

<b>Repony Corp. v R F Realty Co.</b>
2016 NY Slip Op 31644(U)
August 26, 2016
Supreme Court, New York County
Docket Number: 156467/16
Judge: Manuel J. Mendez
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PRESENT: MANUEL J. MENDEZ PART 13  
Justice

REPO NY CORP.,  
Plaintiff, INDEX NO. 156467/16

- v -

R & F REALTY CO., and FIFTH AVENUE LOFT CORPORATION,  
Defendants. MOTION DATE 08-24-2016  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 8 were read on this motion for a Yellowstone injunction.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED	
1-2	_____
3-4, 5-6	_____
7-8	_____

Cross-Motion:  Yes  No

Upon a reading of the foregoing cited papers it is ordered that plaintiff's motion for a Yellowstone injunction enjoining and restraining defendants from terminating Plaintiff's sub-lease agreement dated December 4, 2009 is granted.

On December 4, 2009 plaintiff and defendant R & F REALTY CO., entered into a 15 year sub-lease agreement for premises located at 140 Fifth Avenue a/k/a 2 West 19<sup>th</sup> Street, Unit 1C, New York, N.Y.. The premises are to be "used as a bakery and café ". Plaintiff would additionally "be allowed to brew coffee, prepare soups, sandwiches, salads and heat prepared foods brought in from outside...." ( see Rider to Sub-lease Par. 73). Paragraph 73 of the Rider further states that .. "Except as set forth in the foregoing sentence, baking and cooking is not permitted..." Plaintiff operated the bakery and café at the premises without incident until he was served with a 15 day notice to cure by defendant R & F Realty Co., for violating, in essence , the provisions of Paragraph 73 of the sub-lease. R & F Realty Co., had previously been served with a 30 day notice to cure by the Proprietary Lessor Fifth Avenue Loft Corporation, for its violation of the lease agreement by permitting Plaintiff's use of the premises contrary to what is contemplated in paragraph 73 of the sub-lease.

Plaintiff served the defendants with a summons with notice commencing a declaratory judgment action seeking a judgment "declaring that the subject lease and master lease are not violated by plaintiff's use of the subject premises." Plaintiff simultaneous therewith brought this motion by order to show cause seeking a Yellowstone injunction tolling the cure period. Plaintiff alleges that the premises comply with all New York City Department of Buildings and Fire Department requirements, that there are no violations, all permit requirements have been met and that premises are being used in the same manner since 2010 when the lease

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

commenced.

Defendant R & F Realty Co., alleges that the motion should be denied because there are violations that need to be cured, more specifically those prohibited by Paragraph 73 of the Sub-lease, and that plaintiff has not stated that it has the desire and ability to cure the violations by any means short of vacating the premises. Defendant Fifth Avenue Loft Corporation alleges that since plaintiff commenced an action for declaratory relief by serving a summons with notice, defendants are without proper notice of the action which divests this court of jurisdiction. They further argue that they served a 30 day notice on R & F Realty Co., not on plaintiff and plaintiff has no standing to stay the cure period, finally they argue that plaintiff has failed to state that it has the desire and ability to cure the violation by any means short of vacating the premises.

A Yellowstone injunction is appropriate to preserve the status quo pending the determination of the underlying dispute. A Commercial tenant must satisfy the following criteria in order to obtain an injunction staying termination of the leasehold while the propriety of the underlying default is litigated: (1) tenant holds a commercial lease, (2) tenant has received a notice of default, notice to cure, or threat of termination of the lease, (3) tenant has requested injunction relief prior to the termination of the lease, and (4) tenant is prepared and has the ability to cure the alleged default by any means short of vacating the premises ( Reade v. Highpoint Associates IX, LLC., 1 A.D. 3d 276, 768 N.Y.S. 2d 439 [1<sup>st</sup>. Dept. 2003]; Heon Lee v. TT & PP Main Street Realty Corp., 286 A.D. 2d 665, 729 N.Y.S. 2d 775 [2<sup>nd</sup>. Dept. 2001]). A Yellowstone injunction is not conditioned on Tenant's likelihood of success on the merits of the underlying action ( Stuart, v. D&D Associates, 160 A.D. 2d 547, 554 N.Y.S. 2d 197 [1<sup>st</sup>. Dept. 1990]).

The purpose of a Yellowstone injunction is to toll the cure period. To allow a Commercial tenant faced with a threat of termination of its lease to protect its investment in the leasehold by 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 Avenue Associates, 93 N.Y.2d 508, 715 N.E. 2d 117, 693 N.Y.S. 2d 91 [1999]).

A plaintiff is entitled to bring a declaratory judgment action that it is not in default under the lease and also to seek a Yellowstone injunction. furthermore, when plaintiff has represented neither that it is unable to cure the alleged default nor by its challenge to defendants' claims, that it is unwilling to cure, this will be deemed to have satisfied the fourth requirement for obtaining a Yellowstone injunction ( see TSI West 14, Inc., v. Samson Associates, LLC, 8 A.D.3d 51, 778 N.Y.S.2d 29 [1<sup>st</sup>. Dept. 2004]).

