

**Prestige Deli & Grill Corp. v PLG Bedford Holdings
LLC**

2020 NY Slip Op 32370(U)

July 17, 2020

Supreme Court, Kings County

Docket Number: 510220/20

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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PRESTIGE DELI & GRILL CORP.,

Plaintiff, Decision and order

- against - Index No. 510220/20

PLG BEDFORD HOLDINGS LLC,
-----x
Defendant,
PRESENT: HON. LEON RUCHELSMAN

July 17, 2020

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 February 1, 2017 the plaintiff tenant entered into a lease with landlord concerning the rental of space located at 2034 Bedford Avenue in Kings County. A notice to cure was served on May 15, 2020 alleging two defaults, namely the failure to install grease traps and the failure to provide insurance. Additionally, the notice to cure noted the plaintiff owed \$13,278.16 in back rent and other fees. The plaintiff failed to respond to the notice and on June 2, 2020 the defendant served a notice of termination. The plaintiff asserts that due to various executive and administrative orders promulgated during the COVID-19 pandemic, the notice to cure and notice to termination were invalid or that the notice to cure did not yet expire and the Yellowstone request is proper even though the time to cure has since expired. The defendant opposes that request.

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]).

Executive Order 202.28 states that "there shall be no...enforcement...for nonpayment of rent or a foreclosure of any residential or commercial mortgage, for nonpayment of such

mortgage, owned or rented by someone that is eligible for unemployment insurance or benefits under state or federal law or otherwise facing financial hardship due to the COVID-19 pandemic for a period of sixty days beginning on June 20, 2020" (id). Thus, the Executive Order clearly prohibits the enforcement of a termination of a commercial lease for sixty days commencing June 20, 2020. Further, Administrative Order 131/20 states that pursuant to that Executive Order foreclosure matters "shall continue to be suspended until further order" (id). While this action is not a foreclosure matter in the strict sense it certainly concerns action regarding the non-payment of rent. The Administrative Order does not describe the posture of the matter that is sought to be stayed, how long it has been the subject of litigation or any prejudice to any party, but rather broadly stays all foreclosure and non payment matters. The defendant argues that the executive order "could not apply to the enforcement of private parties rights under a private agreement" (see, Memorandum in Opposition, ¶30), however, by staying all foreclosures the executive order does exactly that. To the extent the defendant is challenging the authority to restrain private contracts, this motion is not the proper venue for such arguments. Further, it is true that Executive Order 202.28 was issued after the relevant dates applicable here, however, that

order was built upon and supplemented other orders and surely governs the specific facts of this case.


Thus, concerning the actual defaults, 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 that to extent such defaults are found to exist, the plaintiff will undoubtedly cure them (see, ERS Enterprises, Inc., v. Empire Holdings LLC, 286 AD2d 206, 729 NYS2d 23 [1st Dept., 2001]).

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

So ordered.

ENTER:

DATED: July 17, 2020
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC