Mark Hotel LLC v Madison Seventy-Seventh LLC
2008 NY Slip Op 32001(U)
July 14, 2008
Supreme Court, New York County
Docket Number: 0116512/2007
Judge: Emily Jane Goodman
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SCANNED ON 7/17/2008

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN, Justice

PART 17

Mark Hotel LLC

INDEX NO. 116512/07

MOTION DATE

- v -

Madison Seventy-Seventh LLC

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided per attached

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

FILED
JUL 17 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/14/08

EJG, J.S.C.
EMILY JANE GOODMAN

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 17

---X

MARK HOTEL LLC,

Plaintiff,

Index No. 116512/07

-against-

MADISON SEVENTY-SEVENTH LLC,

Defendant.

FILED
JUL 17 2008
COUNTY CLERK'S OFFICE
NEW YORK

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Emily Jane Goodman, J.:

This dispute concerning the interpretation of a lease has been the subject of a prior action before this court, entitled *Mark Hotel LLC v Madison Seventy-Seventh LLC*, Index No. 103824/07 (the prior action). Familiarity with the facts is therefore assumed. A temporary restraining order is currently in effect in this action.

In the prior action, this court granted plaintiff Mark Hotel LLC's (the Hotel) motion for a *Yellowstone* injunction, following a notice of default which was served on the Hotel by defendant Madison Seventy-Seventh LLC (Madison) on March 7, 2007. *Yellowstone* decision, dated August 14, 2007, Aff. of Senbhar, Ex. 10. Subsequently, the Hotel moved for summary judgment, which was granted in a decision dated January 2, 2008 (summary judgment decision). The effect of the grant of summary judgment in the Hotel's favor is to extinguish the previous *Yellowstone*

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injunction, as no longer necessary to protect the Hotel's rights with regard to the defaults alleged in that action.

In the summary judgment decision, this court found that (1) the plain language of the 150-year lease (Lease) between the parties allows the Hotel to reconfigure the premises so as to allow for the creation of some luxury cooperative hotel units; (2) the Hotel did not violate the Lease when it proceeded with alterations, for which it requested approval, even though Madison did not give its consent; and (3) that the Hotel was not in default when it told the Department of Buildings (DOB) that it was the owner of the premises on various applications presented thereto. The present motion was served and argued while the summary judgment motion in the prior action was pending.

On November 26, 2007, Madison served yet another notice of default on the Hotel (Notice)(Order to Show Cause for *Yellowstone* Injunction, Ex. 1), which elucidated several allegedly new defaults, which Madison claims have only recently come to its attention, and which are, allegedly, different from the defaults behind the prior action. The Notice states that the Hotel: (1) has failed to provide "plans, certificates or approvals for the alterations" from the DOB or the New York City Landmarks Preservation Commission (LC) under Article Thirty-Fourth, Section D of the Lease (*id.* at unnumbered page 1); (2) is performing alterations to the hotel without Madison's consent which are much

larger in scope than those described to Madison in a "Progress Print" provided by the Hotel in December 2006;[1] (3) is making alterations which deviate from the Progress Print, in derogation of Article Thirty-Fourth, Section (E)(i) of the Lease; (4) and is creating a premises which will no longer be a luxury hotel comparable to the Hotel Carlyle, as that hotel existed in 1981, which, according to Madison, is the only correct reading of the Lease.

The alterations being made to the hotel are unarguably massive, entailing a complete gut renovation of the interior, raising of the roof, and lowering of the basement floor. The completed hotel will contain luxury condominium hotel units, some with full kitchens and multiple bedrooms and baths. However, according to the Hotel, the bulk of the premises will continue to consist of transient hotel rooms, albeit, luxurious ones. As of the time of the bringing of this motion, the premises is still in the demolition phase. This may no longer be true, as, under the *Yellowstone* injunction in the prior action, and as of the conclusion of the summary judgment motion, the renovations have presumably continued apace.

