Campaniello v Greene St. Holding Corp.
2013 NY Slip Op 33682(U)
March 6, 2013
Supreme Court, New York County
Docket Number: 113289/11
Judge: Paul Wooten
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SCANNED ON 3/12/2013

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN PART 7

Justice

THOMAS CAMPANIELLO,
Plaintiff

INDEX NO. 113289/11

-against-

MOTION SEQ. NO. 001

GREENE STREET HOLDING CORP. and the BOARD OF DIRECTORS OF GREENE STREET HOLDING CORP.,

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Defendants.

The following papers were read on this motion by plaintiff for a Yellowstone injunction and cross-motion for summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits— Exhibits _____ | No(s). _____

Replying Affidavits — Exhibits _____ | No(s). _____

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Before the Court is an Order to Show Cause (OSC) brought by Thomas Campaniello (plaintiff), a commercial tenant-shareholder, for a Yellowstone Injunction seeking to enjoin and restrain the cooperative housing corporation Greene Street Holding Corp. (the cooperative or defendant) and the Board of Directors of Green Street Holding Corp. (the Board) (collectively, defendants) from taking any action to terminate plaintiff's leasehold or tenancy, and from commencing summary eviction proceedings, of the commercial space (leased premises) located at 136 Green Street, New York, New York (the building). Greene Street is the owner and landlord of the building, and the Board is elected by the shareholders of Greene Street to manage and operate the building. Defendants are in opposition to plaintiff's motion, and cross-move pursuant to CPLR 3212, for summary judgment on the first, second and third causes of action contained within the complaint.

Plaintiff and defendant entered into a written lease agreement on August 30, 2006 for the

leased premises. Plaintiff maintains that he was provided a copy of Greene Street's by-laws when he became a shareholder and proprietary lessee of defendants. Plaintiff states in his complaint that sometime prior to August of 2010, he sought permission from defendants to sublet the leased premises to a subtenant at a monthly rental of $60,000.00, and defendants refused consent of the proposed sublet unless plaintiff agreed to pay an "exorbitant sublet fee" (*see* Complaint at ¶ 20, 21). Paragraph 15 of the lease and Article V, Section 10 of the by-laws state the terms under which plaintiff may sublet the space. Defendants maintain that they are permitted to implement a monthly sublet fee of 10% under an amendment to Article V, Section 10 of the by-laws of the cooperative, adopted by the Board (*see* Defendant's Cross-Motion [Cross-Motion], Exhibit D). Plaintiff alleges that he was "forced to agree in a written consent to sublet agreement to pay the exorbitant sublet fee and to pay $3,000.00 for Greene Street's claimed attorneys' fees or be denied permission to sublet and lose [the sub]tenant" (*id.* at ¶ 24). Plaintiff avers that after multiple requests to have alleged water leaks and floods addressed at the leased premises, and because plaintiff maintains that the by-laws and the lease agreement do not authorize the sublet fee, plaintiff withheld the sublet fee payments.

This action arises out of a notice to cure, dated October 28, 2011, which defendant served upon plaintiff that stated plaintiff had breached provisions in the proprietary lease, by subletting his premises without paying the required sublet fee of 10% of the monthly sublet rent for his premises. Greene Street claimed that plaintiff owed sublet fees in the amount of $6,000.00 per month from October of 2010 through and including September of 2011, as well as $6,500.00 per month from October of 2011 to the present. The notice to cure informed plaintiff that if he failed to cure the default by paying the amounts owed within 30 days, the defendant would terminate the lease.

On or about November 23, 2011, plaintiff commenced this proceeding by Summons and Complaint. The complaint asserts five causes of action and seeks various relief, including, *inter alia*, (1) a declaratory judgment against defendants declaring that the amendment to the shareholder

adopted by-laws which purports to allow for a sublet fee is unauthorized by the Business Corporations Law under the cooperative's certificate of incorporation, and is therefore unenforceable (First Cause of Action); (2) a declaratory judgment declaring that the cooperative's lease does not permit the imposition of a sublet fee (Second Cause of Action); and (3) an order enjoining the cooperative from collecting a sublet fee from the plaintiff (the Third Cause of Action). The complaint also seeks an injunction against the defendants compelling them to make repairs to the rear exterior wall, which plaintiff maintains defendants have not done after multiple requests.

