Marbot v Wysocki
2017 NY Slip Op 32954(U)
June 15, 2017
Supreme Court, Rensselaer County
Docket Number: 256511
Judge: Michael H. Melkonian
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STATE OF NEW YORK
SUPREME COURT COUNTY OF RENSSELAER

TIMOTHY MARBOT,

Petitioner,

-against-

AMENDED DECISION AND ORDER

JEFF WYSOCKI, JAN WYSOCKI each individually and Landowner/Receiver of the ON-FARM FORAGES, JEFFY WYSOCI/WYSOCKI FARM/JAN WYSOCKI, and WYSOCKI FARM,

Respondents.

(Supreme Court, Rensselaer County, Motion Term, June 14, 2017)
Index No. 256511
(RJI No. 31-0506-2017)

(Acting Justice Michael H. Melkonian, Presiding)

APPEARANCES: Dana L. Salazar, Esq.
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MELKONIAN, J.:

Petitioner Timothy Marbot ("petitioner") moves by Order to Show Cause for a "Yellowstone" injunction (First National Stores, Inc. v Yellowstone Shopping Centers, 21

NY2d 630 [1968]) restraining respondents from terminating the parties' land use and contract for on-farm forage on certain lands owned by the respondents based on a notice of default dated May 30, 2017.[1]

The record reflects that on May 1, 2014, petitioner and respondents entered into an agreement by which petitioner would grow his own crops on certain areas of respondents' farm, and, in return, petitioner would provide to respondents corn and hay silage to feed respondents' milk cows. The silage was to be provided by petitioner to respondents no later than June 1st of each subsequent year of the agreement. Respondents allege that petitioner failed to provide the requisite amount of corn and hay silage, prompting the instant action.

By notice of default dated May 30, 2017, counsel for respondents advised petitioner:

> "Please accept this notice pursuant to the Default provisions of the contract signed by you on March 29, 2014. Pursuant to said provision, you are hereby given a ten-day notice in writing that you are in default of your obligations of the aforementioned contract. With specificity, the liens that have been placed against your commercial accounts with your suppliers, contractors, and/or subcontractors are in direct violation of the

[1]On June 14, 2017, the Court issued an oral decision on the record granting petitioner's request. Upon further review of the record and in the exercise of its discretion, the Court amends its oral decision to the extent delineated herein.

> lien provision of the contract.[2] Additionally, you are in default of your corn and hay silage payments under the terms of the agreement. If you are unable to cure all defaults to the satisfaction of my client within ten (10) days, this correspondence shall serve as your notice that the contract shall immediately (sic) cancelled at that time."

The purpose of a "Yellowstone injunction" is to allow a tenant confronted by a threat of termination of the lease to obtain a stay tolling the running of the cure period so that after a determination on the merits, the tenant may cure the defect and avoid a forfeiture of the leasehold (see, Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assocs., 93 NY2d 508, 514 [1999]; Post v 120 E. End Ave. Corp., 62 NY2d 19 [1984]).

To obtain a Yellowstone injunction, the tenant-movant must show that: (1) it holds a commercial lease; (2) the landlord served upon tenant-movant a notice of default, a notice to cure, or a threat of termination of the lease; (3) it sought injunctive relief prior to the termination of the lease; and (4) it is ready, willing, and able to cure any default by any means short of vacating the premises (Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Associates, 93 NY2d 508 [1999]; see, also, 225 E. 36th St. Garage Corp. v 221 E. 36th Owners Corp., 211 AD2d 420 [1st Dept. 1995]).

The purpose of a notice of default is to "apprise the tenant of claimed defaults in its

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[2]Respondents have 3abandoned their claim that petitioner breached any portion of the agreement insofar as "liens" are concerned.

obligations under the lease and of the forfeiture and termination of the lease if those defaults [are] not cured within a set period" (Filmtrucks, Inc. v Express Indus. & Term. Corp., 127 AD2d 509, 510 [1st Dept. 1987]; One Main v Le K Rest. Corp., 1 AD3d 365, 366 [2nd Dept. 2003]; Oswego Props. v Campfield, 182 AD2d 1058, 1060 [3rd Dept. 1992]). The notice of default must inform the tenant unequivocally and unambiguously as to how the tenant has violated the lease and the conduct required to prevent eviction (Chinatown Apts. v Chu Cho Lam, 51 NY2d 786, 788 [1980]; Greenfield v Etts Enters., 177 AD2d 365 [1st Dept. 1991]; Garland v Titan W. Assocs., 147 AD2d 304, 310-11 [1st Dept. 1989]). The standard for determining if such notice is sufficient "is one of reasonableness in view of the attendant circumstances" (Hughes v Lenox Hill Hosp., 226 AD2d 4, 18 [1st Dept. 1996]). In determining whether a notice of default is valid, the court must look to the face of the notice and may not look beyond the notice to resuscitate a notice that is otherwise defective on its face (see, Domen Holding Co. v Aranovich, 1 NY3d 117 [2003] [a notice "must be 'adequate' on its face"]).

As a threshold matter, respondents argue that the order to show cause was not properly served thereby divesting this Court of jurisdiction over them.

Motions brought on by order to show cause must be served "at a time and in a manner specified therein" (CPLR § 2214 [d]). The instant order to show cause signed by Supreme Court (Zwack, J.) directed service thereof upon the respondents "by electronic mail to Respondent's counsel on June 9, 2017, and to Respondent's counsel by registered mail,

return receipt requested..."

