SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** 12
Justice

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STELLA, L.L.C.,

Plaintiff,

- v –

EQUITY CONCEPTS LLC,

Defendant.

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INDEX NO. 153669/2018

MOTION DATE

MOTION SEQ. NO. 1

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 10, 14, 15, 18, 19, 20, 21 were read on this application for a *Yellowstone* injunction

In 2011, plaintiff tenant and defendant landlord entered into a commercial lease for certain premises located at 184 Duane Street in Manhattan. (NYSCEF 3). It is undisputed that pursuant to the lease, plaintiff was required to inspect, clean, repair, and/or maintain the 10-ton water tower serving the water-cooled air-conditioning system servicing the premises and to register the water tower with the appropriate City agencies. (*Id.*).

By notice of default dated April 9, 2018, and served by defendant on plaintiff, defendant alleges that plaintiff is violating a substantial obligation of its tenancy by failing to take required actions related to the water tower, and provides that plaintiff had to cure the default on or before April 23, 2018, or defendant would terminate the tenancy and remove it from the premises. (NYSCEF 4).

On or about April 21, 2018, plaintiff commenced the instant action by summons and complaint, seeking a declaration that it is not in default of its lease as set forth in the notice of default and an order permanently enjoining defendant from terminating the lease based on the aforesaid default. (NYSCEF 2). Simultaneously, plaintiff filed an order to show cause seeking a declaration that it is not in default and that the notice of default is null and of no force and effect, and an order, pending the hearing and determination of its motion, staying and enjoining defendant from taking action to terminate the lease. (NYSCEF 10).

In support of its motion, plaintiff asserts that it advised defendant of its intention to install an air-cooled window unit to replace the water tower, which the lease permits, and that defendant improperly rejected its request and instead served it with the notice of default. Plaintiff contends that it has valid reasons for replacing the water tower, including that it is old and past its useful life span, that there had been an outbreak of Legionalla disease related to water-cooled units, and that the cost and expense of reporting, maintaining, cleaning, and caring for the water tower will exceed $15,000 per year. It denies that it is in default of the lease but contends that if it is found to be in default, it is willing to cure it by any means short of vacating the premises. (NYSCEF 11).

In opposition, defendant asserts that the lease requires plaintiff to take care of the existing water tower, and that plaintiff's claim that the tower is past its useful life span is based on inadmissible hearsay. It also argues that plaintiff's conclusory assertions of a desire or willingness to cure a default do not entitle it to a *Yellowstone* injunction, and that plaintiff has not demonstrated the ability and willingness to cure. (NYSCEF 18, 21).

A *Yellowstone* injunction may be granted on a showing by the tenant that: (1) it holds a commercial lease; (2) it received a notice of default; (3) it requested injunctive relief before the

expiration of the cure period in the notice of default and 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. Assocs.*, 93 NY2d 508 [1999]). As the first three elements are undisputed here, the sole issue is whether plaintiff demonstrates that it is able and willing to cure its default.

Whether plaintiff desires, and is entitled under the lease, to replace the water tower with a new unit is irrelevant to whether it defaulted by failing to perform the functions it was obligated to do as specified in the notice of default or whether it is able and willing to perform its obligations under the lease. Other than the affidavit of its principal wherein she states conclusorily that plaintiff is willing to cure any default by any means, plaintiff submits no evidence to support its claim that it is willing and able to cure it or that it has made any effort to do so.

Moreover, plaintiff's alleged willingness to cure the defaults is contradicted by its continued failure to cure, and by its complaints that the cure would be expensive and that defendant's conduct in seeking to hold it in default constitutes a "contrived scheme to impose extra-legal obligations upon [it] and to potentially endanger the public by insisting on [its] continued use of a water cooled air conditioning system that has been found to be a public danger by both New York City and New York State Emergency Regulations." (NYSCEF 11). And, having obtained an estimate for the repair and maintenance of the water tower in October 2017 (NYSCEF 7), plaintiff does not explain why between then and now it has nevertheless failed to make the repairs. Plaintiff thus fails to meet is burden of establishing that is willing and able to cure the defaults. (*See IP Intl. Prods., Inc. v 275 Canal St. Assocs.*, 139 AD3d 464 [1st Dept 2016] [court properly denied application for *Yellowstone* injunction as tenant did not show

willingness to cure, and its allegation that it was willing to cure belied by continued violation of lease]; *see also Linmont Realty, Inc. v Vitocarl, Inc.*, 147 AD2d 618 [2d Dept 1989] [tenant did not show good faith willingness to cure as it made no offer to cure defaults, but instead alleged that they were not its responsibility, did not exist, or had been waived by defendants]; *compare Terosal Props., Inc. v Bellino*, 257 AD2d 568 [2d Dept 1999] [plaintiff met its burden by repeatedly indicating willingness to repair defects and providing proof of substantial efforts it already made to address issues raised in notice to cure]).

Accordingly, it is hereby

ORDERED, that plaintiff's application for a *Yellowstone* injunction is denied.

5/18/2018
DATE

BARBARA JAFFE, J.S.C.

HON. BARBARA JAFFE

CHECK ONE:	☐	CASE DISPOSED		X	NON-FINAL DISPOSITION		
APPLICATION:	☐	GRANTED	X	☐	GRANTED IN PART	☐	OTHER
CHECK IF APPROPRIATE:	☐	SETTLE ORDER		☐	SUBMIT ORDER		
	☐	DO NOT POST		☐	FIDUCIARY APPOINTMENT	☐	REFERENCE