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| <b>CAC 3 LLC v Maiden Lane Props. LLC</b>  |
| 2019 NY Slip Op 31307(U)   |
| May 9, 2019  |
| Supreme Court, New York County   |
| Docket Number: 151929/2019   |
| Judge: William Franc Perry   |
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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. W. FRANC PERRY** PART IAS MOTION 23EFM

*Justice*

-----X  
CAC 3 LLC, INDEX NO. 151929/2019  
Plaintiff, MOTION DATE 05/09/19  
- v - MOTION SEQ. NO. 001 002 003  
MAIDEN LANE PROPERTIES LLC,

**DECISION AND ORDER**

Defendant.  
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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 15, 16, 36, 37, 38, 39, 40, 41, 42, 43

were read on this motion to/for INJUNCTION/RESTRAINING ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 44

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 003) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80

were read on this motion to/for INJUNCTION/RESTRAINING ORDER

In this landlord tenant matter, plaintiff CAC 3, LLC (“tenant”), initially moved in motion sequence number 001 for a Yellowstone injunction tolling a notice to cure served by defendant Maiden Lane Properties LLC (“landlord”). Upon determining that tenant had met its burden of showing they were ready, willing, and able to cure, the court entered a TRO pending a hearing on the motion.

On March 14, 2019, landlord filed a second order to show cause seeking (1) to expedite the hearing scheduled on tenant’s motion and (1) an order dismissing tenant’s cause of action for a Yellowstone injunction. In entering the order to show cause, the court declined to reschedule the hearing on motion sequence number 001 and also struck the portions of landlord’s order to show cause requesting access to the subject premises and modification of the language in

tenant's order to show cause in motion sequence number 001, which prohibited landlord from entering onto the premises. The court heard arguments on the motions on April 18, 2019, during which hearing the court indicated that it would take the motions on submission.

On April 22, 2019, tenant sent notice to landlord that it had cured the defaults identified in landlord's notice to cure. Despite notice that tenant had cured, on April 23, 2019, landlord sent a letter to tenant purporting to accept tenant's offer to terminate the lease for non-compliance with the lease's terms (effective April 30, 2019), which offer was automatic under the lease in the event tenant either "vacate[d], abandon[ed], or desert[ed] the [] premises" or "ceased operating or conducting business in accordance with the terms of this Lease." (Lease, Article 44[C]). In response, tenant filed yet another order to show cause (motion sequence number 003) on April 25, 2019, for an order enjoining landlord from exercising its option under Article 44(C) to terminate the lease, commencing any summary proceedings against tenant, and deeming landlord's purported April 23, 2019 acceptance of cancelation null and void.

The Court finds that tenant has established its entitlement to Yellowstone relief, having established that it has a commercial lease, received a notice of default, timely requested injunctive relief, and stated its preparedness and ability to cure the alleged default (*Reade v Highpoint Assoc. IX, LLC.*, 1 AD3d 276, 277 [1st Dept 2003]). Accordingly, landlord's application in motion sequence number 002 to dismiss tenant's cause of action for a Yellowstone injunction is denied.

As for tenant's application in motion sequence number 003, the lease at issue expressly provides that guarantor can, through notice of intent to vacate the premises and, upon compliance with certain conditions precedent, end guarantor's liability for further rent due by tenant for the unpaid period of time remaining on the subject lease. In anticipation of vacating the premises on

or before such date, tenant seemingly began to wind down its business, including offering a reduced variety of food items for sale starting on April 22, 2019, and continuing to present.

Tenant argues that the landlord's attempt to declare the lease void prior to the noticed date of tenant's vacating the premises is a calculated effort to prevent guarantor from exercising his express right to give notice of early vacatur of the premises to prevent guarantor being held liable for all future rent for the unpaid period of time left on the lease.

The court finds that tenant's recommencing selling food products from the premises on April 22, 2019, prevented landlord's accepting the purported offer of termination of the lease on April 23, 2019. The court further finds that landlord's purported interpretation of the lease, that any pause in tenant's continuing to sell food from the premises, or reducing or modifying tenant's food offerings, allows landlord to terminate the lease, as such an interpretation would make it impossible for the guarantor to exercise his express right under the lease to limit his liability for the rent due for the remaining time of the lease. The court finds the balancing of the equities lies in tenant's favor. Accordingly, tenant's application to continue the TRO previously issued regarding the notice to cure and purported termination acceptance is granted (*see Empire State Bldg. Assoc. v. Trump Empire State Partners*, 245 AD2d 225, 228 [1st Dept 1997]).

Finally, the court finds that landlord has not sufficiently articulated unique monetary harms, if any, that may be caused by continuing the TRO such as to warrant an order directing tenant to post a bond as a condition on an extension of the TRO. Landlord's hypothetical future inability to collect from guarantor the amounts owed by tenant under the lease are not unique damages that can be incurred as a result of a continuation of the TRO.

Accordingly, it is hereby

ORDERED that tenant's application in motion sequence number 001 for a Yellowstone injunction is granted; and it is further

ORDERED that landlord, its employees, servants, agents, attorneys, affiliates, partners and all other persons acting on behalf of or in concert with landlord are enjoined and restrained, until June 11, 2019, from taking any steps to terminate tenant's lease based upon a certain notice dated February 5, 2019, and from in any manner or by any means taking any action, including but not limited to the commencement of summary proceedings and/or ousting tenant from the building which is subject to the notice which is referred to therein as a portion of the second floor, listed as space "B" in the building known as 100 Maiden Lane, New York, New York (the "premises"); and it is further

ORDERED that the time for tenant to cure any defaults alleged in the February 5, 2019 notice to cure is extended until June 11, 2019; and it is further

ORDERED that landlord's application in motion sequence number 002 to dismiss tenant's cause of action for a Yellowstone injunction is denied; and it is further

ORDERED that tenant's application in motion sequence number 003 for a preliminary injunction tolling landlord's termination of the lease under Article 44(c) thereof is granted; and it is further

ORDERED that the Cancellation Acceptance dated April 23, 2019 is deemed null, void and of no force and effect; and it is further

ORDERED that landlord, its employees, servants, agents, attorneys, affiliates, partners and all other persons acting on behalf of or in concert with landlord are enjoined and restrained until June 11, 2019, from exercising the option under Article 44(c) of the lease dated January 20, 2012, to terminate the lease for tenant's failure to cure the alleged defaults, and from

commencing any summary proceedings and/or in any manner disturbing in any manner the possession and rights of tenant in and to the premises; and it is further

ORDERED that counsel for all parties are directed to appear for a preliminary conference on June 18, 2019, in IAS Part 23 of the courthouse located at 80 Centre Street, New York, New York, in Room 307 at 9:30 am.

5/9/2019  
DATE

  
W. FRANC PERRY, J.S.C.

|                       |                          |                            |                                     |                       |                          |
|-----------------------|--------------------------|----------------------------|-------------------------------------|-----------------------|--------------------------|
| CHECK ONE:            | <input type="checkbox"/> | CASE DISPOSED              | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION |                          |
|                       | <input type="checkbox"/> | GRANTED                    | <input type="checkbox"/>            | GRANTED IN PART       | <input type="checkbox"/> |
| APPLICATION:          | <input type="checkbox"/> | SETTLE ORDER               |                                     | SUBMIT ORDER          |                          |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN |                                     | FIDUCIARY APPOINTMENT | <input type="checkbox"/> |
|                       |                          |                            |                                     |                       | REFERENCE                |
|                       |                          |                            |                                     |                       | OTHER                    |