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

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DOUBLE D WILLIAMSBURGH INC.,

Plaintiff, Decision and order

- against - Index No. 507272/2023

742 DRIGGS LLC,

Defendant, May 24, 2023

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PRESENT: HON. LEON RUCHELSMAN Motion Seq. #1

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 July 17, 2022 the plaintiff tenant entered into a lease with landlord concerning the rental of space located at 742 Driggs Avenue in Kings County. Te rental space is utilized as a restaurant. A notice to cure was served on February 14, 2023 alleging three defaults. The first default alleged the tenant permitted excessive noise at the premises. The second default alleged the tenant installed hanging lights in violation of the lease. The third default alleged the tenant placed items under the fire escape in violation of the lease. 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. As noted, the defendant opposes the motion.

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 [1st Dept., 2001]).

Concerning the default regarding excessive noise, paragraph 80 of the rider to lease states the tenant will insure the demised premises does not exhibit "excessive unreasonable noise" (see, Paragraph 80 of the Rider [NYSCEF Doc. No. 5]). There are surely questions of fact whether in fact such noise exists to constitute a breach of the lease. This issue must be explored through discovery and at this juncture the motion seeking a Yellowstone is granted.

The next default alleged the placement of hanging lights in the rear yard constituted impermissible alterations without the landlord's approval. Paragraph 3 of the lease and paragraph 71 of the rider both concern alterations. Paragraph 3 deals with "alterations, installations, additions or improvements which are non structural" and paragraph 71 of the rider deals with alterations that require work to be done at the premises (see, Paragraph 3 of the lease and Paragraph 71 of the Rider [NYSCEF Doc. No. 5]). The mere hanging of lights hardly can be termed alterations to the premises as contemplated by the lease or the

rider. Surely there are questions of fact in this regard. In any event, the Yellowstone injunction is granted concerning this alleged violation.

Lastly, Paragraph 6 of the lease does not mention fire-escapes, but does require the tenant to comply with all fire safety codes. If the tenant's activities of placing items under the fire escape violates any fire code then surely the tenant will cure such defects.

Paragraph 56(a) of the rider states that "all waste and garbage from the demised premises shall be placed by Tenant in covered containers or sealed plastic bags and stored by Tenant in the demised premises pending removal of same by a private sanitation company" (id). The third violation also asserts that the tenant violated the above provision and that "even after private sanitation picks up the garbage, the garbage bins remain in front of the building until approximately 5:00 pm until when the restaurant reopens for business. As per the lease, you are required to keep said garbage stored in the demised premises and only put out for the private sanitation company to pick up same" (see, Notice to Cure Lease Default, Paragraph 3 [NYSCEF Doc. No. 6]). However, the rider to the lease does not impose any time frame when the garbage bins must be returned to the demised premises. There are surely questions of fact whether leaving the garbage bins in the front of the premises after the garbage has

been collected constitutes a violation of this provision. In any event, discovery will explore the issue and the tenant will surely cure any violation that may exist.

Therefore, based on the foregoing the motion seeking a Yellowstone injunction is granted as to all the defaults.

So ordered.

ENTER:

DATED: May 24, 2023
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC