

Confidence Beauty Salon Corp. v 299 Third St, LLC
2015 NY Slip Op 32284(U)
December 3, 2015
Supreme Court, New York County
Docket Number: 157777/2015
Judge: Joan M. Kenney
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 8

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CONFIDENCE BEAUTY SALON CORP.,

Plaintiff,
-against-

Index # 157777/2015
DECISION & ORDER

299 THIRD SA, 299 THIRD SI, LLC, and
299 SMNA, LP,
Defendants.

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KENNEY, JOAN, M., J.S.C.

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

Papers	Numbered
Order to Show Cause, & Affirmation	1-2
Affirmation in Partial Opposition & Exhibit	3-5

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 beauty salon located on the second floor, front, of 297 Third Avenue, New York, NY (the premises). The lease expires by its own terms on December 31, 2017.

On or about April 21, 2015, defendants (collectively the landlord) purchased three buildings adjacent to and including the premises at issue. In or about 2009, plaintiff alleges that it subleased the rear portion of the first floor, of 297 Third Avenue,

New York, NY from the landlord's predecessor-in-interest.¹ Plaintiff states further that the prior owner/landlord permitted the salon to expand its business, by consenting to an oral subletting arrangement for additional space below and to the rear of the premises (the additional space). Plaintiff claims that the sublessor was DJ Visual Aid Services Inc. (DJ). An entity wholly owned by the landlords' predecessor-in-interest.

Plaintiff does not dispute that it erected an internal staircase from the premises to the additional space. The purpose of the staircase was to have access to additional treatment rooms that were constructed. The landlord denies that the prior owner consented to any subletting arrangement between plaintiff and DJ.

In support of this contention, the landlord proffers an affidavit from the attorney who represented the current owner in connection with the purchase of the buildings. As part of the process to obtain financing for the transaction, plaintiff provided the landlord with estoppel certificates for the premises at issue as well as for the 23rd street location, which not the subject of the instant application.

The estoppel certificates are attached to the landlord's opposition papers and include, *inter alia*, the following

¹ Plaintiff also leases a commercial space located at 202 East 23rd Street, New York, NY (the 23rd street premises) from the landlord. A separate lease between plaintiff and the landlord's successor-in-interest of the 23rd street premises expires on April 30, 2021, and is not the subject of this lawsuit.

representations made by plaintiff:

- ratification of the existence of the lease;
- the lease was not modified in any way and represents the entire understanding of the parties;
- there has not been subletting of the leased premises or assignment of the lease.

The landlord's 30 day notice to cure, dated June 22, 2015, sets forth a litany of alleged lease violations, that include:

- unlawful occupation of the additional space;
- illegal construction of the additional space without obtaining building permits;
- failure to obtain sufficient insurance;
- occupying the additional space in violation of the building's certificate of occupancy;
- illegal alteration of the electrical and plumbing systems without obtaining proper permits.

The notice to cure provided plaintiff with the opportunity to correct the lease violations, e.g., by removing the staircase and ceasing to use the additional space. The notice to cure also informed plaintiff that the landlord's consent was not needed to correct the lease violations, (if the cost did not exceed \$30,000.00), subject to filing plans and obtaining all the necessary permits to correct the changes to the premises.

"The 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).

Plaintiff's contention that an oral sublet agreement with the former owner of the premises is not credible. The evidence

establishes that plaintiff made representations in the estoppel certificate contrary to those it asserts here. Plaintiff also had knowledge that it's representations would be acted upon, and it appears that landlord detrimentally relied upon those representations. Plaintiff had actual knowledge of the true state of affairs of the premises. *JRK Franklin, LLC, v 164 East 87th Street LLC*, 27 AD3d 392 [1st Dept 2006]; (see also, *Health-Loom Corp. v Soho Plaza Corp.*, 272 AD2d 179, 181 [1st Dept 2000]).

Moreover, an estoppel certificate will be enforced unless the certifying party can show a defense to the making of the document, such as fraud or duress, or that the assignee (the landlord), accepted the certificate with knowledge of the contrary, and true, state of the facts (*Hammelburger v Foursome Inn Corp.*, 54 NY2d 580, at 586-587 [1981]). No such defense has been asserted here, and no evidence was submitted to establish that the landlord knew the representations in the certificates were false. (Id).

First Nat. Stores, Inc. v Yellowstone Shopping Ctr., Inc., 21 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 (2nd 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]). Additionally, 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, plaintiff has not shown that it is prepared and nor that it has the ability to cure the alleged defaults (*Aegis Holding Lipstick LLC, v Metropolitan 885 Third Avenue Leasehold LLC, and CB Richard Ellis, Inc.*, 95 AD3d 708 [1st Dept 2012]). Consequently, and for the reasons set forth herein, this Court's interim decision, dated July 29, 2015, is hereby vacated and the motion is denied.

Accordingly, it is

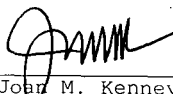
ORDERED that plaintiff's motion is denied; and it is further

ORDERED that this Court's prior decision is **vacated**, as well as, any stay granted therein; and it is further

ORDERED that plaintiff has 30 days from it's attorneys' **receipt** of notice of entry of this Order, to comply with the landlord's notice to cure, dated, June 22, 2015.

Dated: December 03, 2015

E N T E R:



Hon. John M. Kenney
J.S.C.