NEW YORK SUPREME COURT - COUNTY OF BRONX
**PART 32**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX
----------X

**LOYALTY DAYCARE, LLC,**

Index No. **801387/22E**

**Plaintiff(s),**

Hon. **FIDEL E. GOMEZ**
Justice

**- against -**

**MONARCH DEVELOPMENT, INC.,**

**Defendant(s).**
----------X

The following papers numbered 1, Read on plaintiff's motion noticed on 2/14/21, and duly submitted as no. 1 on the Motion Calendar of 4/25/22.

| | PAPERS NUMBERED | |
|---|---|---|
| Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed | 1 | |
| Answering Affidavit and Exhibits | 2 | |
| Replying Affidavit and Exhibits | 3 | |
| 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 seeking, *inter alia*, a Yellowstone Injunction is decided in accordance with the Decision and Order annexed hereto.

Dated: 6/1/2022

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Hon. **FIDEL E. GOMEZ, AJSC**

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

2. MOTION/CROSS-MOTION IS
☐ GRANTED
X DENIED
☐ GRANTED IN PART

3. CHECK IF APPROPRIATE.
☐ GRANTED IN PART

☐ SETTLE ORDER
☐ SUBMIT ORDER
☐ DO NOT POST
☐ FIDUCIARY APPOINTMENT
☐ REFEREE APPOINTMENT
☐ NEXT APPEARANCE DATE 8/1/2022 @10:30am

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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LOYALTY DAYCARE, LLC, **DECISION AND ORDER**

Plaintiff(s), Index No: 801387/22E

- against -

MONARCH DEVELOPMENT, INC.,

Defendant(s).

----------x

In this action for, *inter alia*, declaratory judgment, plaintiff moves seeking an order pursuant to CPLR § 6301, granting it a preliminary injunction, enjoining defendant from terminating the lease between the parties. Plaintiff avers that in this action: (1) it is likely to succeed on the merits because it timely exercised the option to renew the lease between the parties; (2) absent a preliminary injunction preventing the termination of the lease, it would lose its valuable leasehold, thereby causing irreparable harm; and (3) that the equity tips in favor of the preliminary injunction since defendant would not be prejudiced by the grant thereof. Defendant opposes the instant motion asserting, *inter alia,* that because plaintiff failed to timely seek a renewal of the lease in the manner expressly prescribed by the lease, plaintiff is unlikely to succeed on the merits.

For the reasons that follow hereinafter, plaintiff's motion is

denied.

The instant action is for declaratory judgment, anticipatory breach of contract, and permanent injunction. The complaint alleges that the parties entered into a 10 year lease for the premises located at 4240 Third Avenue, Bronx, NY 10457 (4240). Pursuant to the lease, plaintiff would lease 4240 for a term of 10 years, which would end on November 30, 2020. Pursuant to paragraph 45 of the lease's rider, the lease could be renewed for an additional five years. The lease did not provide an expiration date for the option to renew and plaintiff timely exercised the same. Nevertheless, on December 8, 2021, defendant terminated the lease by serving a Notice of Termination upon plaintiff. Plaintiff alleges that it has never defaulted under the terms of the lease nor breached any of the terms therein. Based on the foregoing, plaintiff's first cause of action is for declaratory judgment wherein it seeks a declaration that it timely renewed the lease and has a right to occupy 4240. Plaintiff's second cause of action is for anticipatory breach of contract, wherein plaintiff alleges that because it fully complied with all obligations under the lease, defendant unjustifiably seeks to remove it from 4240, thereby entitling plaintiff to damages and treble damages pursuant to RPAPL § 853. Plaintiff's third cause of action is for permanent injunction, wherein based on the foregoing, plaintiff seeks to permanently enjoin defendant from removing it from 4240.

Plaintiff's motion seeking a Yellowstone and/or a preliminary injunction is denied. Significantly, on this record, plaintiff fails to establish that it timely exercised the right to renew the lease. Specifically, the notice seeking renewal of the lease prior to its expiration was not provided in accordance with the express terms of the lease. Moreover, when the notice seeking renewal was provided in the manner prescribed by the lease, it was not provided until after the written lease term expired. As such, as a matter of law, plaintiff fails to establish that it is able to renew the lease if granted a Yellowstone Injunction, since by the terms of the lease, renewal is not available unless properly exercised prior to November 30, 2020 - the date the written lease expired. For this reason, plaintiff also fails to establish a likelihood of success on the merits, thereby warranting denial of its motion for a preliminary injunction.

In support of its motion, plaintiff submits an affidavit by Luis E. Ducasse (Ducasse), a plaintiff's Member, wherein he states, in relevant part, the following. On December 16, 2010, the parties entered into a 10 year lease for 4240. At that time, plaintiff tendered $28,875 as a security deposit, $25,000 as key money, and $5,000 for first month's rent. Pursuant to paragraph 45 of the lease's rider, plaintiff had the option to renew the lease for an additional five years. On November 21, 2018, plaintiff exercised that right by emailing a letter to defendant wherein plaintiff's

Member wrote "I wish to extend the rental period until November 30, 2025." On January 4, 2019, plaintiff emailed defendant, inquiring whether it received the renewal letter, to which defendant asked plaintiff for a telephone number to contact it. Thereafter, plaintiff received defendant's Notice of Termination, wherein plaintiff was apprised that its tenancy would be terminated on January 31, 2022. On January 21, 2022, plaintiff reminded defendant that it had renewed the lease, to no avail. In an email, defendant requested that plaintiff submit any evidence demonstrating that defendant agreed to extend the lease, because it was defendant's contention that the written lease was never renewed prior to its expiration. Ducasse states that plaintiff has expended significant funds in 4240 and that it would be irreparably harmed if its lease were terminated. Ducasse states that plaintiff never breached the terms of the lease or defaulted thereunder, but that if it did, plaintiff is willing to cure any breaches.

Plaintiff submits the lease between the parties, which is dated December 16, 2010. The lease indicates that it is for a term of 10 years, beginning on December 16, 2010, and ending on November 30, 2020. Paragraph 1 of the lease rider indicates that the monthly rent would escalate yearly, with the monthly rent being $12,675.00 for the tenth year - December 1, 2019, through November 30, 2020. Paragraph 19, titled Notices, states that

> [a]ny notice which either party may or is required to give, shall be given by

mailing the same, postage prepaid, certified mail, return receipt requested, to Tenant at the demised premises, or Landlord at the address shown above. A complimentary copy of the notice to Tenant shall also be emailed to Peter Farkas, Esq., at farkasp@gmail.com.

Paragraph 45, titled Option to Renew, states

> [p]rovided Tenant is not in default in the performance of any covenants of this lease and rider, including but not limited to the covenant to pay rent and additional rent, Tenant shall have the option to renew lease. The rent for the year 2011 will be either 5% increase above the 10th year's lease or Fair Market Value based on the following formula, whichever is less. The parties will choose each one broker and the two will pick a third and the three brokers will provide their "BPO"s (Broker Property Opinions) based on the same use for the Premises. The average of the three will represent the Fair Market Value estimate for this paragraph. Escalations thereafter will be 2.5% per year. If Tenant decides not to, then Landlord may advertise the premises; may place a sign on the building advertising that the property is available for rent, and may show the premises to prospective tenants during business hours of 9:00 AM - 5:00 PM Monday through Saturday, upon 24 hours notice to tenant. At the end of the initial 10 year lease period, should Tenant elect to exercise its option to renew lease and extend for an additional five (5) years Landlord shall have the right to cancel the lease at anytime during the renewal period for the purpose of developing or significantly rehabilitating the building structure and property, so long as it shall give Tenant six (6) months notice to vacate the Premises. Tenant will be required to deliver possession upon or at any time

> before the expiration of such notice and shall not owe any rent beyond the date that keys and actual physical possession of the premises is tendered to the Landlord.

Plaintiff submits a letter dated November 21, 2018, sent by Ducasse to defendant[1]. Within the letter, Ducasse states that with respect to 4240, he "wish[es] to extend the rental period until November 30th 2020." Plaintiff also submits an email, dated November 21, 2018, appended to the foregoing letter, from Ducasse to Jose Perez, which states that Ducasse wanted a meeting to discuss the exercise of the option to renew.

Plaintiff submits a series of documents appended to two United States Postal Service Certified Mail Receipts. The receipts are dated January 21, 2022, and addressed to Mastermind LTD and Mastermind Management, at 668 Crescent Avenue, Bronx, NY 10458. The first document is the letter dated November 21, 2018, and already discussed above. The second document is the email appended to the letter, already discussed above. The third document is a letter from Ducasse to defendant, dated January 20, 2022, wherein he asserts that per the emails annexed to his letter, plaintiff

[1] The letter is addressed to Mastermind, Ltd. (Mastermind), at 668 Crescent Avenue, Bronx, NY 10458. Although it is never established that Mastermind and defendant are the same entity, defendant never disputes receipt of the instant letter. Instead, defendant, by counsel, only takes issue with the sufficiency of the notice given the terms in the lease (Affirmation in Opposition to Order to Show cause Paragraphs 51-54). As such, the Court treats all correspondence to Mastermind and emails with that domain as if sent to defendant.

exercised the right to renew the lease between the parties. The fourth document is an email exchange between plaintiff and Radame Perez (Radame), of Mastermind, occurring on January 4, 2019, wherein plaintiff inquires whether Radame reviewed plaintiff's intent to renew. Defendant's response was to request plaintiff's best contact number. The last email is from defendant to plaintiff, dated January 25, 2022, wherein Radame states

> I am in receipt of your email. Please feel free to submit any evidence that you have documenting when ownership agreed to extend the lease. We assert that the lease expired and was never renewed or extended further and you have been provided notice to vacate the premises.

Plaintiff submits a Notice of Termination dated December 8, 2021, wherein counsel for defendant states that effective January 31, 2022, defendant elects to terminate plaintiff's month-to-month tenancy, which until November 30, 2022, was a tenancy pursuant to a written lease.

