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

PRESENT: CYNTHIA S. KERN Justice J.S.C. PART 55

ZHU, TIAN YUAN

- v -

GRAND GOLDEN DOOR, LLC

INDEX NO. 653206/13

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

is decided in accordance with the annexed decision.

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

Dated: 12/20/13

CYNTHIA S. KERN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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TIAN YUAN ZHU,

Plaintiff,

Index No. 653206/2013

-against-

DECISION/ORDER

GRAND GOLDEN DOOR, LLC,

Defendant.

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HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits and Cross Motion.....	2
Replying Affidavits.....	3
Exhibits.....	

Plaintiff Tian Yuan Zhu ("Zhu") brings this motion by order to show cause for a Yellowstone injunction. Defendant Grand Golden Door, LLC ("Grand") brings a cross-motion for injunctive relief, summary judgment and various other relief. As will be explained more fully below, the motion for a Yellowstone injunction is granted and the cross-motion is granted in part and denied in part.

The relevant facts are as follows. Plaintiff is presently the tenant of the premises located at 290 Grand Street and is using the premises to operate a restaurant. Prior to plaintiff's ownership of the restaurant, the same premises were used as a restaurant by Grand Hing Restaurant Corp under a lease dated 1994 between the prior restaurant owner as tenant and

Roman Realty Co. as landlord. On or about October 1997, plaintiff assumed the lease by assignment and assumption of lease and bought the restaurant from the prior restaurant owner. After that lease expired, plaintiff signed another lease with the owner of the premises for a term of ten years commencing in 2003 and expiring in March 2013. In April 2011, a new owner, Heshmir LLC acquired ownership of the premises. Plaintiff entered into a new lease with Heshmir LLC as landlord commencing in January 2013 and expiring on December 2019. In August of 2013, defendant Grand acquired ownership of the premises.

On August 26, 2013, defendant Grand issued a fifteen day notice to cure default to plaintiff. The notice alleged that plaintiff was violating a substantial obligation of his tenancy in that he was operating in violation of the certificate of occupancy for the building in violation of articles 6 and 15 of the lease; that plaintiff was operating the premises as a place of assembly without a place of assembly permit in violation of Articles 6 and 15 of the lease; that plaintiff failed to obtain the proper insurance for the premises as required by article 42 of the Lease; and that plaintiff failed to provide the current owner with proof of the proper insurance for the premises as required by article 42 of the lease. The notice to cure further provides plaintiff with a period to cure expiring on September 17, 2013. In response to the notice to cure default, the plaintiff brought the present order to show cause for a Yellowstone injunction, which was filed by the plaintiff on September 17, 2013.

The purpose of a Yellowstone injunction is to extend the cure period, thereby preserving the lease until the merits of the dispute can be resolved. *See Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assocs.*, 93 N.Y.2d 508, 514 (1999). "The party requesting 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 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 is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises." *See id.* In the instant case, it is undisputed that the plaintiff holds a commercial lease and that he received a notice to cure default. The two issues which the parties dispute are whether the plaintiff requested injunctive relief prior to the termination of the lease and whether plaintiff is prepared and maintains the ability to cure the alleged defaults by any means short of vacating the premises.

Initially, the court finds that plaintiff properly requested injunctive relief prior to the termination of the tenancy. It is undisputed that plaintiff filed the order to show cause requesting the injunction on September17, 2013 which was the last day set forth in the notice to cure, although the court did not sign the order to show cause until September 19, which was after the tenancy terminated. Under these circumstances, the court finds that the application was timely brought. *See KB Gallery, LLC v. 875 W. 181 Owners Corp.*, 76 A.D.3d 909 (1st Dept 2010) (application for Yellowstone relief untimely "since plaintiff did not make its application until after the applicable cure period had expired and the notice of termination had been served"); *Continental Towers Garage Corp. v. Contowers Assoc. Ltd. Partnership,* 141 A.D.2d 390, 394 (1st Dept 1988) (the application for a TRO must be made prior to the termination of the lease). Since plaintiff made the application for the Yellowstone injunction prior to the termination of the lease, by bringing the order to show cause to the courthouse and filing it before the cure period expired, he clearly brought the application before the lease was terminated. The mere fact that there was a delay in the court actually signing the order to show cause, because of processing

issues within the courthouse, does not change this result.

The Court also finds that plaintiff has established that he is prepared and maintains the ability to cure the alleged defaults by any means short of vacating the premises. The first default alleged by defendant is that plaintiff is operating the premises in violation of the certificate of occupancy for the building, which provides that the first floor of the premises can be used as a store and the cellar and the second floor can be used for storage. Although it is undisputed that plaintiff's current use of the premises does not comply with the certificate of occupancy for the building, the court finds that plaintiff has sufficiently established that he has the desire and ability to cure this default. Initially, the court notes that plaintiff has been operating in the current fashion, using the second floor as a restaurant and using the basement as a kitchen since he took possession of the premises in 1997 and no prior landlord has ever raised any objection to the way in which plaintiff was using the premises. Moreover, plaintiff alleges that he was not aware that the premises were not in compliance with the certificate of occupancy because the prior owner of the restaurant had filed applications with the building department for alterations which would have legalized the use of the premises and he had never received any notice that these alterations had not been approved or were insufficient. However, now that defendant has notified plaintiff of this default, plaintiff has indicated and sufficiently established that he is ready and willing to take all the necessary steps to amend the certificate of occupancy by hiring a professional engineer to complete the work and that he has the ability to do so.

The court also finds that plaintiff has sufficiently established that he has the desire and ability to cure his alleged default in operating the premises as a place of assembly without a place of assembly permit. Section 27-232 of the New York City Administrative Code defines a place

of assembly as:

> An enclosed room or space in which seventy-five or more persons gather for religious, recreational, educational, political or social purposes, or for the consumption of food or drink, or for similar group activities or which is designed for use by seventy-five or more persons gathered for any of the above reasons....

Plaintiff has already indicated that he will not allow more than seventy four persons to occupy either the first or second floor of the premises at the same time until and unless he obtains a place of assembly permit. Moreover, it is unclear from reading the Administrative Code whether the first and second floor of the restaurant would each be considered an enclosed room or space or whether the entire premises would be considered an enclosed room or space. Therefore, based on the representation by plaintiff that he will obtain a place of assembly permit once the certificate of occupancy is amended and based on his representation that he will not allow more than 74 persons on each floor until he obtains such permit, the court finds that he has sufficiently established a desire and ability to cure to the extent that there might be a continuing violation of this requirement.

The last default alleged is that plaintiff has not obtained proper insurance for the premises and has failed to provide the defendant with proper proof of insurance. As defendant has correctly pointed out, a tenant cannot obtain a Yellowstone injunction when there is a claim that insurance coverage has not been continuously maintained as such a breach is incurable. *See Kyung Sik Kim v. Idylwood N.Y., LLC,* 66 A.D.3d 528 (1st Dept 2009). Therefore, the court will discuss the issue of whether there is any default with respect to the obligation to obtain insurance under the lease in the section of this decision discussing the defendant's motion for summary judgment. Based on the foregoing, the court finds that plaintiff is entitled to a Yellowstone

injunction with respect to the defaults alleged by defendant other than the defaults with respect to the obligation to maintain insurance.

The court will now address defendant's cross-motion for injunctive relief and summary judgment. Defendant seeks a preliminary injunction enjoining plaintiff from operating the premises contrary to the certificate of occupancy, from allowing more than 74 persons in the premises at the same time without a public assembly license and from operating as a restaurant until such time as he procures proper insurance. It also seeks summary judgment declaring that plaintiff is in violation of the lease based on his using the premises in violation of the certificate of occupancy, based on his use without a public assembly permit and based on his failure to procure the insurance that is required by the lease. As will be explained more fully below, defendant's cross-motion for injunctive relief and summary judgment is denied based on the express provisions of the lease, based on the principles and purpose of a Yellowstone injunction and because defendant has failed to establish a likelihood of success with respect to its claim that plaintiff has failed to comply with his obligation to procure insurance under the lease.

Pursuant to the unambiguous provisions of paragraph 17 of the lease, the landlord is not entitled to terminate the lease based upon the defaults alleged by the landlord in this case until and unless it serves the tenant with a fifteen day notice and the tenant fails to diligently proceed to remedy or cure such default. Paragraph 17 of the lease specifically provides that:

> If tenant defaults in fulfilling any of the covenants of this lease other than the covenants for the payment of rent or additional rent,...then, in any one or more of such events, upon Owner serving a written fifteen (15) day notice upon tenant specifying the nature of the default and upon the expiration of said default fifteen (15) day period, and if Tenant shall not have diligently commenced curing such default within such fifteen (15) day period, and shall not thereafter with reasonable diligence and in good faith proceed to remedy or cure such default, then Owner may serve a written five (5) days notice of cancellation of

> the lease upon Tenant, and upon the expiration of said five (5) days, this lease and the term thereunder shall end and expire ....

Therefore, defendant cannot show that it is entitled to terminate the lease even if it undisputed that tenant is violating the lease by certain actions such as operating contrary to the certificate of occupancy unless it can establish that tenant has failed to proceed diligently to remedy or cure the default once he is notified of such default. Since the defendant has failed to make that showing on this motion, it is not entitled to any injunctive relief or summary judgment.

