[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN PART 7

Justice

CLEAN ACT INC.,

Plaintiff

-against-

4126 REALTY CORP.,

Defendant.

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INDEX NO. 113457/11

MOTION SEQ. NO. 001

The following papers, numbered 1 to 2, were read on this motion by plaintiff for a Yellowstone Injunction

Notice of Motion/Order to Show Cause — Affidavits — Exhibits		No(s). 1
Answering Affidavits— Exhibits		No(s). 2
Replying Affidavits — Exhibits		No(s).

Before the Court is an Order to Show Cause (OSC) brought by Clean Act Inc. (plaintiff) for a Yellowstone Injunction seeking to enjoin and restrain 4126 Realty Corp. (defendant) from taking any action to terminate plaintiff's leasehold or tenancy, and from commencing summary eviction proceedings, of the store premises located at 4126 Broadway a/k/a 4128 Broadway, New York, New York, 10033. Plaintiff also seeks attorneys' fees, costs, and disbursements, as well as sanctions against defendant. Defendant has responded in opposition to plaintiff's motion.

Plaintiff is a commercial tenant in defendant's premises pursuant to a fifteen year lease which commenced on September 1, 2008 through August 31, 2023, for use of the space as a laundromat. Plaintiff maintains that when its President Angelo Ramos was originally shown the space to be rented, defendant's principal showed him an "L" shaped vacant store, which measured 1,200 square feet (OSC, Ramos Affidavit ¶ 3). The "L" area or the space which accounts for approximately 165 square feet is comprised of a bathroom and storage area (*id.* at 5). The remainder of the space, approximately 1,035 square feet, is a rectangular area (*id.*). After signing the lease plaintiff hired Nu-Tech Laundries, Inc. (Nu-Tech) to construct a laundromat in the leased space, and these plans also included the installation of plumbing and fixtures for a new handicap accessible bathroom and storage

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

area in the "L" area of the space. Plaintiff maintains that defendant landlord was shown the building plans and signed off on the New York City Buildings Department (NYCBD) Plan/Work Application and the PW-3 Cost Affidavit on September 29, 2008 (*id.* at 8-9; OSC exhibit F), and same was then signed off on by the NYCBD on August 13, 2009 (*id.* at 10-11; OSC exhibit G).

Plaintiff asserts that in early November of 2011, defendant's President, Dimitrios Fotopulos, approached Mr. Ramos and asked if he would surrender the "L" portion of his space, which includes the accessible bathroom and storage area (*id.* at 13). Mr. Ramos responded that he would not surrender that portion of his leased space (*id.*). Subsequently, on November 18, 2011, defendant served upon plaintiff a Fifteen (15) Day Notice to Cure (Notice to Cure). The crux of the claimed violation was that plaintiff has breached the lease agreement and rider by constructing an additional room and bathroom outside the scope and parameters of the rented premises and without the written consent of the defendant. Plaintiff maintains that it is ready, willing and able to cure any default to be found valid by the Court, and defendant did not serve plaintiff with the Notice to Cure until just over two years after the laundromat opened in August of 2009.

In opposition defendant submits the affidavit of its Mr. Fotopulos, which states that the premises leased to plaintiff is rectangular in shape the "L" space was not contained within the lease agreement, contrary to plaintiff's allegation (Opposition ¶ 10). Further, Mr. Fotopulos maintains *inter alia*, that the diagram which he initialed does not accurately reflect the work that was done because plaintiff submitted to NYCBD amended plans which Mr. Fotopulos states he had not seen until he requested said plans in 2011. Further, defendant asserts that plaintiff wilfully refused to proceed with the duly noticed Examination Before Trial (EBT) of plaintiff and Steven Chon, plaintiff's engineer.

"A *Yellowstone* injunction is a provisional remedy, and the purpose of the interlocutory relief is not to determine the ultimate rights of the parties but to maintain the status quo until a full hearing on the merits can be held" (*2914 Third Sportswear Realty Corp. v Acadia 2914 Third Ave.*, LLC, 93 AD3d 573, 573 [1st Dept 2012], citing *Gambar Enters. v Kelly Servs.*, 69 AD2d 297, 306 [1979]). In order to

obtain a Yellowstone Injunction, the moving party must demonstrate that "(1) it holds a commercial lease; (2) it received from the landlord 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. Assoc.*, 93 NY2d 508, 514 [1999]; *see Aegis Holding Lipstick LLC v Metropolitan 885 Third Ave. Leasehold LLC*, 95 AD3d 708, 708 [1st Dept 2012]). The limited purpose of a Yellowstone injunction is to stay the landlord's termination of the lease while the underlying default is litigated (*id.*). In this case plaintiff has demonstrated its right to *Yellowstone* relief, and contrary to defendant's contention, the question of whether the "L" portion of the premises was within the scope of the original lease agreement is a justiciable controversy, as well as whether defendant knew of plaintiff's use of the "L" space when it signed off on the construction plans.

The Court now turns to the portion of plaintiff's motion which seeks sanctions against defendant. Part 130 of the Rules of the Chief Administrator permits courts to sanction attorneys for engaging in frivolous conduct, which includes conduct: (1) "completely without merit in law"; (2) "undertaken primarily to... harass or maliciously injure another"; or (3) "assert[ing] material factual statements that are false" (*see* 22 NYCRR § 130-1.1; *Tavella v Tavella*, 25 AD3d 523, 524 [1st Dept 2006]). The Court does not find that defendants' conduct was frivolous within the meaning of 22 NYCRR § 130-1.1, and as such this portion of plaintiff's motion is denied.

Upon the foregoing, it is,

ORDERED that plaintiff's motion for a Yellowstone injunction is granted, and the period in which plaintiff can cure any defaults under the lease agreement and rider set out in the November 18, 2011 Notice to Cure is hereby tolled pending a determination of plaintiff's complaint; and it is further,

ORDERED that the portion of plaintiff's motion seeking to enjoin defendant from, its attorneys, employees and agents acting on its behalf, from taking any action to terminate plaintiff's commercial

tenancy and from commencing summary eviction proceedings or interfere with plaintiff's continued possession of the premises is granted; and it is further,

ORDERED that the portion of plaintiff's motion seeking attorneys' fees, costs, disbursements and sanctions is denied; and it is further,

ORDERED that discovery shall commence immediately and plaintiff is directed to appear for an EBT within 45 days of entry of this Order; and it is further,

ORDERED that the parties are directed to appear for a Preliminary Conference at 11:00 a.m. on September 12, 2012 at 60 Centre Street, Room 341, Part 7.

ORDERED plaintiff is directed to serve a copy of this Order with Notice of Entry upon defendant and the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 6-29-12

Paul Wooten J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**

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