140 West 28th Street Associates, LLC, Petitioner-Landlord v. 140 West Associates, LLC, Respondent-Tenant, 82056/10 Decided: December 21, 2010

NEW YORK COUNTY
Civil Court

Additional Respondents-Undertenants

Central Parking System of New York, Inc., a/k/a Central Parking System Inc. of New York, "XYZ Corp.", "John Doe" and "Jane Doe"

ATTORNEYS

Judge Engoron

~~In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 5,~~ were used on this motion by petitioner for summary judgment and cross-motion by respondents 140 West Associates, LLC ("respondent"), and Central Parking System of New York, Inc. (collectively, "respondents") to dismiss or, alternatively, for summary judgment:

Papers Numbered:

Moving Papers 1

Cross-Moving Papers 2

Reply Papers (petitioner) 3

Reply Papers (respondents) 4

Sur-Reply Papers (petitioner) 5

Decision and Order

*1

Upon the foregoing papers, it is hereby ordered that the instant motion is granted and the instant cross-motion is denied.

This summary holdover proceeding is very simple; so simple, in fact, that, although the Court read and considered the reply and sur-reply papers, they were extraneous, the moving and cross-moving papers having said it all.

Here's how simple this case is. Petitioner and respondent entered into a lease; respondent breached it by failing to fulfill two obligations, one to build a particularized structure solely within the perimeter of the premises by a certain date, the other to pay rent and additional rent

(real estate taxes); petitioner served, according to Hoyle, notices to cure, notices of termination, a *2 notice of petition and a petition; respondents served an answer; and both sides now move for summary judgment. As petitioner properly, indeed punctiliously, served all notices, and as respondent breached the lease and has no defenses thereto, procedural or substantive, petitioner wins.

Now for the long version. On or about March 16, 2007, petitioner and respondent entered into a lease (Moving Exh. C) that in prospect may have seemed to respondent like a gold mine, but in retrospect must seem like fool's gold. Had all gone well, respondent would have, pursuant to an option to purchase, owned the land, adorned with a classy hotel. Of course, all did not go well; a year and a half after the lease was signed the economy tanked. Consequently, the lease, as written, became financially nonviable for respondent, which freely admits that rather than attempt to build a hotel solely on the premises, it sought to build a mixed-use structure covering the premises and at least one other adjoining property. Respondent claims that it kept petitioner apprised of its change of plans. However, petitioner never approved the change and essentially told respondent that proceeding along that path was at its own risk. In this Court's view, petitioner's wait-and-see attitude would not have constituted a waiver even had there not been a "no waiver" clause. In fact, there was such a clause; there is absolutely no evidence that petitioner waived the clause; and it clearly forecloses respondent's waiver defense.

But what most interests this Court in this case is respondent's desperate grasp for the holy grail: a traverse hearing. Service of process in a summary proceeding is designed to provide notice to the respondent of the existence of the lawsuit. Every trial judge is aware that it has become a game, one that is almost completely divorced from actual notice, which is not even the standard. Rather than claim a lack of actual notice, respondents attempt to find something, anything, an undotted "i," an uncrossed "t," a misspelled name, that the petitioner did wrong. In the instant case, petitioner did everything right. Indeed, it scored a hat trick, effecting personal, substitute, and conspicuous place service.

First, petitioner effected personal service by reasonably attempting to locate and hand-deliver process to respondent's principals, who attempted to evade service (as noted by petitioner, only one of the three principals has submitted an affidavit that would create an issue of fact; the others have not, and the one submitted affidavit is insufficient to create issues of fact as to the other two principals). If there is any doubt as to the first form of service, there is none as to the second and third.

Second, petitioner effected substitute service upon an employee at the premises, who is caught on camera (Moving Exh. L) walking away from the process server, whose statement that she dropped the papers at the employee's feet is sufficient under well-established case law and has not been rebutted by anyone with personal knowledge. Respondent argues, in its papers and at oral argument, that the process server was required to make various inquiries and statements, but these arguments, while perhaps not unreasonable on their face, are made out of whole cloth as far as established law is concerned. See **RPAPL §735**. The arguments must also fall on deaf ears given that the employee walked away from the process server.

Third, petitioner effected conspicuous place service, also caught on camera. About all that respondent could do about this form of service, which it did, and does, is claim that the copies *3

posted were not "true and accurate copies" of the original. Left unsaid is how they were different. Left unsubmitted is an example of the "different" copy. Left unargued is whether the difference was material, much less prejudicial. Perhaps the difference was a stray mark, a minuscule typographical error, or two pages stapled in reverse. Baldly claiming "not true and accurate" does not get you a traverse any more than baldly claiming "fishing expedition" gets you relief from disclosure obligations.

In addition to delivering process, petitioner mailed process, certainly everything that was obligatory. Petitioner has described service in mind-numbing detail, and that detail complies and comports with all requirements.

Yet another reason to uphold service is respondent's jumbled "First Jurisdictional Defense" (Moving Exh. F, ¶9), which is devoid of factual bases for its various ambiguous statements (e.g., "failed to serve properly conformed copies"). It has been held that an objection to the admission of evidence "on every ground ever made or thought of" is not sufficiently particular. So it is here.

In sum, we have reached the stage where the "service of process contest" has gone beyond what could be called a "game" and into the realm of what could be called "farce." Even the most pristine service will, totally predictably, be fought tooth and nail, at the premises ("hide and seek"), and in the courthouse (where prevaricating is routine). The service "tail" is wagging the substance "dog."

This Court calls on the state legislature to amend the CPLR and the RPAPL so that service is deemed effected if proper procedures were followed, whether or not actual notice is received, or if actual notice is received, whether or not proper procedures were followed.

The current system is enormously wasteful of legal resources, encourages rank perjury, and leaves real property, such as the valuable midtown Manhattan parcel at issue here, lying fallow and/or in legal limbo. Service of process contests should go the way of the medieval joust and trial by battle. The legislature should act soon, as legal farce often causes economic tragedy (for example, respondent has failed to pay rent since April of this year, and valuable real estate is being used as a ground-level parking lot, while the service of process contest wheels spin).

In the instant case, petitioner, correctly anticipating the upcoming service of process contest, even resorted to on-site videotaping of the service. Petitioner saw no need to submit the videotape in support of the instant motion, and this Court sees no need to view it, despite respondent's unsupported insistence that it contains a "smoking gun" vitiating service.

As for respondent's 13 affirmative defenses, for the most part they are devoid of factual allegations and thus not properly pled; they are unsupported in opposition to the instant motion; and they are rebutted by petitioner's moving papers. However, the following items might be worthy of brief comment (some because they were stressed at oral argument).

The first affirmative defense (Moving Exh. F, ¶10) alleges, in part, that the "construction notice to cure" (Moving Exh. H) fails to state the date by which a cure was required. Putting aside the question of whether an obligation to construct a building by a certain date can be cured after the date has passed, a notice to cure need not set forth a calendar date if the respondent can *4 reasonably determine said date. Pursuant to Lease §26.01(b), the cure period was 20 days. The

instant notice is dated March 18, 2010, states that it was being sent by overnight mail, and states that the cure period commences one day after it was sent. Pursuant to General Construction Law §20, March 19th, the day of receipt, did not count. Thus, the 20-day cure period began March 20 and ended April 8. Furthermore, this Court finds that the language of the notice was more than sufficient to inform respondent of the claimed default and of any possible cure (as noted, respondent did not even attempt compliance).

The second affirmative defense challenges, among other things, the signature on the "payment notice to cure" (Moving Exh. I). However, said handwritten signature, even if necessary (which it is not), matches the one on the subject lease (Moving Exh. I, at 85, notarized at 86).

The ninth and tenth affirmative defenses claim that petitioner reinstated the terminated tenancy by drawing down on a letter of credit, which constituted the payment of rent. The lease clearly allowed drawn-downs without a reinstatement of the tenancy, and the money withdrawn may have been additional security or may have been "use and occupancy," but it was not rent.

The thirteenth affirmative defense, that the subject predicate notices cannot be used as the basis of this proceeding because petitioner relied on them in a prior proceeding, is contrary to law and barred by law of the case.

Respondent correctly states (Cross-Moving Affirmation, ¶19) that the "construction notice to cure" does not use the word "cure." This was rather poor drafting. However, the notice does say that pursuant to §26.01 of the lease, a failure to perform that continues for 20 days after issuance of the notice shall be an event of default. This is sufficient. "The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view to-day." **Wood v. Lucy, Lady Duff-Gordon, 222 NY 88, 91 (1917)** (Cardozo, J.).

This Court has considered respondents' myriad other arguments and finds them to be unavailing.

Petitioner's request to require respondent to pay use and occupancy pending the resolution of this proceeding is denied without prejudice solely as moot, as this proceeding is herein resolved.

Thus, the instant motion is granted; the instant cross-motion is denied; the clerk is hereby directed to enter a judgment of possession only, warrant to issue and execute forthwith; the clerk is also hereby directed to place this matter on the Part 52 Calendar of January 19, 2011, Room 353, 9:30 AM, for an inquest into all monetary issues, including rent, additional rent, use and occupancy, and attorney's fees.