

**Serpin Intl. Gourmet Foods, Inc. v Brooklyn Kings Plaza, LLC**

2018 NY Slip Op 30069(U)

January 16, 2018

Supreme Court, Kings County

Docket Number: 515745/2017

Judge: Sylvia G. Ash

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Comm-11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 16th day of January, 2018.

P R E S E N T:

HON. SYLVIA G. ASH,

Justice.

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SERPIN INTERNATIONAL GOURMET FOODS,  
INC., FUNADDICT, LLC,

Plaintiff(s),

- against -

DECISION AND ORDER

Index # 515745/2017

BROOKLYN KINGS PLAZA, LLC, THE RETAIL  
PROPERTY TRUST, A Massachusetts Business  
Trust, QUEENS CENTER SPE LLC,

Defendant(s).

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The following papers numbered 1 to 17 read herein:

Notice of Motion/Order to Show Cause/

Petition/Cross Motion and

Affidavits (Affirmations) Annexed

Opposing Affidavits (Affirmations)

Reply Affidavits (Affirmations)

Papers Numbered

1 - 7

8 - 14

15 - 17

Upon the foregoing papers, Plaintiffs' motions for a *Yellowstone* injunction and for reinstatement to the leased premises are denied. Defendants' cross-motions to dismiss the amended complaint are granted.

### ***Background***

On August 14, 2017, Plaintiff, SERPIN INTERNATIONAL GOURMET FOODS, INC. ("Serpín") commenced this action against Defendant, BROOKLYN KINGS PLAZA, LLC ("Kings Plaza"). Simultaneously with the filing of the summons and complaint, Serpín filed an order to show cause seeking a *Yellowstone* injunction against Kings Plaza enjoining it from terminating Serpín's lease and obtaining possession of the premises. Serpín operates a retail store<sup>1</sup> within a shopping mall owned and operated by Kings Plaza. The complaint asserts two causes of action against Kings Plaza

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<sup>1</sup> It is unclear from the parties' papers whether Serpín occupies a stationary store within Kings Plaza's shopping mall or a moveable cart/kiosk.

based upon allegations that Kings Plaza failed to provide adequate security: (1) breach of the implied covenant of good faith and fair dealing and (2) constructive eviction.

Thereafter, on September 1, 2017, Plaintiff filed an amended summons and complaint adding co-Plaintiff, FUNADDICT, LLC ("FunAddict" and collectively "Plaintiffs") and additional Defendants, THE RETAIL PROPERTY TRUST, A Massachusetts Business Trust ("RPT") and QUEENS CENTER SPE LLC ("Queens Center"). In the amended complaint, Plaintiffs assert breach of the implied covenant of good faith and fair dealing and violation of Real Property Law ("RPL") §235-c against RPT and Queens Center on the grounds that the early termination clauses of their respective lease agreements are unconscionable.

Simultaneously with the filing of the amended summons and complaint, Plaintiffs filed a supplemental order to show cause seeking a *Yellowstone* injunction enjoining RPT and Queens Center from terminating FunAddict's lease and obtaining possession of the premises. FunAddict operates a retail kiosk within Roosevelt Field shopping mall, which is owned and operated by RPT. FunAddict also operates two retail kiosks within Queens Center Mall, which is owned and operated by Queens Center.

Thereafter, on or around November 15, 2017, Plaintiffs filed another order to show cause seeking an order reinstating Plaintiffs to possession of their respective space within the shopping malls owned by Kings Plaza and Queens Center. According to Plaintiffs, on November 2, 2017, Defendants removed their kiosks from their respective spaces and refused Plaintiffs access to the kiosks and their merchandise. Plaintiffs rely on Real Property Actions and Proceedings Law ("RPAPL") §853 for reinstatement to possession of said kiosks and for treble damages due to Defendants' alleged illegal use of self-help to effectuate Plaintiffs' eviction.

All three Defendants oppose Plaintiffs' motions for a *Yellowstone* injunction. Kings Plaza and Queens Center cross-move to dismiss Plaintiffs' amended complaint and, upon dismissal, to schedule a hearing to determine attorney's fees and costs as allowed under the parties' respective lease agreements.

#### Kings Plaza

Kings Plaza does not dispute that Serpin is a tenant in possession at its shopping center pursuant to a written lease dated August 3, 2009. According to Kings Plaza, Serpin failed to pay rent starting in November 2016. As a result, Kings Plaza served a Demand for Rent upon Serpin providing that Serpin's failure to pay the amount due by August 23, 2017 would result in the

commencement of a summary proceeding under the RPAPL. Due to Serpin's failure to pay, a non-payment proceeding was commenced against Serpin in Kings County Civil Court.

Kings Plaza argues that Serpin cannot satisfy the requirements for a *Yellowstone* injunction because (1) there was no threat of termination of the lease because the Demand for Rent only stated that the landlord would commence a non-payment proceeding if tenant failed to pay, not terminate the lease; (2) Serpin failed to obtain a stay of its time to cure prior to the expiration of the cure period<sup>2</sup> and (3) Serpin cannot prove an ability to cure its monetary default.

Kings Plaza also argues that Plaintiffs' complaint against it must be dismissed for failure to state a cause of action. Specifically, that the claim for breach of the implied covenant of good faith, which is premised upon the allegation that Kings Plaza failed to provide adequate security in its mall, cannot be sustained because the relevant lease, which is over 60 pages long, does not require the landlord to provide any security. Further, that because the complaint fails to reference any obligation in the lease upon which a breach of the covenant of good faith may be alleged, that this cause of action fails as a matter of law. Secondly, that Plaintiffs' cause of action against Kings Plaza for constructive eviction also fails because Serpin continues to occupy the leased space and conduct its business and, therefore, there can be no constructive eviction.

In opposition to Kings Plaza's motion, Plaintiffs merely argue that it has stated a cause of action sufficient to survive a motion to dismiss.

#### Queens Center

In its separate cross-motion to dismiss, Queens Center submits that FunAddict sells LED light sneakers from two carts in the common area of its mall pursuant to licenses, not leases. That although the subject agreements are entitled "Specialty Lease Agreement," the terms of the agreements support an interpretation that they are licenses rather than leases because Queens Center has not surrendered absolute possession and control of any given area to FunAddict. Specifically, that the "licensed areas" are movable carts located within the mall's common area which can be unilaterally relocated by the landlord pursuant to the parties' agreements. Secondly, that a license

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<sup>2</sup> Kings Plaza argues that, because Serpin was unsuccessful in obtaining a temporary restraining order when it filed its *Yellowstone* injunction application, Serpin failed to obtain a toll of the time to cure and such time has now long expired.

is revocable at will and without cause and that the parties' agreement allows Queens Center to terminate the agreement upon three days written notice for any reason.

Because the parties' agreements are licenses and not leases, Queens Center argues that a *Yellowstone* injunction is not proper. In addition, Queens Center argues that a *Yellowstone* injunction is not appropriate because the termination notices served on FunAddict did not request a cure of any default but instead informed FunAddict that Queens Center was exercising its absolute right to terminate the agreements on three days notice. Further, that even if the termination date was deemed to be a "cure date," FunAddict's application would be untimely since FunAddict failed to obtain a temporary restraining order prior to the termination date of September 6, 2017.

Queens Center also argues that Plaintiffs' complaint must be dismissed as against it for failure to state a cause of action because Plaintiffs fail to set forth any contract provision or obligation upon which it relies to support its claim for breach of the implied covenant of good faith and fair dealing. Secondly, that Plaintiffs cannot assert a claim against it under RPL §235-c because (1) the subject agreement are licenses and not leases and therefore, the RPL does not apply and (2) Plaintiffs' allegation that FunAddict had no meaningful opportunity to negotiate and was forced to sign an unconscionable agreement is conclusory, especially in light of the fact that FunAddict is a Tennessee limited liability company that operates at least four retail locations throughout New York.

In opposition to Queens Center's motion, Plaintiffs contend that whether the Specialty Lease Agreement is a lease or a license is a question of fact and that Queens Center's motion to dismiss should therefore be denied.

RPT

Although RPT did not file a motion to dismiss, RPT opposes Plaintiffs' motion seeking, among other things, a stay of the termination of FunAddict's lease at Roosevelt Field Mall. RPT contends that the lease agreement with FunAddict is a "temporary tenant lease agreement" that provides both parties the right to an early termination of the lease. With respect to the landlord's option to terminate, the agreement provides that the landlord may elect to terminate the lease upon 30 days advance written notice to the tenant. Further, that RPT sent FunAddict and its counsel a Notice of Lease Termination letter dated August 2, 2017. Upon FunAddict's failure to vacate the

leased space after 30 days, RPT filed a Notice of Petition to evict FunAddict in the District Court of Nassau County.<sup>3</sup>

RPT argues that FunAddict cannot satisfy the requirements supporting an injunction because the lease has been properly terminated pursuant to the parties' agreement. In other words, RPT submits that there is nothing to "cure" and that FunAddict is merely a holdover at this point.

