SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: TRIAL TERM PART 35 x
VERONA WINE BAR INC,

Plaintiff, Index No: 1986/16

-against-

353 WEST 20TH STREET LLC,

Defendant,

x

Recitation as required by CPLR 2219(a), of the papers considered in this motion for a preliminary injunction and the cross-motion to dismiss.

Papers	Numbered
Order to Show Cause/Motion and Affidavits Annexed.	1
Cross-motion and affidavits annexed.....	2
Answering Affidavits.....	
Reply Papers.....	3, 4
Memoranda of Law.....	

Upon the foregoing cited papers, the Decision/Order on this motion:

In this action for declaratory and injunctive relief, plaintiff moves for an order granting it a preliminary injunction enjoining defendant from terminating or cancelling its lease and or from commencing any summary proceeding or other action to terminate its leasehold interests in the premises. Defendant cross-moves for an order pursuant to CPLR 3211 to dismiss the complaint.

Pursuant to a written lease dated February 15, 2015, plaintiff is the commercial tenant of the ground floor retail space in the building owned by defendant and located at 253 Van Brunt Street, Brooklyn. On July 21, 2015, the defendant sent a Fifteen (15) Day Notice of Default to plaintiff listing a number of provisions of the lease plaintiff was in default of and demanding that plaintiff cure said defaults by August 10, 2015. Prior to the expiration of the Notice of Default, the parties and their counsel met at the premises and agreed to extend plaintiff's time to cure its defaults to October 6, 2015. The agreement also included a voluntary waiver by plaintiff of its right to seek a Yellowstone injunction. On February 10, 2016, defendant served plaintiff with a Five (5) Day Notice of Termination. Defendant notified plaintiff that its tenancy was terminated effective February 22, 2016 based upon its failure to cure the violations in the Notice of Default, specifically five items therein including

proof of comprehensive liability coverage in the amounts and types required by the lease, proof of insurance coverage for the subcontractors engaged at the premises, failure to keep the basement area clean and clear of debris and garbage, failure to maintain the side area adjacent to the premises in a clean condition, and failing to submit signage plans for prior written approval. Plaintiff then commenced this action on February 19, 2016 seeking, *inter alia*, a permanent injunction enjoining the defendant from terminating or interfering with its leasehold and moved by order to show cause for the instant preliminary relief.

Firstly, motions for a preliminary injunction pursuant to CPLR 6301, like motions for Yellowstone injunctions, must be made prior to the expiration of the cure period *(see Goldcrest Realty Co. v 61 Bronx Riv. Rd. Owners, Inc.*, 83 AD3d 129 [2d Dept 2011]). Here, plaintiff moved for the instant relief on February 19, 2016, after the expiration of the cure period on October 6, 2015 and even after service of the Notice of Termination dated February 10, 2016. Further, even assuming a timely application and putting aside for the moment the lease provision containing a waiver of plaintiff's right to seek injunctive relief, the plaintiff fails to demonstrate its entitlement to a preliminary injunction. To obtain a preliminary injunction, the movant has the burden of demonstrating a likelihood of success on the merits, danger of irreparable harm in the absence of an injunction, and a balance of equities in its favor *(see Busters Cleaning Corp. v Frati*, 180 AD2d 705 [2d Dept). Here, plaintiff has failed to establish a likelihood of success on the merits. Although plaintiff, by affidavit of its principal James Velez, details the efforts plaintiff has made to cure a number of the alleged defaults, Mr. Velez does not address, either in his affidavit or in the reply papers, the issue of insurance coverage. The papers contain no evidence demonstrating that plaintiff is in compliance with the lease provision requiring it to maintain comprehensive liability insurance. Under these circumstances, the failure to maintain the requisite insurance is an incurable default (*see Kyung Sik Kim v Idylwood, N.Y., LLC*, 66 AD3d 528 [1st Dept 2009], *JT Queens Carwash, Inc. v 88-16 N. Blvd., LLC*, 101 AD3d 1089 [2d Dept 2012]) that has not been waived as the lease contains a clear and unambiguous "no-waiver" clause (*see Excel Graphics Techs., Inc. v CFG/AGSCB 75 Ninth Ave.*, L.L.C., 1 AD3d 65 [1st Dept 2003]).

Accordingly, plaintiff's order to show cause for a preliminary injunction is denied and the temporary restraining order is vacated.

In support of the cross-motion to dismiss pursuant to CPLR 3211, defendant argues that plaintiff expressly waived its right to seek a declaratory judgment and any injunctive relief as to any provision of the subject lease or any notice sent pursuant to any provision of the lease. Defendant in making its argument relies upon paragraph 99 of the lease rider, which provides:

> "99) Waiver of Injunctive Relief. Tenant waives any right to bring a declaratory judgment action with respect to any provision of this Lease, or with respect to any notice sent pursuant to the provisions of this Lease, and expressly agrees not to seek injunctive relief which would stay, extend or otherwise

toll any of the time limitations or provisions of this Lease, or any notice sent pursuant thereto. Any breach of this paragraph shall constitute a breach of a substantial obligation of the tenancy, and shall be grounds for the immediate termination of this Lease. It is further agreed that in the event injunctive relief is sought, of if a "Yellowstone" injunction (First National Stores, Inc. v Yellowstone Shopping Centers, Inc. 21 N.Y.2d 630) is sought, such relief shall be denied, and the Owner shall be entitled to recover the costs of opposing such an application or action, including its attorneys fees actually incurred."

In opposition, plaintiff argues that it is not seeking a Yellowstone injunction but does not otherwise address the waiver provision as to declaratory or injunctive relief. "A lease agreement, like any other contract, essentially involves a bargained-for exchange between the parties" (*Rowe v. Great Atl. & Pac. Tea Co.*, 46 N.Y.2d 62, 67[1978]. Therefore, "[a]bsent some violation of law or transgression of a strong public policy, the parties to a contract are basically free to make whatever agreement they wish..." (*Rowe v Great Atl. & Pac. Tea Co.*, supra at 67-68). As there is no dispute that this was a bargained for agreement between represented parties, the court finds that the waiver provision contained in the rider to the lease, which is unambiguous, is enforceable and not violative of public policy (*see Aloyts v 601 Tenant's Corp.*, 2007 WL6938117 [N.Y.Sup. 2007]). Lastly, although plaintiff argues that defendant is equitably estopped from terminating the lease, plaintiff has not sufficiently demonstrated that defendant's conduct amounted to a false representation (*see Schwartz v Miltz*, 77 AD3d 723 [2d Dept 2010]).

Accordingly, the defendant's cross-motion pursuant to CPLR 3211 is granted insofar as it seeks dismissal of the plaintiff's complaint, and is otherwise denied.

This constitutes the decision/order of the court.

Dated: August 1, 2016

Enter,

Karen B. Rothenberg
J.S.C.

Karen B. Rothenberg
Justice, Supreme Court