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SVC W. Babylon LLC v 204 Great E. Neck Rd. LLC
2020 NY Slip Op 20289
Decided on October 27, 2020
Supreme Court, Suffolk County
Emerson, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
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Decided on October 27, 2020

Supreme Court, Suffolk County

SVC West Babylon LLC, Plaintiff,

against

204 Great East Neck Road LLC, Defendant.

621083-19

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Elizabeth H. Emerson, J.

Upon the following papers read on this motion*to dismiss and cross-motion to amend*; Notice of Motion and supporting papers*86-94* ; Notice of Cross Motion and supporting papers *95-114* ; Answering Affidavits and supporting papers*115-119* ; Replying Affidavits and supporting papers; it is,

ORDERED that the motion by the defendant for summary judgment in its favor, dismissing the plaintiff's claim for injunctive relief and declaring that the plaintiff's untimely [*2]notice to renew the parties' lease was ineffective as a matter of law, is granted; and it is further

ORDERED that the cross motion by the plaintiff for leave to amend the complaint and to compel discovery is denied as academic.

The defendant is the owner of a parcel of real property located at 204 Great East Neck Road, West Babylon, New York. In March 1999, the property was divided into two parcels that were leased to Berkshire-Great East Neck LLC ("Berkshire") pursuant to two separate ground leases. Berkshire subleased one parcel (parcel A) to CVS West Babylon, LLC (the "CVS Sublease") and the other (parcel B) to an assisted-living facility. Pursuant to the CVS Sublease, Berkshire constructed a free-standing CVS pharmacy and store on parcel A at its sole cost and expense. On September 3, 2015, Berkshire assigned its interest in the ground lease of parcel A (the "CVS Ground Lease") and the CVS Sublease to the plaintiff. Both the

CVS Ground Lease and the CVS Sublease were for 20-year terms commencing on February 1, 2000, and ending on January 31, 2020. The CVS Ground Lease gave the plaintiff five options to renew for terms of five years each. To exercise the first option, the plaintiff was required to give, and the defendant was required to receive, written notice of the plaintiff's election to exercise the option "no later than nine (9) months prior to the termination date of the Lease . . . time being of the essence." If the notice was not so given and received, it automatically expired.

The notice was required to be given and received on or before April 30, 2019. By a letter dated September 20, 2019, the plaintiff notified the defendant that it was exercising the first option to renew and to extend the term of the CVS Ground Lease until January 31, 2025. By a letter dated October 3, 2019, the defendant rejected the plaintiff's notice as untimely. This action ensued. The plaintiff's theory of the case is that equity can intervene to relieve a tenant from an untimely notice to renew. The complaint contains two causes of action: for injunctive relief and for a judgment declaring that the renewal option has been exercised by the plaintiff and that the CVS ground lease has been extended. The defendant answered the complaint and now moves for summary judgment. The defendant contends that the plaintiff has not strictly complied with the renewal terms of the CVS Ground Lease, as required, and that the plaintiff is not entitled to equitable renewal of the CVS Ground Lease as a matter of law.

Contrary to the plaintiff's contentions, **Baygold Assoc., Inc. v Congregation Yetev Lev of Monsey, Inc.**(19 NY3d 223), upon which the defendant relies, is directly on point. In **J. N. A. Realty Corp. v Cross Bay Chelsea, Inc**. (42 NY2d 392), the Court of Appeals held that equity will intervene to relieve a commercial tenant's failure to timely exercise an option to renew a lease when (1) such failure was the result of inadvertence, negligence, or honest mistake, (2) the nonrenewal would result in a forfeiture by the tenant, and (3) the landlord would not be prejudiced by the tenant's failure to send, or its delay in sending, the renewal notice (**Baygold** at 225). The issue in **Baygold** was whether an out-of-possession tenant was entitled to equitable relief excusing its failure to timely exercise an option to renew a commercial lease (**Id**.). The Court of Appeals answered that question in the negative.

Like the plaintiff in this case, the plaintiff in **Baygold**("Baygold") had a ground lease with the owner of the premises and subleased the premises. The ground lease, which was for a term of 10 years, gave Baygold the option to extend the lease term for four additional 10-year periods. Baygold failed to comply with the lease-renewal provision. The Court of

Appeals found that Baygold had failed to meet the second prong of the **J. N. A. Realty** test, i.e, that the nonrenewal would result in a forfeiture by Baygold (**Id**. at 227). The Court explained that the forfeiture rule was crafted to protect tenants in possession who make improvements of a "substantial character" with an eye toward renewing a lease, not to protect the revenue stream of an out-of-possession tenant like Baygold (**Id**. at 228). The Court found that Baygold's improvements to the premises, which were made between 1972 and 1985 when Baygold was a tenant in possession, were not made with a view toward renewal of the lease and were too attenuated from Baygold's failure to exercise the option over 20 years later (**Id**. at 227-228). The Court explained that its holding in **J.N.A. Realty** is restricted to tenants who make "considerable investment" in improvements to the premises in anticipation of the lease renewal or would lose a considerable amount of customer good will should the lease not be renewed (**Id**. at 228). It was never intended to apply in circumstances where an out-of-possession tenant fails to make any improvements in anticipation of renewal and does not possess any good will in a going concern (**Id**. at 228-229).

The plaintiff in this case, SVC West Babylon LLC ("SVC"), contends that it has expended substantial sums of capital (approximately $2.4 million) to acquire its leasehold interest in the property and to manage, maintain, and repair the property (approximately $35,000). SVC contends that the loss thereof is sufficient to satisfy the second prong of the **J. N. A. Realty** test.

SVC is an out-of-possession tenant whose investment in the property consists of the $2.4 million purchase price for the CVS Ground Lease. SVC's investment in the property was not made in anticipation of renewal of the CVS Ground Lease. It was made to acquire the CVS Ground Lease with the expectation that SVC would derive revenue from possessing a long-term lease (**Id**. at 227-228). The forfeiture rule was not crafted to protect the revenue stream of an out-of-possession tenant like SVC (**Id**. at 228). The additional $35,000 that SVC spent to manage, maintain, and repair the property was not spent on improvements to the property in anticipation of the Ground Lease's renewal either. The record reflects that it was spent on maintenance and repairs for which SVC was responsible under the CVS Ground Lease (*see*, **Kaplan v Amsterdam Video**, 266 AD2d 168, 169 [no equitable interest against forfeiture shown where lease provided that tenant was to bear the expense]). Even if the court were to attribute the improvements made by Berkshire to the plaintiff, they were not made with a view toward renewal of the lease and were too attenuated from the plaintiff's failure to exercise the option 20 years later (**Baygold** at 227-228).

Relying on **Souslain Wholesale Beer & Soda v 380-4 Union Ave. Realty Corp.** (166 AD2d 435), SVC contends that a plaintiff's loss of its investment in the acquisition of a business is sufficient to satisfy the second prong of the **J. N. A. Realty** test. In **Souslain**, the plaintiff was [*3]a tenant in possession who purchased a wholesale beer and soda business from the defendant landlord seven years before. The Second Department held that the plaintiff's default in renewing the lease would result in a substantial forfeiture of the plaintiff's investment in the purchase of the business. In **Souslain**, the plaintiff had good will in a going concern, unlike SVC, who will not lose any customer good will if the lease is not renewed (**Baygold**, *supra* at 228). This is not a case in which the business location itself is a valuable asset and SVC stands to lose customer goodwill associated with that location (**227 Franklin Realty LLC v Walnut Road Realty Corp.**, 66 Misc 3d 580, 592, *citing* **J.N.A. Realty**, *supra* at 398). The goodwill 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 the tenant's interest in a long-standing location for a retail business (**205-215 Lexington Ave. Assoc. LLC v 201-203 Lexington Ave. Corp.**(2018 NY Slip Op 30369[U] [Sup Ct, NY County] n 3, *citing* **135 E 57th St. LLC v Daffy's Inc.**, 91 AD3d 1, 6). SVC does not own or operate the CVS pharmacy located on parcel A. It merely subleases parcel A to CVS West Babylon, LLC.