**YELLOWSTONE INJUNCTION**

Based on the foregoing, plaintiff's motion seeking a Yellowstone Injunction is denied. On this record, where because there is no breach of the lease alleged as a basis for its termination, there has never been a notice to cure served upon plaintiff, and thus, Yellowstone relief is unavailable. Moreover, even if the Court treats the failure to timely renew the instant lease and the Notice of Termination served upon plaintiff as a

Notice to Cure, it is clear that plaintiff did not properly exercise its right to renew the lease until after the written lease expired, thereby precluding the renewal sought by plaintiff.

A Yellowstone Injunction is an equitable remedy fashioned by the court and traces its roots to *First National Stores, Inc. v Yellowstone Shopping Center, Inc.* (21 NY2d 630 [1968]). In that case, the plaintiff - the tenant - and the defendant - the landlord - were involved in a dispute regarding who would bear the expense of installing a sprinkler system (*id.* at 634). Significantly, the defendant, alleging that it was the plaintiff's responsibility under the lease, served the plaintiff with a Notice to Cure, alleging that the failure to install the sprinkler system was a material breach of the lease (*id.* at 634-635). Plaintiff chose not to cure and instead responded by commencing a declaratory judgment action (*id.* at 635). Plaintiff failed to seek injunctive relief by way of a temporary restraining order prior to the expiration of the cure period and thereafter, the defendant terminated the lease (*id.* at 635). The trial court declined to entertain jurisdiction over plaintiff's application, noting that the claims therein could be interposed as defenses in any ensuing summary proceeding (*id.* at 635). The Appellate Division reversed, noting that the plaintiff had, in fact, breached the lease, but that termination of the lease would be inequitable (*id.* at 636-637). The court extended the time within which the plaintiff could cure the alleged breach (*id.* at

636-637). The Court of Appeals reversed, noting that although it possessed inherent and equitable powers, it nevertheless could not retroactively extend the cure period (*id.* at 637). Specifically, the court stated

> [i]n a proper case, a court has the fullest liberty in molding its decree to the necessities of the occasion. But, it cannot grant equitable relief if there is no acceptable basis for doing so. Here, the lease had been terminated in strict accordance with its terms. The tenant did not obtain a temporary restraining order until after the landlord acted. The temporary restraining order merely preserved the status quo as of the date it was obtained. Once the Appellate Division determined that the tenant had in fact defaulted by not installing the sprinkler system, the conclusion had to be drawn that the lease was terminated in accordance with its terms. The Appellate Division could not revive it unless it read into the lease a clause to the effect that the tenant could have an additional 20 days to cure its default before the landlord could commence summary eviction proceedings. This the court was powerless to do absent a showing of fraud, mutual mistake or other acceptable basis of reformation

(*id.* at 637). The court thus held that absent a toll, after the cure period has expired, a court cannot accord any relief.

Since then, tenants, relying on *First National Stores, Inc.*, have developed the practice of obtaining stays of cure periods occasioned by the breach of a lease prior to their expiration, thus allowing the litigation of the merits of the alleged breaches. In *Mann Theatres Corp. of California v Mid-Is. Shopping Plaza Co.* (94

AD2d 466 [2d Dept 1983], *affd*, 62 NY2d 930 [1984]), the plaintiff was granted a Yellowstone Injunction and in describing the foregoing practice, the court stated

> [u]nder the procedure promulgated in First Nat. Stores v Yellowstone Shopping Center, a tenant may obtain a restraining order which tolls the running of the notice to cure until a declaration of the parties' rights may be had. In Yellowstone (supra), the tenant's failure to obtain a restraining order until after the cure period had run was fatal since there is no judicial power to revive a cure period that has expired. Absent a toll of the cure period, a judicial determination that the lease has been violated leaves the tenant without the ability to cure if the time to cure has elapsed by the time of decision. Therefore, a tenant who fails to seek a restraining order tolling the time to cure must either cure during the time limited or litigate under the peril that a negative determination of the substantive issues will destroy the leasehold without a further opportunity for cure

(*id.* at 477 [internal citations omitted]; *see Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Avenue Associates*, 93 NY2d 508 [1999] ["While seemingly unremarkable, the Yellowstone case ushered in a new era of commercial landlord-tenant law in New York State. As a result of this decision, tenants developed the practice of obtaining a stay of the cure period before it expired to preserve the lease until the merits of the dispute could be resolved in court. These injunctions have become commonplace, with courts granting them routinely to avoid forfeiture of the tenant's

substantial interest in the leasehold premises. Yellowstone gave rise to a creative remedy for tenants when confronted with a tangible threat of lease termination. 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" (internal citations omitted).]).

