SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SHIRLEY WERNER KORNREICH J.S.C.
Justice

PART 54

LF 420 W. Broadway

-v-

420 W. Broadway Corp.

INDEX NO. 653630/11

MOTION DATE _____

MOTION SEQ. NO. 001

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 9, 10, 11, 12, 13, 15

Answering Affidavits — Exhibits _____ | No(s). 17, 18, 19, 20

Replying Affidavits _____ | No(s). 26-27

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision

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

Dated: 6/29/12

SHIRLEY WERNER KORNREICH J.S.C., J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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LF 420 WEST BROADWAY, LLC and AHNS, LLC,

Plaintiffs,

v

Index No. 653630/2011
DECISION & ORDER

420 WEST BROADWAY CORPORATION,

Defendant.

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SHIRLEY WERNER KORNREICH, J.:

Plaintiffs LF 420 West Broadway, LLC (LF 420) and AHNS, LLC (AHNS) move, by order to show cause, for a *Yellowstone* injunction to stay and toll the expiration of the 10-day cure period set forth in defendant 420 West Broadway Corporation's default notice dated December 20, 2011, and to enjoin defendant from taking any action to terminate plaintiffs' lease or tenancy.

I. Background

Plaintiffs are the current lessees of the commercial space located on the ground floor of 420 West Broadway (the building), pursuant to a proprietary lease that they executed with defendant, a cooperative corporation, as of June 25, 2007. Plaintiffs also are shareholders of defendant, having acquired the shares that were assigned to that ground floor commercial space, known as Unit # 1, on the same date.

Plaintiffs acquired their interest in the premises, through a series of transactions, from non-party FWAN Management Co., LLC (FWAN). FWAN was named as one of two "Original Shareholders" in the cooperative's Offering Plan, under which, in 2001, the building was converted into its current cooperative form. Prior to the cooperative conversion, FWAN had owned 40% of the building. Following the cooperative conversion, FWAN became the original

shareholder and proprietary lessee of Unit # 1.

In addition to the commercial space located on the ground floor of the building, Unit # 1 includes approximately 3000 square feet of basement storage space, which is the subject of this controversy. The remainder of the basement storage space is assigned among the building's nine residential units.

At some point after plaintiffs became the shareholders and lessees of Unit # 1, defendant cooperative allegedly became aware that portions of plaintiffs' basement storage space had been sublet without the approval of defendant's board of directors, as required under plaintiffs' proprietary lease. Specifically, the proprietary lease provides, in pertinent part, that

> [t]he Lessee (except a Holder of Unsold Shares or an Original Shareholder as that term is defined in the [Offering] Plan) shall not sublet the whole or any part of the Unit or renew or extend any previously authorized sublease, unless consent thereto shall have been duly authorized by a resolution of the Directors, or given in writing by a majority of the Directors or, if the Directors shall have failed or refused to give such consent, then by lessees owning at least two thirds of the then issued shares of the Lessor

(Complaint, Exh. A at ¶ 15). Although defendant's board of directors had no direct knowledge of the precise subletting arrangements, the directors believed, due to the presence of strangers wandering around in the basement, that plaintiffs' basement storage space had been sublet, and possibly sub-sublet, without the requisite approvals. Defendant contends that the presence of these strangers made the residential tenants uncomfortable, not only because the tenants used the basement to store their valuable personal property, but because the basement provided unrestricted access to the residential portions of the building.

Once defendant became aware of this allegedly unauthorized subletting, defendant performed a walk-through of plaintiffs' basement storage space with, among others, the owner of

one of the plaintiffs and his attorney. In that walk-through, defendant allegedly discovered that portions of plaintiffs' storage space were being utilized by, at least, the following entities and individuals: the Donna Karan Company Store LLC (DKNY), Trudy German, Frits de Knegt, and Lawrence de Knegt.[1]

In view of the restrictions on subletting imposed by plaintiffs' proprietary lease, on November 22, 2011, the board requested that plaintiffs produce copies of all subleases, sub-subleases, occupancy agreements, and other agreements pertaining to plaintiffs' ground floor commercial space and basement areas of the building. On December 20, 2011, having received no response to this request, defendant served a ten-day notice of cure on plaintiffs for violating their proprietary lease by subletting portions of the basement storage space without the requisite approvals. Shortly thereafter, by order to show cause dated December 29, 2011, plaintiffs commenced the instant action seeking a *Yellowstone* injunction.

