NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 32

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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WALEED D. NASSER and MUSTAFA ALSAIDI,

Index No. **816242/2021E**

Plaintiffs,

Hon. **FIDEL E. GOMEZ**
Justice

- against -

V.V. 3RD AVE. REALTY, LLC,

Defendant.
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The following papers numbered 1 to 3, read on this motion, noticed on 1/6/2022, and duly submitted as no. 1 on the Motion Calendar of 3/28/2022.

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

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

Dated: 5/4/22

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

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

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

3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST
☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT
X NEXT APPEARANCE DATE: June 13, 2022 at 2:00 p.m.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

----------X

WALEED D. NASSER and MUSTAFA ALSAIDI,

Plaintiffs,

DECISION AND ORDER

- against -

Index No. **816242/2021E**

V.V. 3RD AVE. REALTY, LLC,

Defendant.

----------X

Plaintiffs Waleed D. Nasser and Mustafa Alsaidi ("Plaintiffs") move by order to show cause for an order pursuant to CPLR 6301 and/or CPLR 2201 granting a Yellowstone injunction enjoining Defendant V.V. 3rd Ave. Realty, LLC ("Defendant") from, *inter alia*, interfering with Plaintiffs' exclusive right of use and occupancy of the store located at 3593 Third Avenue, Bronx, NY[1] a/k/a 492 East 168th Street, Bronx, NY (the "Premises), from interfering with Plaintiffs' exclusive right to occupy the Premises, and from commencing any proceeding to dispossess or evict Plaintiffs from the Premises, and extending and staying any period of the Plaintiffs to cure any alleged default under the parties' lease agreement, pending the hearing and determination of this action. Defendant opposes.

For the reasons which follow, Plaintiffs' motion is granted.

BACKGROUND:

On November 29, 2021, Plaintiffs commenced the instant action against Defendant by filing a summons and complaint, alleging causes of action for declaratory judgment,[2] anticipatory

[1] There is a discrepancy in the address in the papers submitted by Plaintiffs. The complaint, as well as Plaintiff Waleed D. Nasser's affidavit, list the address of the premises as 3592 Third Avenue, Bronx, NY (NYSCEF Doc. Nos. 2, 15). The Lease provides that the address of the premises is 3593 Third Avenue, Bronx, NY (NYSCEF Doc. No. 22). As such, the Court will consider the motion as if it affects the premises located at 3593 Third Avenue, Bronx, NY.

[2] Plaintiffs did not specifically enumerate this cause of action.

breach of contract and permanent injunction. On January 11, 2022, Plaintiffs filed an amended complaint, adding a cause of action for fraud in the inducement.[3]

The complaint alleges that Defendant is the owner of the Premises (Compl. ¶ 3).

Plaintiffs allege that on or around August 1, 2020, the parties entered into a lease for the corner store E 169 Street, located at the Premises (the "Lease") (Compl. ¶ 4). Plaintiffs allege that the Lease is for a term of ten (10) years and expires on July 31, 2030 (Compl. ¶ 5).

The complaint alleges that on or around November 4, 2021, Defendant served a Notice to Cure (the "Notice") upon Plaintiffs (Compl. ¶ 8). The Notice, attached as Exhibit B to the complaint, states that Plaintiffs are in violation of the Lease because they: (1) removed electrical panels and/or commenced alterations of plumbing, electrical and/or general construction, without Defendant's permission and without having first obtained any architectural drawings or permits, in violation of paragraphs 48 and/or 49 of the Lease;[4] (2) did not make a proper application to Con Edison for the gas meter, as required by paragraphs 49 and 52[5] of the Lease; and (3) are selling food, drink and tobacco at the Premises in violation of the Lease. The Notice states that Defendant shall terminate the tenancy if Plaintiffs do not cure these deficiencies by November 30, 2021 (Compl., Exhibit B).

Plaintiffs allege that they have cured the defaults, or is in the process of curing them, and/or were never in violation of the Lease (Compl. ¶ 9). First, Plaintiffs allege that they already sent a work permit to Defendant (Compl. ¶ 15; Compl., Exhibit C).