Generally, courts will grant a Yellowstone Injunction in order to avoid the forfeiture of a tenant's substantial interest in the leasehold premises (*Graubard Mollen Horowitz Pomeranz & Shapiro* at 514). Thus, a Yellowstone Injunction serves to maintain the status quo and when granted, a Yellowstone Injunction results in a toll of the cure period within which a particular breach under the lease is to be remedied (*id.* at 514). Said toll allows a tenant to protect its investment in the leasehold until such time as the underlying breach can be resolved on the merits and if the resolution is adverse to the tenant enables the same to cure the breach (*id.* at 514); *Garland v Titan West Associates*, 147 AD2d 304, 307 [1st Dept 1989]; *Hempstead Video, Inc. v 363 Rockaway Associates, LLP*, 38 AD3d 838, 839 [2d Dept 2007]; *Purdue Pharma, LP v Ardsley Partners, LP*, 5 AD3d 654, 655 [2d Dept 2004]; *Marathon Outdoor, LLC v Patent Construction Systems Division of Harsco Corporation*, 306 AD2d 254,

255 [2d Dept 2003]; *Long Island Gynecological Services, P.C. v 1103 Stewart Avenue Associates Limited Partnership*, 224 AD2d 591, 593 [2d Dept 1996]).

In order to obtain a Yellowstone Injunction the party seeking the same must demonstrate all of the following: (1) that it holds a commercial lease; (2) that 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 (*Graubard Mollen Horowitz Pomeranz & Shapiro* at 514; *Garland* at 307; *Hempstead Video, Inc.* at 839; *Purdue Pharma, LP* at 655; *Marathon Outdoor, LLC* at 255; *Long Island Gynecological Services, P.C.* at 593).

Notably, in order to obtain a Yellowstone Injunction, courts require far less than the showing required for preliminary injunctive relief (*Post v 120 E. End Ave. Corp.*, 62 NY2d 19, 25 [1984] ["An applicant rarely has been required to demonstrate a likelihood of success, irreparable injury, and that the equities favored preliminary relief as those terms are traditionally understood."]; *Marathon Outdoor, LLC* at 255; *Heavy Cream, Inc. v Kurtz*, 146 AD2d 672, 673 [2d Dept 1989]). For example, the proponent of a Yellowstone Injunction need not demonstrate a likelihood of success on the merits in the underlying action, where

the alleged breach is being litigated (*TSI West 14, Inc. v Samson Associates, LLC*, 8 AD3d 51, 53 [1st Dept 2004]; *Herzfeld & Stern v Inwood Realty Corporation*, 102 AD2d 737, 738 [1st Dept 1984]). Accordingly, the proponent of a Yellowstone Injunction need not prove its ability to cure the breach in order to obtain the injunction and instead, is only required to proffer a basis leading to the conclusion that the proponent desires to cure and has the ability to do so through means short of vacating the premises (*Herzfeld & Stern* at 738). Indeed, "[t]he mere threat of termination and forfeiture of the lease has been held sufficient to justify maintenance of the status quo by [Yellowstone] injunction" (*Garland* at 307-308).

Significantly, a Yellowstone Injunction is limited in both scope and purpose and as such only tolls the cure period and does not nullify the remedies to which a landlord is otherwise entitled under the lease (*Graubard Mollen Horowitz Pomeranz* at 515; *Waldbaum, Inc. v Fifth Avenue of Long Island Realty Associates*, 85 NY2d 600, 606 [1995] ["The Yellowstone injunction only served to forestall defendant from prematurely cancelling the lease during its initial term, in order to afford an opportunity for plaintiff to obtain a judicial determination of its breach and what would be required to cure it, and bring plaintiff in compliance with the terms of the lease. The injunction could not, in and of itself, relieve plaintiff of the necessity of complying with the condition

precedent to renewal set forth in the lease, that plaintiff not be in default."]; *Duane Reade v 405 Lexington, L.L.C.*, 19 AD3d 179, 180 [1st Dept 2005]).

It is well settled that where the breach of a lease cannot be cured, an application for a Yellowstone Injunction must be denied (*Bliss World LLC v 10 W. 57th St. Realty LLC*, 170 AD3d 401, 401 [1st Dept 2019] ["A necessary lynchpin of a Yellowstone injunction is that the claimed default is capable of cure. Where the claimed default is not capable of cure, there is no basis for a Yellowstone injunction. Here, the claimed defaults are the tenant's failure to procure insurance and improper assignment of the lease. The tenant provides various steps that it will take to cure if it is ultimately found to be in material violation of the insurance provisions of the lease. None of these proposed cures involve any retroactive change in coverage, which means that the alleged defaults raised by the landlord are not susceptible to cure"] [internal citations omitted]; *Kyung Sik Kim v Idylwood, N.Y., LLC*, 66 AD3d 528, 529 [1st Dept 2009] ["The motion court found, after a hearing, that plaintiffs had not previously and continuously maintained insurance coverage as required by their commercial lease. This violation was a material breach of the lease and, in these circumstances, an incurable violation that is an independent basis for the denial of Yellowstone relief" [internal citations omitted]; *Grenadeir Parking Corp. v Landmark Assoc.*, 294 AD2d 313,

314 [1st Dept 2002]).