As described in the motions made in the previous action, the Hotel provided Madison with architectural plans, entitled

[1]The court assumes that the "Progress Print" is the same plans which the Hotel provided to Madison in December 2006, although they were not referred to as such in the prior action.

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"Progress Print" (Order to Show Cause, Ex. 2) in December of 2006. Based on Madison's interpretation of the Lease, Madison refused to even look at the Progress Print, and informed the Hotel that it would not look at *any* plans which entailed the building of cooperative hotel units. In the decision on the summary judgment motion in the prior action, which was signed while the instant motion was still pending, this court found that the Hotel did not violate the Lease by proceeding with the alterations despite Madison's refusal to give its approval, because Madison's reading of the Lease was "an incorrect and strained interpretation" (Decision, at 10). As a result, this court found that Madison's approval of the renovations had been unreasonably withheld. As such, the court found that the Hotel was within its rights to consider itself in compliance with the Lease, and was within its rights to proceed with its plans.

To repeat the standards for awarding a *Yellowstone* injunction, as set forth in the previous action,

> [t]he purpose of a *Yellowstone* injunction is to allow a tenant confronted by a threat of termination of a lease to obtain a stay tolling the running of the statutory 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.

Hempstead Video, Inc. v 363 Rockaway Associates, LLP, 38 AD3d 838, 838-839 (2d Dept 2007) citing *First National Stores, Inc. v Yellowstone Shopping Center, Inc.*, 21 NY2d 630 (1968). A

Yellowstone injunction follows a showing that the tenant holds a commercial lease; that it has received a "notice of default, notice to cure, or threat of termination of the lease" (*Hempstead Video. Inc. v 363 Rockaway Associates, LLP*, 38 AD3d at 839]; that it brought the application for a temporary restraining order prior to the expiration of the cure period and termination of the lease; and that the tenant has shown a "desire and ability" to cure the default "by any means short of vacating the premises." *Id.; see also 3636 Greystone Owners, Inc. v Greystone Building*, 4 AD3d 122, 123 (1st Dept 2004)(tenant must show that it is "prepared and able" to cure); *TAG 380, LLC v Sprint Spectrum, L.P.*, 290 AD2d 404 (1st Dept 2002).

As with the *Yellowstone* injunction in the prior action, the Hotel has met the first three prongs of the *Yellowstone* test: it possesses a valuable commercial premises; it received a notice of default; and it brought the motion in a timely manner. The issue Madison raises in the present motion is the Hotel's ability to cure, which Madison claims is impossible, considering the scope of the demolition, as well as the Hotel's alleged failure to provide sufficient plans in 2006 for Madison's approval.

At some point in 2007, Madison apparently reviewed the Progress Print, and found it wanting. It now argues that the Progress Print was insufficient to apprise it of the scope of the project, in that it did not reveal a complete gutting of the

building, and the extensive structural changes which would be made.

In December 2007, the Hotel provided Madison with a new set of plans, which had been filed with the DOB and Landmarks Preservation Commission, along with numerous other documents, purporting to show the most recent plans for the renovation, including, allegedly, the demolition plans. The Hotel claims that, by providing these new materials to Madison, it has cured any defaults it may have made previously in the production of plans, and that, in any event, Madison should have been aware of the extent of the interior demolition intended by virtue of having received the 2006 plans, which allegedly provided sufficient notice of the scope of the project.[2]

In response, Madison first insists that the Hotel's defaults are incurable, because the Hotel failed to provide proper plans which would have indicated to Madison the full extent of the proposed renovation *before* demolition, as required by Article Thirty-Fourth, Section D of the Lease. Madison argues, essentially, that the Hotel can never go back in time and cure this alleged failure to comply with the Lease and so, cannot establish a right to a *Yellowstone* injunction. Thus, Madison

[2]The Hotel also maintains that it was not required to produce any more plans, due to the futility of such a gesture, because Madison was adamant that cooperatives could never be built under the terms of the Lease.

argues that in default number one, the Hotel's failure to provide "plans, certificates or approvals for the alterations" from the DOB or the LC is an incurable default requiring termination of the Lease.

