

406 Broome St. Rest. Inc. v LaFayette Ctr., LLC

2011 NY Slip Op 34099(U)

October 3, 2011

Sup Ct, New York County

Docket Number: 650358/2008E

Judge: Paul G. Feinman

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

HON. PAUL G. FEINMAN

PRESENT: _____
Justice

PART 12

406 BROOME ST, 1255
- v -

CAGAYETTE CENTER

INDEX NO. 650358/08 E
MOTION DATE _____
MOTION SEQ. NO. 12
MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION AND CROSS MOTION(S) ARE DECIDED
IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.**

OCT 03 2011

Dated: _____

Paul G. Feinman

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X
406 BROOME ST REST INC.,
Plaintiff,
- against -

Index No. 650358/2008E
Mot. Seq. Nos. 012

LAFAYETTE CENTER, LLC,
Defendant.

DECISION AND ORDER

-----X

For Plaintiff:
The Stolper Group, LLP
By: Randolph K. Adler, Jr., Esq.
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New York, NY 10013

For Defendant¹:
D. Reeves Carter, Esq.
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E-filed papers considered in review of these motion seeking injunctive relief and cross motion seeking legal fees:

Papers	Efiling Document No.
Order to Show Cause, Affidavit, Exhibits	93 ²
Notice of Cross Motion, Memo of Law in Opp. & Supp.	95, 96

PAUL G. FEINMAN, J.:

In this bitterly contested commercial landlord-tenant litigation, plaintiff-lessee moves by order to show cause seeking a *Yellowstone* injunction. Defendant cross-moves seeking legal fees should the motion be denied. For the reasons set forth below, plaintiff's motion is granted and the cross motion is accordingly denied .

The parties entered into a commercial lease agreement dated September 15, 2005 by

¹At the time the motion was filed, Mr. Carter was associated with the firm Guzov Ofsink, LLC. He has since filed a notice of appearance as indicated here and the firm of Guzov Ofsink relieved as counsel for defendant. See Doc. No. 117 (Notice of Appearance for incoming counsel) and Doc. No. 121 (So ordered Stipulation relieving outgoing counsel).

²Movant's papers submitted along with the order to show cause are not yet uploaded into the NYSCEF system and exist only as hard copy. Movant is directed to upload the affirmation, affidavit, and exhibits into system, identified as part of motion sequence 012.

which plaintiff leases the ground floor and basement of defendant's property for use as a restaurant (OSC Ex. 1 Lease). Litigation ensued in 2008 with plaintiff claiming, in essence, that defendant unreasonably withheld its consent to an assignment of its lease to a non-party.

This current motion is brought following plaintiff's receipt of a notice of default issued by defendant landlord dated April 12, 2011, stating that plaintiff has breached the commercial lease by installing or placing a sign on the exterior of the building without defendant's authorization, and demanding that the sign be removed or proof of authorization provided by April 22, 2011 (OSC Ex. 2, Carter Letter 04/12/2011). By return letter dated April 21, 2011, plaintiff's attorney in part sought clarification as to whether it is the "Brinkley's" sign or the new yellow awning replacing the old blue awning that is at issue (OSC Ex. 6, Adler, Jr. Letter 04/21/2011). His letter states that the sign was previously approved by defendant-landlord, its management company, its architect, and the Landmarks Commission, with the latter involved because the building is located in a Historic Landmark District such that it must approve any work or alteration to the exterior (*id.*) The letter further states that defendant had approved the previous awning, it is clearly visible in the website of the managing agent Veracity, and the new awning is identical in all respects except for the color (*id.*; Ex. 4 [Veracity website photos]; Ex. 5 [photo of "Brinkley's" sign, awning]). The letter reminds defendant's attorney that the commercial lease provides that the landlord's consent shall not be unreasonably withheld, asks what the reasoning is in this situation, and concludes by "formally placing the Landlord on notice" of various conditions that cause defendant to be in default of its own lease commitments (OSC Ex. 6, Adler, Jr. Letter 04/21/2011, p. 2). Defendant's attorney's letter of April 25, 2011 indicates that it is the awning that is at issue, that permission to replace the old awning with the

new one was not asked for nor granted, and that the new awning must be removed by May 5, 2011, otherwise defendant will cancel the lease pursuant to its terms (OSC Ex. 3, Carter Letter 04/25/2011). Plaintiff filed its motion brought by order to show cause thereafter seeking a *Yellowstone* injunction to stay the Notice of Default.