Where the proponent of Yellowstone Injunction fails to move for injunctive relief prior to the expiration of the cure period, a court has no power to grant it (*First Natl. Stores* at 637; *T.W. Dress Corp. v Kaufman*, 143 AD2d 900 [2d Dept 1988] ["We conclude that the plaintiff's motion for a Yellowstone injunction, was properly denied. In order to preserve the right to cure a default under the lease by a declaratory judgment action, the tenant must obtain a stay of the period within which the default may be cured"] [internal citations omitted]; *Norlee Wholesale Corp., Inc. v 4111 Hempstead Turnpike Corp.*, 138 AD2d 466, 470 [2d Dept 1988] ["Here, there has been no toll of the period in which to cure, and, consequently, there has been an irrevocable lapse of the time to cure. Therefore, while the plaintiff can litigate the substantive question of the breach of the lease, it can do so only under the peril that a negative determination of the substantive issues will destroy the leasehold without a further opportunity for cure" [internal citation and quotation marks omitted]; *Health 'N Sports, Inc. v Providence Capital Realty Group, Inc.*, 75 AD2d 884, 885 [2d Dept 1980]).

Preliminarily, Yellowstone relief is denied because, as urged by defendant, here, plaintiff has never been served with a Notice to Cure since the failure to timely renew the lease is not a breach of any of its terms. Indeed, while some cases hold that

Yellowstone relief is available upon service of a Notice of Termination, it is clear that in those cases there was not only a claim that the tenant both breached the relevant lease and was also served with a Notice to Cure. To be sure, in *Graubard Mollen Horowitz Pomeranz & Shapiro*, although the Court granted a Yellowstone injunction to plaintiffs, stating that the same could be granted upon receipt "from the landlord either a notice of default, a notice to cure, or *a threat of termination of the lease*" (*id.* at 514), it was clear that in that case plaintiffs were also served with a Notice to Cure (*id.* at 511 ["by Notice to Cure dated February 24, 1994, [defendants] advised the [plaintiff] that it was in default of its leasehold obligations by failing to maintain the required security."]; *see also 225 E. 36th St. Garage Corp. v 221 E. 36th Owners Corp.*, 211 AD2d 420, 420 [1st Dept 1995] [plaintiff brought action seeking a Yellowstone Injunction after it was served with both a Notice to Cure and a Notice of Termination.]).

Assuming *arguendo*, were the Court inclined to treat the failure to renew as a breach of the lease and the time between the service of the Notice of Termination and the termination date as a cure period, as a matter of law, plaintiff did not renew and cannot renew the lease. Accordingly, plaintiff cannot cure the failure to renew the lease.

Whether plaintiff has the ability to cure, as urged by Ducasse, requires a review of the terms of the lease between the

parties against the backdrop of well settled contract law.

It has long been held that absent a violation of law or some transgression of public policy, people are free to enter into contracts, making whatever agreement they wish, no matter how unwise they may seem to others (*Rowe v Great Atlantic & Pacific Tea Company, Inc.*, 46 NY2d 62, 67-68 [1978]). Consequently, when a contract dispute arises, it is the court's role to enforce the agreement rather than reform it (*Grace v Nappa*, 46 NY2d 560, 565 [1979]). In order to enforce the agreement, the court must construe it in accordance with the intent of the parties, the best evidence of which being the very contract itself and the terms contained therein (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002]). It is well settled that "when the parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms" (*Vermont Teddy Bear Co., Inc. v 583 Madison Realty Company*, 1 NY3d 470, 475 [2004] [internal quotation marks omitted]). Moreover, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield* at 569). Accordingly, courts should refrain from interpreting agreements in a manner which implies something not specifically included by the parties, and courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the

writing (*Vermont Teddy Bear Co., Inc.* at 475). This approach serves to preserve "stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses [and] infirmity of memory" (*Wallace v 600 Partners Co.*, 86 NY2d 543, 548 [1995] [internal quotation marks omitted]).

The proscription against judicial rewriting of contracts is particularly important in real property transactions, where commercial certainty is paramount, and where the agreement was negotiated at arm's length between sophisticated, counseled business people (*Vermont Teddy Bear Co., Inc.* at 475). Specifically, in real estate transactions, parties to the sale of real property, like signatories of any agreement, are free to tailor their contract to meet their particular needs and to include or exclude those provisions which they choose. Absent some indicia of fraud or other circumstances warranting equitable intervention, it is the duty of a court to enforce rather than reform the bargain struck (*Grace* at 565).

Leases are nothing more than contracts and are thus subject to the rules of contract interpretation, namely, that the intent of the parties is to be given paramount consideration, which intent is to be gleaned from the four corners of the agreement, and that of course, the court may not rewrite the contract for the parties under the guise of construction, nor may it construe the language in such a way as would distort the contract's apparent meaning

(*Tantleff v Truscelli*, 110 AD2d 240, 244 [2d Dept 1985]).