SVC contends that no appellate court has interpreted **Baygold** to require that the tenant must be "in possession" in order to seek equitable relief. In several of the cases on which SVC relies, however, the tenant was in possession of the premises. In **Laundry Mgt.—N.3rd St. Inc. v BFN Realty Assoc., LLC**(179 AD3d 776), the plaintiff tenant operated a laundromat on the premises owned by the defendant landlord. In **Robert B. Jetter, M.D., PLLC v 737 Park Ave. Acquisition LLC**, (162 AD3d 444), the plaintiff operated a medical office on the premises leased from the defendant landlord. In **Nichols v Didas**(137 AD3d 1495), the plaintiff operated a pub on the premises leased from the defendant landlord. In **Waterfalls Italian Cuisine, Inc. v Tamarin**(149 AD3d 1141 & 119 AD3d 773), the plaintiff operated a restaurant on the premises owned by the defendant landlord. The other cases on which SVC relies do not involve the equitable renewal of leases and have no application to the facts of this case (*see*, **RMP Capital Corp. v Victory Jet, LLC**, 139 AD3d 836 [action to recover damages for breach of a factoring agreement]; **DiSario v Rynston**, 138 AD3d 672 [action to foreclose a mechanic's lien]); **Chestnut Realty Corp. v Kaminsky**, 132 AD3d 797 [action to recover damages for breach of a lease]; **Kimso Apts., LLC v Gandhi**, 129 AD3d 785 [action to recover damages for breach of a settlement agreement]).

SVC contends that, in **205-215 Lexington Ave. Assoc. LLC v 201-203 Lexington Ave. Corp.**(*supra*), the Supreme Court, New York County, rejected the argument that **Baygold** requires the tenant to be "in possession" in order to seek equitable relief:

> "To the extent that Landlord relies on **Baygold Assoc., Inc. v Congregation Yetev Lev of Monsey, Inc.,** 19 NY3d 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 posess any good will in a going concern.' **Id.** at 228-229. Here, unlike in **Baygold Assoc., Inc.**, [*4]Tenant has 'expended [substantial] monies on improvements' and, therefore, is distinguishable. **Id**. at 228."

The interpretation of **Baygold** by the Supreme Court, New York County, is not binding on this court. In any event, that court found that the tenant had made substantial improvements to the premises, some as recently as one day before it received notice of termination of the lease, with the intention of renewing the lease. The record in this case reveals that SVC made no improvements to the property in anticipation of renewing the lease (*see, supra*). Thus, **205-215 Lexington Ave. Assoc.** is not applicable to the facts of this case.

The Court of Appeals made it clear in **Baygold** that its holding in **J.N.A. Realty** was restricted to tenants who make "considerable investment" in improvements to the premises in anticipation of the lease renewal or would lose a considerable amount of customer good will should the lease not be renewed (**Baygold**, *supra* at 228). The court is not aware of any cases, nor has the plaintiff cited to any, in which a tenant, like SVC, who does not fall into one of those two categories has obtained equitable relief excusing its failure to timely exercise an option to renew a commercial lease. In fact, the Court of Appeals explicitly stated in **Baygold**, "This narrow equitable doctrine was never intended to apply in a circumstance, like this, where the out-of-possession tenant fails to make any improvements in anticipation of renewal and does not possess any good will in a going concern (**Id**. at 228-229)."

In view of the foregoing, the court finds that the defendant has established its entitlement to judgment as a matter of law and that the plaintiff has failed to raise a triable issue of fact in opposition thereto. Accordingly, the motion is granted and the cross motion is denied as academic.

Dated:October 27, 2020

J.S.C.

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