

Hair Bar NYC II, Inc. v Assr Suzer 218, LLC
2017 NY Slip Op 32752(U)
December 22, 2017
Supreme Court, New York County
Docket Number: 160249/2017
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

HAIR BAR NYC II, INC.,

Plaintiff,

- v -

ASSR SUZER 218, LLC,

Defendant.

Index No.: 160249/2017
Motion Date: 12/19/2017
Motion Seq. No.: 001
Motion Cal. No.: _____

The following papers, numbered 1 to 4 were read on this motion for a Yellowstone injunction.

Order to Show Cause -Affidavits -Exhibits _____
Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

<u>PAPERS NUMBERED</u>
1, 2
3
4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion shall be granted.

On this motion, plaintiff tenant moves for a Yellowstone injunction (see First National Stores, Inc. v Yellowstone Shopping Center, Inc., 21 NY2d 630 [1968]) to stay the cure period of the 15 day notice of default dated November 3, 2017 issued by plaintiff's landlord, the named defendant, pending resolution of this action for declaratory judgment that the lease is valid and that plaintiff is not in default thereunder and a permanent injunction preventing the defendant from terminating plaintiff's lease based upon such notice of default.

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

A party seeking a Yellowstone injunction must demonstrate that: "(1) it holds a commercial lease; (2) it received from the landlord either a notice of default, a notice of 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." Zona, Inc., v Soho Centrale, LLC, 270 AD2d 12, 13 (1st Dept 2000) (citations omitted).

Plaintiff has met this burden with respect to the November 3, 2017 notice of default.

Defendant argues that plaintiff's application for a Yellowstone injunction should be denied because, inter alia, plaintiff has not shown that it is willing to cure the conditions cited in the notice to default.

The First Department has held that "[t]he proper inquiry is whether a basis exists for believing that the tenant desires to cure and has the ability to do so through any means short of vacating the premises." Herzfeld & Stern v Ironwood Realty Corp., 102 AD2d 737, 738 (1st Dept 1984).

In proffering the argument that Hair Bar has no intention to cure as "Hair Bar never received permission to use these areas, and certainly not the written permission required under the lease", defendant essentially seeks a summary declaratory

judgment in its favor that plaintiff substantially violated the lease, before issue has even been joined. Such request is wholly premature.

Nor has defendant established bad faith on the part of defendant. The First Department has stated

[t]he cases cited by defendant involve situations in which the tenant either affirmatively indicated its refusal to cure (see, Metropolis Westchester Lanes v Colonial Park Homes, 187 AD2d 492 [2d Dept 1992]), or acted in a thoroughly blatant fashion to demonstrate that it had no intention of curing an obvious breach, should it be found in violation of the lease (see, e.g., Cemco Rests. v Ten Park Ave. Tenants Corp., 135 AD2d 461 [1st Dept 1987]), lv dismissed 72 NY2d 840 [1988]). Here, plaintiff has clearly stated its willingness to [occupy only the premises demised under the lease].

ERS Enterprises, Inc. v Empire Holdings, LLC, 286 AD2d 206, 207

(1st Dept 2001); see also TSI West 14, Inc., v Samson Associates, LLC, 8 AD3d 51 (1st Dept 2004).

Defendant has not shown such affirmative or flouting conduct on the part of plaintiff. In fact, plaintiff has submitted evidence that it is defendant that has refused to permit plaintiff to effectuate the cure involving plaintiff's removing certain items from the office in question

As a condition of the injunction pursuant to CPLR 6312 the court shall require defendant to pay ongoing use and occupancy for the duration of the injunction at the same rate as the current rent under the Lease. Such is "rationally related to the quantum of damages which [landlord] would sustain in the event that the [tenant] is later determined not to have been entitled

to the injunction" (61 West 62nd Owners Corp v Harkness Apartment Owners Corp, 173 AD2d 372, 373 [1st Dept 1991]).

Accordingly, it is

ORDERED that the plaintiff's motion for a Yellowstone injunction is GRANTED and the cure period is hereby tolled pending a determination of whether the plaintiff is in default under the Lease pursuant to defendant's November 3, 2017, notice to cure; and it is further

ORDERED that defendant is hereby preliminarily enjoined from terminating plaintiff's lease pending the disposition of this action and a declaration determining the rights, remedies and liabilities of the parties; and it is further

ORDERED that the Yellowstone injunction granted above is hereby conditioned on plaintiff's payment of use and occupancy for the premises in an amount equal to the rent due under the Lease, for December 2017, if not tendered to date, immediately, and payment of future use and occupancy as rent becomes due under the Lease; and it is further

ORDERED that the parties are hereby directed to attend a preliminary conference on January 30, 2018, at 9:30 A.M., at the Courthouse, IAS Part 59, Room 331, 60 Centre Street, New York 10013.

This is the decision of the court.

Dated: December 22, 2017

ENTER:

~~Debra A. James~~
DEBRA A. JAMES J.S.C.