A *Yellowstone* injunction maintains the status quo by tolling the cure period so that a commercial tenant faced with a threat of the termination of its lease can protect its leasehold and, where there is an adverse determination on the merits, cure the default and avoid a forfeiture (*Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc.*, 93 NY2d 508, 514 [1999]). The purpose of a *Yellowstone* injunction is to stop the running of the cure period and maintain the status quo while the underlying dispute is litigated (*E.C. Elec., Inc. v Amblunthorp Holding, Inc.*, 38 AD3d 401, 401 [1st Dept 2007]; *First Natl. Stores, Inc. v Yellowstone Shopping Ctr. Inc.*, 21 NY2d 630 [1968]). “[F]ar less than the normal showing required for preliminary injunctive relief” is needed, as the “threat of termination of the lease and forfeiture, standing alone, has been sufficient to permit maintenance of the *status quo* by injunction (*Post v 120 East End Ave. Corp.*, 62 NY2d 19, 25-26 [1984]).

Defendant opposes the granting of injunctive relief, relying in particular on *Excel Graphics Technologies, Inc. v CFG/AGSCB 75 Ninth Ave. LLC*, 1 AD3d 65 (1st Dept 2003) (Doc. 96 Cross Mot. and Opp. pp. 2 *et seq.*). In *Excel Graphics*, the commercial tenant, who acknowledged subletting premises without the landlord’s permission, sought a declaration that the landlord had waived prior written consent because it had accepted rent and allowed the subtenants’ names to be listed in the building’s directory; it also sought a *Yellowstone* injunction to prevent termination of the lease in the interim. The landlord cross-moved to dismiss the

complaint based on documentary evidence, namely explicit terms in parties' lease providing that neither the listing of subtenants in the building directory nor the acceptance of rent constituted a waiver of the requirement of prior written consent. The lower court's granting of the *Yellowstone* injunction was reversed based on the lease terms which established that the tenant-plaintiff could not win a declaration that the landlord had waived its rights.

Here, defendant's reliance on *Excel Graphics* is not persuasive. Defendant argues that plaintiff installed a new awning without prior written permission, and has thus materially breached the lease (Doc. 96 Cross Mot. and Opp. pp. 2 *et seq.*). Defendant points to paragraph 50 of the lease which prohibits placing or installing "any signs, flashing signs, animated signs, or otherwise, without first obtaining in each instance, landlord's prior written consent and approval which shall not be reasonably withheld," the provision of which is termed an "essential condition of the lease" (OSC Ex. 1 Lease ¶ 50). It is arguable, however, whether an "awning" is the equivalent of a "sign," or is only deemed a sign if it contains words. Unlike the tenant in *Excel Graphics* who clearly knew it was violating the lease by subletting without permission, it is not clear here that plaintiff realized that replacing the existing awning ran afoul of an essential term of the lease and required permission which would not have been unreasonably withheld. Thus, it is proper that plaintiff seeks a *Yellowstone* injunction so that if it is found to have breached the lease, it can cure by removing the awning, and, assuming, without deciding, that it is reasonable for defendant to withhold consent in this instance. Therefore, plaintiff's motion for a *Yellowstone* injunction is granted.³

³The court notes without further comment that plaintiff's April 21, 2011 letter requested defendant to "immediate[ly] cure" four alleged ongoing defaults in defendant's lease obligations.

The cross motion seeking recovery of legal fees is denied, as there has not yet been a “favorabl[e]” disposition of the motion or the action (OSC Ex. 1 Lease ¶ 46).

In granting the order to show cause and directing the service of opposition papers, the court requested that the parties be prepared at oral argument to address the issue of an undertaking being fixed pursuant to CPLR 6312 (b) should plaintiff’s motion be granted. Neither party has made any submission on the issue nor submitted any minutes containing a discussion of the issue.⁴ Thus, the Court is unable to fix the amount of an undertaking without resort to sheer speculation as to the potential damages should it turn out this preliminary injunctive relief was improvidently granted. Accordingly, it is

ORDERED that the motion by plaintiff for a *Yellowstone* injunction is granted upon the condition that plaintiff continues to pay as use and occupancy its rent and additional rent as provided for in the lease;

ORDERED that the plaintiff is directed to post a preliminary injunction bond in an amount to be determined upon the serving and filing of a motion by plaintiff to fix the bond amount within 15 (fifteen) days of entry of this decision. Defendant may submit its position on the amount of the bond in the form of opposition or a cross motion; 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 plaintiff’s lease based on the April 25, 2011 Notice of Default, for the premises located at 406 Broome Street/199 Lafayette Street, New York, New York; and it is further

⁴Neither party ordered the transcript of the June 1, 2011 oral argument.

ORDERED that the cross motion for attorney fees is denied; and it is further

ORDERED that the time to file a note of issue, previously extended to June 17, 2011 by the decision and order dated April 22, 2011, is extended one further time to December 2, 2011.

This constitutes the decision and order of the court.

Dated: October 3, 2011
New York, New York



J.S.C.