SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART: 8
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T-MOBILE NORTHEAST LLC, Index # 653339/14

Plaintiff,

-against- **Decision & Order**

JOMEL ASSOCIATES, INC.,

Defendant.
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KENNEY, JOAN, M., J.S.C.

For Plaintiff:
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For Defendants:
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Papers considered in review of this motion seeking a Yellowstone injunction:

Papers	Numbered
Order to Show Cause, Affirmation, Affidavits, Exhibits and Memorandum of Law	1-20
Affidavit in Opposition, Exhibits and Memorandum of Law	21-35
Notice of Motion, Affidavit in Support, Affirmation in Support, Exhibits and Memorandum of Law	36-47
Affirmation, Affidavit in Opposition to Cross Motion, Exhibits and Memorandum of Law	48-53
Reply Affirmation and Memorandum of Law	54-55

Motion sequences 001-002 are consolidated for decision.

Plaintiff moves, by Order To Show Cause (OSC), for a Yellowstone injunction seeking to toll the period to cure plaintiff's alleged violations of the commercial lease (the lease), attendant to part of the roof, located at 1589 Second Avenue, New York, NY (the premises). Plaintiff rents space on the roof of the premises for the use and maintenance of its telecommunications equipment. The parties' lease, has been amended three times since its original execution on January 24, 1997, expires by its own terms

on January 31, 2027.

The first amendment was signed by the parties on or about May 20, 2002. Plaintiff sought to upgrade its equipment and needed additional space to do so (from 80 sq. ft. to 140 sq. ft.). The amendment stated, *inter alia*, that plaintiff affirmed that "the weight of the new equipment does not exceed the load bearing capacity of the rooftop of the building." Attached and made a part of the amendment, are schematic drawings of the layout of the roof, indicating the location and placement of the new equipment, in relation to the increased square footage being acquired. Additionally, the first amendment states that plaintiff "shall reimburse Lessor for any and all damages lessee or it's agents cause, which may occur or arise during the installation of the [e]quipment."

The second amendment, dated November 30, 2006, changed the amount of rent due at "the commencement of the [r]enewal [t]erm ...," which started February 1, 2007. The rent increased to $3,800.00 per month.

The third amendment, dated on or about November 30, 2011, gave plaintiff a right to extend the lease for "one (1) additional ten (10) year term (Second Renewal Term)." Plaintiff was also granted an option to extend the lease for five years thereafter, for a total of 15 years. This amendment also included a one time lump sum payment of $1,000.00, to defendant as consideration for the "necessary" work associated with the "upgrade of transmission lines, ..." The work to

be done states "AC CUBE Swap-out. TMO to continue 2" Teleco conduit to be at minimum 20' above grade."[1]

Paragraph 9 of the lease requires:

> "[plaintiff] to indemnify and hold [defendant], it's agents, employees and officers harmless from and against any and all claims, actions, losses, damages, costs and expenses including but not limited to reasonable attorneys' fees arising out of or in connection with ... directly relating to the installation, operation, maintenance, and removal of [plaintiff's] equipment ... ."

Paragraph 13 of the lease states in pertinent part as follows:

> "[If [plaintiff] fails to make its rental payment and any additional "Rents" ... when due and does not cure such failure within ten (10) days of [defendant's] notice thereof ... either party shall have the right to terminate on written notice to take effect immediately if the other party (I) fails to perform any other covenant for a period of forty-five (45) days after receipt of said notice .... ."

Paragraph 15 of the lease is the Notice provision, and states in its entirety as follows:

> "Unless otherwise provided herein, any notice or demand required to be given herein shall be given by certified or registered mail, return receipt requested or reliable overnight courier to the address of Lessee and Lessor as set forth below."

In pertinent part, Paragraph 13 of the lease provides that:

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[1]All three amendments incorporate, by reference, all of the terms and conditions of the original lease.

> "[Defendant] shall have the right to terminate this Agreement by written notice to take effect immediately if [plaintiff] fails to make its rental payment and any additional "Rents" ... when due and does not cure such failure within ten (10) days of [defendant's] notice thereof.

