2021 WL 1096667
Supreme Court, Appellate Term, New York,
Second Dept., 2, 11, 13 Jud. Dist..

REDBRIDGE BEDFORD, LLC,
Respondent,
v.
240 BEDFORD AVE. REALTY HOLDING CORP., Foodtown Supermarket,
Appellant, et al., Undertenant.

2019-1338 K C
|
Decided on March 19, 2021

Appeal from a final judgment of the Civil Court of the City of New York, Kings County (Robin Kelly Sheares, J.), entered July 17, 2019. The final judgment, entered pursuant to an order of that court dated July 17, 2019 granting landlord's motion for summary judgment, awarded landlord possession in a holdover summary proceeding.

Attorneys and Law Firms

Wenig Saltiel, LLP (Meryl L. Wenig, Brooklyn, and Sehzad M. Sooklall of counsel), for appellant.

Adam Leitman Bailey, P.C. (Jonathan D. Lupkin, New York, of counsel), for respondent.

PRESENT: THOMAS P. ALIOTTA, P.J., DAVID ELLIOT, WAVNY TOUSSAINT, JJ.

Opinion

***1** ORDERED that the final judgment is reversed, without costs, the order dated July 17, 2019 is vacated, and landlord's motion for summary judgment is denied.

In this commercial holdover proceeding commenced in 2018, landlord alleges that tenant supermarket breached a substantial obligation of the lease by, insofar as is relevant to this appeal, after having been served with a notice to cure, bringing a declaratory judgment action against landlord in Supreme Court, Kings County, on March 19, 2014, seeking a judgment that tenant had not violated several lease provisions.

In the Supreme Court action, tenant, along with 159 MP Corp., tenant's co-plaintiff therein, moved for a *Yellowstone* injunction, and landlord cross-moved for summary judgment, based on paragraph 67 (H) of the rider to the lease between the parties which provides, in part, "Tenant waives its right to bring a declaratory judgment action with respect to any notice sent pursuant to the provisions of this Lease." Relying on this waiver provision, the Supreme Court denied tenant's motion for a *Yellowstone* injunction, granted landlord's cross motion for summary judgment and dismissed the complaint (*159 MP Corp. v. Redbridge Bedford, LLC*, 2015 N.Y. Slip Op. 32817[U], 2015 WL 13701792 [Sup. Ct., Kings County 2015]). By order dated January 31, 2018, the Appellate Division affirmed the Supreme Court order (*159 MP Corp. v. Redbridge Bedford, LLC*, 160 A.D.3d 176, 71 N.Y.S.3d 87 [2018]), and the Appellate Division's order was affirmed by the Court of Appeals on May 7, 2019 (*159 MP Corp. v. Redbridge Bedford, LLC*, 33 N.Y.3d 353, 104 N.Y.S.3d 1, 128 N.E.3d 128 [2019]).

This proceeding was commenced, and landlord moved for summary judgment, after the Appellate Division's decision was rendered but before the Court of Appeals decided the case. Landlord based its motion on paragraph 67 (H) of the lease between the parties, which further provides that "any breach" of the waiver clause in that paragraph is a breach of a substantial obligation of the tenancy, and is therefore a ground for termination of the lease. The Civil Court granted landlord's motion. Tenant appeals from the final judgment that was subsequently entered.

Landlord argues that the dismissal of tenant's declaratory judgment action is dispositive of the issue before this court. However, the declaratory judgment action asserted that tenant was in compliance with the lease and did not involve any counterclaim by landlord to terminate the lease (*see 159 MP Corp. v. Redbridge Bedford, LLC*, 33 N.Y.3d at 357 n. 1, 104 N.Y.S.3d 1, 128 N.E.3d 128). This holdover proceeding is grounded upon landlord's purported termination of the lease based upon the termination clause of paragraph 67 (H), which tenant argues is void as against public policy.

Several months after the entry of the final judgment in this proceeding, and in response to the Court of Appeals' decision in the declaratory judgment action (*see* 2019 Legis. Bill Hist. NY AB 2554), the legislature enacted Real Property Law § 235-h, declaring that "any provision waiving or prohibiting the right of any tenant to bring a declaratory judgment action" with respect to any term of a commercial lease shall be "null and void as against public policy." We rely on the legislature's expression of the

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public policy of New York, as explicitly set forth in Real Property Law § 235-h and reflected in the legislative history thereof, and hold that the clause permitting the termination of the lease based upon tenant's commencement of a declaratory judgment action is unenforceable as against public policy.

***2** Accordingly, the final judgment is reversed, the order dated July 17, 2019 is vacated, and landlord's motion for summary judgment is denied.

ALIOTTA, P.J., ELLIOT and TOUSSAINT, JJ., concur.

All Citations

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