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

PRESENT: KENNEY Justice

PART 8

WANG, XIANG XI

- v -

DORA STRAUS FAMILY LIMITED, ET AL.

INDEX NO. 103351/11

MOTION DATE

MOTION SEQ. NO. 01

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 10/4/11

JOAN M. KENNEY 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 PART: 8

----------X Index #103351/11

XIANG XI WANG,

Plaintiff,

-against-

DECISION & ORDER

DORA STRAUSS FAMILY LIMITED PARTNERSHIP ASSOCIATION,

Defendant.

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HON. JOAN M. KENNEY, J.:

Papers considered in review of this motion seeking a Yellowstone Injunction:

Papers	**Numbered**
Order To Show Cause, Affirmation, Affidavit and Exhibits	1-7
Opposition Papers, Affirmation with Exhibits	8-14

Plaintiff's Counsel:
Todd Rothenberg, Esq.
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(914) 235-7234

Defendant's Counsel:
Fred Seeman, Esq.
By: Peter Kirwin, Esq.
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New York, NY 10038
(212) 608-5000

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 the commercial storefront premises located at 286 Grand Street, New York, NY 10002 (the premises). The lease expires by its own terms on December 31, 2011.

The threshold issue to be decided is whether or not the instant motion is properly before the court. Defendant served a notice of cancellation and termination on or about March 21, 2011. The nature of the allegations precipitating the lease termination are that plaintiff's fish store has apparently been leaking for many years, due to improper drainage and water leakage. The

alleged result is that the premises has suffered from, among other things, extraordinary water damage, structural deterioration and massive mold infiltration that has been repeatedly covered with drywall.

Plaintiff presented the OSC for signature on March 18, 2011. Pursuant to the decretal paragraph delineating the mode and method of service, plaintiff had until April 1, 2011, to serve defendant by "personal delivery." Also, defendant's counsel was given notice of plaintiff's intention to proffer the OSC for signature on March 18, 2011 (*see*, affidavit of James Patalano, who avers that he spoke to defendant's counsel on March 17, 2011, and informed him of the date and time of the presentation of the motion, and filing of the pleadings).[1]

Clearly, counsel for both sides were in the middle of an ongoing process to either correct the problems at the premises, or defendant would choose to end the landlord/tenant relationship with plaintiff. Defendant's argument that there was some technical deficiency in the timing of the motion, and/or the service thereof, is unavailing. There was not any prejudice suffered, nor was there any question that defendant had notice of the return date of the motion. Moreover, defendant was granted an adjournment of this

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[1]The court takes note of the following: there is a pending eviction proceeding pending in Civil Court, New York County, and as a result, the parties counsel were in contact with each other for sometime before the instant litigation was commenced.

motion, so as to provide defendant with ample opportunity to submit written opposition to the Court. Now to the merits of the motion.

FACTUAL BACKGROUND

Plaintiff operates a retail fish and seafood store at the premises. The store is set up with large tanks of live fish, turtles and frogs, as well as fish that is stored in both water and ice. Plaintiff has been the lessee of the premises since at least 2007. It is undisputed that inoperable drains and/or a lack of proper drainage, has caused or significantly contributed to the damage observed in the premises by non-party witnesses.

Defendant has proffered two expert opinions, one from a structural engineer and one from and environmental assessment firm that among other things remediates mold. The conclusions reached by these firms are horrific and are undisputed. The structural engineer's report states in pertinent part as follows:

> "it is necessary to install immediately adequate temporary shoring below the first floor joists...."
>
> ...[retention] of the services of an environmental specialist to test for the... presence of hazardous materials."

The structural expert determined that because of constant exposure to large amount of water the structural integrity of the building has been compromised. As per the recommendation of the structural engineer defendant hired an additional environmental expert, Hazardous Elimination Corp. Attached to the opposition papers as

Exhibit "C" is the environmental expert's report, which states in pertinent part as follows, as it relates to the basement of the premises:

> "The drywall is covered in spots by water stains from above and live mold from the front to the back of the space, some mold growths were found to be 'dripping off the joists and structure.'"

Notably, both expects inspected the premises on different dates and plaintiff's store was actively leaking water into the basement. It is undisputed that the premises continues to leak, resulting in additional damage to the structural joists and causing the beams to rot. The inadequate waterproofing and insufficient support for severed floor joists has all occurred in violation of the terms of the lease.

Furthermore, it appears from the papers, that plaintiff has completely failed to address any of the problems related to the saturation of the premises. As of this writing, plaintiff has not provided any indication that he intends to take any measures to cure the problems and/or renovate the damaged parts of the premises.[2]

DISCUSSION

First Nat. Stores, Inc. v. Yellowstone Shopping Ctr., Inc., 21

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[2]The case was conferenced on at least two occasions and after the last conference the parties were to report back to the Court, what if any steps were going to be taken to repair the water damage and/or for plaintiff to vacate the premises.

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 (2d 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]).

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]).

Furthermore, "[t]he 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).

It is clear from the prior communications that occurred between these parties, and the inspections of the premises, that the notice to cure and notice of termination both served in connection with the current application, occurred in order to give plaintiff ample opportunity to address the conditions discovered.

By failing to indicate in his motion papers that he has the financial wherewithal to repair the conditions at the premises, plaintiff is unable to satisfy his burden of establishing that he has both the desire and the ability to cure the alleged default by any means short of vacating the premises *(see 225 East 36th Street Garage Corp. v 221 E. 36th Owners Corp.*, 211 AD2d 420 [1st Dept 2004]). Additionally, plaintiff has not provided proof of any efforts he has made in addressing the structural and environmental conditions described in the opposition papers prior to the commencement of this action. The Court has considered all of the additional arguments raised in the parties' motion papers and find them unavailing.

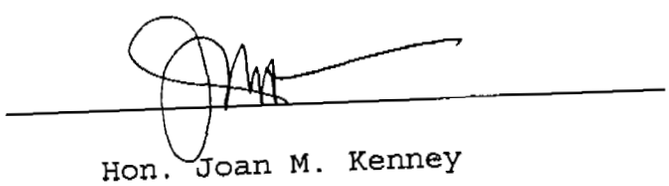
Consequently, plaintiff's motion is denied and all previous stays are vacated.

Accordingly, it is

ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: October 4, 2011

E N T E R:



Hon. Joan M. Kenney

UNFILED JUDGMENT

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