Audthan LLC v Nick & Duke, LLC

2016 NY Slip Op 30260(U)

February 10, 2016

Supreme Court, New York County

Docket Number: 652050/15

Judge: Robert R. Reed

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 43
-- X

AUDTHAN LLC,

Index No. 652050/15

Plaintiff,

- against -

DECISION

NICK & DUKE, LLC,

Defendant.
-- X

ROBERT REED, J.:

Audthan LLC (Audthan) moves, by order to show cause, for an order preliminarily and permanently: (a) granting a *Yellowstone* injunction, or in the alternative, an injunction pursuant to CPLR 6301, staying and tolling the termination of the lease, dated May 24, 2013 (Lease), between Audthan and Nick & Duke, LLC (Landlord) for the premises known as 182-188 Eleventh Avenue, New York, New York (Property), as set forth in the "Notice of Termination," dated July 15, 2015 (Notice), served on Audthan; (b) staying and tolling the cure period set forth in Article 15 of the Lease applicable to the purported violations enumerated in the Notice; (c) temporarily and preliminarily enjoining Landlord from taking any legal action, or action pursuant to the Notice; and (d) temporarily and preliminarily enjoining Landlord from commencing any special proceedings concerning the Notice.

This court issued a temporary restraining order on July 29, 2015, pending the hearing and determination of the motion, preventing Landlord from: (a) claiming that the Lease is terminated pursuant to the Notice; and (b) commencing any summary proceedings or any other legal action against Audthan concerning the Notice, or in any way disturbing Audthan's tenancy or possession of the Property on the grounds set forth in the Notice.

Background

The following, unless otherwise stated, is taken from the first amended complaint: Landlord, as fee owner, and Audthan, as lessee, entered into a long-term ground lease of the Property. The term is from May 24, 2013 to March 31, 2053, renewable at Audthan's sole discretion and election for another 48 years and 7 months (*id.*, ¶¶ 12-14). The Lease contemplates that Audthan will construct on the Property a residential and commercial building of 58,000 square feet (Building), plus gut and renovate an existing building on the Property, to create 15,000 square feet for low-income housing (Low Income Housing Unit) (*id.*, ¶ 15). Under limited circumstances, in addition to basic rent, Landlord is entitled to charge "additional rent" (*id.*, ¶ 18).

Since entering into the Lease, Audthan has devoted substantial resources to developing the Building and the Low Income Housing Unit, including designing the structures, obtaining necessary permits, regulatory approvals, and financing, and clearing pre-existing violations on the Property (*id.*, ¶¶ 20-21). Audthan has complied with the Lease provision that granted it a minimum of one year to cure the violations, and such additional time to cure the violations as is reasonably necessary under the circumstances (*id.*, ¶ 22). Of 70 violations existing at the commencement of the Lease, 64 have been cured, and 3 are in the process of being cured. 31 violations of record have been removed, and it is working diligently since the commencement of the Lease as to the regulatory impediments to the removal of record of the remaining violations (*id.*, ¶ 23). Audthan is almost ready to obtain a building permit, finalize financing, and commence construction (*id.*, ¶ 24).

Since execution of the Lease, Landlord has acted in a pattern of conduct to frustrate and hinder Audthan's ability to construct the Building and the Low Income Housing Unit, and prevent it from obtaining financing (*id.*, ¶ 26). By the Notice, delivered on July 18, 2015, Landlord has purported to terminate the Lease, effective August 3, 2015, the stated basis of which is Audthan's failure to cure violations within one year of execution of the Lease (*id.*, ¶ 28).

Audthan has complied with the requirements of the Lease by timely commencing efforts to cure the violations, many of which were not capable of being cured within the one-year period. In accordance with the Lease requirements, Audthan has diligently endeavored to effectuate such cure (*id.*, ¶ 30).

Landlord has wrongfully purported to assess its attorneys' fees to Audthan as "additional rent," has stated its intention to continue to do so, and indicated that it will use any failure of Audthan to pay such improperly assessed additional rent as a basis for claiming a default and seeking to terminate the Lease (*id.*, ¶¶ 42-44).