In an action for Yellowstone relief, the order to show cause initiating it must be served in accordance with the order's directive (Jubilee, Inc. v Haslacha, Inc., 270 AD2d 34 [1st Dept. 2000]). In emergency cases, the notice to be given may, in the exercise of the court's discretion, be fixed by the judge without adherence to the prescribed methods for service of a summons or other notice, provided reasonable notice is given under the circumstances (NY Jur Injunctions § 146). Although notice received by means other than those authorized by statute cannot serve to bring a defendant within the jurisdiction of the court (Macchia v Russo, 67 NY2d 592 [1986]; Markoff v South Nassau Community Hosp., 61 NY2d 283 [1984]; Feinstein v Bergner, 48 NY2d 234, 241 [1979]; Matter of Country Side Sand & Gravel, Inc. v Town of Pomfret Zoning Bd. of Appeals, 57 AD3d 1501 [4th Dept. 2008]), in an order to show cause, permission is routinely granted to resort to substituted service (Hornok v Hornok, 121 AD2d 937 [1st Dept. 1986]).

Here, respondents are clearly subject to the jurisdiction of this court (CPLR § 302 [a][1]) and it is clear that respondents had actual notice of the order to show cause. The order to show cause does not include a directive that it must be served directly on respondents (Jubilee, Inc. v Haslacha, Inc., 270 AD2d 34 [1st Dept. 2000]). Moreover, service of the order to show cause, in a manner directed by the court at counsel's office, may be validated nunc pro tunc (Bleecker St. Corp. v Souto Geffen Co., 277 AD2d 133 [1st Dept. 2000]; Bianco v Coles, 131 AD2d 10 [3rd Dept. 1987]). Therefore, the order to show cause was

properly served.

Petitioner argues that respondents' May 30, 2017 notice to cure is facially defective. This Court agrees. The May 30, 2017 notice was written prior to any default by the petitioner. By the express terms of the contract, petitioner had until "6-1" to provide respondents with the requisite corn and hay silage. Indeed, respondents admit that "[p]etitioner had until June 1, of this year to remit the silage that remained outstanding pursuant to the terms of the contract." Inasmuch as notice of default was written prior to the date that any default could have taken place under the contract (June 1), it is defective. In addition, while respondents have alleged that petitioner has breached certain provisions of the contract, they do so without any degree of specificity.

Assuming *arguendo* that the notice of default was proper, petitioner would be entitled to a Yellowstone injunction where, as here, petitioner has established he: (1) holds a commercial lease; (2) faces the threat of lease termination in that petitioner received from respondents a notice of default threatening lease termination; (3) timely requested injunctive relief; and (4) is prepared and maintains the desire and ability to cure any violation determined by this court, by a means other than vacating the subject premises (see, Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Associates, 93 NY2d 508 [1999]; see, also, 225 E. 36th St. Garage Corp. v 221 E. 36th Owners Corp., 211 AD2d 420 [1st Dept. 1995]).

While respondents oppose the granting of a Yellowstone injunction, arguing, *inter*

alia, that petitioner will be unable to provide respondents with the requisite corn and hay silage, such is not a requirement for the granting of a Yellowstone injunction (Jemaltown of 125th Street, Inc. v Leon Betesh/Park Seen Rlty Assoc., 115 AD2d 381 [1st Dept. 1985]). Because a Yellowstone injunction is designed to avoid the tenant's forfeiture of its valuable leasehold interest while it challenges the propriety of the landlord's default notice, the tenant "need not, as a prerequisite to the granting of a Yellowstone injunction, demonstrate a likelihood of success on the merits" or "prove its ability to cure a default" (Herzfeld & Stern v Ironwood Realty Corp., 102 AD2d 737, 738 [1st Dept. 1984]). Rather, "[t]he proper inquiry is whether a basis exists for believing that the tenant desires to cure and has the ability to do so through any means short of vacating the premises" (WPA/Partners LLC v Port Imperial Ferry Corp., 307 AD2d 234, 237 [1st Dept. 2003]; Jemaltown of 125th Street, Inc. v Leon Betesh/Park Seen Rlty Assoc., 115 AD2d 381 [1st Dept. 1985]). Said differently, courts have held that where, as here, petitioner has professed a willingness to do whatever is necessary to cure a lease default, it is sufficient that there exists a potential means to cure the alleged default (see, Marathon Outdoor, LLC. v Patent Constr. Sys. Div. of Harsco, 306 AD2d 254, 255 [2nd Dept. 2003]; Empire State Bldg. Assoc. v Trump Empire State Partners, 245 AD2d 225, 229 [1st Dept. 1997]). During oral argument on the order to show cause petitioner's attorney stated that petitioner indeed has the desire and ability to provide respondents with the requisite corn and hay silage.

Accordingly, Yellowstone relief is warranted.

Accordingly, it is hereby ORDERED that petitioner's motion seeking a Yellowstone injunction is GRANTED and that petitioner shall post an undertaking in the amount of $1,000.00 within 30 days.

This constitutes the Decision and Order of the Court. This Decision and Order is returned to the attorneys for the petitioner. All other papers are delivered to the County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

SO ORDERED.
ENTER.

Dated: Troy, New York
June 15, 2017

MICHAEL H. MELKONIAN
Acting Supreme Court Justice

Papers Considered:

(1) Order to Show Cause dated June 9, 2017;
(2) Notice of Petition dated June 9, 2017;
(3) Petition dated June 9, 2017;
(4) Affirmation of Dana L. Salazar, Esq., dated June 9, 2017;
(5) Affidavit of Timothy Marbot dated June 9, 2017, with exhibits annexed;
(6) Answer dated June 13, 2017;
(7) Affidavit of Jeff Wysocki dated June 13, 2017, with exhibits annexed;
(8) Memorandum of Law dated June 14, 2017.