| **80 Broad Retail Assoc., LLC v BSD 80 Broad LLC** |
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| 2019 NY Slip Op 33488(U) |
| November 25, 2019 |
| Supreme Court, New York County |
| Docket Number: 159994/2019 |
| Judge: Barbara Jaffe |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

*Justice*

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80 BROAD RETAIL ASSOCIATES, LLC,

Plaintiff,

- v -

BSD 80 BROAD LLC,

Defendant.

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**INDEX NO.** 159994/2019

**MOTION DATE**

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 14-27 were read on this motion for preliminary injunction.

By order to show cause dated October 30, 2019, plaintiff seeks injunctive relief pursuant to *First Nat. Stores v Yellowstone Shopping Ctr., Inc.*, 21 NY2d 630 (1968). Defendant opposes. The sole issue presented is whether plaintiff, having moved its retail business out of the premises, retains its right to sublet the premises while it continues to pay for rent and electricity and sends its superintendent to maintain the premises.

Plaintiff is the tenant of the ground floor and basement of 80 Broad Street in Manhattan pursuant to a written lease dated December 2, 1992, which was assigned to plaintiff as tenant on December 29, 2013. (NYSCEF 4). On February 10, 2015, plaintiff sublet the premises to a nonparty to operate a Bolton's.

In article 17(1) of the lease, the parties agreed as follows:

> [I]f the demised premises become vacant or deserted. . . then . . . upon [defendant] serving a written twenty (20) days' notice upon [plaintiff] specifying the nature of said default and upon the expiration of said twenty ( 20) days, if [plaintiff] shall have failed to comply with or remedy such default, or if the said default or omission complained of shall be of a nature that the same cannot be completely cured or remedied within said twenty (20) day period, and if [plaintiff] shall not have diligently commenced curing such default with

> said twenty (20) day period, and shall not thereafter with reasonable diligence and in good faith proceed to remedy or cure such default, then [defendant] may serve a written three (3) day notice of cancellation.

(NYSCEF 6).

Pursuant to paragraph 44 of the rider to the lease, plaintiff was given, "notwithstanding anything to the contrary contained in this lease," the right throughout the term, without defendant's prior consent, to assign the lease and sublet all or any part of the premises. (*Id.*).

Plaintiff alleges that by brokerage agreement dated August 8, 2019, it retained a real estate broker to rent out the premises, and that on August 23, 2019, it ceased to operate its business. Signs were placed in the window of the premises directing the public to visit its other stores. (NYSCEF 15). Plaintiff nonetheless maintains the electrical service, has its superintendent of stores visit the store "regularly," and continues to pay the rent. By a 20-day notice to cure dated September 4, 2019, plaintiff was notified that it was in violation of article 17 of the lease. (NYSCEF 3).

Plaintiff argues that it has not deserted the premise, and absent any definition of "vacant" in the lease, it cannot be said to have left the premises vacant. Thus, the notice to cure is too conclusory to afford plaintiff an opportunity to remedy the alleged default. It also attributes to defendant the motive of seeking to regain possession in order to obtain a tenant which will pay more than the "significantly below market rent."

As plaintiff holds a commercial lease, received a notice to cure, requests injunctive relief before the termination of the lease, and is ready, able, and willing to sublet the premises before it can become vacant, it contends that it is entitled to the injunctive relief. (NYSCEF 8).

Defendant argues that as entitlement to *Yellowstone* relief requires, *inter alia*, that the tenant is able to cure the default by any means short of vacating the premises, having vacated the

premises, plaintiff is not entitled to the relief. It accuses plaintiff of preventing defendant from reletting the space that it "cannot and does not wish to use" and of "being a landlord" to "gain leverage in a buyout negotiation with" defendant.

Defendant's suggestion that plaintiff is usurping defendant's right to relet the premises fails to account for plaintiff's unquestionable right to sublet. Moreover, absent any provision in the lease governing the circumstances where a tenant goes out of business but continues to maintain possession of the premises, it cannot be shown that plaintiff has vacated the premises. Thus, plaintiff demonstrates that it is attempting to cure the alleged default by seeking to sublet the premises. This is not an instance of "the dog in the manger" (*see Broad Fin. Ctr. LLC v Natl. Assn of Securities Dealers, Inc.*, 187 FSupp2d 139, 141 [SD NY 2002]), as plaintiff is not attempting to prevent defendant from doing something it, plaintiff, cannot do. Rather, plaintiff is affirmatively attempting to exercise its right under the lease to sublet. (*See NNA Restaurant Mgmt. LLC v Eshaghian*, 2002 WL 3440625 [Sup Ct, NY County 2002] [tenant has right to stay to allow exercise of its "legitimate, bargained-for right to under the lease: the right to assign;" tenant not foreclosed from curing default by assigning lease]).

Accordingly, it is hereby

ORDERED, that plaintiff's application for a continuation of the existing *Yellowstone* injunction is granted, and defendant is hereby restrained and enjoined from taking further steps to terminate plaintiff's lease and from commencing eviction proceedings against plaintiff based on its notice to cure during the pendency of this action.

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11/25/2019
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION
[X] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER

159994/2019 Motion No. 001

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|---|---|---|---|---|---|
| APPLICATION: | ☐ | SETTLE ORDER | ☐ | SUBMIT ORDER | |
| CHECK IF APPROPRIATE: | ☐ | INCLUDES TRANSFER/REASSIGN | ☐ | FIDUCIARY APPOINTMENT | ☐ REFERENCE |