MEMORANDUM

SUPREME COURT: QUEENS COUNTY
IA PART 27

| | |
|---|---|
| ORANGE TEA, INC. | INDEX NO. 4175/12 |
| Plaintiff(s), | MOTION DATE April 10, 2012 |
| - against - | MOTION CAL. NO. 9 &10 |
| AMERICAN WILD GINSENG CENTER, INC. | MOTION SEQUENCE NO. 1 & 2 |
| Defendant(s). | |

In this action for declaratory judgment and injunctive relief, plaintiff Orange Tea Inc. (Orange) seeks an order granting a Yellowstone injunction prohibiting the over tenant, American Wild Ginseng Center Inc. (Ginseng) from terminating the sublease while this action is pending, tolling plaintiff's time to cure any defaults of the lease, and granting a preliminary injunction enjoining Ginseng from terminating the sublease and commencing an action to recover possession of the leased premises. Orange separately moves for an injunction enjoining Ginseng or anyone acting on its behalf from interfering with or communicating with Orange's's customers in any way, including the hiring of security guards to force customers to move away from its interior counter, and further seeks an order vacating an order of the court directing Orange to pay $1,000 a month in storage fees.

These motions are consolidated for the purpose of a single decision and are determined as follows:

Orange entered into a commercial sublease and rider agreement with Ginseng on January 28, 2011, whereby it leased the space identified as Counter 1 within a mall located at 40-10 Main Street, Flushing, New York. The sublease describes the rented premises as "approx. 96 net sq. ft., immediately adjacent to sidewalk and pursuant to the Diagram attached herein)" and states that premises may be "used for bubble tea, freshly made natural beverages and juices, including but not limited to fruit juices and food, snack items and no other products allowed". The sublease term runs from February 1, 2011 through December 31, 2014.

Orange opened for business in May 2011. Ginseng served Orange with a three-day notice to cure, dated February 20, 2012, which provides, in pertinent part, as follows: "PLEASE TAKE NOTICE, that you have violated and continue to violate substantial obligations of your tenancy in that in violation of Paragraph 43 of the Rider to the Lease, you have failed to comply with the rules and regulations of the building where the Subject Premises situates. Specifically, you have been conducting business at the hallway, occupying half of the entrance for your customers to line up to place orders, allowing customers to take the other half of the entrance, blocking access to the building and other business and blocking fire exit."

"PLEASE TAKE NOTICE THAT, you have violated and continue to violate substantial obligations of your tenancy in that in violation of Paragraph 8 of the Rider to the Lease, you have put a sign on the sidewalk in front of the building without the prior consent of the Landlord."

"PLEASE TAKE NOTICE THAT, you have violated and continue to violate substantial obligations of your tenancy in that in violation of Paragraph 45 of the Rider to the Lease, you have failed to pay the requisite $1,000 per month for a storage space from the date you opened door for business, May 2011 to February 2012, totaling $10,000." Said notice required Orange to cure its default on or before February 27, 2012.

Orange commenced the within action on February 27, 2012, and moved by way of an order to show cause on the same date for a Yellowstone injunction. The parties' counsel appeared in this part on February 27, 2012, at which time it was undisputed that Ginseng had retained the keys to storage space and had not provided Orange with access to the storage space. This court directed Ginseng to provide Orange with the keys and access to the storage space, and directed Orange to commence paying the rent for the subject storage space once it was provided such access. On March 1, 2012, Ginseng's counsel delivered the keys to storage space to counsel for Orange, along with a letter demanding immediate payment of the rental amount of $1,000 for the storage space for the month of March. This court in the order to show cause granted a temporary restraining order, enjoining Ginseng from terminating Orange's tenancy and from commencing a summary proceeding in Civil Court and tolled the expiration date set forth in the notice to cure, pending the hearing of this motion. The parties were ordered to maintain the status quo.

*First Natl. 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) Orange holds a commercial lease, (2) the landlord has served a notice to cure, (3) the referenced cure period has not expired, and (4) Orange has to demonstrate an ability and

willingness to "cure." (*Graubard Mollen Horowitz Pomerantz & Shapiro v 600 Third Ave. Assocs*., 93 NY2d 508 [1999]; *Hempstead Video, Inc. v 363 Rockaway Associates, LLP*, 38 AD3d 838, 838-839 [2d Dept 2007]; *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 Ave. Corp*., 62 NY2d 19, 26 [1984]). 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]).

"The 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 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 [2007]).

Here, plaintiff holds a commercial sublease, received a notice to cure and sought injunctive relief on February 27, 2012, the last day before Ginseng could terminate the lease. Thus, Orange is entitled to a "Yellowstone" injunction if it is able to cure any claimed defaults on the lease.

Orange asserts, and Ginseng does not dispute, that it obtained Ginseng's permission to display its sign or banner, prior to placing it outside of the premises. Furthermore, Orange's president Jun Jiang states in his affidavit, that the banner is taken in at the end of each business day, and therefore any claimed violation can easily be cured. Orange, thus, has demonstrated that it is willing and able to cure the alleged violation of Paragraph 8 of the Rider to the Lease.

Orange asserts that it was not provided with any rules and regulations of the building and that none exist. Orange, however, concedes that its customers line up from the sidewalk to the counter when the mall doors are open, and that when the doors are closed the customers line up or congregate inside the premises near or in front of the entrance to the mall. Clearly, Orange may not conduct its business in a manner that blocks egress from the building, in violation of the New York City fire or building codes. Orange claims to have cured this alleged violation by installing line ropes, but it does not appear that this has

significantly reduce the congestion in the aisle and at the place of egress. Orange's counsel, in his reply affirmation, states that Orange has hired a contractor with respect to its counter area, and, Ginseng's counsel, in a letter dated March 28, 2012, noted that Orange had moved its counter so as to allow its customers to line up and place orders within the premises. Ginseng's counsel suggested that if Orange's employees instructed its customers not to block the area, this alleged violation was capable of being cured. Orange, thus, has demonstrated that it is willing and able to cure the manner in which it does business, so as to prevent congestion at the place of egress and in the aisle.

Paragraph 45 the Rider to the Lease clearly provides for payment of additional monthly rent for storage space, commencing "the earlier of i) the date of the Undertenant opens door for business or ii) the date the Undertenant demands possession of the storage space". It is undisputed that Orange was not given access to the storage space at the time it commenced doing business in May 2011, and that its demand for access and use of the space were not met at that time, or anytime prior to the service of the notice to cure. Therefore, as Ginseng had not given Orange possession of the storage space between May 2011 and February 2012, that portion of the notice to cure which seeks to recover rent for said period is invalid.

The court notes that Orange asserts in its reply papers that the storage rent provision had been orally modified or waived, and therefore should not be enforced. This argument is improperly raised, and will not be considered here, as "[t]he function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion" *(Matter of Harleysville Ins. Co. v Rosario*, 17 AD3d 677, 677-678 [2d Dept 2005]; see also *Wells Fargo Bank, N.A. v Marchione*, 69 A.D.3d 204, 206 [2d Dept 2009]; *Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992]).

In view of the foregoing, Orange's motion for a Yellowstone injunction is granted. Turning now to Orange's separate motion for injunctive relief, a party moving for a preliminary injunction "must demonstrate by clear and convincing evidence (1) a likelihood of ultimate success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) that a balancing of equities favors the movant's position'" (*EdCia Corp. v McCormack*, 44 AD3d 991, 993, [2d Dept 2007], *quoting Apa Sec., Inc. v Apa*, 37 AD3d 502, 503, [2d Dept 2007] *see W.T. Grant Co. v Srogi*, 52 NY2d 496, 517, [1981]). The movant must show that the irreparable harm is "imminent, not remote or speculative" (*Golden v Steam Heat*, 216 AD2d 440, 442, [2d Dept 1995]). Moreover, "[e]conomic loss, which is compensable by money damages, does not constitute irreparable harm" (*EdCia Corp. v McCormack*, 44 AD3d at 994; *see also Family-Friendly Media, Inc. v Recorder Tel. Network*, 74 AD3d 738, [2d Dept 2010]). The decision to grant or deny a preliminary

