

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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95 ROCKWELL PLACE LLC,

Index No.

Plaintiff,

-against-

COMPLAINT

HERTZ FAMILY LLC,

Defendant.

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Plaintiff-Tenant, 95 Rockwell Place LLC (“Tenant”), by its attorneys Sills Cummis & Gross P.C., as and for its Complaint against Defendant-Landlord Hertz Family LLC (“Landlord”), alleges as follows:

NATURE OF THE ACTION

1. This is a Yellowstone action seeking injunctive and declaratory relief to prevent Landlord’s termination of Tenant’s Lease (as defined below) following Landlord’s service of a facially defective notice to cure dated June 10, 2020 (the “Notice to Cure”). Landlord intends to terminate the Lease based on this facially defective predicate notice that it opportunistically served in the midst of the COVID-19 pandemic, and in violation of various Executive Orders issued by Governor Andrew M. Cuomo.

PARTIES

2. Tenant is a foreign limited liability company organized and existing under the laws of the State of Delaware and authorized to do business in the State of New York, with its principal place of business in Brooklyn, New York.

3. Upon information and belief, Landlord is a domestic limited liability company with its principal place of business located in Brooklyn, New York, and the ground-lessor of the

real property commonly known as and located at 93-95 Rockwell Place, Brooklyn, New York (the “Premises”).

THE LEASE

4. Tenant leased the Premises from Landlord pursuant to a written commercial Ground Lease dated June 1, 2012, as subsequently amended (the “Lease”).

5. The Lease is for a term of forty-nine years, with two (2) ten year extension options, making Tenant’s total Lease term 69 years.

6. Pursuant to the terms of the Lease, Tenant leased the Premises specifically to construct a new building such as a retail, hotel, office, and/or residential building (the “Project”).

7. In furtherance of the Project and the Lease, Tenant purchased approximately an additional 47,000 square feet of air rights, and has invested approximately \$20 million to date.

THE COVID-19 PANDEMIC AND ITS EFFECT ON THE PROJECT

8. By March 2020, Tenant was current on all rent payments due under the Lease and had a term sheet from a lender (the “Lender”) to finance the Project, contingent on an amendment of the Lease being executed that would extend the Lease term to ninety-nine years.

9. Tenant and Landlord reached agreement on the extension, and further agreed that the Lease amendment would be executed concurrently with the execution of Lender’s financing documents and funding of the loan.

10. Soon thereafter, Governor Cuomo and/or Mayor DeBlasio ordered that all New York State and New York City businesses, schools, courts, and nonessential government, among other things, to close due to the COVID-19 pandemic and ordered that all non-essential employees stay home.

11. The State's actions radically, and justifiably, disrupted society and everyday life as we knew it in order to save human lives.

12. Specifically, by virtue of Executive Order No. 202.6, dated March 7, 2020 issued by Governor Cuomo and titled "Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency," the State of New York closed all non-essential business.

13. Tenant's non-essential construction business and the Project were severely and negatively affected by Executive Order No. 202.6.

14. Subsequent amendments to Executive Order 202.6 further reduced Tenant's ability to operate over the following months. Tenant could not meaningfully operate as a construction business during this period, as such operation was, and is, a significant, governmentally-recognized hazard to public health during the on-going COVID-19 pandemic.

15. As a result of the COVID-19 pandemic, the Lender was no longer willing to move forward with financing the Project as a hotel.

16. Instead, Tenant, Landlord, and Lender discussed among themselves and tentatively agreed on proceeding with the Project as a residential housing development.

17. Based on Tenant's latest discussions with the Lender, it is willing to proceed with financing the Project as a residential development.

18. By virtue of the foregoing, the Lease's express purpose of Tenant building a new building has been temporarily frustrated, and it is impossible, for Tenant to do so while the State restricts Tenant's ability to do business.

LANDLORD'S NOTICES

19. Landlord did not recognize the gravity of this moment in history or the negative effect that the State of New York's shutdown of daily life had on the City, Tenant's business, and the express purpose of the Lease to construct a new building.

20. While the government decided that Tenant's business, like so many others, represented a danger to public health at this unique moment in time, Landlord decided it simply did not care.

21. On or about June 10, 2020, Landlord sent Tenant the Notice to Cure, which was delivered on June 12, 2020.

22. The Notice to Cure purports to allege three defaults under the Lease, the failure to pay base rent; to pay unpaid real estate taxes; and to comply with a timetable in the Lease (the "Timetable"). The Notice to Cure further purports to give Tenant twenty days to cure the alleged base rent and real estate tax defaults, and thirty days to cure to alleged default with respect to the Timetable.

23. The thirty-day period to cure the alleged Timetable default initially expired at 11:59 on July 13, 2020.

24. On or about July 13, 2020, and prior to the expiration of the cure period, Landlord signed and sent Tenant a letter whose subject line is "Official Notice of Event of Default and Termination of Lease" (the "Notice of Termination"), which purports to terminate the Lease five days after its service.

25. On July 20, 2020, Tenant contacted Landlord via e-mail and requested an extension of the period to cure the purported defaults alleged in the Notice to Cure.

26. On July 20, 2020, Landlord agreed to extend the Notice to Cure's cure period to July 31, 2020.

27. Landlord's extension of the cure period rendered the Notice of Termination null and void, and waived any attempt to terminate the Lease pursuant to said notice.

28. The Notice of Termination was otherwise null and void because it was prematurely sent prior to the expiration of the Notice to Cure's initial cure period on July 13, 2020.

29. This action is being commenced prior the expiration of the extended cure period of the Notice to Cure.

TENANT IS NOT IN DEFAULT OF THE LEASE

30. Tenant disputes the validity of the Notice to Cure and disputes that it is in default of any of its obligations under the Lease.

31. The Notice to Cure is defective on its face because, among other reasons, it lacks specificity regarding the alleged failures by Tenant under the Lease; the actions required of Tenant to cure; and the consequences to Tenant if it does not cure.

The Rent Default

32. Tenant is not in default of the Lease based on the failure to pay rent.

33. Executive Order 202.28 states, in pertinent part:

There shall be no initiation of a proceeding or enforcement of either an eviction of any residential or commercial tenant, for nonpayment of rent or a foreclosure of any residential or commercial mortgage, for nonpayment of such mortgage, owned or rented by someone that is eligible for unemployment insurance or benefits under state or federal law or otherwise facing financial hardship due to the COVID-19 pandemic for a period of sixty days beginning on June 20, 2020.

34. On June 6, 2020, the Governor issued Executive Order No. 202.38, which continued the suspension and modifications of, inter alia, 202.28 until July 6, 2020.

35. Thereafter, on July 6, 2020, the Governor issued Executive Order No. 202.48, which provides, in pertinent part:



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