The amended complaint contains six causes of action. The first seeks a judgment declaring that: (a) Audthan is not in breach of the Lease; (b) the Notice is invalid to terminate the Lease; (c) Landlord has unclean hands; and (d) Landlord's refusal to act upon Audthan's requests for the requisite applications for permits and approvals, authorized by the Lease, constitutes a breach of the Lease and Landlord's obligation of good faith and fair dealing.

The second cause of action alleges that, based on the foregoing, Landlord has breached the Lease. The third cause of action seeks an order compelling Landlord to specifically perform its obligations under the Lease, including reviewing, approving, and executing such documents

as are reasonably necessary for Audthan to proceed with the Project. The fourth cause of action alleges a breach of the implied covenant of good faith and fair dealing. The fifth and sixth causes of action seek an injunction preliminarily and permanently enjoining Landlord from taking any steps in furtherance of the Notice, and enjoining Landlord to take such steps as are reasonably necessary to permit Audthan to carry out the Project.

In support of its motion by order to show cause, Audthan avers that it began the work necessary to cure and remove the violations prior to the execution of the Lease. Audthan states that it expects imminently to obtain certification of a cure to a claim of harassment. In section 14.01 of the Lease, the parties acknowledge that a harassment finding was issued by the New York City Department of Housing and Preservation Development (HPD) on April 2, 2009 with respect to Lot 1 of the Property, and that the New York City Department of Buildings (DOB) will not issue a building permit for the new Building until a cure of such harassment (HPD Cure) is effectuated. In the Lease, Audthan agreed to:

> "pursue with commercially reasonable diligence the cure thereof such that the harassment finding shall not prevent, impede, adversely affect or impair the construction of an approximately 58,000 square foot residential and commercial building on Lots 3 and 4 of the Demised Premises, which includes unimpaired development rights to be transferred from Lot 1 to and for the benefit of Lots 3 and 4 (the 'HPD Cure')"

(Lease, § 14.01). Audthan claims that it has been working on overcoming the governmental and regulatory obstacles to the full cure and removal of record of the violations.

Audthan states that, unless the Notice is stayed, it will make more difficult the cure of the violations about which Landlord is complaining. It contends that, by serving the Notice when it did, Landlord is not engaged in a good faith effort to secure the cure of the violations, which have largely been resolved, and will shortly be in a position to be removed of record. Rather,

Landlord is positioning itself to reap the benefits of Audthan's work. If successful in terminating the Lease, Landlord can now find a new tenant willing to pay a higher rent or agree to more favorable terms, because it will be freed of the obligation to address the problems already remedied through Audthan's efforts and at Audthan's expense. Audthan contends further that it is entitled to a *Yellowstone* injunction tolling the running of the cure period and maintaining the status quo, and a preliminary injunction, because Audthan has cured almost all of the violations and is both willing and able to cure the remaining violations, as demonstrated by its efforts to date.

In opposition, Landlord argues that the request for a *Yellowstone* injunction is untimely, because it was made after the Notice was sent, and the Lease terminated pursuant to Articles 15.01(c) and 15.02(b) thereof due to Audthan's failure to cure and remove of record the 43 violations. It argues further that Audthan's failure to qualify for *Yellowstone* relief necessitates denial of its request for injunctive relief. It claims that this action is an improper attempt to litigate this landlord-tenant dispute in a Supreme Court plenary action, rather than by way of a summary proceeding in the Civil Court, which is the preferred forum for resolving such disputes.

Landlord asserts that, more than two years after the May 24, 2013 Lease commencement date, the 43 violations have not been removed of record. In addition to these violations, numerous other violations have been recorded against the Property since May 24, 2013. Landlord contends that Audthan has unilaterally decided to cease paying the additional rent that has come due, consisting of attorneys' fees and professional architect's fees, totaling $123,110.39 for the months of June 2015 and July 2015, and an amount of $136,964.55 for August 2015 and

September 2015, for a total arrears of $260,074.94, which arrears are due to Landlord under section 3.05 of the Lease.

According to Landlord, the Lease required the 43 violations to be cured and removed of record by May 24, 2014. Landlord contends that it is undisputed that the violations, by their nature, could have been cured and removed of record by May 24, 2014, both as to timing and irrespective of HPD's harassment finding, as Audthan's own recent actions have demonstrated. The Lease gave Landlord the right to terminate the Lease, without any further time to cure, in the event that the 43 violations were not cured and removed of record by May 24, 2014.

Discussion

Yellowstone Injunction

The request for a *Yellowstone* injunction is granted. "The Court of Appeals has acknowledged that courts routinely grant *Yellowstone* relief to reflect this State's policy against forfeiture, and courts have done so by accepting 'far less than the normal showing required for preliminary injunctive relief'" (*Village Ctr. for Care v Sligo Realty & Serv. Corp.*, 95 AD3d 219, 222 [1st Dept 2012], quoting *Post v 120 E. End Ave. Corp.*, 62 NY2d 19, 25 [1984]).

> "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"

(*Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc.*, 93 NY2d 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'"

(*id.*, quoting *225 E. 36th St. Garage Corp. v 221 E. 36th Owners Corp.*, 211 AD2d 420, 421 [1st Dept 1995]). Audthan has satisfied these requirements.

Section 15.01 of the Lease ("Events of Default") provides in part:

> "The occurrence at any time during the Term of any one or more of the following events shall be an 'Event of Default':
>
> > (c) if any violation of Legal Requirements existing on or about the Property as of the Commencement Date is not cured and removed of record within one (1) year after the Commencement Date; provided, however, in the case of any such violation which cannot be cured and removed of record within such one (1) year period, if Lessee shall commence efforts to cure the same within such one (1) year period, and thereafter diligently and continuously endeavor to effectuate such cure, and for so long as, in Lessor's reasonable judgment, the continuance of such violation does not result in the impairment of Lessor's title to the Demised Premises, or materially and adversely affect the value thereof, relative to their condition as of the date hereof, or jeopardize the life or safety of any Person, or subject Lessor to legal or financial liability to any Person, then the time for such cure shall be extended to such period as may be reasonable under the circumstances to allow for such and cure and removal of record of such violation(s)."

"Legal Requirements" is defined as "the requirements of all federal, state and local laws, statutes, codes, ordinances, rules and regulations, including judicial opinions and presidential authority, at any time applicable to the Property, whether now existing or hereafter enacted" (Lease, Article Forty ["Definitions"]. at 59).

Landlord argues that the court cannot grant the requested relief because of the Notice, purporting to terminate the Lease. Where a notice of termination is served prior to the expiration of the operable cure period, however, it is ineffective (*Empire State Bldg. Assoc. v Trump Empire State Partners*, 245 AD2d 225, 229 [1st Dept 1997]). Although not conclusive, Audthan has demonstrated the likelihood that the Lease had not terminated prior to the request for

[* 8]

injunctive relief. Moreover, because the "the law in this regard disfavors forfeiture . . . a demonstration of success on the merits is not a prerequisite to such relief" provided that, at this juncture, "a basis exists for believing that the tenant . . . has the ability [to] cure through any means short of vacating the premises" (*WPA/Partners v Port Imperial Ferry Corp.*, 307 AD2d 234, 237 [1st Dept 2003] [internal quotation marks and citations omitted]). Such is the case here.

Although Section 15 (c) prescribes a one-year period from May 24, 2013 to cure the violations, it contemplates that some violations may not be curable and removed of record within the one-year period, and excuses Audthan from an event of default, provided it commences to cure the violations within the one-year period, and thereafter works diligently and continuously to effectuate the cure (Lease, § 15. 01 [c]).

Audthan submitted the affidavit of John Jacobson, the managing member of JJ/Skybox, LLC, a member of Audthan. Mr. Jacobson explains that, at the time that Audthan entered into the Lease, the Property consisted of three Lots - Lots 1, 3, and 4. On Lot 1 was a single room occupancy hotel (SRO) with respect to which the HPD had already made a finding of harassment against the former tenant which had not been cured. Lot 3 was an empty lot, and Lot 4 contained a two-story structure that had been used as an automobile body shop, but had been badly damaged in a fire and was unusable (*id.*, ¶ 3). Lots 3 and 4 were combined into a single Lot 3, the two-story structure on former Lot 4 was demolished, and Audthan has almost completed the process of having the HPD certify the Project as a HPD Cure (*id.*, ¶ 4).

