notice. (#59). Plaintiff also claims that the termination notice is untimely under the lease Section 14(a) since Plaintiff attempted to cure the alleged improper default, and regardless, IMV acknowledged in writing its approval by signing the estoppel certificate with Canandaigua National Bank. (Mina aff'd#59-68).

Defendants dispute Plaintiff's interpretation of the events, and vehemently deny that the sign was in place when the lease was executed or that they agreed to put the original sign back. (Verdi aff'd 24-38). Mr. Verdi "specifically deny[ies] the allegations made by Mr. Mina...." (Verdi #27)

Upon review of the parties' submissions, it is unclear as to what the parties agreed to, regarding removal and replacement of the sign. It is clear, however, that the parties can not agree even on the simple facts regarding the sign, location, size, color and content. The Court does preliminarily find, that even assuming Defendant's rendition is accurate, any violation thereof by the Plaintiff as alleged in the papers is de minimis, does not constitute a default under the lease and Defendants have failed to show any prejudice resulting from the sign placement. (*Restoration Realty Corp. v. Robero,* 58 N.Y.2d 1089, (1983).

Accordingly, since the parties have disagreed to almost every fact concerning the sign, and their credibility, which can not be determined on the papers, is of paramount importance, the original sign or a substantially similar sign shall be placed where the original sign was located until further determination of this Court, unless the parties agree otherwise.

Original Complaint:

Plaintiff on April 9, 2015 filed his complaint alleging seven causes of action: 1) a declaration of the parties' rights, duties and obligations with respect to the lease; 2) breach of contract for failure to release renovation funds and timely building the floor; 3) breach of contract under the IMV operating agreement for excluding Plaintiff and self dealing; 4) breach of contract by FSI in failing to properly install the floor; 5) breach of fiduciary duty through self-dealing by Imburgia and Verdi in utilizing their own companies without competitive bidding and over inflated invoices, and depleting the $3 million dollar loan with CNB; 6) an accounting of the $3 million dollar loan; 7) unjust enrichment.

Proposed Amended Complaint:

The proposed amended complaint adds Plaintiff Saha Med Grill LLC, and Defendant FSI Accoustical Systems, LLC. Plaintiff has alleged four additional causes of action for declaratory relief:

> c. Declaring that Saha is not obligated to pay the FSI mechanic's lien and striking the same;
>
> d. Declaring that Pomodoro is entitled to maintain the A-frame Sign in its present location and to replace it with a permanent sign similar in design, color and size to the Ground Sign;
>
> e. Declaring that there are no current violations of the fire code at the Existing Restaurant;
>
> f. Declaring that June 10 Special Meeting was improper and null and void in all respects and that Defendants do not have the authority to remove Mina as a Manager of IMV and/or approve a capital contribution for funds to be applied to the first $250,000 in Renovation funds that are owed to Pomodoro.

While agreeing that a motion to amend shall be freely granted, Defendants oppose Plaintiff's application to amend on the basis that the proposed amendment is futile. Defendant submits that the declaration as to the June 10, Special Meeting later re-scheduled to July 23, 2015 under the status quo agreement was lawfully conducted; declaratory relief challenging the mechanic's lien must await foreclosure of the lien; the default notice regarding the fire violation has been withdrawn; and there is no controversy to Pomodoro using the A-frame sign (the small plastic folding sign Def. Ex D), but the lease was terminated based upon Pomodoro's installation of a ground sign.

"Leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit". (Citations omitted, *Letterman v. Reddington,* 278 A.D.2d 868, (4th Dept., 2000); *Nahrebeski v. Molnar,* 286 A.D.2d 891, (4th Dept., 2002); CPLR 3025). A party's exposure to a complete defense or exposure to greater liability is not sufficient to establish prejudice. (*Id.*). However, leave is properly denied where the amendment lacks merit based upon the lack of factual allegations to support conclusory or speculative allegations. (*A.R. Mack Construction v. Patricia Electric,* 5 A.D.3d 1025, (4th Dept., 2004)).

Although Defendants contend that Plaintiff's proposed amendments are futile, they have not shown that the proposed amended pleading is patently lacking in merit or that they will be prejudiced by the amendment. Here, issue has not been joined nor discovery commenced so no prejudice exists.

Accordingly, Plaintiff's motion to amend the complaint is granted.

Defendant's request that Plaintiff file a bond in the amount of $250,000 is denied.

This constitutes the opinion and decision of the Court pursuant to CPLR 4213. Plaintiff's counsel shall submit the order on notice.

Signed this 13 day of August 2015 at Rochester, New York.

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