NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 32

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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GRAND CONCOURSE GROUP, LLC,

Index No. **810141/2021E**

Plaintiff,

Hon. **FIDEL E. GOMEZ**
Justice

- against -

LOVE GOSPEL ASSEMBLY,

Defendant.

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The following papers numbered 1 to 4, read on this motion, noticed on 8/16/2021, and duly submitted as no. 1 on the Motion Calendar of 2/14/2022.

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	2	
Replying Affidavit and Exhibits	3, 4	
Notice of Cross-Motion - Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers-Order of Reference		
Memorandum of Law		

Plaintiff's motion is decided in accordance with the Decision and Order annexed hereto.

Dated: 3/10/2022

Hon. _____
FIDEL E. GOMEZ, A.J.S.C.

1. CHECK ONE..... ☐ CASE DISPOSED X NON-FINAL DISPOSITION

2. MOTION IS..... ☐ GRANTED X DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST
☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT
X NEXT APPEARANCE DATE: April 18, 2022 at 11:00 a.m.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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GRAND CONCOURSE GROUP, LLC,

Plaintiff,

DECISION AND ORDER

- against -

Index No. **810141/2021E**

LOVE GOSPEL ASSEMBLY,

Defendant.

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Plaintiff Grand Concourse Group, LLC ("Plaintiff") moves by order to show cause for an order granting it a Yellowstone injunction enjoining Defendant Love Gospel Assembly ("Defendant") from, *inter alia*, commencing any summary or other proceeding to terminate or cancel Plaintiff's leasehold interest in the Lease, pending the hearing and determination of this action. Plaintiff also seeks an order referring any remaining disputes between the parties to arbitration pursuant to paragraph 25 of the Lease. Defendant opposes.

For the reasons which follow, Plaintiff's motion is denied.

BACKGROUND:

On July 27, 2021, Plaintiff commenced the instant action against Defendant by filing a summons and complaint, alleging causes of action for a declaratory judgment pursuant to CPLR § 3001 and a permanent injunction.

The complaint alleges that Defendant is the landlord and Plaintiff is the tenant at 2315 Grand Concourse, Bronx, NY ("2315"). Plaintiff alleges that on or around July 22, 2014, the parties entered into a ground lease for 2315 (the "Lease"). Plaintiff alleges that the Lease was part of a greater transaction between the parties pursuant to which Plaintiff purchased an adjacent property located at 2301-2313 Grand Concourse, Bronx, NY ("2301"), the excess development rights and easements over 2315-2323 Grand Concourse, Bronx, NY (the "Air Rights"), and the Lease for $5,200,000.00 (Compl. ¶ 3, ¶ 11). Plaintiff alleges that in making this transaction, its intent was to tear down the two properties and build an apartment building on the site (Compl. ¶ 12). The ground floor would be for retail space and the upper floors would be for condominium apartments (Compl. ¶ 15). Plaintiff alleges that as future consideration, the transaction provided

that Defendant would receive a second-floor condominium unit in the building to be built (Compl. ¶ 16). Plaintiff alleges that Defendant still owns a third lot, on which its church is located, at 2323 Grand Concourse, Bronx, NY ("2323") (Compl. ¶ 13).

The complaint alleges that on or around June 24, 2021, Defendant served a Notice of Termination (the "Notice") upon Plaintiff (Compl. ¶ 4). Plaintiff alleges that the Notice states that Plaintiff's rights under the Lease would be terminated on July 30, 2021 (Compl. ¶ 5).

Plaintiff alleges that it is not in default under the Lease. Plaintiff alleges that it has proceeded "promptly, diligently, and in good faith" to construct the building, but that Defendant has prevented Plaintiff from obtaining the necessary permits and approvals from the Department of Buildings ("DOB") to commence construction (Compl. ¶ 6-7).

Plaintiff also alleges that Defendant has not given an appropriate notice of termination or adequately explained or particularized the claimed defaults. Plaintiff further alleges that the Notice refers to documents which are not attached to the Notice (Compl. ¶ 8).

On July 27, 2021, Plaintiff filed the instant motion. On February 14, 2022, the motion was marked fully submitted.

DISCUSSION:

In support of its motion, Plaintiff submitted, *inter alia*, the affidavit of Rodney Alberts, an employee of Plaintiff's principals; the Lease; the Notice; the Purchase Agreement dated January 29, 2014 (the "Purchase Agreement") and the First Amendment to the Purchase Agreement (the "First Amendment"); and the Zoning Lot and Development Agreement dated July 22, 2014 (the "Development Agreement").

Mr. Alberts reiterates the allegations made in the complaint. He also clarifies that Plaintiff intended to tear down the two buildings at 2301 and 2315, whereupon title to 2315 would be conveyed to Plaintiff and the Lease would merge with title (Affidavit of Rodney Alberts, ¶ 6). He also states that a portion of the new building to be constructed above the lot previously housing 2315 was to be conveyed to Defendant, along with the second-floor of the new building as a condominium (Affidavit of Rodney Alberts, ¶ 8).

Plaintiff argues that its failure to timely construct the new building was caused by Defendant's unreasonable demands and refusal to sign the requisite applications, which would allow Plaintiff to file its plans with the DOB. Plaintiff argues that it is ready, willing and able to

fulfill its obligation by constructing the new building upon Defendant's cooperation. Plaintiff argues that it has no intent to vacate or forfeit the Lease.

In opposition, Defendant argues that the motion must be denied, because: (1) the Lease is voidable; (2) the Lease has expired; and (3) the Lease does not contain a cure period.

Defendant argues that the Lease has already expired, because it served three notices of termination on Plaintiff: on May 14, 2020, February 5, 2021, and June 24, 2021. Defendant argues that Plaintiff did not seek a Yellowstone injunction after the first two termination notices.

Defendant also argues that there is no cure provision in the Lease. Defendant argues that even if there was a cure period, Plaintiff would not be able to cure its default. Defendant argues that since the Lease requires that the construction be completed within five years of delivery of 2315 by Defendant to Plaintiff, and delivery was made on July 22, 2015 (Affidavit of David Martin, ¶ 11),[1] Plaintiff was required to complete construction by July 23, 2020.[2] Defendant argues that Plaintiff cannot meet this completion date, as it has already passed. Defendant also argues that Plaintiff has not demonstrated how it would cure the default.[3]

In reply, citing *28 Mott St. Co. v Summit Import Corp.*, 64 Misc2d 860 [Civ Ct, New York County 1970], Plaintiff argues that the tenancy is still in effect, because the Notice vitiates the earlier notices of termination. Plaintiff also argues that Plaintiff affirmed the Lease and waived any opportunity to terminate the Lease (Affidavit of Eric Berliner, ¶ 22-25).

In sur-reply,[4] Defendant argues that Plaintiff makes new arguments for the first time in reply. Specifically, Defendant argues that Plaintiff's arguments regarding waiver of its right to terminate the Lease are made for the first time in reply and should not be considered. Defendant also argues that *28 Mott St.* is not applicable here, because that case does not concern the termination of a lease based on a tenant's default.

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1 Mr. Martin's affidavit states that Defendant vacated 2315 on July 22, 2015, and the keys were given to Mr. Alberts on July 23, 2015 (Affidavit of David Martin, ¶ 11).

2 Defendant also argues that pursuant to the Purchase Agreement and First Amendment, construction was to have been completed by July 2019.

3 Defendant also argues that Plaintiff defaulted under other provisions. Defendant argues that Plaintiff never obtained casualty insurance as required by paragraph 8A of the Lease. Defendant also argues that Plaintiff failed to furnish a performance bond in the amount of $1,800,000.00 as required by the First Amendment.

4 The Court (McShan, J.) permitted Defendant to submit a sur-reply by Order dated January 13, 2022.

In order to be entitled to a Yellowstone injunction, the movant must demonstrate that: (1) it holds a commercial lease; (2) it received a notice of default, a notice to cure, or a threat of termination of the lease from the landlord; (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 (*Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Avenue Associates*, 93 NY2d 508, 514 [1999]; *Gap, Inc. v 44-45 Broadway Leasing Co., LLC*, 191 AD3d 549, 550 [1st Dept 2021]).

An application for a Yellowstone injunction must be made not only before the termination of the lease, but before the expiration of the cure period (*Three Amigos SJL Rest., Inc. v 250 West 43 Owner, LLC*, 144 AD3d 490, 491 [1st Dept 2016]; *166 Enterprises Corp. v I G Second Generation Partners, L.P.*, 81 AD3d 154, 158 [1st Dept 2011]; *Goldcrest Realty Co. v 61 Bronx River Road Owners, Inc.*, 83 AD3d 129, 130 [2d Dept 2011] [holding that the plaintiff's application for a Yellowstone injunction was not timely, even though it was made one day before the termination of the lease as provided in the notice of termination, because it was made after the expiration of the cure period]; *Korova Milk Bar of White Plains, Inc. v PRE Properties, LLC*, 70 AD3d 646, 647 [2d Dept 2010]). A court "cannot reinstate a lease after the lapse of time specified to cure a default" (*Korova Milk Bar of White Plains, Inc.*, 70 AD3d 646 at 647).

The purpose of a Yellowstone injunction is to stop the running of the cure period and to preserve the status quo under the lease, not to resolve the underlying merits of the parties' dispute (*Gap, Inc.*, 191 AD3d 549 at 550; *E.C. Electronics, Inc. v Amblunthorp Holding, Inc.*, 38 AD3d 401, 401-402 [1st Dept 2007]; *Newmann v Mapama Corp.*, 96 AD2d 793, 795 [1st Dept 1983]). In determining whether a Yellowstone injunction is warranted, it is not necessary to resolve the underlying merits of the parties' disputes about whether there is any default warranting termination of the lease in the first instance (*Booston LLC v 35 West Realty Co. LLC*, 185 AD3d 508, 546-547 [1st Dept 2020]; *Bliss World LLC v 10 West 57th Street Realty LLC*, 170 AD3d 401, 402 [1st Dept 2019]).

Absent a cure provision in the lease, "the equitable relief of tolling the period within which to cure a default cannot be invoked" (*Wuertz v Cowne*, 65 AD2d 528, 528 [1st Dept 1978]; *Times Sq. Stores Corp. v Bernice Realty Co.*, 107 AD2d 677, 680 [2d Dept 1985]). Moreover, "[w]here the claimed default is not capable of cure, there is no basis for a Yellowstone injunction" (*Bliss World LLC*, 170 AD3d 401 at 401; *Booston LLC*, 185 AD3d 508 at 546; *Kyung Sik Kim v Idylwood, N.Y., LLC*, 66 AD3d 528, 529 [1st Dept 2009]; *JT Queens Carwash, Inc. v 88-16*

Northern Blvd., LLC, 101 AD3d 1089, 1090 [2d Dept 2012] ["the failure to maintain the requisite insurance would be an incurable default that formed an independent basis for denial of Yellowstone relief"]).

Here, the Lease states that the term of the Lease is forty-nine (49) years, beginning on the date on which Defendant delivers 2315 vacant (the "Date of Commencement"). The Lease obligates Defendant to deliver 2315 vacant on or before July 21, 2015 (Plaintiff's Exhibit A, ¶ 3).

Paragraph 5(A) of the Lease states that: "Lessee shall use the Premises for the purpose of demolishing the existing building and building a new building to be comprised as a condominium in accordance with the First Amendment to Agreement and with the Agreement by Lessor and Lessee regarding 2301-2313 Grand Concourse, New York, NY and 2315 Grand Concourse, New York, NY."[5]

The Lease states in at least two different paragraphs that construction must be completed within 5 years of the Date of Commencement, and that the failure to do so is a default under the Lease. Paragraph 10(A) of the Lease states that:

> No later than three (3) years from delivery of the Premises vacant by Lessor to Lessee, *Lessee shall commence and thereafter diligently prosecute to completion the construction on the Premises within five (5) years*, at Lessee's sole cost and expense, as required under the Agreement. All construction performed by Lessee under this Paragraph 10A shall be subject to the provisions of Paragraph 11 hereof. *Failure to commence or thereafter diligently prosecute to completion such construction shall constitute a default under this lease* (emphasis added).

Paragraph 19(A) of the Lease also provides that: "The occurrence of the following event shall constitute an event of default by Lessee under this Lease: (1) Lessee shall fail to substantially complete improvements to the property within 5 years from the Date of Commencement".

There is no dispute that the Lease does not provide a cure period within which to cure this default under the Lease. The Lease merely provides that Defendant may terminate the Lease upon Plaintiff's default by providing a thirty-day notice of intention to terminate. Specifically, paragraph 19(B) of the Lease states that:

> Subject to the rights of the Leasehold Mortgagee, *in the event of any default by Lessee under this Lease, then*, in addition to and without prejudice to any other right or remedy given hereunder or by law and notwithstanding any waiver of any former breach of covenant

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[5] Presumably, the parties meant to indicate "Bronx, NY", not "New York, NY".