Mr. Jacobson states that, over the past two years, Audthan has expended more than $16 million, $2 million dollars of which has been spent to cure violations on the Property and to effect the HPD Cure necessary to remove of record the already cured violations on the Property,

including more than $400,000 in direct expenditures to cure violations on the Property (*id.*, ¶ 5). The showing of a "significant investment in a valuable leasehold" militates in favor of granting the injunction (*see WPA/Partners v Port Imperial Ferry Corp.*, 307 AD2d at 236). According to Mr. Jacobson, as of the date of his affidavit, Audthan was one month or two away from obtaining certification of the Project as a HPD Cure, a necessary precondition for Audthan to obtain financing and commence the construction of the Project. Another approximately $1.5 million has been paid to Landlord in the form of rent (*id.*, ¶ 5).

The Notice contains a list of 43 DOB and New York City Environmental Control Board (ECB) violations that purportedly existed on the Lease commencement date that Landlord claims were not cured within the first year of the Lease term. Mr. Jacobson states that all but three of these have been cured, and the remaining three will be cured within the next several months. He avers that, because of the pre-existing HPD finding of harassment, removal of many of the violations of record cannot be completed until the HPD Cure is certified (*id.*, ¶ 9).

According to George John Cooper, the manager for the Project, he has personal knowledge of the assertions set forth in his affidavit. He states that he is a registered architect, and has been involved in the Project as design architect since its inception, and has been Project Manager since June 2014. He states that since Audthan entered into the Lease in March 2013, he has been involved in Audthan's efforts to cure and has managed the removal of record the numerous pre-existing violations recorded against the Property. Since June 2014, he has been the principal person overseeing the efforts by Audthan to address those violations (Cooper aff, ¶¶ 7-8). Mr. Cooper states that Audthan has been working diligently since the onset of the Lease

term to cure the Violations, notwithstanding the administrative and legal obstacles, some of which are acknowledged and provided for in the Lease.

For example, he states, in the Lease, the parties acknowledge that HPD issued a harassment finding on April 2, 2009, four years prior to the onset of the Lease term in 2013, with respect to Lot 1 of the Property and that DOB "will not issue a building permit for the New Building until a cure of such harassment finding is effectuated" (Lease § 14.01). The parties also agreed that:

> "the harassment finding shall not prevent, impede, adversely affect or impair the construction of an approximately 58,000 square foot residential and commercial building on Lots 3 and 4 of the Demised Premises, which includes unimpaired development rights to be transferred from Lot 1 to and for the benefit of Lots 3 and 4 (the 'HPD Cure')"

(*id.*). In Lease section 14.02 ("Development Agreement"), Audthan represented that, to effectuate the HPD Cure, it has entered or shall enter into a "Development Agreement" with a not-for-profit corporation, and cause approximately 15,000 square feet of the "existing Improvements to be renovated for operation as low-income housing in conjunction with the construction of the New Building." In section 14.03 ("Declaration of Condominium"), to effectuate the HPD Cure, "upon the renovation of a portion of the existing Improvements to serve as low-income apartments and the construction of the New Building, . . . [the parties] shall join in the preparation and filing, at Lessee's sole cost and expense, of a declaration of condominium," pursuant to which three condominium units are to be established, and one is to consist of low-income apartments constructed and operated in accordance with the Development Agreement.

Mr. Cooper states that, by October 2013, the plans and drawings were submitted to the HPD, after which there was a period of comment, revision, and negotiation, including the

involvement of the local community board and other neighborhood organizations. By late 2014 and into 2015, the support of the local community board, Community Board 4, was obtained for Audthan's Project. Mr. Cooper represents that the process is virtually complete, and he expects that HPD will issue a certification of the HPD Cure within the next two months from the date of the affidavit. Afterwards, a regulatory agreement will be entered into and submitted to Landlord for its consent, and the DOB will be authorized to issue permits for the work on the Project (*id.*, ¶ 18).

Mr. Cooper claims that, as for lots 3 and 4, of the 43 violations cited in the Notice, 27 have been cured. These pertain to a fire-damaged structure on former Lot 4. Audthan demolished the structure during the period May 21-28, 2013, and thereby cured 27 violations. Thus, he claims, with respect to the Lot 3 and 4 violations, Audthan has presently done all it can do (*id.*, ¶¶ 23-24).

As for the 16 other violations cited in the Notice, all are in Lot 1, and are recorded against the SRO, and are also subject to the DOB ban on permits, demolition, or alteration pending certification of the HPD Cure (*id.*, ¶ 25). Mr. Cooper avers that the SRO will be gut-rehabilitated, and the most reasonable and practical way to carry out a cure of violations is to eliminate them during the course of demolition and construction, which cannot commence until the cure is certified (*id.*, ¶ 26). Nevertheless, he states, violations 1, 13, and 15 have been resolved, and the DOB has accepted Audthan's certificate of correction, and violation 16 has been dismissed (*id.*, ¶ 28).

Mr. Cooper continues that violations 3-4, 6-8, 10-12, and 14 have been cured, and have either been submitted to the DOB for dismissal or have a certificate of correction awaiting DOB

approval (*id.*, ¶ 26). Only violations 2, 5, and 9 involve any ongoing work for correction. Violation 2 has four components, which are resolved or being resolved: (a) the illuminated signs have been removed and a permit is being acquired for a single unilluminated sign; (b) the extensions complained of do not exist, which is being confirmed with DOB; (c) the complained of windows have been repaired; and (d) a permit has been obtained, and work to correct a drain pipe was to have begun in August 2015, and last approximately two months (*id.*, ¶¶ 29-31).

Violation 5 involves facade repairs. The bulk of the required work was performed but, upon inspection by a structural engineer, it was determined that further work was required on

certain decorative elements on the building walls. They are in the process of expanding the scope of an existing permit to cover this work. Violation 9 was for water on floors in hallways and rooms of the basement. A permit has been issued for the renovation of the ground floor and basement, which will resolve this issue, and was to have begun in August 2015, and last approximately two months (*id.*, ¶¶ 32-33).

Mr. Cooper concludes that the effort to obtain certification of the HPD Cure commenced before the Lease was signed so that the demolition of the Lot 4 structure and a gut renovation of the SRO, the principal means for curing outstanding violations, could commence. The demolition of the Lot 4 structure, and the elimination of 27 violations, was carried out while the Lease was being signed in 2013. The process for approval of the renovation of the SRO became extended, the violations on Lot 1 were then worked on separately, and were cured or are in the process of being cured. In addition, Audthan has also remedied some 27 other violations that it inherited when it entered into the Lease that Landlord does not acknowledge (*id.*, ¶¶ 35-36).

In opposition, Landlord insists that the violations could have been easily cured soon after the onset of the Lease term, or certainly during the one-year period set forth in the Lease. In support of this assertion, however, Landlord provided no evidence by someone with actual knowledge, relying instead on the assertions of counsel, and the affidavits submitted on Audthan's behalf. For example, counsel for Landlord states that, once Audthan received the Notice in July 2015, it "began curing as many of the 43 Violations as quickly as possible" (affirmation of Menachem J. Kastner, Esq., ¶ 17). In support of this assertion, Landlord cites the Cooper affidavit, ¶¶ 25-33, and the Jacobson affidavit, ¶ 17). However, according to the cited paragraphs in the Cooper affidavit, and as described above, Audthan demolished the structure during the period May 21-28, 2013, and thereby cured 27 violations for Lots 3 and 4. As for the 16 Lot 1 violations recorded against the SRO, Audthan intends to gut-rehabilitate it, and it deems the most reasonable way to carry out a cure of violations is to eliminate them during the course of demolition and construction, which cannot commence until the HPD cure is certified. Nevertheless, according to Audthan, it has been carrying out substantial repair work; violations 6-7, 10-12 were cured by the work carried out in 2011, and only violations 2, 5 and 9 involve any ongoing work for correction. Hence, Landlord's assertion that it began curing the violations after receiving the Notice is belied by the record. Landlord has not persuasively controverted the assertion that a *Yellowstone* injunction is warranted, because Audthan has taken "substantial steps" to cure the violations and "is actively working toward that end" (*Baruch, LLC v 587 Fifth Ave., LLC*, 44 AD3d 339, 340 [1st Dept 2007]).

Thus, Audthan has adequately established on this record 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" (*Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc.*, 93 NY2d at 514 [internal quotation marks and citation omitted]).

Preliminary Injunction

The request for a preliminary injunction is granted. "The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor" (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]). Audthan has satisfied all three requirements.

As discussed above, Audthan has demonstrated a likelihood of success on the merits. Audthan has also demonstrated irreparable harm. The harm to Audthan from losing the Lease "could well be irreparable," because damages are not likely to compensate it for the value of the Lease, the term of which ends on March 31, 2053, with renewal rights (Lease, § 2.03) (*Empire State Bldg. Assoc. v Trump Empire State Partners*, 245 AD2d at 230).

The balance of equities favors Audthan. Landlord did not explain why it waited until it did to serve the Notice. In the meantime, according to Audthan, it continued investing in the project. Mr. Jacobson avers that the Notice had been served far too late to have any impact on the actual cure of the violations, which is nearly complete. The Notice was served on the eve of Audthan obtaining certification of the HPD Cure, which would free Audthan to arrange for financing and begin the principal work on the Project (Jacobson aff, ¶ 18). According to Mr. Jacobson, Landlord's claim that the Lease has been terminated will render it difficult, if not

impossible, for Audthan to obtain financing on the Project, and this obstacle to financing will endanger the Project (Jacobson aff, ¶ 19). Unless the Notice is stayed, Audthan contends, it will actually delay and make more difficult the cure of the very violations about which Landlord complains. Neither the HPD nor the DOB and ECB, much less financing institutions, will be encouraged to negotiate and finalize arrangements with Audthan if its title to the Property is in question (*id.*, ¶ 20). Landlord has not persuasively controverted these assertions.

Landlord argues that this action is an improper attempt to litigate this landlord-tenant dispute in a Supreme Court plenary action, rather than by way of a summary proceeding in the Civil Court, which is the preferred forum for resolving such disputes. However, that Court does not have jurisdiction to grant Audthan the affirmative relief of mandating Landlord's cooperation (*see Manhattan Parking Sys.-Serv. Corp. v Murray House Owners Corp.*, 211 AD2d 534, 535 [1st Dept 1995]). The third cause of action seeks an order compelling Landlord specifically to perform its obligations under the Lease, including reviewing, approving, and executing such documents as are reasonably necessary for Audthan to proceed with the Project in obtaining the amendments to the certificate of occupancy that plaintiff needs

Finally, CPLR 6312 (b) requires an undertaking, the purpose of which is "to reimburse the defendant for damages sustained if it is later finally determined that the preliminary injunction was erroneously granted" (*Margolies v Encounter, Inc.*, 42 NY2d 475, 477 [1977], *Colonial Sur. Co. v Eastland Constr., Inc.*, 77 AD3d 581, 582 [1st Dept 2010]).

Only Landlord, in its opposition papers, has addressed this issue. Landlord states that, in the event that the court grants injunctive relief, then, at a minimum, the motion should be granted upon the condition that: (1) Audthan remedies the violations set forth in the Notice by a date

certain; (2) Audthan remedies all violations recorded against the Property by a date certain; (3) Audthan pays ongoing "use and occupancy" and "additional use and occupancy" to Landlord as provided in the Lease; and (4) Audthan post an undertaking with the court in an amount of not less than $1 million, plus an amount sufficient to compensate Landlord for loss of development of the Property and the risk of economic conditions diminishing the value of the Property. Without input from both parties, the court cannot accurately determine an appropriate amount of such undertaking.

Audthan's motion for a *Yellowstone* injunction and preliminary injunction is granted to the extent of providing for the same injunctive relief provided in the temporary restraining order contained within the order to show cause dated July 29, 2015, and the temporary restraining order is continued pending further order of the court. The parties are directed to settle an order on notice (a) with recommendations as to the amount of the undertaking, (b) that provides for Audthan to pay ongoing use and occupancy, and (c) sets the time frame within which the violations listed in the Notice are to be removed.

Dated: February 10, 2016

ENTER:

J.S.C.