

Lucky Dollar, Inc. v Mount Calvary Pentecostal Church

2016 NY Slip Op 30259(U)

February 8, 2016

Supreme Court, New York County

Docket Number: 651840/2014

Judge: Charles E. Ramos

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

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LUCKY DOLLAR, INC.,

Plaintiff,

Index No. 651840/2014

- against -

MOUNT CALVARY PENTECOSTAL CHURCH,

Defendant.

-----x

Hon. Charles E. Ramos, J.S.C.:

Plaintiff Lucky Dollar, Inc. ("Lucky Dollar") moves, pursuant to motion sequence number 003, for a *Yellowstone* injunction against defendant Mount Calvary Pentecostal Church (the "Church") staying and tolling the expiration date of the cure period set forth in the Church's notice to cure, dated October 6, 2015 (the "Notice to Cure"), which seeks to evict Lucky Dollar from the building located at 2061, 2063 and 2065 Amsterdam Avenue, New York, NY 10032 (the "Premises").

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For the reasons set forth below, the Notice to Cure is deficient, and the Church is enjoined from using the Notice to Cure as a predicate for reclaiming possession of the Premises.

Background

The facts set forth herein are taken from the parties' submissions, which are undisputed except where noted.

The Church is the owner of the Premises (Complaint, ¶ 4). Lucky Dollar is a tenant of the Premises pursuant to a lease dated November 23, 1998 (the "Lease") (*id.* at ¶ 5). Section 7 of

the rider to the Lease dated November 23, 1998 (the "Rider") requires that the landlord serve the tenant with a notice to cure with a 10-day cure period prior to terminating the Lease (Affirmation of William X. Zou, Esq. ["Zou aff"], Ex. B).

On or about June 10, 2014, the Church served Lucky Dollar a notice to cure alleging that Lucky Dollar violated the Lease provisions by installing an illegal heating, ventilation, and air conditioning (HVAC) system in the Premises without the Church's approval (Complaint, ¶ 6). This Court granted Lucky Dollar a *Yellowstone* injunction on July 18, 2014 (Zou aff, ¶ 4).

On October 6, 2015, the Church served Lucky Dollar with a second notice to cure alleging that Lucky Dollar violated Section 2(a) of the Rider by not maintaining a minimum insurance policy of "\$1,500,000 in general liability" (Zou aff, ¶¶ 6-7). The Notice to Cure states that, in order to cure the default, Lucky Dollar must:

Procure an insurance policy that complies with the terms of the lease agreement, which includes the aforementioned requirement of \$1,500,000.00 in general liability insurance (Zou aff, Ex. A).

Section 2 of the Rider states, in relevant parts:

Tenant covenants to provide and deliver to the Landlord duly issued Certificates of Insurance regarding the following policies on or before the earlier of the commence date of the term hereof or Tenant's entering the premises for any purposes whatsoever, and to keep in force during the term hereof, for the benefit of the Landlord and Tenant:

(a) A comprehensive policy of general liability insurance relating to the premises and appurtenances... Such policy is to be written by good and solvent insurance companies satisfactory to the Landlord for the full term of this lease and renewals thereof in the amount of ONE MILLION FIVE HUNDRED THOUSAND (\$1,500,000.00) DOLLARS minimum single risk with respect of any one person and/or incident producing personal or bodily injury and FIVE HUNDRED THOUSAND (\$500,000.00) DOLLARS regarding property damage, single risk... (Zou aff, Ex. B [emphasis added]).

From the period of April 1, 2014 to April 1, 2015, Lucky Dollar's general liability insurance policy covered an aggregate sum of \$2,000,000, but only up to \$1,000,000 per single risk (Zou aff, Ex. C).

Lucky Dollar brought this order to show cause within the 10-day cure period seeking a *Yellowstone* injunction against the Church. Pending the hearing and determination of motion sequence number 003, this Court temporarily restrained the Church from terminating Lucky Dollar's lease and tolled the cure period.

Discussion

The purpose of a notice to cure is to "apprise the tenant of claimed defaults in its obligations under the lease and of the forfeiture and termination of the lease if those defaults are not cured within a set period" (*Filmtrucks, Inc. v Express Indus. & Term. Corp.*, 127 AD2d 509, 510 [1st Dept 1987]). The notice to cure must be "unequivocal and unambiguous" (*Garland v Titan West Associates*, 147 AD2d 304, 310 [1st Dept 1989]). Inasmuch as service of a proper notice to cure is a condition precedent to

eviction under the lease, a deficient notice deprives the landlord of a predicate for reclaiming possession of the premises (*Chinatown Apts. v Chu Cho Lam*, 51 NY2d 786, 788 [1980]).