> *Lessor may: (1) Terminate this Lease, and Lessee's right to possession of the Property, by giving to Lessee a notice of intention to terminate this Lease specifying a day not earlier than thirty (30) days after the date on which such notice of intention is given and, upon the giving of such notice, the term of this Lease and all right, title, and interest of the Lessee hereunder shall expire as fully and completely on the day so specified as if that day were the date herein specifically fixed for the expiration of the term, whereupon Lessee shall immediately surrender the Property to Lessor*, and if Lessee fails to do so, Lessor may, without prejudice to any other remedy which it may have for possession or arrearages in rent, enter upon and take possession of the Property and expel or remove Lessee and any other person who may be occupying such Property or any part thereof without being liable for prosecution or any claim of damages therefore; and Lessee agrees to pay to Lessor on demand the amount of all loss and damage which Lessor may suffer by reason of such termination, whether through inability to relet the Property on satisfactory terms or otherwise (emphasis added).

Paragraph 31 of the Lease also provides that: ". . . in the event Lessee does not complete construction of the building within five (5) years from delivery of possession of the building vacant and free of tenancies in accordance with the First Amendment Agreement between Lessor and Lessee as Seller and Purchaser, Lessor shall have the right to terminate this Ground Lease."

Since a Yellowstone injunction cannot be granted in the absence of a cure provision (*Wuertz*, 65 AD2d 528 at 528; *Times Sq. Stores Corp.*, 107 AD2d 677 at 680), Plaintiff's motion must be denied. This is so even if the Notice vitiates the earlier notices of termination, as the Notice is simply a notice of the termination of the Lease, and does not provide a cure period.

Additionally, it is clear that here, Plaintiff cannot cure the default. Although Plaintiff argues that it is ready to begin construction once the parties' rights and obligations are determined, the terms of the Lease are clear. The Lease states that Plaintiff must complete construction within 5 years from the Date of Commencement (Plaintiff's Exhibit A, ¶ 10A, ¶ 19A, ¶ 31). There is no dispute that the Date of Commencement was July 22, 2015. As such, construction was to be completed by July 23, 2020. There is no dispute that construction was not completed by this date and that construction has yet to begin. As such, Defendant cannot cure its alleged default, as the deadline to complete construction, as agreed to by the parties in the Lease, has passed. As such, Plaintiff's motion must be denied (*Bliss World LLC*, 170 AD3d 401 at 401; *Booston LLC*, 185 AD3d 508 at 546; *Kyung Sik Kim*, 66 AD3d 528 at 529; *JT Queens Carwash, Inc.*, 101 AD3d 1089 at 1090).

The Court notes that the parties submitted extensive information, arguing that the default under the Lease and the delay in construction was caused by the other party. The parties also dispute whether Defendant has waived Plaintiff's default under the Lease and whether Defendant has the right to terminate the Lease. However, the Court need not determine the merits of these underlying issues, as it is not necessary to the determination of the issue of whether a Yellowstone injunction should be granted (*Gap, Inc.*, 191 AD3d 549 at 550; *E.C. Electronics, Inc.*, 38 AD3d 401 at 401-402; *Newmann*, 96 AD2d 793 at 795; *Booston LLC*, 185 AD3d 508 at 546-547; *Bliss World LLC*, 170 AD3d 401 at 402).

As for Plaintiff's request that this matter be referred to arbitration pursuant to paragraph 25 of the Lease, since Plaintiff makes no arguments in support of this request in its papers, the request is deemed abandoned. Moreover, paragraph 25 of the Lease does not address resolution of disputes by arbitration. However, the parties are free to and are encouraged to participate in any arbitration or other mediation programs available to the parties.

Accordingly, Plaintiff's motion is denied.

It is hereby

ORDERED that the temporary restraining order is vacated; and it is further

ORDERED that the parties appear for a virtual **Preliminary Conference** on **April 18, 2022, at 11:00 a.m.**; and it is further

ORDERED that Defendant serve a copy of this Decision and Order upon Plaintiff, with Notice of Entry, within thirty (30) days of the date hereof.

This constitutes the Decision and Order of this Court.

Dated: 3/10/2022

Hon. **FIDEL E. GOMEZ, A.J.S.C.**