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| Mark Hotel L.L.C. v Madison Seventy-Seventh L.L.C. |
| 2006 NY Slip Op 30707(U) |
| September 20, 2006 |
| Supreme Court, New York County |
| Docket Number: 101949/06 |
| Judge: Emily Jane Goodman |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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MARK HOTEL L.L.C.¹,

Plaintiff,

-against-

MADISON SEVENTY-SEVENTH L.L.C.,

Index No. 101949/06

FILED

SEP 27 2006

Defendant.

NEW YORK
COUNTY CLERK'S OFFICE

EMILY JANE GOODMAN, J.S.C.:

Plaintiff, the holder of the ground leases for the premises located at 25 East 77th Street and 1000 Madison Avenue in Manhattan (the Premises), moves for a *Yellowstone* injunction enjoining Defendant from terminating two leases, dated August 1, 1981 (the Leases) for those Premises. In its Verified Complaint, Plaintiff also seeks a declaration that it is not in default under the Leases. Defendant opposes the motion on the basis that "Plaintiff has not submitted an affidavit from any of its partners that Plaintiff will take the necessary steps to cure the ECB violation." For the reasons set forth below, Plaintiff's motion for a *Yellowstone* injunction is granted.

By Notices of Default, dated January 20, 2006, Defendant alleged that Plaintiff breached the Leases by (1) defaulting under Article 9 of the Leases by failing to comply with law "with respect to (a) the Premises and appurtenances thereto and (b) the use or occupation of the Premises, by permitting numerous violations to be noted or issued against the Premises" (which violations were attached as exhibits to the Notices). The Notices further alleged that Plaintiff

¹By order dated March 29, 2006, the caption was amended to substitute Mark Hotel, L.L.C. in the place of Madison Avenue Hotel Partners L.P. as Plaintiff in the action.

breached the Leases by defaulting under Article 5 and Article 9 of the Leases by “using the Premises in a manner which violates the certificate of occupancy in force relating to the building thereon situated, by operating a transient hotel.”

DISCUSSION

The purpose of a *Yellowstone* injunction is to allow a tenant confronted by a threat of termination of the lease to obtain a stay by tolling the running of the cure period so that, after a determination of the merits, the tenant may cure the defect and avoid a forfeiture of the leasehold (see First Natl. Stores v Yellowstone Shopping Ctr., Inc., 21 NY2d 630 [1968]; Long Island Gynecological Servs., P.C. v 1103 Stewart Ave. Assocs. Ltd. Partnership, 224 AD2d 591 [2d Dept 1996]; Garland v Titan West Assocs., 147 AD2d 304 [1st Dept 1989]). Because courts are powerless to revive expired leases, “tenants developed the practice of obtaining a stay of the cure period before it expired to preserve the lease until the merits of the dispute could be settled in court” (Post v 120 East End Ave. Corp., 62 NY2d 19, 25 [1984]). If, after a determination, the tenant was found to have violated the lease, the tenant could cure the default during the cure period remaining, or, was subject to eviction (*id.*).

In order to be granted a *Yellowstone* injunction, the commercial tenant must demonstrate that: (1) it holds a commercial lease; (2) it has received from the landlord a notice of default, a notice to cure, or a threat of termination of the lease; (3) it requested injunctive relief prior to the termination of the lease; and (4) it has the desire and ability to cure the alleged defaults by any means short of vacating the premises (see 225 East 36th Street Garage Corp. v 221 East 36th Owners Corp., 211 AD2d 420 [1st Dept 1995]; accord Lexington Ave. and 42nd Street Corp. v 380 Lexchamp Operating, Inc., 205 AD2d 421 [1st Dept 1994]; Stuart v D&D

Assocs., 160 AD2d 547 [1st Dept 1990]). The courts have granted *Yellowstone* injunctions “routinely to avoid forfeiture of the tenant’s interest and in doing so they [have] accepted far less than the normal showing required for preliminary injunctive relief” (Post v 120 East End Ave. Corp., *supra* at 25).

The *Yellowstone* injunction is granted because Plaintiff has met all the requirements for obtaining a *Yellowstone* injunction (see Duane Reade v Highpoint Assoc. IX, LLC., 1 AD3d 276 [1st Dept 2003] [trial court reversed for not granting a *Yellowstone* injunction to tenant who subleased part of premises for use as a thrift shop in violation of the lease; tenant established that it held a commercial lease, received a notice of default, timely requested injunctive relief and evidenced its preparedness and ability to cure the default by sending the subtenant a notice of default]). Defendant’s argument that Plaintiff has not submitted an affidavit from any of its partners evidencing that Plaintiff will take the necessary steps to cure the ECB violation, is contradicted by the fact that the Complaint was verified by the Plaintiff, and indicates the Plaintiff’s willingness to cure the defaults by any means short of vacating the Premises. Although Plaintiff maintains in a letter dated May 1, 2006 that Defendant narrowed the issues to three violations which have been removed (two involving passenger elevators and one involving an ECB violation, which was dismissed after a hearing), the Notices of Default include the allegation that Article 5 and Article 9 of the Leases were breached because Plaintiff was “using the Premises in a manner which violates the certificate of occupancy in force relating to the building thereon situated , by operating a transient hotel.” Although Plaintiff makes several arguments as to why it is not in violation of the certificate of occupancy, it is premature for the Court to issue the declaration sought, especially where such relief was not the subject of the

motion.

It is hereby

ORDERED that plaintiff's motion is for a *Yellowstone* injunction is granted; and it is further

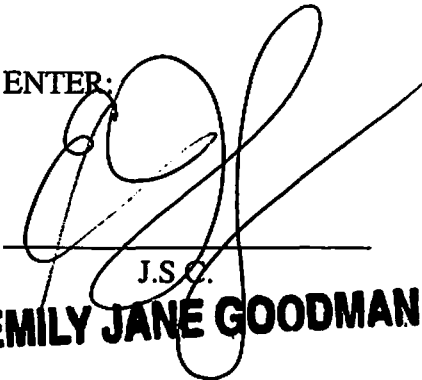
ORDERED that Defendant, its agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of Defendant, are enjoined and restrained, during the pendency of this action, from taking any action to cancel or terminate the Leases based on the Notices to Cure; and it is further

ORDERED that Plaintiff post a bond in the amount of \$ 100,000 upon receipt of a copy of this Decision and Order with Notice of Entry.

This Constitutes the Decision and Order of the Court.

Dated: September 20, 2006

ENTER:



J.S.C.
EMILY JANE GOODMAN

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