SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

----------x	**TRIAL/IAS PART: 16**
PETER SCALAMANDRE & SONS, INC.,	**NASSAU COUNTY**
Plaintiff,	**Index No: 001248-12**
	Motion Seq. No. 2
-against-	**Submission Date: 4/16/12**
INCORPORATED VILLAGE OF FREEPORT,	
Defendant.	
----------x	

Papers Read on this Motion:

Notice of Motion, Affidavit in Support and Exhibits.....x
Summons and Complaint.....x
Affirmation in Opposition and Exhibits.....x

This matter is before the court on the motion filed by Defendant Incorporated Village of Freeport ("Village" or "Defendant") on March 29, 2012 and submitted on April 16, 2012. For the reasons set forth below, the Court denies the motion.

BACKGROUND

A. Relief Sought

Defendant moves for an Order, pursuant to CPLR § 3211(a)(5), dismissing the complaint in its entirety.

Plaintiff Peter Scalamandre & Sons, Inc. ("Plaintiff") opposes the motion.

B. The Parties' History

The Complaint alleges as follows:

Peter Scalamandre ("Peter") is the President of the Plaintiff corporation. The Village is the sole owner of the premises ("Premises") located at Section 62, Block D, Lot p/o 397, located

in the Village. On or about January 14, 1992, Plaintiff entered into a written lease agreement with Defendant ("1992 Lease"). The 1992 Lease was for a period of six and one half (6.5) months, running from January 15, 1992 to July 31, 1992. Plaintiff alleges that Peter continues to pay, and Defendant continues to accept, the payment as agreed upon in the Lease for the next twenty years, through January of 2012.

In August of 2009, at the Village's request, Peter began good faith negotiations with Defendant to enter into a new lease. Pursuant to those negotiations, on or about May 3, 2010, Peter forwarded a newly negotiated, signed lease to the Village for signature in an attempt to begin a new tenancy at an increased rate. The Village received the new lease but "subsequently forgot about its existence for several months thereafter" (Compl. at ¶ 12). On October 24, 2011, the newly negotiated lease was re-sent, via facsimile, to the Village at the request of J. Barrington Jackson ("Jackson"), the Deputy Village Attorney. Shortly thereafter, the Village demanded retroactive payment from Peter.

On October 27, 2011, the Village served a Notice to Quit on Peter, terminating the tenancy at the Premises on November 30, 2011. Defendant continue to accept rent from Plaintiff after November 30, 2011, and did not commence a summary holdover proceeding. In November of 2011, Peter again attempted in good faith to negotiate a new lease with Defendant. On or after December 16, 2011, Defendant delivered a Notice to Quit on Peter, terminating the tenancy at the Premises on January 31, 2012. Plaintiff alleges that the Notice to Quit was not properly served and, therefore, is defective. Plaintiff alleges that it is, and has been, ready willing and able to negotiate a new lease with the Defendant, and is not in default.

Plaintiff alleges that if Defendant is permitted to terminate the tenancy, Plaintiff will suffer irreparable injury. Plaintiff alleges, further, that 1) Defendant will not be prejudiced by the continuation of the tenancy, and Plaintiff is willing to negotiate new terms; 2) Plaintiff has no adequate remedy at law to rectify the damages it will suffer upon Defendant's allegedly wrongful termination of the tenancy; 3) the Village should be required to specifically perform its obligation regarding the tenancy; and 4) Defendant should be enjoined from commencing any actions, bringing any proceedings, or taking any other steps to terminate the lease. Plaintiff seeks a judgment enjoining the Defendant from commencing any action, bringing any proceeding, or

taking any other steps to terminate the tenancy.

On January 31, 2012, Plaintiff filed an Order to Show Cause seeking injunctive relief ("Prior Motion"). On January 31, 2012, the parties entered into a stipulation ("First Stipulation"), which was so-ordered by the Court, pursuant to which 1) Defendant agreed to stay any commencement of a summary proceeding against Plaintiff for sixty (60) days from the date of the stipulation; and 2) in consideration of the stay, Plaintiff agreed to waive any and all defenses to the Notice to Quit dated December 16, 2011, including but not limited to any defects in the instrument or service or proof of service.

On April 24, 2012, the parties entered into a stipulation, pursuant to which the terms of the First Stipulation were extended pending the Court's decision on Defendant's motion to dismiss. In addition, pursuant to the April 24, 2012 stipulation, Plaintiff withdrew the Prior Motion.

In support of Defendant's motion to dismiss, Jackson affirms that on or about January 14, 1992, Defendant entered into the 1992 Lease with Plaintiff (Ex. B to Jackson Aff. in Supp.), which was a commercial lease agreement. Pursuant to the 1992 Lease, Plaintiff was to make rental payments of $800 per month. The 1992 lease ended on July 31, 1992, at which time Plaintiff remained at, and continued to use, the Premises. Plaintiff's conduct in this regard initiated the existence of a month-to-month tenancy between Plaintiff and Defendant, which commenced on August 1, 1992 and continues to the present day.

Jackson affirms, further, that on or about March 1, 2010, a new commercial lease between the parties was scheduled to commence ("Proposed Lease") (Ex. C to Jackson Aff. in Supp.). The Proposed Lease contains the signature of the Plaintiff but does not contain the signature of the Defendant.

Jackson avers, further, that on or about October 24, 2011, Plaintiff faxed to Defendant a newly negotiated lease which makes reference to the potential commencement of a month-to-month tenancy. Shortly thereafter, Defendant sought payment from Plaintiff in a sum equivalent to the market value of the Premises.

On or about October 27, 2011, Defendant delivered a Notice to Quit to Plaintiff. On or about December 16, 2011, Defendant delivered a second Notice to Quit on Plaintiff, to which the

First Stipulation makes reference. Shortly thereafter, Defendant submitted a third Notice to Quit by mail to Plaintiff. On January 31, 2011, the parties entered into the First Stipulation.

In opposition to Defendant's motion, counsel for Plaintiff ("Plaintiff's Counsel") affirms that, pursuant to the Court's recommendation that the parties attempt to resolve this action, Peter has engaged in good faith negotiations with Defendant. On March 1, 2012, counsel for the parties met and discussed an agreement to resolve the dispute of whether Peter owed the Village retroactive payments, notwithstanding Plaintiff's contention that "it was [the] Village's error in letting the lease sit without its signature for one and a half years" (Francis Aff. in Opp. at ¶ 6). Plaintiff's Counsel affirms that, for 18 months, the Village "continued to accept rent at the previous, lower rate" (*id.* at n. 1). On March 6, 2012, Plaintiff's Counsel was advised that the Village rejected the proposed agreement. Plaintiffs' Counsel notes, however, that the minutes of the Board of Trustees (*id.* at Ex. C) do not make reference to this matter

C. The Parties' Positions

Defendant submits that the Complaint is not viable because Plaintiff cannot establish the existence of a commercial lease, which is essential to its request for a Yellowstone Injunction. The Proposed Lease, on which Plaintiff relies, does not contain the signature of both parties. It is Defendant's position is that there is a month-to-month tenancy, and Defendant's continuous acceptance of payments supports that position. Moreover, Defendant has not acknowledged the existence of a commercial lease agreement between the parties, with the exception of the 6-month 1992 Lease.

Plaintiff opposes Defendant's motion, submitting that Plaintiff has a viable cause of action for the requested relief, which is necessary to protect Plaintiff's leasehold interest. Plaintiff contends that Defendant's acceptance of rent in February and March of 2012, following the purported termination of Plaintiff's tenancy, constitutes a waiver of the Notice to Quit. Plaintiff also argues that, while there is no written lease, Plaintiff clearly has a leasehold interest in the Premises by virtue of the fact that Plaintiff has been the sole occupant of the Premises for over 20 years. Plaintiff also submits that Defendant has failed to articulate a basis, pursuant to CPLR 3211(a)(5), that would warrant dismissal of the Complaint.

RULING OF THE COURT

The purpose of a *Yellowstone* injunction is to allow a commercial tenant confronted by a threat of termination of a lease to obtain a stay tolling the running of the cure period so that, after a determination of the merits of any action arising under the lease, the tenant may cure the defect and avoid a forfeiture of the leasehold. *First Natl. Stores v. Yellowstone Shopping Ctr.*, 21 N.Y.2d 630 (1968); *Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assocs.*, 93 N.Y.2d 508 (1999); *Hempstead Video, Inc. v. 363 Rockaway Assocs., LLP,* 38 A.D.3d 838 (2d Dept. 2007); *Long Is. Gynecological Servs. v. 1103 Stewart Ave. Assocs. Ltd. Partnership,* 224 A.D.2d 591 (2d Dept. 1996). A tenant seeking *Yellowstone* relief must demonstrate that: 1) it holds a commercial lease; 2) it has received from the landlord a notice of default; 3) its application for a temporary restraining order was made prior to expiration of the cure period and termination of the lease; and 4) it has the desire and ability to cure the alleged default by any means short of vacating the premises. *See Hempstead Video, Inc. v. 363 Rockaway Assocs., LLP,* 38 A.D.3d at 839; *Mayfair Super Mkts., Inc. v. Serota,* 262 A.D.2d 461, 461-462 (2d Dept. 1999).

The Court denies Defendant's motion to dismiss in light of the allegations of Plaintiff that Defendant accepted rent from Plaintiff following the service of the Notices to Quit. A landlord's acceptance of rent may be deemed to constitute a waiver of any alleged right to terminate the leases of tenants and to result in the renewal of such leases. *363-367 Neptune Avenue, LLC v. Neary*, 30 Misc. 3d 779, * 790, n. 8 (Sup. Ct., Bronx Cty. 2010), citing *Timothy v. Matison*, 20 Misc. 3d 1105A, * 2 (Dist. Ct., Nassau Cty. 2008) and *Greenwich Gardens Assoc. v. Pitt*, 126 Misc. 2d 947, 955 (Dist. Ct., Nassau Cty. 1984). Thus, Plaintiff may be able to establish that it holds a commercial lease, and can satisfy the other required criteria, entitling it to the requested relief.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear before the Court for a Preliminary Conference on July 2, 2012 at 9:30 a.m.

ENTER

DATED: Mineola, NY
May 31, 2012

HON. TIMOTHY S. DRISCOLL
J.S.C.