Madison next states, in default number two, that the Hotel failed to obtain consent from Madison for any of the work it has already performed, in violation of Article Thirty-Fourth, Section B of the Lease, which is, allegedly, another default which can never be cured, because the damage has already been done.[3]

Default number three is Madison's contention that the work being done and which the Hotel plans to do "substantially deviates from the only set of drawings [the Hotel] delivered to [Madison] prior to December 12, 2007 (the "Progress Print"), in violation of Article Thirty-Fourth, Section E(i)." Aff. of Silverman, at 2. Madison maintains that this default is also incurable.

Madison provides the affidavit of its architect, Manuel Castado (Castado), who was hired in November 2007 specifically, Madison alleges, to determine whether the work the Hotel was performing, and the future work planned, "were strictly in accordance with the Progress Print (emphasis in original)." Aff.

[3]As previously noted, the court already determined in the related action that Madison unreasonably refused to review the plans presented to it and therefore the Hotel did not violate the Lease by preceding with alterations.

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of Silverman, at 5. Castado visited the project on November 12, 2007, and found the renovation to include major structural changes (such as the entire gut demolition itself) which he alleges were not indicated in the Progress Print.

Madison later sent another architect, Paul Taylor (Taylor), who inspected the hotel in December 2007. Taylor also noted the total interior demolition which, allegedly, was not indicated on the Progress Print. Taylor also observed that one of the hotel's two interior fire staircases had been removed, along with the sprinkler and fire alarm systems. Madison complains that the these acts "create[] serious safety issues for workers and others in the building, including people in the commercial establishments on the ground floor of the property that are still occupied."[4] Aff. of Silverman, at 12. Madison is concerned that the removal of the fire safety measures places it in "legal jeopardy," for plans it never approved. *Id.* Madison argues that this default is also incurable, because the Hotel cannot remedy its initial mistake in informing Madison of the breadth of the renovations.

In the fourth alleged default, Madison claims that the Hotel's conversion of a substantial portion of the hotel to cooperative use is improper because the alterations will not

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[4]The renovations in the hotel do not involve the first floor commercial tenants.

result in a hotel like the Hotel Carlyle, as it existed at that time, and as purportedly required by Art. Fifth of the Lease.[5] Madison reiterates that the default cannot be cured, or alternatively, can only be cured at enormous cost. Madison bases a great deal of this argument on a newspaper article in the New York Post, dated November 8, 2007, in which the Post claimed that the Hotel was poised to sell a massive triplex cooperative apartment, comprising the entire top three stories of the hotel to a named buyer, for $150 million. Aff. of Silverman in Opposition to Motion, Ex. B.

Madison is also concerned that the Hotel is building a number of "family sized" apartments, which, allegedly, can never be used for transients. Madison argues that building such large cooperative apartments runs afoul of the building's Certificate of Occupancy, which designates the hotel as being approved for a "Group 5 Transient Hotel" only, a designation which Madison claims bars the Hotel from turning any part of the hotel into large units which will not be used for transient custom.

The Hotel flatly denies any plans to create and sell a triplex apartment (*see* Aff. of Izak Sehbarhar, Ex. 6, at 4). It also maintains that such a unit or the creation of large, family-sized units would not violate the Lease.

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[5]Neither party addresses whether Madison is precluded from asserting, in this action, further arguments concerning Lease interpretation, which were not raised in the prior action.

In sum, Madison's arguments seem to be premised on the idea that, had it looked at the Progress Prints in 2006, it would have found them wanting, and finds them wanting today, despite the fact that the Hotel has provided new plans in December 2007. Further, Madison's arguments are premised on the legal contention that the Hotel has no right to cure defaults, if any.