Moreover, granting the defendant the relief it seeks is contrary to the entire purpose of a Yellowstone injunction. The law in New York is clear that a tenant is entitled to a Yellowstone injunction without any consideration of the merits of the "purported lease violations". *Jemaltown of 125th Street, Inc. v. Betesh/Park Seen Realty Associates,* 115 A.D.2d 381 (1st Dept 1985). As a result, the tenant is not required to prove, on his Yellowstone application, that he can cure the alleged defects–"all he need do to obtain the Yellowstone injunction is convince the court of his desire and ability to cure the defect by any means short of vacating the premises." *Id.* at 382. Based on this well established rule, the First Department held that it was error to not grant a Yellowstone injunction to a tenant who received a notice to cure based on entering into a prohibited sublease without giving the tenant an opportunity to evict the subtenant. *Duane Reade v. Highpoint Associates,*1 A.D.3d 276 (1st Dept 2003). Similarly, in the instant case, it would defeat the entire purpose of a Yellowstone injunction to hold that landlord can obtain summary judgment declaring a lease invalid based on a default under the lease without giving the tenant an opportunity to establish that he has the desire and ability to cure the default by any means short of vacating the premises.

Finally, the court finds that defendant has failed to establish a likelihood of success or entitlement to summary judgment based on its claim that plaintiff has defaulted on his obligation to obtain the insurance required by article 42 of the lease. Paragraph 42 of the lease requires the plaintiff to maintain the following insurance–commercial liability coverage naming the landlord as an additional insured "providing primary plus umbrella coverage with limits of not less than two million dollars ($1,000,000) per occurrence....", customary all risks property insurance covering the demised premises, statutory workers compensation and employers liability insurance and any other insurance that the landlord reasonably requires with respect to risks relating to tenant's use or manner of use of the premises. The plaintiff has submitted to the court and provided to the defendant his insurance policy with Travelers Insurance Co. which indicates that the defendant has been covered as an additional insured since the time it acquired the premises in August 2013 pursuant to the Xtend endorsement. Plaintiff has also established that he has property insurance and workers compensation coverage, thereby satisfying his obligation to obtain the insurance required by article 42 of the lease.

It is unclear whether defendant is taking the position that the plaintiff has defaulted in his obligation under the lease to procure insurance based on the fact that the insurance coverage was initially only for one million per occurrence rather than two million per occurrence. To the extent it is making this argument, the defendant has failed to establish as a matter of law that the tenant is in default for his prior failure to have insurance for two million per occurrence as opposed to one million and it has failed to establish a likelihood of success on its claim that any prior failure to have coverage for two million per occurrence violates the lease. There is a written discrepancy as to the amount of liability coverage under the lease. The written words

have a requirement of two million but the numerical amount stated is one million. Based on the ambiguity in the lease as to the proper amount of insurance, there are disputed factual issues as to whether the plaintiff has any obligation to obtain coverage for two million per occurrence as opposed to one million. Moreover, the plaintiff has now increased the amount of liability insurance to two million per occurrence effective as of September 5th, 2013.

Defendant has also failed to establish that it is entitled to injunctive relief or summary judgment based on its argument that the insurance plaintiff acquired in September of 2013 is insufficient and fraudulent because the insurance binder provides that it is for a restaurant without liquor and the tenant has failed to obtain liquor liability insurance. Defendant has not cited any authority for the proposition that the tenant is required to obtain any special liquor insurance and the tenant has attached the opinion letter issued by the Office of General Counsel of State of New York Insurance Department indicating that a restaurant which serves liquor is not required to procure liquor liability insurance. Moreover, the landlord has failed to cite to any provision of the lease requiring the tenant to obtain liquor liability insurance. Despite there being no proof by the landlord that this coverage is required, the plaintiff has now obtained liability insurance coverage for injury due to intoxication or under the influence of alcohol. Under these circumstances, defendant has not established either a likelihood of success or entitlement to summary judgment based on its claim that plaintiff has breached his obligation to obtain insurance pursuant to paragraph 42 of the lease.

Finally, defendant's request that plaintiff continue to pay use and occupancy for the premises is granted as it would be unjust to allow plaintiff to remain in possession of the leased premises without making payments for past, current and ongoing use and occupancy. *See 401*

Hotel v MTI/Image Group, 271 A.D.2d 228230 (1st Dept 2000). Defendant's request that plaintiff be required to post an undertaking is, however, denied.

Accordingly, it is hereby

ORDERED that plaintiff's motion for a Yellowstone injunction is granted to the extent stated in the decision; pending the determination of this action, the operation and effect of defendant's notice dated August 26, 2013 is tolled and is enjoined and stayed from taking any further steps or actions of any kind to (1) recover possession of the leased premises or (2) cancel or terminate the lease based upon the notice dated August 26, 2013 and defendant is prohibited from serving any notices of default, cancellation and/or termination based upon the same alleged defaults under the lease and it is further

ORDERED that plaintiff is required to make payments for past, current and ongoing occupancy to the extent it has not already done so according to the terms of its lease and that such payment is a condition of the granting and continuation of this Yellowstone injunction.

The remainder of the cross-motion is denied. This constitutes the decision, order and judgment of the court.

Dated: 12/20/13

Enter: _____

J.S.C.

CYNTHIA S. KERN
J.S.C.