In the absence of fraud or other wrongful act, a party who signs a written contract is presumed to know and have assented to the contents therein (*Pimpinello v Swift & Co.*, 253 NY 159, 162 [1930]; *Metzger v Aetna Ins. Co.*, 227 NY 411, 416 [1920]; *Renee Knitwear Corp. v ADT Sec. Sys.*, 277 AD2d 215, 216 [2d Dept 2000]; *Barclays Bank of New York, N.A. v Sokol*, 128 AD2d 492, 493 [2d Dept 1987]; *Slater v Fid. & Cas. Co. of N.Y.*, 277 AD 79, 81 [1st Dept 1950]). In discussing this long-standing rule the court in *Metzger* stated that

> [i]t has often been held that when a party to a written contract accepts it as a contract he is bound by the stipulations and conditions expressed in it whether he reads them or not. Ignorance through negligence or inexcusable trustfulness will not relieve a party from his contract obligations. He who signs or accepts a written contract, in the absence of fraud or other wrongful act on the part of another contracting party, is conclusively presumed to know its contents and to assent to them and there can be no evidence for the jury as to his understanding of its terms. This rule is as applicable to insurance contracts as to contracts of any kind.

(*Metzger* at 416 [internal citations omitted]).

Here, the written lease between the parties states that its term begins on December 16, 2010, and ends on November 30, 2020. Paragraph 45 of the rider provides for renewal of the lease upon plaintiff's exercise of that option. While not expressly setting

a deadline for the exercise of the foregoing option, paragraph 45 prescribes a procedure for the calculation of rent upon the exercise of the option for year 2021 - a year after the lease is to expire - and further states that "[a]t the end of the initial 10 year lease period, should Tenant elect to exercise its option to renew lease and extend for an additional five (5) years Landlord shall have the right to cancel the lease."

Paragraph 19 of the rider requires that any notice required under the lease "shall be given by mailing the same, postage prepaid, certified mail, return receipt requested."

As noted above, in enforcing the agreement, the court must construe it in accordance with the intent of the parties, the best evidence of which being the very contract itself and the terms contained therein (*Greenfield* at 569). Moreover, it is well settled that leases are contracts and thus, subject to the rules of contract interpretation, namely, that the intent of the parties is to be given paramount consideration, which intent is to be gleaned from the four corners of the agreement, and that of course, a court may not rewrite the contract for the parties under the guise of construction, nor may it construe the language in such a way as would distort the contract's apparent meaning (*Tantleff* at 244).

Here, then, where Ducasse states and the record establishes that the renewal notice provided to defendant by plaintiff on November 21, 2018, via email, it is clear that said notice was not

provided to defendant as required by the clear and express language of paragraph 19 of the lease rider - via certified mail, return receipt. Accordingly, plaintiff's attempt to renew the lease in 2018 was invalid.

The record further establishes that plaintiff did not notify defendant about its intent to renew the lease, via certified mail, return receipt, until January 21, 2022, over a year after November 30, 2020 - the date the written lease expired. Contrary to plaintiff's assertion, while the lease between the parties did not expressly set a deadline within which plaintiff could seek renewal of the lease, the lease clearly demonstrates that it was the intent of the parties that renewal could only be exercised before the written lease expired. To be sure, within the very same paragraph authorizing renewal upon request, the lease makes reference to a method of calculating rent for year 2021, a year after the lease was to expire, and to defendant's right to terminate the lease after the renewal period.

Clearly, then, on this record, plaintiff did not timely exercise its option to renew and cannot do so now. To conclude otherwise, as urged by plaintiff, would run afoul of well settled principles of contract interpretation. First, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield* at 569). Second, it is well settled that no clause in a contract

should be interpreted in a away which renders another clause meaningless (*Two Guys from Harrison-N.Y., Inc. v S.F.R. Realty Assoc.*, 63 NY2d 396, 403 [1984] ["In construing a contract, one of a court's goals is to avoid an interpretation that would leave contractual clauses meaningless."]; *Corhill Corp. v S. D. Plants, Inc.*, 9 NY2d 595, 599 [1961]; *Muzak Corp. v Hotel Taft Corp.*, 1 NY2d 42, 46 [1956]; *UBS Sec. LLC v Red Zone LLC*, 77 AD3d 575, 579 [1st Dept 2010]). Here, plaintiff's position that it could extend the 10 year lease by exercising a renewal option in year 11, at which time it was a month-to-month tenant, would render meaningless every part of the lease which limits the lease's term to 10 years. This would abrogate the clear intent of the parties evinced by the written lease. Thus, defendant's position is without merit.

To the extent that plaintiff equates his current month-to-month tenancy to its tenancy governed by the written lease, they are not one in the same, and as noted above, per the agreement, renewal was required prior to the expiration of the written lease.

Notably, upon the expiration of a tenancy governed by a written lease, when the tenant remains in possession and the landlord continues to accept rent, the tenancy becomes a month-to-month periodic tenancy (*Park Summit Realty Corp. v Frank*, 107 Misc 2d 318, 322 [App Term 1980], *affd*, 84 AD2d 700 [1st Dept 1981], *affd*, 56 NY2d 1025 [1982] ["The common-law rule in New York has been modified to the extent that presently only a month-to-month