I. The Notice To Cure Fails To Unequivocally and Unambiguously Inform Lucky Dollar Of How It Violated The Lease.

The Notice to Cure stated that Lucky Dollar did not maintain a minimum insurance policy of "\$1,500,000 in general liability" (Zou aff, Ex. A). The term "general liability" is ambiguous - it could refer to either coverage in aggregate or coverage per single risk. Lucky Dollar maintained a general liability insurance policy of \$2,000,000 in aggregate from the period of April 1, 2014 to April 1, 2015. What Lucky Dollar failed to do was to maintain a minimum general liability insurance policy of \$1,500,000 per single risk and \$500,000 property damage, single risk pursuant to Section 2(a) of the Rider.

However, even if Lucky Dollar failed to maintain adequate minimum single risk insurance coverage, the Church did not unequivocally and unambiguously allege said failure in the Notice of Cure. Thus, the Notice to Cure cannot be used as a predicate for repossessing the Premises pursuant to the terms of the Lease (see, e.g., *Chinatown Apts.*, 51 NY2d at 788 [where a notice to terminate failed to cite any specific prohibition in the lease which allegedly had been violated by the construction of a structure, the deficiency in the notice caused it to be

ineffective and deprived the landlord of a predicate for reclaiming possession of the premises]).

II. Had The Notice To Cure Adequately Alleged Lucky Dollar's Failure To Maintain The Minimum Single Risk Coverage, It Still Would Have Failed To Unequivocally and Unambiguously Inform Lucky Dollar Of The Conduct Required To Prevent Eviction.

A tenant's failure to maintain adequate general liability insurance coverage exposes the landlord to an "unknown universe" of claims arising during the period of inadequate insurance coverage (*Kyung Sik Kim v Idylwood, N.Y., LLC*, 66 AD3d 528, 529 [1st Dept 2009]). A tenant may cure an alleged default arising from inadequate occurrence-based insurance coverage by retroactively amending the terms of coverage so that it is consistent with the lease (see *Federated Retail Holdings, Inc. v Weatherly 39th St., LLC*, 920 NYS2d 896, 901 [Sup Ct, NY County 2011]; *National Union Fire Insurance Company of Pittsburgh, PA v Red Apple Group, Inc.*, 309 AD2d 657 [1st Dept 2003] [insurance endorsements that retroactively cover real estate leases can be valid]).

Had the Notice to Cure adequately alleged Lucky Dollar's violation of Section 2(a) of the Rider, it still does not unequivocally and unambiguously inform Lucky Dollar of the conduct required to prevent eviction. The Notice to Cure states that Lucky Dollar may prevent eviction by procuring an insurance

policy that "complies with the terms of the lease agreement, which includes the aforementioned requirement of \$1,500,000.00 in general liability insurance." Such conduct would be insufficient to prevent eviction pursuant to the terms of Section 2(a). In order to prevent eviction pursuant to an effective notice to cure, Lucky Dollar would not only have to procure a general liability insurance policy that covers \$1,500,000 per single risk and \$500,000 property damage, single risk, but would also have to retroactively amend the terms of its inadequate past insurance coverage, so that the coverage is consistent with the Lease and does not expose the Church to an unknown universe of claims.

By failing to unequivocally and unambiguously state the conduct required to prevent eviction, the Church prejudiced Lucky Dollar's right to cure.

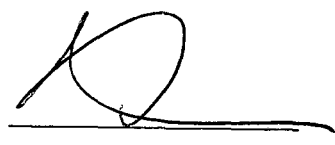
Accordingly, it is hereby

ORDERED that Mount Calvary Pentecostal Church is enjoined from using the notice to cure, dated October 6, 2015 as a predicate for reclaiming possession of the building located at 2061, 2063 and 2065 Amsterdam Avenue, New York, NY 10032 from Lucky Dollar, Inc., and it is further

ORDERED that the motion for an injunction is denied as moot.

DATED: February 8, 2016

ENTER:



CHARLES E. RAMOS

2/11/16