

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 52

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:
NINTH AVENUE REALTY LLC, :
:
Petitioner, :
-against- :
MDDCAR CORP. d/b/a Chimichurri Grill :
401 West 43rd St., a/k/a 607-609 Ninth Ave. :
Ground Floor Store a/k/a Northern Space on :
The Ground floor of the building known as :
609 Ninth Avenue a/k/a Space 2, :
New York, New York 10036 :
:
and :
ABC CORP., :
Respondents. :
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DECISION AND ORDER

Index no.: L&T- 89992/09

Hon. Ann E. O’Shea

This is a summary holdover proceeding, commenced in October 2009, which is based on the allegations of the Petitioner-Landlord (“Petitioner”) that Respondents-Tenants (“Respondents”) violated a term of a lease between the parties and failed to cure the violation within the time allotted. Petitioner seeks possession of the premises and recovery of accrued use and occupancy and other charges. After numerous procedural and other delays, a trial was held before this Court on August 4 and August 12, 2011. Having reviewed the documentary evidence, heard the testimony and had the opportunity to assess the credibility of the witnesses, I find that Respondents violated a term of the parties’ lease; that Petitioner properly served Respondents with a notice to cure the violation; that Respondents failed to cure the violation within the time allowed. Based upon those findings,

I conclude that Petitioner is entitled to a judgment of possession of the subject premises and payment of all accrued use and occupancy and other related charges.

Petitioner and Respondent are parties to a written 10-year lease agreement, dated January 30, 2008, ("the Lease") for premises described as "Ground floor store a/k/a Northern space on the Ground Floor of the building known as 609 Ninth Avenue, a/k/a Space 2 located at 401 West 43rd Street a/k/a 607-609 Ninth Avenue" New York, NY (the Premises"). After taking possession of the Premises, Respondent undertook certain renovation work. A dispute arose between Respondent and its contractor, which resulted in the placement of a \$128,105.00 mechanic's lien against the Premises on January 26, 2009.

Article 3 of the Lease provides in relevant part:

"If any mechanic's lien is filed against the demised premises, or the building of which the same forms a part, for work claimed to have been done for, or materials furnished to Tenant . . . the same shall be discharged by Tenant within 30 days thereafter, at Tenant's expense, by payment or filing a bond as permitted by law."

Article 61(B) of the Lease provides in relevant part:

"Tenant shall not suffer nor permit . . . any mechanics or other liens for work, labor or materials rendered or furnished to or for the account of Tenant upon or in connection with the Demised Premises or to be erected upon the same or any portion thereof. Nevertheless, Tenant shall hold the Landlord harmless from all liens or charges of whatever nature or description, arising from or in consequence of, any alterations or improvements that Tenant shall make or cause to be made upon the Demised Premises."

Article 17 of the Lease provides that, if Tenant violates any of the terms of the Lease and fails to remedy the violation within 15 days of service of a written notice to cure, the Landlord may terminate the tenancy upon five-days notice of termination.

When Petitioner learned of the contractor's Mechanics Lien, it served Respondent with a

Notice to Cure, dated June 2, 2009, notifying Respondent of its violation of Articles 3 and 61(B) of the Lease and demanding that Respondent remedy the violation by paying the lien or filing a bond in satisfaction of the lien by June 29, 2009, or Petitioner would terminate Respondent's tenancy. Respondent failed to pay or bond the mechanics lien by June 29, 2009. Respondent obtained a temporary stay of eviction proceedings (a "Yellowstone Injunction") from Supreme Court, New York County, but its motion for a preliminary injunction was subsequently denied and all stays were lifted on August 18, 2009. Petitioner then served a five-day notice of termination of the Lease upon Respondent and commenced this proceeding on October 13, 2009.

As it is undisputed that Respondent violated the Lease by causing a mechanic's lien to be filed against the Premises and failed to cure the violation within 15 days after Petitioner served the Notice to Cure (or, for that matter, by the close of the evidence in the trial), and as Petitioner acted within its rights under the Lease in terminating the tenancy, Petitioner is entitled to a judgment of immediate possession of the premises.

In addition, Respondent failed to pay all of the rent and/or use and occupancy amounts and related charges due under the Lease, so that, by the time this proceeding was commenced in October 2009, Petitioner's records indicated that Respondent owed a balance of \$25,356.58. By the commencement of the trial, that balance, supplemented by unpaid use and occupancy and related charges, had grown to \$28,299.77. Respondent acknowledged that it owed Petitioner unpaid rent and use and occupancy, but contended that Petitioner had failed to credit Respondent with some payments and that some late fees were erroneous. Petitioner acknowledged certain errors in its records regarding payment of late fees. Each party was afforded an opportunity to submit evidence to support its contention as to the amount owed. Petitioner submitted a revised ledger for the period

February 1, 2008, through August 15, 2011, setting forth the amount of rent or use and occupancy and related charges – including late fees -- due for each month, the category, amount and date of each payment, and corrective credits that were afforded to Respondent. Respondent submitted an incomplete ledger, which simply noted, without support, that certain items had been paid or “removed in Court.” In the absence of any evidence to support Respondents’ assertions, I accept Petitioner’s amended ledger, which appears to fairly set forth the amounts due and unpaid through August 15, 2011.

Based upon the foregoing, Petitioner is entitled to a money judgment in the amount of \$28,299.77, plus interest on that amount from August 15, 2011, less any amounts Respondents may have paid since that date, plus reasonable attorneys’ fees as provided under the terms of the Lease.

Petitioner is directed to submit an order on notice within 10 days of the date of this decision and order.

Dated: November 1, 2011


Ann E. O'Shea, AJSC