[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN Justice

PART 57

J + P 418 Corp

INDEX NO. 600653/04

- v -

MOTION DATE

MOTION SEQ. NO. ~~004~~ 001

Melman Meat

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is granted as per decision/order dated 3/17/05.

FILED
MAR 22 2005
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 3/17/05

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

G & P 418 Corp.,

Plaintiff,

- against -

MEILMAN MANAGEMENT & DEVELOPMENT LLC,

Defendants.

Action No. 1
Index No.: 600653/04

x

x

G & P 418 Corp.,

Plaintiff,

- against -

MEILMAN MANAGEMENT & DEVELOPMENT LLC,

Defendants.

Action No. 2
Index No.: 102375/05

DECISION/ORDER

In these related actions for declaratory and injunctive relief, plaintiff/tenant moves for a Yellowstone injunction enjoining defendant/landlord from terminating plaintiff's tenancy under a commercial lease, and tolling the time to cure the defaults alleged in Notices to Cure dated January 7, 2004 ("Action No. 1 Notice") and January 26, 2005 ("Action No. 2 Notice"), respectively.

In order to obtain a Yellowstone injunction, a plaintiff must show 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." (Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assocs., 93 NY2d 508, 514 [1999], quoting 225 E. 36th St. Garage Corp. v 221 E. 36th Owners Corp., 211 AD2d 420, 421 [1st Dept 1995]. See First Natl. Stores v Yellowstone Shopping Ctr., 21 NY2d 630 [1968].)

The Action No. 1 Notice alleges lease defaults based on plaintiff's failure to install adequate soundproofing at the premises; failure to procure insurance required by the lease; and violations of requirements of paragraph 73 of the lease, including failure to use the premises as a "sophisticated bar/lounge" and playing of various types of music prohibited by the lease.

As a threshold matter, the court rejects defendant's contention that Action No. 1 was not timely commenced. Plaintiff commenced the action by obtaining an order to show cause before the expiration of the cure period, and served the order to show cause within the time ordered by the court.

Action No. 1 was adjourned repeatedly pending settlement efforts by the parties. During the adjournments, plaintiff installed soundproofing at the premises, thus evidencing its willingness to cure the alleged soundproofing violation. While defendant disputes the sufficiency of the soundproofing, this dispute does not demonstrate the absence of willingness or ability on plaintiff's part to cure. Termination of plaintiff's tenancy based on a default in soundproofing should therefore be stayed.

As to plaintiff's alleged failure to procure required insurance, plaintiff provided insurance certificates during the pendency of this action, again evidencing its willingness to cure this violation. While it is undisputed that the insurance does not comply with certain lease requirements, including that the insurer waive its right of subrogation, plaintiff raises a bona fide issue as to impossibility of performance of such requirements. Under these circumstances, termination of the lease based on the alleged insurance defaults should be stayed.

As to violations of the use and occupancy clause of the lease, defendant initially took the position that the two "major thrusts" of the Action No. 1 Notice to Cure were insurance and soundproofing. (See Meilman Aff. In Opp.; Stipulations dated Sept. 23, 2004 and Nov. 4, 2004.) Moreover, although defendant also took the position that the lease did not permit the playing of live music by rock bands, defendant acknowledges that it would not have objected to the bands if the sound could have been reasonably controlled through soundproofing and if the bands were suitable for a "sophisticated bar/lounge." (Meilman Supp. Aff. In Opp., ¶ 60.) Under these circumstances, a stay is also appropriate as to the use and occupancy violations alleged in the Action No. 1 Notice to Cure.

The court reaches a different result as to the Action No. 2 Notice to Cure. This Notice alleges violations of the lease based on, among other things, use of the premises for the playing of "'live music' in front of 'standing audiences'" without a valid public assembly permit; use of the premises for dancing and as a "cabaret"; and permitting the premises to be used as an "adult establishment."

Initially, the court rejects plaintiff's argument that the Action No. 2 Notice to Cure was served in violation of a temporary restraining order in the order to show cause, dated March 12,

2004, by which Action No. 1 was commenced. The court accordingly addresses the merits of plaintiff's motion for a Yellowstone injunction in Action No. 2.

In support of this motion, plaintiff denies that it has permitted the use of the premises for any of the above purposes. In opposition, defendant submits considerable documentary evidence that the premises has been used as a cabaret with live entertainment (City of New York Department of Buildings violation dated Jan. 27, 2005), and that it has been used, as recently as February 18, 2005 and repeatedly prior to that date, for "fetish parties." (See Meilman Aff. In Opp., Exs. C, E.) Plaintiff does not submit a reply addressing this evidence and thus rests on the conclusory denials in its moving papers that it has violated the lease provisions regarding use of the premises that are the basis for the Action No. 2 Notice to Cure. Plaintiff thus in effect takes the position that there are no violations to cure. Alternatively, it asserts that "if it turns out that we are wrong about this, we will make certain that this does not recur." (Sardinas Aff. In Support, ¶ 11.) This assertion, in the face of the documentary evidence submitted by defendant, is patently insufficient to demonstrate the requisite willingness to cure.

It is accordingly hereby ORDERED as follows:

Plaintiff's motion in Action No. 1 is granted to the following extent: Plaintiff is granted a preliminary injunction enjoining and restraining defendant, pending the hearing and determination of this action, from terminating or cancelling plaintiff's lease based on the Notice to Cure dated January 7, 2004, and tolling the cure period set forth in said notice; and it is further

ORDERED that this injunction is conditioned on 1) payment by plaintiff of any outstanding rent within five days after service of a copy of this order with notice of entry; and 2) payment by plaintiff of future rent as and when it accrues; and 3) plaintiff's posting of an

undertaking by cash or surety company bond in the amount of fifty thousand dollars within five days after service of a copy of this order with notice of entry; and it is further

ORDERED that plaintiff's motion in Action No. 2 is denied; and it is further

ORDERED that the parties shall appear for preliminary conferences in Actions Nos. 1 and 2 in Part 57 of this court on April 19, 2005 at 11:30 a.m.

This constitutes the decision and order of the court.

Dated: New York, New York
March 17, 2005

MARCY FRIEDMAN, J.S.C.