periodic tenancy springs forth from the combination of tenant holdover and landlord acceptance of rent (see Real Property Law, s 232-c). Significantly, the terms of the month-to-month tenancy, except as to duration, is governed by the same terms as the original expired written just expired (*id*. at 322; *see also Baylies v Ingram*, 84 AD 360, 362–63 [1st Dept 1903], *affd*, 181 NY 518 [1905] ["In the absence of any proof upon the subject, there can be no reason for holding that the relations of the parties have changed, so nothing has occurred to break the continuity of the holding, or from which it can be implied that any conditions exist rendering inoperative any of the terms of the lease. Nor do we think that the rule is limited to the relation merely of landlord and tenant in the use and occupation and the payment of rent, so as to exclude the independent covenants from continuing with the other parts of the lease. A holding over, to be upon the same terms as contained in the original lease, carries with it the necessary implication that all of the covenants which became binding by the execution of the lease continue to remain in full force, unless changed conditions appear rendering them inapplicable. We can conceive of no sound reason which would warrant the rejection of any part of the lease upon which the parties agreed. Their relation continued in all respects precisely as if the term had not expired. The holding over constitutes merely an enlargement of the term, and the lease is applied thereto with the same force as though it had

been re-executed."]). Thus, here, Paragraph 45 of the rider, which required renewal prior to 2021 still applies and bars renewal now when the tenancy is merely month-to-month..

Since to obtain a Yellowstone Injunction the party seeking the same must demonstrate *all* of the following: (1) that it holds a commercial lease; (2) that 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 (*Graubard Mollen Horowitz Pomeranz & Shapiro* at 514; *Garland* at 307; *Hempstead Video, Inc.* at 839; *Purdue Pharma, LP* at 655; *Marathon Outdoor, LLC* at 255; *Long Island Gynecological Services, P.C.* at 593), here, while plaintiff asserts that it can cure by simply having the Court deem its belated notice to renew timely, it is urging judicial rewriting of the lease, which this Court cannot and will not do. As such, plaintiff fails to demonstrate that it can prevent forfeiture of the lease by obtaining a renewal of the same. Hence, plaintiff fails to establish, as it must, that it can cure the purported breach of the instant lease.

**PRELIMINARY INJUNCTION**

Plaintiff's motion seeking a preliminary injunction is denied. Significantly, since on this record plaintiff cannot exercise its

option to renew the lease, plaintiff fails to establish a likelihood of success on the merits.

CPLR § 6301 describes the grounds upon which the court can grant a preliminary injunction and reads, in pertinent part, as follows:

> A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.

Thus, a preliminary injunction "provide[s] a provisional remedy by maintaining the status quo pending a full hearing on the merits, rather than to determine the ultimate rights of the parties and mandate corrective action" (*Jamie B. v Hernandez*, 274 AD2d 335, 336 [1st Dept 2000]). Accordingly, the court should not, on a motion for a preliminary injunction, grant the ultimate relief sought in the underlying action (*id.* at 336).

Because a preliminary injunction substantially limits a defendant's rights and is, therefore, an extraordinary provisional remedy, it requires a special showing (*Margolies v Encounter, Inc.*, 42 NY2d 475, 479 [1977]. Hence, a preliminary injunction will only

be granted when the party seeking such relief demonstrates a likelihood of ultimate success on the merits, irreparable injury if the preliminary injunction is withheld, and a balance of equities tips them in favor of the moving party (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]; *Doe v Axelrod*, 73 NY2d 748, 750 [1988]; *61 West 62 Owners Corp. v CGM EMP LLC*, 77 AD3d 330, 334 [2010], *mod* 16 NY3d 822 [2011]; *Second on Second Cafe, Inc. v Hing Sing Trading, Inc.*, 66 AD3d 255, 264 [1st Dept 2009]; *Stockley v Gorelik*, 24 AD3d 535, 536 [2005]).

With respect to likelihood of success on the merits, the threshold inquiry is whether the proponent has tendered sufficient evidence demonstrating ultimate success in the underlying action (*Doe* at 750-751). While the proponent of a preliminary injunction need not tender conclusive proof beyond any factual dispute establishing ultimate success in the underlying action (*Sau Thi Ma v Xuan T. Lien*, 198 AD2d 186, 187 [1993], *lv dismissed* 83 NY2d 847 [1994]; *Ying Fung Moy v Hohi Umeki*, 10 AD3d 604, 605 [2004]), "[a] party seeking the drastic remedy of a preliminary injunction must [nevertheless] establish a clear right to that relief under the law and the undisputed facts upon the moving papers" (*Gagnon Bus Co., Inc. v Vallo Transp., Ltd.* 13 AD3d 334, 335 [2004]). This, of course, does not mean that plaintiff must conclusively establish guaranteed success on the merits and thus, issues of fact raised by the defendant cannot serve as a basis for denial of any motion

seeking a preliminary injunction (*Ma* at 187; *Moy* at 605; *Stockely* at 536; *Demartini v Chatham Green, Inc.*, 169 AD2d 689, 689 [1st Dept 1991]). In *Doe*, plaintiffs, a coalition of various members of the medical and pharmaceutical communities, sued seeking a declaration that 100 NYCRR 80.67 - which imposed strict control on certain tranquilizing medications - be declared unconstitutional (*id.* at 749). Plaintiffs also sought a preliminary injunction enjoining defendant, the State, from enforcing the challenged regulation (*id.*). The court denied plaintiffs' request for a preliminary injunction, holding that because plaintiffs failed to establish that defendant "acted outside of the authority constitutionally delegated to him under the Public Health Law or that the regulation was so lacking in reason for its promulgation that it [was] essentially arbitrary" (*id.* at 750 [internal citations and quotation marks omitted]), they failed to establish a likelihood of success on the merits (*id.*). Conversely, in *Stockley*, the court granted plaintiffs' - owners of a condominium - application for a preliminary injunction, thereby enjoining defendants - also owners of the condominium - from building a structure, which plaintiffs established would "encroach upon portions of the common elements of the condominium, which may require an easement the defendants did not seek, and would deprive the plaintiffs of the use and enjoyment of certain common elements, as well as portions of their own units" (*id.* at 536). The court