On or about October 15, 2014, defendant sent a letter, that plaintiff claims constitutes a "notice to cure," addressed to plaintiff's employee demanding that "plaintiff repair and stabilize the parapet and roof" of the premises on or before October 31, 2014, or defendant would seek to terminate the lease." The Court is willing to accept the aforedescribed letter, as a notice to cure in accordance with the terms of the lease (Paragraph 13). The letter is clearly "threatening" plaintiff's tenancy.

It is undisputed that for nine months prior to the service of the alleged notice to cure, the parties were discussing the alleged cause(s) of the deterioration of the parapet and roof, via correspondence and electronic mail. The communications between the parties, include the exchange of plaintiff's paid expert report which argues in essence, that the deterioration of the parapet wall(s) and roof was due to defendant's failure to maintain these parts of the building. In response, defendant produced photographs of the equipment, parapet walls and the roof of the building that indicate otherwise. Based upon the papers before the Court on this motion, it is unclear what the alleged cause of the problems with the roof and the parapets, is as of this writing. Notably, plaintiff does not deny the ability or an unwillingness to assist in correcting the troubles alleged in the notice to cure. However,

defendant affirmatively states that it is not seeking to terminate plaintiff's lease based upon the letter this Court has determined to be a notice to cure. Defendant, the owner of the premises since 1972, contends that it is not seeking to end plaintiff's tenancy, and argues that "[i]n reality, [defendant] is not able to repair the parapets without [plaintiff's] active participation and contributions ... ."

Discussion

Motion Seq. 001

"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 (1st Dept 2007).

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, 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 (2nd 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]; *542 Holding Corp. v Prince Fashions, Inc.*, 46 AD3d 309 [1st Dept 2007]).

To obtain Yellowstone relief a tenant need not show a likelihood of success on the merits (*WPA/Partners LLC v Port Imperial Ferry Corp.*, 307 AD2d 234, 237 [1st Dept 2003]). It can simply deny the alleged breach of its lease (see *Boi To Go, Inc. v Second 800 No. 2 LLC*, 58 AD3d 482 [1st Dept 2009]; *Artcorp Inc. v Citirich Realty Corp.*, 124 AD3d 545, 546 [1st Dept 2015]).

Yellowstone relief is available to protect against leasehold forfeiture, provided that the tenant has the ability to cure by means short of vacatur in the event the tenant is found to be in default of its obligations under a lease (*Post v 120 E. End Ave.*

Corp., 62 NY2d 19, 25 [1984]). This rationale is in line with this State's public policy against the forfeiture of leases (see *Sharp v Norwood*, 223 AD2d 6, 11 [1996], affd. 13 89 NY2d 1068 [1997]). This disinclination against leasehold forfeitures serves to promote the economy and business in our City. In addition, it promotes beneficial services in circumstances such as those presented here, where tenant is a telecommunications company that provides among other things, basic telephone service and emergency service (911 calls) for its customers.

This public policy concern takes on greater weight when a tenant has asserted that it will diligently and in good faith attempt to cure the defect, but through no inaction of its own, can not do so without the cooperation of defendant (see *Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 695[1995] [equity may intervene to relieve (...) against ... forfeitures of valuable lease terms when default in notice has not prejudiced the landlord], quoting *Jones v Gianferante*, 305 NY 135, 138 [1953]; *J.N.A. Realty Corp. v Cross Bay Chelsea*, 42 NY2d 392, 397 [1977]; *Weissman v Adler*, 187 AD2d 647, 648 [1st Dept 1992]).

The Court of Appeals has acknowledged that courts routinely grant Yellowstone relief to reflect this State's policy against forfeiture, and courts have done so by accepting "far less than the normal showing required for preliminary injunctive relief" (*Post*, 62 NY2d at 25).

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A Yellowstone injunction to stay proceedings in response to landlord's notice to cure is a provisional remedy, and the purpose of 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. (see *Gambar Enters. v Kelly Servs.*, 69 AD2d 297, 306 [4th Dept 1979]; *2914 Third Sportswear Realty Corp. v. Acadia 2914 Third Ave., LLC*, 93 AD3d 573, 573 [1st Dept 2012]; *Vill. Ctr. for Care v Sligo Realty & Serv. Corp.*, 95 AD3d 219, 222 [1st Dept 2012]).

Plaintiff has shown that it is prepared and it has the ability to assist in curing the alleged defaults (*Aegis Holding Lipstick LLC, v Metropolitan 885 Third Avenue Leasehold LLC, and CB Richard Ellis, Inc.*, 95 AD3d 708 [1st Dept 2012]). Consequently, and for the reasons set forth herein, the motion is granted.

Motion Seq. 002

"On a motion to dismiss pursuant to CPLR 3211(a)(7), the court accepts as true the facts as alleged in the complaint, affidavits in opposition to the motion, whatever can be reasonably inferred therefrom, accords the plaintiff the benefit of every possible favorable inference, and then determines only whether the facts as alleged, manifest any cognizable legal theory" (*Elmaliach v Bank of China Ltd.*, 110 AD3d 192 [1st Dept., 2013]). The pleadings are to be afforded a "liberal construction," *Leon v Martinez*, 84 NY2d 83, 87 (1994).

"The motion must be denied if from the pleadings' four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law [internal quotation marks omitted]." *Richbell Info. Servs., Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 289 (1st Dept 2003), quoting *511 W. 232nd Owners Corp. v Jennifer Realty Corp.*, 98 NY2d 144, 151-152 (2002); *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Thus, "[t]he issue is not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims." (Id.)

In determining a motion to dismiss a complaint or counterclaim pursuant to CPLR 3211(a)(7), the courts role is limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 120-121 [1st Dept 2002]). The court does not inquire whether there is evidence to support plaintiff's allegations (*Frank*, 292 AD2d at 121), or weigh the plaintiff's chances of ultimate success (*EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005]).

When evidence is submitted pursuant to a CPLR 3211(a)(1) motion, dismissal will be "granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). On a CPLR 3211 motion, a plaintiff's affidavit may remedy an inartfully pleaded complaint and preserve a claim from dismissal, but a

defendant's affidavit will seldom defeat a claim (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]).

"When the moving party [seeks dismissal and] offers evidentiary material, the court is required to determine whether the proponent of the [complaint] has a cause of action, not whether [he or] she has stated one." *Asgahar v Tringali Realty Inc.*, 18 AD3d 408, 409 (2nd Dept 2005)(citation omitted). If the complaint's allegations consist of bare legal conclusions and "documentary evidence flatly contradicts the factual claims, the entitlement to the presumption of truth and the favorable inference is rebutted." *Scott v Bell Atlantic Corp.*, 282 AD2d 180, 183 (1st Dept 2001). Plaintiff has not provided the Court with any documentary evidence that would dispose of the controversy.

The only document the parties can rely upon is the lease for the premises. Most compelling is the indemnification provision of the lease (paragraph 9), which is recited in its entirety herein.

This Court is taking notice of the fact that the lease pertinent to this matter is not a Real Estate Board of New York standard form lease and it is clearly prepared by plaintiff. Additionally, the usual Real Estate Board of New York standard form lease includes waivers of both jury trials and the interposition of any counterclaims. The instant lease is devoid of any of these clauses. The contract speaks for itself, and the terms of the agreement are clear. Discovery has not been completed and much more

has to be determined through that process. Consequently, the motion to dismiss is denied. Either party make seek dispositive relief after the note of issue in this matter is filed.

As a consequence of the indemnification provision contained in the lease, and the contradictory proofs submitted by the parties, it seems that both sides have caused and/or the complicated the problems on the roof and parapets.

For the reasons, set forth herein, plaintiff and defendant shall each bear half of the costs necessary to correct the violations and deterioration of the leased premises (roof and parapets).

Accordingly it is,

ORDERED that the Yellowstone injunction is granted; and it is further

ORDERED that the motion to dismiss is denied; and it is further

ORDERED that plaintiff and defendant shall each bear half of the costs necessary to correct the violations and deterioration of the leased premises (roof and parapets).

Dated: April 6, 2016

E N T E R:

Hon. Joan M. Kenney
J.S.C.