### *Discussion*

#### *Yellowstone Injunctions*

The Court first turns to Plaintiffs' motions for a *Yellowstone* injunction against Kings Plaza, Queens Center, and RPT (motion sequence 1 and 2). The purpose of the *Yellowstone* injunction is to preserve the status quo such that "a commercial tenant, when confronted by a threat of termination of its lease, may protect its investment in the leasehold by obtaining a stay tolling the cure period so that upon an adverse determination on the merits the tenant may cure the default and avoid a forfeiture" (*Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. As...*, 93 NY2d 508, 514 [Ct App 1999]). "The party requesting a *Yellowstone* injunction must demonstrate that: '(1) it holds a commercial lease; (2) it received from the landlord either a notice of default, a notice to cure, or a threat of termination of the lease; (3) it requested injunctive relief prior to the termination of the lease; and (4) it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises'" (*Id. quoting 225 E. 36th St. Garage Corp. v 221 E. 36th Owners Corp.*, 211 AD2d 420, 421 [1st Dept 1995]).

Here, Plaintiffs have failed to demonstrate their entitlement to a *Yellowstone* injunction against any of the Defendants. With regards to Kings Plaza, presuming a threat of termination of its tenancy, Serpin fails to show an ability or intention to cure its default in paying past due rent totaling over \$75,000.00. With regards to Queens Center and RPT, the respective leases were properly terminated with the requisite notice pursuant to the terms of the lease. Plaintiffs fail to point to any lease provision entitling them to an extension of the lease term or any other grounds upon which to find that the landlord's notice of termination was improper.

Moreover, the Court finds that FunAddict's lease agreement with Queens Center, under which FunAddict sells merchandise from a moveable cart/kiosk within Queens Center's mall,

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<sup>3</sup> Roosevelt Field Mall is located in Garden City, New York which is in Nassau County.

constitutes a license agreement and not a lease. For an agreement to constitute a lease and thus create a landlord-tenant relationship, the intent of the parties controls and not the characterization of the agreement (*Linro Equip. Corp. v Westage Tower Assocs.*, 233 AD2d 824, 826 [3d Dept 1996]). “The central distinguishing characteristic of a lease is the surrender of absolute possession and control of property to another party for an agreed-upon rental” (*In re Dodgertown Homeowners Ass’n*, 235 AD2d 538, 539 [2d Dept 1997]). A license, in contrast, gives no interest in land and confers only the nonexclusive, revocable right to enter the land of the licensor to perform an act (*Mirasola v Advanced Capital Group, Inc.*, 73 AD3d 875, 876 [2d Dept 2010]). Here, the subject agreement allowed Queens Center to unilaterally relocate the moveable carts within the mall’s common area as well as revoke FunAddict’s occupancy of the carts upon a mere three days notice. These terms demonstrate that the parties’ intent was to enter into a license agreement and not a lease agreement.

Based upon the foregoing, Plaintiffs are not entitled to a *Yellowstone* injunction. In addition, Plaintiffs’ application for reinstatement to their respective kiosks at Defendants’ malls must also be denied (motion sequence 5).

#### Dismissal Motions

Upon review of the amended complaint and in light of the foregoing determinations, the Court finds that Plaintiffs’ amended complaint must be dismissed for failure to state a cause of action.

“Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance” (*Dalton v Educ. Testing Serv.*, 87 NY2d 384, 389 [Ct App 1995]). “Encompassed within the implied obligation of each promisor to exercise good faith are ‘any promises which a reasonable person in the position of the promisee would be justified in understanding were included’” (*Id.*). “No obligation can be implied, however, which would be inconsistent with other terms of the contractual relationship” (*Murphy v Am. Home Prods. Corp.*, 58 NY2d 293, 304 [Ct App 1983]). The implied covenant of good faith and fair dealing does not create any obligations beyond those stated in the contract (*Dalton v Educ. Testing Serv.*, *supra*).

Here, Plaintiffs’ causes of action against Kings Plaza fails because there is no indication that the relevant agreement obligates Kings Plaza to provide any security at the mall. In addition, Plaintiffs do not provide a basis to imply such an obligation in the contract. Plaintiffs’ causes of action against RPT and Queens Center are also without merit because the subject early termination

clauses are not unconscionable as a matter of law. Moreover, Plaintiffs are business entities familiar with entering into commercial agreements. As such, their claims of imbalanced bargaining power and absence of fair dealing ring hollow.

With regards to Kings Plaza and Queens Center's application for attorneys' fees and costs against Plaintiffs, said Defendants have not established that they are entitled to attorneys' fees under the relevant lease agreements for defending against this action.

Conclusion

Accordingly, it is hereby

ORDERED that Plaintiffs' motions for a *Yellowstone* injunction are denied; it is further

ORDERED that Plaintiffs' motion for reinstatement is denied; it is further

ORDERED that Kings Plaza's motion to dismiss Plaintiffs' complaint as against it is granted; it is further

ORDERED that Queens Center's motion to dismiss Plaintiffs' complaint as against it is granted; and it is further

ORDERED that, based upon the findings contained in this decision, Plaintiffs' complaint is also dismissed as against RPT.

This constitutes the Decision and Order of the Court.

E N T E R,



Sylvia G. Ash, J.S.C.