Plaintiff alleges that it is not in default under the lease because it has been operating in the premises as it has always done since 2010. It brings a declaratory judgment action for a judgment declaring that it is not in default under the sub-lease, and makes this motion for a Yellowstone injunction to prevent the termination of its valuable leasehold. There is yet to be a determination that plaintiff is in violation of the terms of the sub-lease and if it is found that there is a violation, these are of a nature that can easily be cured ( see BOI TO GO INC., v. Second 800 No. 2, LLC, 58 A.D.3d 482, 870 N.Y.S.2d 334 [1<sup>st</sup>. Dept. 2009]).

Plaintiff has met the requirements for obtaining a Yellowstone injunction. It has a Commercial lease, (2) has received a notice of default, to cure or threat of termination, (3) has requested the relief prior to the termination of the lease, and (4) has the ability to cure the alleged default by means short of vacating the premises. Accordingly, the motion for a Preliminary injunction is granted.

Defendant requests that if the court grants the motion for a preliminary injunction, that it be conditioned on the paying of past rent, use and occupancy and the posting of a bond or undertaking. Defendant R & F Realty Co., claims that there is owed on the premises approximately \$44,586.72 dollars which plaintiff should be required to pay. It argues that the court should condition the granting of the preliminary injunction on paying rent arrears for the premises. Plaintiff argues that it is current on the payment of rent.

A court, in the exercise of its discretion, can order the posting of a bond or undertaking and the payment of use and occupancy as a condition of a Yellowstone injunction ( 37<sup>th</sup> Street Enterprises, Inc., v. 500-512 Seventh Avenue Associates, 266 A.D. 2d 28, 697 N.Y.S. 2d 601 [1<sup>st</sup>. Dept. 1999]). The amount ordered deposited must be rationally related to the quantum of damages the landlord would sustain in the event that the tenant is later determined not to have been entitled to an injunction ( 61 West 62<sup>nd</sup>. Owners Corp., v. Harkness Apartment Owners Corp., 173 A.D. 2d 372, 570 N.Y.S. 2d 8 [1<sup>st</sup>. Dept. 1991]; 3636 Greystone Owners, Inc., v. Greystone Building, 4 A.D. 3d 122, 771 N.Y.S. 2d 341 [1<sup>st</sup>. Dept. 2004]).

Thus it has been found rational for the court to order posting of undertaking in the amount of \$18,820 ( John A. Reinsenbach Charter School v. Wolfson, 298 A.D. 2d 224, 748 N.Y.S. 2d 247 [1<sup>st</sup>. Dept. 2002]), posting of a \$30,000 bond and timely payment of rent under the lease ( E.C. Electronics, Inc., v. Amblunthorp Holding, Inc., 38 A.D. 3d 401, 834 N.Y.S. 2d 14 [1<sup>st</sup>. Dept. 2007]), Posting of a \$10,000 bond ( 3636 Greystone Owners, Inc. V. Greystone Building, Supra), posting security of \$100,000 pay arrears and make future monthly payments of \$8,500 ( Sportplex of Middletown, Inc., v. Catskill Regional Off-Track-Betting Corporation, 221 A.D. 2d 428, 633 N.Y.S. 2d 588 [2<sup>nd</sup>. Dept. 1995]), or simply the payment of use and occupancy ( Metropolitan Transportation Authority v. 2 Broadway LLC, 279 A.D. 2d 315, 720 N.Y.S. 2d 12 [1<sup>st</sup>. Dept. 2001]).

Undertaking in the amount of three months rent as a condition of granting a Yellowstone Injunction has been deemed excessive when there is inadequate proof offered by landlord as to potential damages ( Medical Building Associates, Inc., v. Abner Properties Company, 103 A.D. 3d 488, 959 N.Y.S.2d 476 [1<sup>st</sup>. Dept. 2013]).

Defendant R & F Realty Co., has provided this court with proof that plaintiff is in arrears on the payment of rent and additional rent in the amount of \$37,086.00 dollars. The remaining \$7,500 are for attorneys fees.

Accordingly, it is ORDERED that plaintiff's motion for an order staying and tolling the expiration of the cure period set forth in the notices dated June 29, 2016 and July 13, 2016 and preliminarily enjoining and restraining defendants, their agents, servants, representatives and all persons and entities known and unknown, acting on their behalf or in concert with them , in any manner or by any means, from taking any action to terminate the plaintiff's Lease pursuant to the terms of the Lease, or to commence any action or Summary proceeding to evict the plaintiff or to otherwise

interfere with plaintiff's possession of the Premises is granted, and it is further


ORDERED, that the expiration of the cure period set forth in the June 29, 2016 and July 13, 2016 notices is stayed and tolled, and it is further

ORDERED, that defendants, their agents, servants, representatives and all persons and entities known and unknown, acting on their behalf or in concert with them, in any manner or by any means, are enjoined and restrained from taking any action to terminate the plaintiff's Lease pursuant to the terms of the Lease, and/ or to commence any action or summary proceeding to evict the plaintiff from the Premises or to otherwise interfere with plaintiff's possession of the premises, and it is further

ORDERED, that this order is conditioned on plaintiff paying defendant R & F Realty Co., rent arrears in the amount of \$37,086.00 dollars within 15 days from the date of entry of this order.

Enter:

Dated: August 26, 2016

  
 \_\_\_\_\_  
 Manuel J. Mendez  
 J.S.C.

Check one: FINAL DISPOSITION    X NON-FINAL DISPOSITION

Check if appropriate:     DO NOT POST                       REFERENCE