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

PRESENT: ~~JOAN M. KENNEY~~ Justice PART 8

Superior Restaurant NYC, L.P.

- v -

316 Bowery Realty Corp.

INDEX NO. 100922/12

MOTION DATE

MOTION SEQ. NO. 1

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 ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

FILED

APR 09 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/2/12

JOAN M. KENNEY J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART: 8

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SUPERIOR RESTAURANT NYC, L.P., Index # 100922/12

Plaintiff,

-against- DECISION & ORDER

316 BOWERY REALTY CORP.,

Defendant.

----------X

Kenney, J., M., J.

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Papers considered in review of this motion:

Papers:	Numbered:
Order To Show Cause, Affirmation, Affidavit, Exhibits,	1-9
Affirmation, Affidavit in Opposition, Memorandum of Law and Exhibits	10-22
Reply Affirmation	23

In this landlord tenant action, plaintiff, Superior Restaurant Inc. (the tenant), moves for a Yellowstone injunction.

FACTUAL & PROCEDURAL HISTORY

On November 15, 2007, the parties executed a five year commercial lease (the lease) for a restaurant and bar in the premises located at 316 Bowery and 2, 4, and 6, Bleecker Street, New York, New York (the premises).

On or about January 3, 2012, during the pendency of a summary non-payment proceeding entitled, *316 Bowery Realty Corp. v Superior Restaurant NYC, L.P.*, L&T Index # 81388/11 (the non-payment

proceeding)[1], defendant, 316 Bowery Realty Corp. (the landlord) served Superior Restaurant NYC, L.P. (the tenant), with a "Five Day Notice of Security Deposit Draw and Demand to Replenish Security Deposit." This notice stated that the landlord had "drawn down" the tenant's $105,000.00 security deposit and credited the amount toward the tenant's alleged outstanding rent arrearages. The landlord also demanded that the tenant replenish the security deposit within the same five day period.

On January 13, 2012, the landlord served a 15 day Notice to Cure relative to the tenant's alleged failure to replenish the security deposit. The 15 day notice also stated that in the event the tenant did not cure the alleged default, the lease would be terminated. The parties do not dispute that the lease terms provide that the landlord can, and may, utilize the tenant's security deposit to defer any rent, or additional rent arrears, that may accrue during the term of the lease. Furthermore, the parties do not contest that the security deposit was not held in an interest bearing bank account in accordance with the terms of the lease.

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[1]The tenant has appeared in the non-payment proceeding, and has pled several affirmative defenses. In particular, the tenant challenges the landlord's alleged entitlement to be paid twice for the same rent arrears, which include attorneys' fees that have not been accounted for with proper supporting documentation. This Court will only address the specific relief sought by the movant in this action, not whether the allegations made by the parties in the non-payment proceeding have merit.

DISCUSSION

The treatment of money given as a security deposit in connection with the use or rental of real property is governed by GOL §7-103. GOL §7-103(a) provides, in unambiguous language, as follows:

> Whenever money shall be deposited or advanced on a contract or license agreement for the use or rental of real property as security for performance of the contract or agreement or to be applied to payments upon such contract or agreement when due, such money ... shall be held in trust by the person with whom such deposit or advance shall be made and shall not be mingled with the personal moneys or become an asset of the person receiving the same ... .
>
> GOL §7-103(2) provides, in relevant part:
>
> Whenever the person receiving money so deposited or advanced shall deposit such money in a banking organization, such person shall thereupon notify in writing each of the persons making such security deposit or advance, giving the name and address of the banking organization in which the deposit of security money is made, and the amount of such deposit.

Where a landlord has deposited a security deposit in a bank and fails to comply with the notice provision of GOL § 7-103(2), a court may draw the rebuttable inference that the landlord has mingled that security deposit with the landlord's own money, in violation of GOL § 7-103(1). *Paterno v Carroll*, 75 AD3d 625 (2nd Dept 2010); *Dan Klores Assoc. v Abramoff*, 288 AD2d 121 (1st Dept 2001). The landlord's papers are silent as to where or how the

security deposit was held, or that the security deposit ever made its way into an interest bearing bank account.

Such commingling constitutes a conversion, as well as a breach of fiduciary duty (*LeRoy v Sayers*, 217 AD2d 63 [1st Dept 1995]), and regardless of any noncompliance by the tenant with the terms of the lease, it entitles the tenant to an immediate return of the deposit. Id.; accord *Tappan Golf Dr. Range, Inc. v Tappan Prop., Inc.*, 68 AD3d 440 (1st Dept 2009). In the event of such commingling, the landlord may not use any portion of the deposit, even for otherwise legitimate purposes, e.g., to extinguish rent arrears allegedly due and owing. Id.; *Dan Klores Assoc, supra*. The reason for this is that GOL § 703-1 and its predecessor statute transformed the landlord-tenant relationship with regard to security deposits from a creditor-debtor relationship to one in which the landlord is the trustee of the deposit. A tenant seeking the return of a deposit may not "be subject to setoffs or counterclaims asserted against him in a different capacity." *Matter of Perfection Tech. Servs. Press [Cherno-Dalecar Realty Corp.]*, 22 AD2d 352, 356 (2nd Dept 1965). For the reasons set forth above it is clear that the landlord has "drawn down" the tenant's security deposit in violation of the General Obligations Law.

First Nat. Stores, Inc. v. Yellowstone Shopping Ctr., Inc., 21 NY2d 630 (1968), and its progeny established a four prong test for determining whether a "Yellowstone" injunction should be granted.

The requirements for obtaining Yellowstone relief are as follows: (1) plaintiff holds a commercial lease, (2) the landlord has served a notice to cure, (3) the referenced cure period has not expired,[2] and (4) plaintiff has to demonstrate an ability and willingness to "cure." *ERS Enterprises, Inc. v Empire Holdings, LLC*, 286 Ad2d 206 (1st Dept 2001); *Purdue Pharma LP v Ardsley Partners, LP*, 5 AD3d 654 (2d Dept 2004).

A Yellowstone injunction maintains 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 by obtaining a stay tolling the cure period so that upon an adverse determination on the merits the tenant may cure the default and avoid a forfeiture of the lease (*Post v 120 E. End Av. Corp.*, 62 NY 2d 19, 26 [1988]). Additionally, the very nature of this kind of injunction is designed to "forestall the cancellation of a lease to afford the tenant an opportunity to obtain a judicial determination of its breach, the measures necessary to cure it, and those required to bring the tenant in future compliance with the terms of the lease" (*see, Waldbaum, Inc. v. Fifth Ave. of Long Is. Realty Assocs.*, 85 NY2d 600, 606 [1995]). Furthermore, "[t]he purpose of a notice to cure is to specifically apprise the tenant of claimed defaults in its obligations under the lease and of the forfeiture

[2]The parties do not dispute that the instant application is timely.

and termination of the lease if the claimed default is not cured within a set period of time *542 Holding Corp. v. Prince Fashions, Inc.*, 46 AD3d 309 (1st Dept 2007). Thus, the tenant has made a prima facie showing of entitlement to injunctive relief as a matter of law, and the landlord has supplied no evidence sufficient to defeat the granting of this motion.

All arguments or contentions not specifically addressed herein have been considered and determined to be unpersuasive. Consequently, the motion is granted.

Accordingly, it is

ORDERED that plaintiff's time to cure under the Notice to Cure dated January 13, 2012 is hereby tolled; and it is further

ORDERED that defendant is directed to segregate and re-credit plaintiff's security deposit ($105,000.00) in an interest bearing bank account forthwith; and it is further

ORDERED that within thirty days of service of notice of entry of this Order, defendant is to identify the bank and account number for the re-deposited security deposit to the tenant.

Dated: April 2, 2012

E N T E R:

Hon. Joan M. Kenney