

Imber v Carl Fischer Photography, Inc.

2019 NY Slip Op 31197(U)

April 24, 2019

Supreme Court, New York County

Docket Number: 653353/2018

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

-----X

GERALD IMBER, M.D., P.C.,

Plaintiff,

- v -

CARL FISCHER PHOTOGRAPHY, INC.,

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 21, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 45, 46

were read on this motion to/for PREL INJUNCTION/TEMP REST ORDR.

DECISION AND ORDER

This is a motion for a Yellowstone injunction brought by the plaintiff-tenant, Gerald Imber, M.D., P.C. (the **Tenant**). The defendant-landlord, Carl Fischer Photography, Inc. (the **Landlord**), opposes the motion. For the reasons set forth below, the temporary restraining order granted on July 2, 2018 (the **TRO**) is vacated.

By Standard Form of Store Lease (the **Lease Agreement**), dated November 1, 2007, between the Tenant and the Landlord, the Tenant leased certain office space from the Landlord located at 121A East 83rd Street, New York, New York, for the purpose of operating a medical and surgical office. The Landlord served a Notice to Cure on the Tenant dated April 27, 2016, and a subsequent Notice to Cure dated June 1, 2018, alleging that the Tenant is in violation of the Lease Agreement and demanding that the Tenant cure the alleged defaults by July 5, 2018. The Landlord alleges that that the Tenant has failed to (i) provide sufficient proof of payment of insurance premiums and/or certifications of renewal of insurance policies, (ii) replace a bulletin

board that was allegedly removed from the boiler room in the basement, and (iii) remove an obstruction that was blocking the door to the basement, namely, a small table. The Tenant asserts that it is not in violation of the Lease Agreement because there are no defaults or that any alleged defaults have already been cured or can be readily cured.

Where a commercial tenant is threatened with termination of its lease, a Yellowstone injunction maintains the status quo by tolling the cure period pending resolution of the matter, thereby allowing the tenant to cure the default and avoid forfeiture of the lease in the event of an adverse determination on the merits (*Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assocs.*, 93 NY2d 508, 514 [1999]). A party seeking a Yellowstone injunction must demonstrate (i) the existence of a commercial lease, (ii) notice of default, notice to cure, or threat of termination of lease by the landlord, (iii) that the tenant requested injunctive relief prior to the termination of the lease, and (iv) that the tenant is willing and able to cure the alleged default (*id.*). In considering an application for Yellowstone relief, “[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” (*Herzfeld & Stern v Ironwood Realty Corp.*, 102 AD2d 737, 738 [1st Dept 1984]).

Here, the parties do not dispute that there is a commercial lease and that the Landlord has served a Notice to Cure on the Tenant. Nor do the parties dispute that there has been a request for injunctive relief prior to termination of the lease. The inquiry here is whether the Tenant has demonstrated a willingness and ability to cure the alleged defaults.

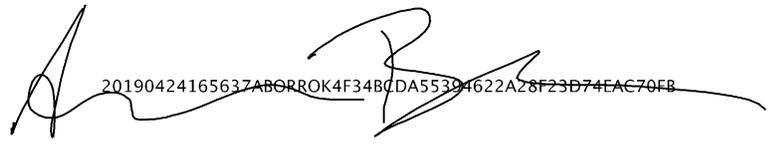
After several months, the list of alleged defaults has been narrowed. It now appears that the issue of the missing bulletin board has been resolved. As to the table allegedly obstructing access to the basement, the Court finds that access has been satisfactorily restored based on photographs taken by counsel for the Landlord on April 3, 2019 and offered at oral argument on April 4, 2019.

Not all defaults have been cured. To wit, Tenant has failed to provide insurance policies which meet the lease requirements. Tenant alleges that it is trying to obtain a retroactive endorsement of its insurance policy for prior periods so that the insurance policy covers the named Tenant under the Lease. At counsel's request, the court has adjourned this matter on a number of occasions so that the Tenant could obtain either the actual endorsement or some indication by the insurer of its willingness to extend such endorsement. On each such appearance, the court has inquired as to whether there is any basis to believe that the insurer would provide retroactive coverage, to which the Tenant has merely indicated that they "have not been told no." Inasmuch as this is insufficient to demonstrate an ability to cure and the court has extended multiple adjournments to Tenant, and Tenant has failed to provide any such evidence, the TRO is vacated and the Yellowstone is denied.

Accordingly, it is hereby

ORDERED that the temporary restraining order entered July 2, 2018 is vacated; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 238, 60 Centre Street, New York, New York on June 10, 2019, at 11:30 AM.



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4/24/2019

DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE