

**Fusulag Corp. v Bock Realty Corp.**

2019 NY Slip Op 33549(U)

November 26, 2019

Supreme Court, Kings County

Docket Number: 520454/19

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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FUSULAG CORP.,

Plaintiff,

Decision and order

- against -

Index No. 520454/19

BOCK REALTY CORP.,

Defendant,

ms # 142  
November 26, 2019

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking a Yellowstone injunction. The defendant has opposed the motion and has cross moved seeking to dismiss the action. Papers were submitted by the parties and arguments held. After reviewing all the arguments, this court now makes the following determination.

On August 26, 1985 the plaintiff tenant entered into a lease with landlord concerning the rental of space located at 369-71 Flatbush Avenue in Kings County. A default notice dated September 13, 2019 was served upon the plaintiff alleging two defaults. The first default alleged the plaintiff failed to pay real estate taxes and present proof of such payment within thirty days. The second default alleges the plaintiff transferred more than fifty percent of its corporate stock to another entity without the landlord's approval. The plaintiff has moved seeking a Yellowstone injunction arguing either the noted defaults are baseless or that in any event they can readily be cured.

### Conclusions of Law

A Yellowstone injunction is a remedy whereby a tenant may obtain a stay tolling the cure period "so that upon an adverse determination on the merits the tenant may cure the default and avoid a forfeiture" (Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assocs., 93 NY2d 508, 693 NYS2d 91 [1999], First National Stores v. Yellowstone Shopping Center Inc., 21 NY2d 630, 290 NYS2d 721 [1968])). For a Yellowstone injunction to be granted the Plaintiff, among other things, must demonstrate that "it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises" (Graubard, supra).

Thus, a tenant seeking a Yellowstone must demonstrate that: (1) it holds a commercial lease, (2) it has received from the landlord a notice of default, (3) its application for a temporary restraining order was made prior to expiration of the cure period and termination of the lease, and (4) it has the desire and ability to cure the alleged default by any means short of vacating the premises (see, Xiotis Restaurant Corp., v. LSS Leasing Ltd. Liability Co., 50 AD3d 678, 855 NYS2d 578 [2d Dept., 2008])).

Paragraph 4 of the amended lease dated September 1, 2004 states that the tenant must pay all real estate taxes "in a timely manner and provide landlord proof of payment...within

thirty days after the due date" (id). The landlord argues the failure to pay the taxes in a timely manner is an incurable default thus a Yellowstone cannot be granted. As the landlord argues, even though the taxes might have eventually been paid, they were not timely paid and the plaintiff "cannot now perform an act which was required to be performed by July 31, 2019" (see, Defendant's Reply Affirmation, ¶ 11). However, the mere fact the taxes have been paid late without any consequence accruing to the landlord does not mean the default is incurable. For example, in Baruch LLC v. 587 Fifth Avenue LLC, 44 AD3d 339, 842 NYS2d 442 [1<sup>st</sup> Dept., 2007] the court held a tenant's efforts to satisfy the terms of the lease, in that case fixing hazardous conditions, can extend beyond the literal times enumerated within the lease. The court noted that a strict adherence to the literal reading of the lease "misses the larger realities" faced by tenants in efforts to satisfy all the provisions of the lease.

Moreover, the issue in this case, namely real estate taxes can hardly be termed 'incurable' in the same manner as the failure to maintain insurance has been held incurable (JT Queens Carwash Inc., v. 88-16 N. Boulevard, LLC, 101 AD3d 1089, 956 NYS2d 536 [2d Dept., 2012]). Concerning the failure to maintain insurance the incurability stems from the obvious fact that without insurance there can be no protection for the defendant "against the unknown universe of any claims arising during the

period of no insurance coverage" (Kyung Sik Kim v. Idylwood N.Y. LLC, 66 AD3d 528, 886 NYS2d 337 [1<sup>st</sup> Dept., 2007]). The defendant argues that taken to its extreme a ruling in favor of the tenant would mean the tenant "can never be in default under the lease for the failure to pay the real estate taxes by the due date, or in default with the City of New York for the failure to pay the real estate taxes by the due date, because it can pay them whenever it wants to, as long as it pays the interest penalties" (see, Defendant's Reply Affirmation, ¶ 13). The court is not adopting that position, however, considering the facts of this case the default was improper.


Further, as conceded the issue concerning the transfer or assignment, there are factual issues which make a summary determination impossible.

Therefore, based on the foregoing the motion seeking a Yellowstone injunction is granted.

So ordered.

ENTER:

DATED: November 26, 2019  
Brooklyn N.Y.

  
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Hon. Leon Ruchelsman  
JSC

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KINGS COUNTY CLERK  
FILED