II. Motion Papers

In their moving papers, plaintiffs argue that their motion for a *Yellowstone* injunction should be granted because they have not violated the terms of their proprietary lease and, thus, are not in default. In support of their contention, plaintiffs submit an affidavit from the chief financial officer of plaintiffs' managing agent, who avers that plaintiffs have not entered into any subleases since they acquired their interest in the premises in 2007 (*see* O'Rourke Aff., ¶ 5). Plaintiffs acknowledge that, while several subleases for portions of the basement space assigned

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[1] It is undisputed that, since at least 2001, if not earlier, DKNY has operated a store in the commercial space located on the ground floor of the building, pursuant to a sublease that was executed by FWAN. That sublet, which is not at issue in this proceeding, also includes a portion of plaintiffs' basement storage, which is not the storage space currently at issue.

to Unit #1 do exist, those subleases were granted by FWAN prior to 2007, and were in place well before plaintiffs acquired their interest in the premises. Plaintiffs contend that, as an Original Shareholder, FWAN had an unrestricted right to sublease Unit #1 Therefore, these pre-existing subleases, which include not only the 2001 sublease between FWAN and Donna Karan, but two 2006 subleases between FWAN and, respectively, Frits de Knegt and Trudy German, cannot provide a basis for defendant's claim of a default by plaintiffs.

Plaintiffs further argue that, to the extent that defendant is basing its claim of a default on a purported sub-sublease between Frits de Knegt and Donna Karan, for DKNY's use of additional portions of plaintiffs' basement storage space, plaintiffs have no first-hand information on such a sub-sublease. Moreover, plaintiffs argue that any such sub-sublease would not provide a basis for defendant's default claim against plaintiffs, because Frits de Knegt, as a member of FWAN, would have stood in the shoes of FWAN when he granted the sublease, or alternatively, would have acquired FWAN's unrestricted sublease rights pursuant to his own sublease with FWAN. Plaintiffs additionally argue that, even though they never have sublet any of their basement space, as is alleged in defendant's notice to cure, plaintiffs, too, would have obtained FWAN's unrestricted right to sublet such space as the assignees of FWAN and as the current tenant-shareholders of Unit # 1.

In any event, plaintiffs argue that their request for a *Yellowstone* injunction should be granted because, to obtain this relief, a commercial tenant need only show that: (1) it holds a commercial lease; (2) the landlord served a notice to cure, or a notice of default on the tenant, or faces the threat of lease termination; (3) it sought injunctive relief prior to expiration of the cure period and termination of the lease; and (4) it has the ability and desire to cure the alleged default

by any means short of vacating the premises (*Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc.*, 93 NY2d 508, 514 [1999]). Plaintiffs argue that, here, it is undisputed that plaintiffs hold a commercial lease, that defendant served a notice to cure on plaintiffs, and, that plaintiffs sought this injunctive relief prior to the expiration of the cure period and termination of the lease. Plaintiffs additionally contend that they are willing and able to cure any default, should one be found, by any means available, including: by reaching an agreement with the sublessees or sub-sublessees to quit the premises; by seeking legal redress to oust any unauthorized sublessees or sub-sublessees; or, by retroactively seeking defendant's consent for subleases that already have been in place for many years.

In its opposition, defendant now concedes that the pre-existing subleases entered into by FWAN, which were inherited by plaintiffs as part of their purchase, cannot be challenged and are not the issue (*see* Transcript of January 12, 2012 Oral Argument at 11; Peltz Aff., ¶ 32). Instead, defendant contends that its focus is on any subleases and renewals that since have been entered into by plaintiffs, or any sub-subleases that since have been entered into by plaintiffs' subtenants. Defendant argues that the presence of unrecognizable strangers in plaintiffs' basement space gives rise to a presumption of subletting on the part of plaintiffs or their subtenants, which relieves defendant of the need to prove an actual subletting and/or sub-subletting agreement.