injunction lies within the sound discretion of the Supreme Court (*see Glorious Temple Church of God in Christ v Dean Holding Corp*., 35 AD3d 806, 807 [2d Dept 2006]).

Orange has failed to establish that it is likely to succeed on the merits, that it will suffer irreparable injury if an injunction is not granted, and that the balance of equities is in its favor (*see Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839 [2005]). Orange claims that Ginseng hired a security guard on February 21, 2012 whose sole purpose is to harass Orange's customers and steer them away from Orange's counter, thereby frustrating the sole purpose of the lease. Its separate motion for injunctive relief with respect to the security guard is grounded on a claim for breach of contract. Orange's complaint, however, only asserts claims for declaratory judgment with respect to the lease agreement and for a permanent injunction based upon the notice to cure. The complaint, however, does not allege a claim for harassment or breach of contract based upon interference with its use and enjoyment of the leased premises. Orange, therefore, is unable to establish a likelihood of success on the merits on a claim for breach of contract claim arising out of the Ginseng's hiring of a security.

To the extent that Orange alleges that it suffered a loss of business after the security guard was hired, this constitutes a claim for economic loss, and does not constitute irreparable harm. Finally, Orange has not demonstrated that the equities are balanced in its favor. Ginseng, as the over tenant, has a duty to ensure that the aisle which is not within the leased premises, and the means of egress, including the entrance/exit door is maintained in manner that ensures the safe passage of customers and other tenants in the building. Therefore, that branch of Orange's separate motion which seeks injunctive relief with respect to the security guard, is denied.

That branch of Orange's separate motion which seeks to vacate this court's directive that Orange commence paying the storage rent of $1,000 a month, pursuant to the terms of Rider to the Lease, upon receipt of the keys to the storage area, is denied. Orange's president Jun Jiang, in support of the motion for a Yellowstone injunction stated in an affidavit, in unequivocal terms, that Orange was not in violation of the lease, as it was not provided with the keys and access to the storage space; that Ginseng was currently using the storage space; and that Ginseng was attempting to convert said space to retail space. Jiang expressly stated that Orange was willing and able to pay the monthly storage space rent, provided that it was given sole access to said storage space .

Orange's former counsel appeared in this part on February 27, 2012, and presented arguments in favor of the court's granting the temporary restraining order. Orange's former counsel represented to this court that Orange would pay the storage rent, if given the keys and access to the storage area. Counsel's representations to the court were identical to those

made by Orange in Jiang's affidavit. This court signed said order to show cause based upon the representations made by Orange, and its then counsel. Orange's present inconsistent and specious claim that its former counsel was not authorized to accept delivery of the keys, therefore, is rejected.

Orange's claim that the storage rent provision was orally modified or waived goes to the merits of the underlying action. In essence, Orange is seeking summary judgment on its claim for declaratory judgment. Such relief is premature, as issue has not been joined (CPLR § 3212).

Accordingly, Orange's motion for a Yellowstone injunction, enjoining Ginseng from terminating Orange's lease, and tolling the expiration date set forth in the notice to cure, is granted, upon the condition that Orange post an undertaking in an amount to be determined in the order to be entered hereon. The parties may submit affidavits regarding the amount of the undertaking along with the proposed order.

Orange's separate motion for a preliminary injunction and to vacate an order of the court is denied in its entirety.

Settle order.

DATE: June 4, 2012

DARRELL L. GAVRIN, J.S.C.