held that plaintiffs' evidence established a likelihood of success on the merits insofar as they demonstrated that they had initially authorized defendants' proposed construction without being fully apprised of its extent, which did not become known until plans were drawn (*id.*).

With regard to irreparable harm, generally, the inquiry is whether in the absence of a preliminary injunction, usually to preserve the status quo, any judgment on the underlying action would be rendered ineffectual (*Ma* at 186; *Moy* at 604). When this is the case, the proponent of a preliminary injunction has demonstrated irreparable harm. In *Ma*, plaintiff sued to recover payments from a winning lottery ticket, such winnings held by the defendant (*id.* at 186). Finding that a preliminary injunction was warranted, the court held that since it was clear that defendant intended to spend the proceeds at issue - intending to share the funds with his family - it was clear that absent a preliminary injunction, plaintiff would be irreparably harmed inasmuch as any judgment would be rendered ineffectual (*id.* at 186). The court in *Moy* similarly held that plaintiff had demonstrated irreparable harm but for the grant of preliminary injunction. In that case, plaintiff sued to void the transfer of her ownership interest in real property on grounds that such transfer was obtained by fraud (*id.* at 604). In holding that plaintiff established entitlement to a preliminary injunction, the court noted that "[t]he purpose of a

preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual" (*id.* 604), and thus, that absent the preliminary injunction, defendant could transfer the property, thereby irreparably harming plaintiff (*id.*).

With regard to the balancing of equities, the same requires that the court look at the prejudice which may accrue to the parties in the event the application for an injunction is granted or denied (*Ma* at 186-187), and usually the equities tip in favor of the party who would be irreparably harmed absent the grant of a preliminary injunction (*id.* at 187). Thus, should the court determine that plaintiff would be irreparably harmed by denial of the preliminary injunction while defendant would suffer little or no harm if said injunction is granted, then a preliminary injunction should be granted (*id.*).

Pursuant to CPLR § 6312(b),

> prior to the granting of a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court, that the plaintiff, if it is finally determined that he or she was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction

Thus, an undertaking is a condition precedent to the grant of a preliminary injunction and such requirement cannot be waived by the court (*Rourke Developers Inc. v Cottrell-Hajeck Inc.*, 285 AD2d 805,

805 [3d Dept 2001]; *Smith v Boxer*, 45 AD2d 1054, 1054 [2d Dept 1974]). The amount of such undertaking is solely within the court's discretion and should be as much as rationally necessary to compensate defendant for any potential damages should it later be determined that a preliminary injunction was unwarranted (*Clover St. Assoc. v Nilsson*, 244 AD2d 312, 313 [2d Dept 1997]; *Kazdin v Putter*, 177 AD2d 456, 457 [1st Dept 1991]). The undertaking represents the amount and indeed the limit of damages to which defendant will be entitled if it is determined that no preliminary injunction ought to have been granted (*Bonded Concrete, Inc. v Town of Saugerties*, 42 AD3d 852, 855 [3d Dept 2007]).

Pursuant to CPLR § 2501(1) and (2), an undertaking is

> [a]ny obligation, whether or not the principal is a party thereto, which contains a covenant by a surety to pay the required amount, as specified therein, if any required condition, as specified therein or as provided in subdivision (c) section 2502, is not fulfilled; and . . . any deposit, made subject to the required condition, of the required amount in legal tender of the United States or in face value of unregistered bonds of the United States or of the state.

CPLR § 2502(a)(1) and (2) defines a surety as an insurance company or a natural person, except an attorney.

Here, as noted above, each and every cause of action asserted by plaintiff hinges on a determination that it can still exercise its option to renew the lease. However, as noted above, because

the written lease expired on November 30, 2020, and plaintiff failed to properly exercise its option to renew before that date, it is, as a matter of law, precluded from doing so now. As such, plaintiff fails to establish a likelihood of success on the merits on each and every one of its causes of action. For example, based on the foregoing, the Court will not be able to declare, as urged, that plaintiff timely renewed the lease between the parties, an essential element of all three causes of action pleaded in the complaint. It is hereby

**ORDERED** that all stays be lifted, forthwith. It is further

**ORDERED** that all parties appear for a conference on August 1, 2022, at 10:30am. It is further

**ORDERED** that defendant serve a copy of this Decision and Order with Notice of Entry upon plaintiff within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : June 1, 2022
Bronx, New York

**HON. FIDEL E. GOMEZ, AJSC**