As to these presumed or purported unauthorized subleases and/or sub-subleases, defendant argues that plaintiffs' request for a *Yellowstone* injunction should be denied, because plaintiffs lack both the desire and ability to cure these alleged defaults. Specifically, defendant argues that plaintiffs' lack of desire to cure any alleged default is evident from the position that plaintiffs' have taken in their moving papers, i.e., that plaintiffs have obtained the Original

Shareholder's unrestricted right to sublet without consent. Defendant argues that plaintiffs' lack of ability to cure any alleged default is evident from plaintiffs' failure to demonstrate *how* they propose to cure any alleged lease violations. Defendant argues that where, as here, plaintiffs contend that they have a right to sublet without defendant's consent, "it would behoove the [p]laintiffs to show that they *can* cure by showing that their subleases included language demonstrating that ability" (*see* Defendant's Memorandum of Law at 4). Defendant argues that, absent proof that plaintiffs and/or their subtenants reserved the right to cancel or revoke any unauthorized subleases or sub-subleases, this court is entitled to presume that plaintiffs lack such ability. Defendant argues that because the purported sub-sublease between Frits de Knegt and Donna Karan has yet to be produced, the court is entitled to presume that such sub-sublease does not contain a cancellation or revocation provision and that plaintiffs lack the ability to cure this default.

Sometime after plaintiffs' motion was submitted, plaintiffs' submitted and filed with this court a letter, accompanied by two sur-reply affidavits, detailing the results of plaintiffs' continuing investigation of defendant's claims. These sur-reply papers include a copy of the sub-sublease with DKNY that, at the time of the oral argument, both parties apparently believed had been granted in the recent past by Frits de Knegt. This newly uncovered document indicates, however, that the sub-sublease with DKNY for additional basement storage space was executed on April 18, 2001 by Leonard de Knegt, the son of Frits de Knegt, allegedly pursuant to an oral sublease that Leonard de Knegt had entered into directly with FWAN. Specifically, in paragraph 48 of the Addendum to this sub-sublease, Leonard de Knegt, as landlord, represents that:

> (a) Landlord is the tenant of the property pursuant to an oral agreement with [FWAN], the owner of the demised premises, (b) pursuant to Landlord's

> agreement with FWAN, Landlord has the absolute right to lease the demised premises to Tenant, (c) Landlord is leasing the demised premises to Tenant on the terms contained in the Lease and this Addendum with FWAN's knowledge and consent, and (d) no consents or approvals of any persons or parties, including without limitation FWAN, are required to be obtained by Landlord in order for Landlord to enter into this Lease and Addendum. In the event that Landlord's agreement with FWAN terminates prior to the term of this Lease, this Lease shall continue as an agreement between FWAN, as landlord, and Tenant, as Tenant, without any further action on the part of Landlord, FWAN, or Tenant

(Stern Sur-Reply Aff., Exh. A). The document is signed by the representative of DKNY, by Leonard de Knegt, and, "[s]olely for the purposes of paragraph 48, " by the representative of FWAN (*id.*). This sub-sublease appears to predate, not only the proprietary lease that was entered into between plaintiffs and defendant as of June 25, 2007 (*see* Stern Aff., Exh. A), but the original proprietary lease that was entered into between FWAN and defendant as of October 4, 2001, i.e., at or about the time the building was converted to its current cooperative form (*id.*, Exh. G).

III. Discussion

Plaintiffs' motion for a *Yellowstone* injunction is granted. The purpose of a *Yellowstone* injunction is to stop the running of the cure period and to maintain the status quo so that a commercial tenant, when confronted by a threat of termination of its lease, may protect its investment in the leasehold while the merits of the underlying dispute is being litigated (*Graubard Mollen Horowitz Pomeranz & Shapiro*, 93 NY2d at 514). Our courts have held that a *Yellowstone* injunction is appropriate in circumstances where there is not a sufficient basis to evaluate whether a tenant actually has violated its lease and, thus, is in default (*see Boi To Go, Inc. v Second 800 No. 2 LLC*, 58 AD3d 482 [1st Dept 2009]; *E.C. Elecs., Inc. v. Amblunthorp Holding, Inc.*, 38 AD3d 401 [1st Dept 2007]) . Moreover, because a *Yellowstone* injunction is

designed to avoid the tenant's forfeiture of its valuable leasehold interest while it challenges the propriety of the landlord's default notice, the tenant "need not, as a prerequisite to the granting of a Yellowstone injunction, demonstrate a likelihood of success on the merits" or prove its ability to cure a default"*(Herzfeld & Stern v Ironwood Realty Corp.*, 102 AD2d 737, 738 [1st Dept 1984]) rather, "[t]he proper inquiry is whether a basis exists for believing that the tenant desires to cure and has the ability to do so through any means short of vacating the premises" (*id.*; *see also WPA/Partners LLC v Port Imperial Ferry Corp.*, 307 AD2d 234, 237 [1st Dept 2003]; *Jemaltown of 125th St., Inc. v Leon Betesh/Park Seen Realty Assoc.*, 115 AD2d 381, 382 [1st Dept 1985]).

Here, it has yet to be determined that plaintiffs have violated their proprietary lease by entering into any unauthorized subleases, by renewing any previously authorized subleases, or by allowing their subtenants to enter into or maintain any unauthorized sub-subleases without the requisite consent, and, thus, whether they are in default . Moreover, the fact that plaintiffs have asserted that they are entitled to sublet without defendant's consent is not a sufficient basis on which to deny a *Yellowstone* injunction, given that plaintiffs also have evinced a willingness to cure in the event that this court determines that a default has occurred. Although defendant argues the a *Yellowstone* injunction should be denied in the absence of proof that plaintiffs actually have retained the ability to cure, our courts have held that where, as here, plaintiffs have professed a willingness to do whatever is necessary to cure a default, should one be found, it is sufficient that there exists a potential means to cure the alleged default *(see Marathon Outdoor, LLC. v Patent Constr. Sys. Div. of Harsco*, 306 AD2d 254, 255 [2nd Dept 2003]; *Empire State Bldg. Assoc. v Trump Empire State Partners*, 245 AD2d 225, 229 [1st Dept 1997]).

In granting *Yellowstone* relief, a court may require the posting of an undertaking by the party seeking relief in an amount rationally related to the quantum of damages which the nonmoving party would sustain, in the event the moving party is later determined not to have been entitled to such relief (*see 61 W. 62nd Owners Corp. v Harkness Apt. Owners Corp.*, 173 AD2d 372, 373 [1st Dept], *lv dismissed* 78 NY2d 1123 [1991]). As there is no mention or discussion in the parties' submissions with respect to any damages that defendant might sustain, in the event that this court determines that plaintiffs are not entitled to this injunctive relief, plaintiffs will be directed to file an undertaking in the nominal amount of $1,000. Accordingly, it is

ORDERED that plaintiffs' motion seeking a *Yellowstone* injunction is granted; and it is further

ORDERED that plaintiffs' undertaking is fixed in the nominal sum of $1,000, conditioned that the plaintiffs, if it is finally determined that they are not entitled to a *Yellowstone* injunction, will pay to the defendant all damages and costs which may be sustained by reason of this injunction.

Dated: June 29, 2012

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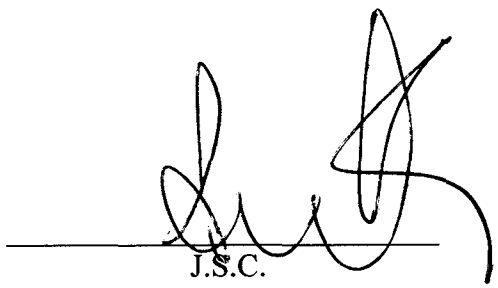

J.S.C.