Subsequently, on or about November 28, 2011, plaintiff moved by Order to Show Cause (OSC) seeking a Temporary Restraining Order (TRO) and a Yellowstone Injunction tolling his time to cure the alleged default and preventing the defendants from taking any steps to terminate the plaintiff's tenancy during the pendency of this action. The Court granted plaintiff a TRO pending the hearing on the OSC. In its OSC, plaintiff seeks a Yellowstone injunction which would permit him to cure the alleged violations of his lease if it is determined by the Court that he has failed to pay the required sublet fees to the defendants. In support, plaintiff contends that the imposition of the amendment allowing for a sublet fee violates the cooperative's certificate of incorporation, Article V, Section 10 of the by-laws and the paragraph 15 of the proprietary lease (*see* Complaint at ¶ 32). Plaintiff also argues that the imposition of a sublet fee is unreasonable where the proprietary lease does not permit the cooperative board to withhold consent to a sublease unreasonably. Defendants oppose the motion and cross-move for an order granting summary judgment and dismissing the first, second and third causes of action of the complaint.

Defendants' Cross-Motion for Summary Judgment

Defendants cross-move pursuant to CPLR 3212, for summary judgment on the first, second and third causes of action contained within the complaint. Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35

NY2d 361, 364 [1974]). The party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus. Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212[b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

In accordance with the terms of Paragraph 15 of the Lease, a commercial unit owner such as the plaintiff may sublet his unit after obtaining the consent of the Board, which consent "shall not be unreasonably withheld" (OSC, exhibit B). The lease further provides that "[a]ny consent to subletting may be subject to such conditions as the Directors or lessees, as the case may be, shall impose" (*id.*). The cooperative also has a series of By-Laws. Amendments to the By-Laws are permitted under the authority of Article XII, Section 1 which provides, in pertinent part, as follows:

> These By-Laws may be amended, enlarged or diminished either (a) at any shareholders' meeting by vote of shareholders owning two-thirds of the amount of outstanding shares . . ., provided that the proposed amendment or the substance thereof shall have been inserted in the notice of meeting or that all of the shareholders be present in person

> or by proxy, or (b) at any meeting of the Board of Directors by a majority vote, provided that the proposed amendment or the substance thereof shall have been inserted in the notice of meeting or that all of the directors are present in person, except that the Board of Directors may not repeal a By-Law amendment adopted by the shareholders as provided above (OSC, exhibit D).

The original By-Laws provided that upon the transfer of or subletting of any lease, "the Board of Directors has the authority to fix and assess a reasonable fee to cover actual expenses and attorneys' fees of the Corporation in connection with such a transaction . . ." (*see* Cross-Motion , Exhibit D at Article V, Section 10). The defendants maintain that the cooperative board met in 1979 and voted to impose a new sublet fee upon any new subleases, and institute a new sublet fee for existing subleases one year thereafter (*id.*, Exhibit I). This vote was distributed to the shareholders (*id.*, Exhibit J). The Board also claims it voted to amend the By-Laws in order to enforce the sublet fee after informing all of the shareholders of the proposed amendment (*id.*, Exhibits N, K).

Plaintiff does not dispute that since 1980, the cooperative has collected a sublet fee from all tenant-shareholders that sublet any portion of their units, including the tenant shareholders who own shares to the commercial spaces. In August of 2010, plaintiff asked the cooperative to consent to his subleasing his commercial space. The cooperative consented on the condition that the plaintiff execute an agreement in which he acknowledged that he was responsible for paying a sublet fee to the cooperative equaling ten percent of the monthly rent payable by the subtenant under the sublease. Plaintiff signed the agreement which also acknowledged that the sublet fee constituted additional maintenance due and owing under the lease (*id.*, Exhibit P).

In support of its cross-motion for summary judgment, defendants argue that the amendment to the By-Laws imposing a sublet fee is a valid and enforceable amendment and therefore the defendants are entitled to summary judgment and a dismissal of the plaintiff's first, second and third causes of action. In opposition, plaintiff argues that the lease does not permit the collection of a sublet fee and the Board lacked the power to amend the By-Laws. The Court agrees with the

defendants that plaintiff's arguments are without merit.

As stated above, paragraph 15 of the lease directs that the lessee of a commercial space may not sublet its premises without the consent of the board and "[A]ny consent to subletting may be subject to such conditions as the Directors ... may impose." (*id.*, Exhibit C). This broad language in the proprietary lease clearly gives the cooperative the right to collect and impose sublet fees even without a shareholder vote (*see Jones v Southgate Owners Corp*, 289 AD2d 73 [1st Dept 2001]; *Zuckerman v 33072 Owners Corp.*, 97 AD2d 736, 737 [1st Dept 1983]. Plaintiff has not cited to any contrary authority. Furthermore, the amendment to the By-Laws permitting the collection of a sublet fee was validly imposed. Plaintiff argues that the Board lacked the authority to amend the By-Laws without shareholder approval. This argument is without legal merit. Section 601(a) of the Business Corporation Law allows a corporation's board to amend its By-Laws if such an action is permitted by the corporation's certificate of incorporation or a by-law adopted by the shareholders. The Cooperative's By-Laws, in compliance with BCL 601(a), permit amendments by Board vote (*Cross-Motion*, Exhibit D). Article XII, Section 1 of the By-Laws provides, in pertinent part, as follows:

> These By-Laws may be amended, enlarged or diminished either (a) at any shareholders' meeting by vote of shareholders owning two-thirds of the amount of outstanding shares . . , provided that the proposed amendment or the substance thereof shall have been inserted in the notice of meeting or that all of the shareholders be present in person or by proxy, or (b) *at any meeting of the Board of Directors by a majority vote, provided that the proposed amendment or the substance thereof shall have been inserted in the notice of meeting or that all of the directors are present in person, except that the Board of Directors may not repeal a By-law amendment adopted by the shareholders as provided above* (*id.*) (emphasis added).

The cooperative's By-Laws permit the Board to amend the By-Laws without seeking shareholder approval. Thus the cooperative can amend its bylaws to impose a sublet fee (*see Quirin v 123 Apartments Corp.*, 128 AD2d 360, 363-364 [1st Dept 1987].

The remaining arguments by the plaintiff are without merit. Plaintiff argues that there is insufficient evidence that the Board noticed the 1979 meeting where it purported to impose a sublet

fee. While the Board claims the original notice was lost, defendants have introduced affidavits from three individuals who attest that they received notice of the 1979 meeting which set forth the sum and substance of the proposed amendment to the By-Laws. Thus, the defendants have satisfied their burden on this motion for summary judgment by introducing evidence in admissible form that notice was given, and in opposition, plaintiff has failed to introduce any evidence rebutting that showing. The By-Laws were properly amended and proper notice was given to shareholders of the intention to impose sublet fees. The cooperative has also demonstrated that it has collected a sublet fee from all shareholders who have tried to sublet their units for the past 32 years. The Notice to Cure was properly served, and therefore there is no basis to grant the plaintiff any relief related to the imposition of sublet fees. Accordingly, the motion for summary judgment is granted and the first, second and third causes of action are hereby dismissed.

Yellowstone Injunction

As the Court has now determined that the sublet fee was validly imposed and that the plaintiff is required to tender payment of the fee, plaintiff's motion for *Yellowstone* injunctive relief is moot and should be denied. In view of the fact that this Court is therefore unable to grant *Yellowstone* relief, the complaint must be dismissed (*see Gold-Land, Inc. v. Haskell*, 248 AD2d 132 [1st Dept 1998]). As the Court of Appeals has stated, "Civil Court has jurisdiction of landlord tenant disputes...and when it can decide the dispute, as in this case, it is desirable that it do so" (*Post v. 120 E. End Ave. Corp.*, 62 NY2d 19, 28 [1984]; *see also Cox v. J.D. Realty Assocs.*, 217 AD2d 179, 181 [1st Dept 1995]). In this respect, there is nothing in plaintiff's papers which suggests that the Civil Court, in a holdover proceeding, would be unable to entertain the arguments which plaintiff has raised herein against its eviction, or in support of its claim of entitlement to an offset of its maintenance obligation due to the alleged lack of repairs to the rear wall. On the contrary, the issues raised herein fall squarely within the Civil Court's jurisdiction. Although this Court may have general jurisdiction over this matter, the Appellate Division, First Department has nevertheless

observed, "[t]hat judicial proceedings might be commenced is not a sufficient basis for the exercise of Supreme Court's equitable powers" *(Cox v. J.D. Realty Assocs.*, 217 AD2d at 181). Indeed, in *Handwerker v. Ensley*, 261 AD2d 190 (1st Dept 1999) and in *Gold-Land, Inc v. Haskell*, 248 AD2d at 132, the First Department held that a landlord-tenant dispute brought in Supreme Court but resolvable in Civil Court should be dismissed even though no Civil Court action was pending.

Accordingly, it is hereby

ORDERED that plaintiff's motion for a Yellowstone injunction is denied; and it is further,

ORDERED that the defendants' cross-motion for summary judgment is granted and the first, second and third causes of action are hereby dismissed with prejudice; and it is further,

ADJUDGED AND DECLARED that the amendment to the By-Laws which imposed a sublet fee on all shareholders of Greene Street is enforceable; and it is further,

ORDERED that the reminder of the complaint is dismissed without prejudice, should the defendants choose to bring an action in Civil Court, and plaintiff may assert said claims in defense of any such proceeding and in support of any counterclaim which it may wish to assert therein.

This constitutes the Decision and Order of the Court.

Dated: 3-6-13

PAUL WOOTEN J.S.C.

Check one: ■ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**