SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 46

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390 PARK PROPERTY LLC and 390 PARK AVENUE ASSOCIATES, LLC, Index No. 656861/2019

Plaintiffs

- against - DECISION AND ORDER

WI/BSREP III 390 PARK LLC, 390 TOWER ASSOCIATES, LLC, and 390 TOWER ASSOCIATES,

Defendants

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LUCY BILLINGS, J.S.C.:

Plaintiffs hold a commercial lease for the Lever House at 390 Park Avenue, New York County, owned by defendants. Plaintiffs have moved for a Yellowstone injunction tolling a Notice to Cure that defendants served on plaintiffs October 21, 2019, giving them until November 25, 2019, to cure violations of the parties' lease. First Nat'l Stores, Inc. v. Yellowstone Shopping Ctr., Inc., 21 N.Y.2d 630 (1968). The violations to be cured relate to plaintiffs' failure to install a sprinkler system throughout the leased premises as required by New York City Administrative Code §§ 27-228.5(b)(1) and 27-929.1. Plaintiffs received a notice of violation of these requirements dated September 3, 2019, from the New York City Department of Buildings (DOB).

The court's temporary restraining order dated November 19, 2019, temporarily tolled the Notice of Cure. The court now denies plaintiffs' motion for injunctive relief.

The limited purpose of a Yellowstone injunction is to toll the tenants' time to cure a default claimed by their landlords under the parties' lease, to allow litigation and determination of whether the tenants are required to cure a default. Graubard Mollen Horowitz Pomerantz & Shapiro v. 600 Third Ave. Assoc., 93 N.Y.2d 508, 514(1999); Artcorp Inc. v. Citirich Realty Corp., 124 A.D.3d 545, 546 (1st Dep't 2015); Village Ctr. for Care v. Sligo Realty & Serv. Corp., 95 A.D.3d 219, 222 (1st Dep't 2012); Boi To Go, Inc. v. Second 800 No. 2 LLC, 58 A.D.3d 482, 482 (2009). Here, there is no question whether plaintiff tenants are required to install a sprinkler system throughout the leased premises as required by Administrative Code §§ 27-228.5(b)(1) and 27-929.1.

Here the question is instead whether, during the 35 days that defendant landlords' Notice to Cure provided to plaintiffs to cure their incomplete installation of the required sprinkler system, they had diligently commenced a cure and in good faith diligently proceeded to cure the default, to avoid the next step under § 18.1 of the parties' lease: of cancellation of the lease. Although plaintiffs are entitled to every opportunity to show that a cancellation of the lease is unwarranted, the purpose of a Yellowstone injunction would be to litigate whether plaintiffs are required to cure, not whether defendants are entitled to cancel the lease. Bliss World LLC v. 10 W. 57th St. Realty LLC, 170 A.D.3d 401, 402 (1st Dep't 2019). The parties need no time to litigate, and the court needs no time to determine whether plaintiffs must cure the incomplete

installation of a sprinkler system. They acknowledge that they must cure. See Artcorp Inc. v. Citirich Realty Corp., 124 A.D.3d at 546; Boi To Go, Inc. v. Second 800 No. 2 LLC, 58 A.D.3d at 482; TSI W. 14, Inc. v. Samson Assoc., LLC, 8 A.D.3d 51, 53 (1st Dep't 2004). The only issue to be litigated and determined is whether, when they received defendants' Notice to Cure and since then, plaintiffs have accomplished enough toward a cure. Bliss World LLC v. 10 W. 57th St. Realty LLC, 170 A.D.3d at 402; Gettinger Assoc., LLC v. Abraham Kamber & Co. LLC, 103 A.D.3d 535, 536 (1st Dep't 2013).

Moreover, plaintiffs are not in a position to seek equitable relief. Nobu Next Door, LLC v. Fine Arts Hous., Inc., 4 N.Y.3d 839, 840 (2005); Waldbaum, Inc. v. Fifth Ave. of Long Is. Realty Assoc., 85 N.Y.2d 600, 607 (1995). See Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co., 86 N.Y.2d 685, 695 (1995); Village Ctr. for Care v. Sligo Realty & Serv. Corp., 95 A.D.3d at 222. Installation of a sprinkler system throughout an occupied building of 24 stories and 267,000 square feet is a massive undertaking to be sure, but the 2004 law that required the undertaking provided 15 years to accomplish it. Plaintiffs not only had fallen far behind by 2011 in accomplishing compliance, but now admit that between 2011 and the compliance deadline July 1, 2019, they made little further progress. When they sought an extension of the compliance deadline from DOB in 2018, given the unexcused delays, DOB denied plaintiffs' request. N.Y.C. Admin. Code § 27-228.5(b)(2). Plaintiffs provide no basis on which the

court is permitted to provide them what DOB denied.

Plaintiffs point out that they did not ask DOB to protect them from a cancellation of their lease. They still may ask the court to protect them from a cancellation of the lease, however, and obtain that protection upon showing that they have complied with § 18.1 of the lease by diligently and in good faith curing their default when and since they received the Notice to Cure. The Notice to Cure need not be tolled to allow plaintiffs to proceed diligently and in good faith to cure their acknowledged noncompliance with Administrative Code §§ 27-228.5(b)(1) and 27-929.1; lease § 8.1, requiring a cure of any notices of a violation of law received from DOB; lease § 8.1.1, requiring compliance with all laws; and lease § 20, imposing sprinkler requirements for the building. If plaintiffs show that they complied with lease § 18.1, any ensuing cancellation of the lease will be invalid, and they will avoid a forfeiture of their lease.

Perhaps most compelling is Administrative Code § 27-228.5's important public safety purpose. By violating that law, plaintiffs continue to endanger their subtenants, building employees, neighbors, and any firefighters and emergency medical personnel in the event of a fire in the building and continue to jeopardize insurance coverage for real and personal property damage as well as for bodily injuries and deaths.

For all the reasons explained above and on the record December 12, 2019, the court denies plaintiffs' motion for a Yellowstone injunction. The temporary injunction dated November

19, 2019, is no longer in effect, eliminating the requirement for security. Graubard Mollen Horowitz Pomerantz & Shapiro v. 600 Third Ave. Assoc., 93 N.Y.2d at 515. See C.P.L.R. § 6312(b); 1414 Holdings, LLC.v. BMS-PSO, LLC, 116 A.D.3d 641, 643-44 (1st Dep't 2014); Witham v. vFinance Invs., Inc., 52 A.D.3d 403, 404 (1st Dep't 2008).

DATED: December 20, 2019

LUCY BILLINGS, J.S.C.

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