

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CHARLES E. RAMOS
Justice

PART 53

Index Number : 652592/2011
FAIRWAY DOUGLSTON LLC,
vs.
AAC DOUGLSTON PLAZA
SEQUENCE NUMBER : 003
OTHER RELIEFS

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).
Answering Affidavits — Exhibits No(s).
Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is

Is decided in accordance with
accompanying memorandum decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 4/13/2012

CHARLES E. RAMOS, J.S.C.

- 1. CHECK ONE: CASE DISPOSED, NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED, DENIED, GRANTED IN PART, OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER, SUBMIT ORDER, DO NOT POST, FIDUCIARY APPOINTMENT, REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

-----X
FAIRWAY DOUGLASTON LLC,

Plaintiff,

Index No.
652592/11

-against-

AAC DOUGLASTON PLAZA SHOPPING CENTER LLC,
RELA REALTY CORP., and KIRBY BUSINESS
ASSOCIATES,

Defendants.
-----X

Charles Edward Ramos, J.S.C.:

In motion sequence 003, the plaintiff Fairway Douglaston LLC ("Fairway") moves by order to show cause for a *Yellowstone* injunction.

This action arises out of a commercial lease, dated June 4, 2008 (the "Lease"), between Fairway and defendants AAC Douglaston Plaza Shopping Center LLC, RELA Realty Corp., and Kirby Business Associates (collectively, the "Landlord") for use of the property located at 242-02 161st Street, Douglaston, NY (the "Premises") as a grocery store.

The subject of this instant motion is the alleged unauthorized installation of rooftop HVAC equipment, other rooftop equipment, and communications equipment (collectively, the "Equipment") at the Premises by Fairway. The Landlord alleges that Fairway installed the Equipment without obtaining the Landlord's approval, however, Fairway contends that the

Landlord did not have a reasonable basis to deny the installation of the Equipment pursuant to the Lease and its delay in responding constituted an approval.

On October 18, 2011, the Landlord served a 30 day notice to cure seeking the removal of the Equipment. Thereafter, on November 1, 2011, Fairway moved by order to show cause for a *Yellowstone* injunction.

"A *Yellowstone* injunction maintains the status quo so that a commercial tenant, when confronted by a threat of termination of its lease, may protect its investment in the leasehold by obtaining 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. Associates*, 93 NY2d 508, 514 [1999]).

To obtain *Yellowstone* injunction, Fairway must demonstrate that: "(1) it holds a commercial lease; (2) it received from the landlord either a notice of default, a notice to cure, or a threat of termination of the lease; (3) it requested injunctive relief prior to the termination of the lease; and (4) it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises" (*225 E. 36th St. Garage Corp. v 221 E. 36th Owners Corp.*, 211 AD2d 420, 421 [1st Dept 1995]).

It is undisputed that Fairway satisfies the first three elements for obtaining a *Yellowstone* injunction, but the Landlord argues that Fairway has not demonstrated that it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises.

During oral argument, on November 15, 2011, this Court found that Fairway was ready, willing, and able to cure any alleged default if this Court finds that it breached the Lease (Transcript, Nov. 15, 2011, 6:4-10). Therefore, Fairway has demonstrated that it is entitled to a *Yellowstone* injunction.

Furthermore, the termination of the Lease and closure of the grocery store currently operating at the Premises will result in irreparable harm to Fairway and its employees if it this Court determines that Fairway did not breach the Lease.

Accordingly, it is

ORDERED, that the plaintiff's motion for a *Yellowstone* injunction to toll the cure period in the Notice to Cure, dated October 18, 2011, is granted, and it is further

ORDERED that the undertaking is fixed in the sum \$25,000 conditioned that the plaintiff, if it is finally determined that the plaintiff was not entitled to a *Yellowstone* injunction, shall pay to the defendants all damages and costs which may be sustained by reason of this *Yellowstone* injunction.

This constitutes the decision and order of this court.

Dated: April 13, 2012

ENTER:



J.S.C.

CHARLES E. RAMOS