

**Gutman v 1245 Broadway Realty LLC**

2020 NY Slip Op 31914(U)

June 16, 2020

Supreme Court, Kings County

Docket Number: 504395/20

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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LEAH GUTMAN,

Plaintiff,

Decision and order

- against -

Index No. 504395/20

1245 BROADWAY REALTY LLC,

Defendant,

June 16, 2020

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PRESENT: HON. LEON RUCHELSMAN

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

On October 11, 2000 the plaintiff tenant entered into a lease with landlord concerning the second, third and fourth floors of rental space located at 1245 Broadway in Kings County. Two notices to cure were served, the first dated February 5, 2020 and the second dated February 14, 2020 both alleging the same three defaults. The first two defaults alleged that leaks on the upper floors caused damage to the first floor tenant who is owed money for damaged goods and who has not paid rent due to the leak. The third default alleged the sidewalk required replacement or repair. 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]).

Many of the defaults are disputed by the plaintiff as constituting defaults. Thus, the plaintiff does not assert that it unequivocally is unwilling to cure any defaults (Metropolis

Westchester Lanes Inc., v. Colonial Park Homes Inc., 187 AD2d 492, 589 NYS2d 570 [2d Dept., 1992]), but rather no such defaults exist. Therefore, the court will examine the defaults and if such are found to exist, the plaintiff will undoubtedly cure them (see, ERS Enterprises, Inc., v. Empire Holdings LLC, 286 AD2d 206, 729 NYS2d 23 [1<sup>st</sup> Dept., 2001]).

The plaintiff argues there has been no proof presented concerning either the damage to the first floor tenant or the need for sidewalk repair and that in any event concerning the leaks they were caused by defendant's own conduct of activities on the roof. Although if true then there should likewise be leaks on all the floors occupied by the plaintiff, to the extent there are questions of fact whether the plaintiff is responsible for the repairs a Yellowstone should not be denied since that would be "tantamount to adjudicating the merits of the underlying case, which is beyond the scope of the application" (New York Classic Motors LLC v. 250 Hudson Street LLC, 2013 WL 5925541 [Supreme Court New York County 2013], W & G Wines LLC v. Golden Chariot Holdings LLC, 46 Misc3d 1202(A), 7 NYS3d 245 [Supreme Court Kings County 2014]).

The next default concerns repairing the sidewalk. There can really be no dispute the sidewalk must be repaired as indicated by the insurance company. The plaintiff has indicated a readiness and willingness to cure the defect of the sidewalk


which the plaintiff is obligated to cure.

Therefore, based on the foregoing the motion seeking a Yellowstone injunction is granted. The issue of the leak must be further pursued and the plaintiff must endeavor to repair the sidewalk.

So ordered.

ENTER:

DATED: June 16, 2020  
Brooklyn N.Y.

  
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Hon. Leon Ruchelsman  
JSC