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[3] The Court has only considered the original complaint in deciding the instant motion, as the arguments made in the moving papers were based on the allegations in the original complaint.

[4] Paragraph 48 of the Lease, entitled "HAVC [sic] SYSTEM IN PREMISES/TENANT RESPONSIBLE", states, in relevant part, that: "Tenant shall be responsible for cost of and obtaining all equipment use permits, if so required by the City of New York or any other governmental agency having jurisdiction".

Paragraph 49 of the Lease, entitled "TENANT'S WORK", states that: "Tenant will, at all its sole cost and expenses, do all work not specifically mentioned above in order to outfit and run and maintain the premises. Tenant will make application and pay all costs to obtain Con Ed gas meter for premises. One gas meter (store #3) is connected on premises at this time. Tenant will be responsible for all gas meter charges in demised premises".

[5] Presumably, the Notice refers to paragraph 53, entitled "Utilities/Rubbish Removal", not paragraph 52, entitled "Subordination". Paragraph 53 of the Lease states, in relevant part, that: "(a) Tenant will pay for his own heat, electric, gas, water and sewer and trash removal."

Second, Plaintiffs allege that they attempted to set up an account with Con Edison (Compl. ¶ 26; Compl., Exhibit F). However, they allege that Defendant has refused Con Edison access to the Premises, and as such, Con Edison was not able to install a meter for them (Compl. ¶ 10). As a result, Plaintiffs allege that they have had to commence a proceeding in the Bronx County Civil Court, under Index No. LT-31270-2021, for an order permitting Con Edison access to the Premises (Compl. ¶ 11; Compl., Exhibit E).

Third, Plaintiffs allege that Defendant has attempted to unilaterally change the Lease by inserting a handwritten clause prohibiting the sale of food at the Premises (Compl. ¶ 12). Plaintiffs allege that this clause is not binding upon them (Compl. ¶ 13). Plaintiffs allege that even if the clause is binding upon them, the word "food" is vague (Compl. ¶ 14). Plaintiffs also allege that Defendant had actual knowledge of their use of the Premises, which is open and obvious (Compl. ¶ 17), and accepted rental payments, without making any objections (Compl. ¶ 18).

On November 29, 2021, Plaintiffs filed the instant motion. On March 28, 2022, the motion was marked fully submitted.

DISCUSSION:

In support of their motion, Plaintiffs submitted, *inter alia*, the affidavit of Waleed D. Nasser, one of the Plaintiffs; the Lease; the Notice; a copy of a work permit; and a letter dated October 2021 from ConEdison.

Plaintiffs argue that they have not breached the Lease. Plaintiffs argue that, nonetheless, they have attempted to and have the desire and ability to cure any alleged defaults (Affidavit of Waleed D. Nasser, ¶ 37-38).

Addressing the first alleged default, Mr. Nasser asserts that Plaintiffs already notified Defendant in September of the work permit from the Department of Buildings (Affidavit of Waleed D. Nasser, ¶ 27; Plaintiffs' Exhibit F).

As for the second alleged default, Plaintiffs argue that they have diligently sought to open an account with Con Edison and to have a meter installed, but that Defendant refused to allow ConEdison access to the Premises. Plaintiffs also argue that Defendant provided the wrong information to set up their meter (Affidavit of Waleed D. Nasser, ¶ 11, 13, 14, 15, 16; Plaintiffs' Exhibits C). Plaintiffs' Exhibit C includes a letter dated October 2021 from ConEdison stating that it needs access to install a new smart meter. The letter indicates that it is for service to the Premises. Plaintiffs argue that they have had to commence a proceeding for an order to compel Defendant to

allow ConEdison access to the utility room to install the meter (Affidavit of Waleed D. Nasser, ¶ 33; Plaintiffs' Exhibit B).