The Hotel is entitled to a *Yellowstone* injunction allowing it to continue with the renovations, pending the completion of this action. Even if Madison succeeds in proving any of its alleged defaults, the court finds that under the circumstances of this case, the defaults are capable of cure.[6]

Madison's citation to *Excel Graphics Technologies, Inc. v CFG/AGSCB 75 Ninth Avenue, L.L.C.* (1 AD3d 65 [1st Dept 2003]) does not alter this determination. In that case, the Court held that the tenant should not have been granted a *Yellowstone* injunction because the default of subletting, without the

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[6]The court takes allegations regarding the safety of construction personnel and the public very seriously. However, Madison has failed to show the legal necessity to have two fire stairwells, and sprinkler and fire alarm systems, in a building under construction, as opposed to a complete and occupied building, which, according to Elliot Harris III, P.E., does require these things. *Compare* Building Code, Administrative Code of the City of New York (Administrative Code) § 27-354 (fire egress in occupied buildings); Administrative Code § 27-923 (fire safety systems in occupied buildings) to Administrative Code § 27-1007, *et seq.* (fire safety systems in buildings under construction). Nor has Madison alerted the court to any violations issued by an appropriate oversight authority such as the buildings department or the fire department.

landlord's approval, was incurable. However, this action involves alterations, and the same Court has more recently held that a tenant may cure such a default (*see Britti Corp. v Perry Thompson Third LLC.*, 26 AD3d 235 (1st Dept 2006) (*Yellowstone* properly granted despite tenant's failure to obtain building permits and landlord's prior written consent before altering the premises; termination was not warranted absent evidence that the tenant was unwilling or unable to cure the breach); *see also ERS Enterprises, Inc. v Empire Holdings LLC.*, 304 AD2d 433 (1st Dept 2003) (*Yellowstone* properly granted despite tenant's failure to obtain landlord's consent to alterations because tenant could restore leased restaurant to its original condition).[7] Moreover, it is important to note that here, the tenant actually requested approval in accordance with the Lease and the landlord refused to not only consent to the alterations but to review any documents originally submitted to it. Accordingly, to the extent that the Hotel is found to have committed the defaults alleged in the notice, those defaults are curable (and may have already been cured).

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[7] In any event, the import of *Excel* is unclear (*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).

Madison requests that, in the event the motion is granted, an undertaking should be set at $150 million, the amount which, according to Madison, the Hotel admits the entire reconstruction will cost. Madison maintains that it is entitled to an undertaking in this amount "in case [the Hotel] experiences financial difficulty and is unable to complete the reconstruction." Silverman Aff., at 24. Madison is apparently convinced that the premises will remain in the same gutted condition which its architects inspected in November and December of 2006, and, as such, would take an enormous amount of money to complete. It is unrealistic to believe, however, that the gut demolition is the catastrophic end result of the renovation of the hotel. And, it is pure speculation on Madison's part that the Hotel might run out of money to complete the project, leaving Madison with a worthless shell of a building and, in light of the Hotel's explanation of the structure of its financing.

In the prior action, the parties agreed to an undertaking of $200,000. Madison claims that this relatively small amount dealt only with the question of how the Hotel would reconstruct the project to eliminate the cooperative units, and therefore, was not concerned with curing the Hotel's alleged breach of the Lease in gutting the building. Therefore, Madison claims that the prior undertaking should not be taken into account in fixing an undertaking in the present action. Apart from suggesting the

same bond as previously agreed to, the Hotel makes no other arguments concerning the proper amount of the bond.

Under the circumstances herein, an undertaking in the amount of $15 million dollars is sufficient.

Accordingly, it is

ORDERED that the motion for a *Yellowstone* injunction is granted; and it is further

ORDERED that defendant Madison Seventy-Seventh Street LLC, its agents, servants 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 lease based on the Notice to Cure; and it is further

ORDERED that the plaintiff post a bond of $15 million dollars upon receipt of a copy of this Decision and Order with Notice of Entry.

This Constitutes the Decision and Order of the Court.

Dated: July 14, 2008

FILED
JUL 17 2008
COUNTY CLERK'S OFFICE
NEW YORK

ENTER:

____

J.S.C.

EMILY JANE GOODMAN