As for the third alleged default, Plaintiffs assert that the Lease does not state that they cannot sell food (Affidavit of Waleed D. Nasser, ¶ 19; Plaintiffs' Exhibit E). Plaintiffs argue that Defendant unilaterally changed the Lease after it was executed by them to add a prohibition on the sale of food, and that they did not agree to this additional clause (Affidavit of Waleed D. Nasser, ¶ 20-23). However, Mr. Nasser asserts that he did not object to the additional clause because he understood it to mean that he could not open a deli or a supermarket (Affidavit of Waleed D. Nasser, ¶ 24). Plaintiffs also argue that Defendant waived its right to enforce this clause, because it had actual knowledge that they were selling food, but nevertheless accepted rent without objection (Affidavit of Waleed D. Nasser, ¶ 26, 34).

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, Plaintiffs have demonstrated that they are entitled to a Yellowstone injunction. Plaintiffs have demonstrated that: (1) the parties entered into the Lease, which has an expiration date of July 31, 2030 (Plaintiffs' Exhibit E); (2) they received the Notice, which provided them with a cure period ending on November 30, 2021 (Plaintiffs' Exhibit A); (3) they brought the within motion on November 29, 2021, prior to the end of the cure period set forth in the Notice[6]

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[6] The Notice complies with the minimum 15-day notice period required by paragraph 17 of the Lease.

The Court notes that the copy of the Lease Plaintiffs provided in support of their motion is missing the page with paragraph 17. However, the copy of the Lease Defendant provided in opposition includes the missing page. Paragraph 17 states, in relevant part, that:

> If Tenant defaults in fulfilling any of the covenants of this lease other than the covenants for the payment of rent or additional rent . . . then, in any one or more of such events, upon Owner serving a written fifteen (15) day notice upon Tenant specifying the nature of said default, and upon the expiration of said fifteen (15) days, if Tenant shall have failed to comply with or remedy such default, or if the said default or omission complained of shall be of a nature that the same cannot be completely cured or remedied within said fifteen (15) day period, and if Tenant shall not have diligently commenced curing such default within such fifteen (15) day period, and shall not thereafter with reasonable diligence and in good faith proceed to remedy or cure such default, then Owner may serve a written five (5) days notice of cancellation of this lease upon Tenant, and upon the expiration of said five (5) days, this lease and the term thereunder shall

(*See Barsyl Supermarkets, Inc. v Avenue P Assoc., LLC*, 86 AD3d 545, 546 [2d Dept 2011] [holding that the tenant had timely brought its motion for a Yellowstone injunction as it brought the motion before the end of the cure period set forth in the notice of termination, which that court deemed to be the notice to cure]) and (4) they have either cured the alleged defaults, or have the ability to cure the alleged defaults by any means short of vacating the Premises. As for the first alleged default, Plaintiffs have demonstrated that they cured the alleged default by providing Defendant with the requisite work permit. As for the second alleged default, Plaintiffs have demonstrated that they attempted and are continuing to attempt to resolve the alleged default by submitting evidence that they attempted to create an account with ConEdison and that they have attempted to get a meter installed, but that their efforts have been hindered by Defendant. As for the third alleged default, Plaintiffs argue that they did not default, as the Lease does not prohibit the sale of food and drinks, but they nevertheless state that they have the ability to cure the defaults (Affidavit of Waleed D. Nasser, ¶ 37-38) (*See TSI West 14, Inc. v Samson Associates, LLC*, 8 AD3d 51, 52-53 [1st Dept 2004]; *Terosal Properties, Inc. v Bellino*, 257 AD2d 568, 568 [2d Dept 1999] ["With regard to the last criterion, the plaintiff satisfied its burden both by repeatedly indicating in its motion papers that it was willing to repair any defective condition found by the court and by providing proof of the substantial efforts it had already made in addressing the majority of the conditions listed in the notice to cure"]; *Jemaltown of 125th Street, Inc. v Leon Betesh/Park Seen Realty Associates*, 115 AD2d 381, 381 [1st Dept 1985] ["Rather than requiring the tenant to prove, on his application, that he can cure the alleged defects, all he need do to obtain the Yellowstone injunction is convince the court of his desire and ability to cure the defects by any means short of vacating the premises"]).[7]

> end and expire as fully and completely as if the expiration of such five (5) day period were the day herein definitely fixed for the end and expiration of this lease and the term thereof . . . (NYSCEF Doc. No. 41).

[7] Although not argued in the papers, the parties discussed the issue of whether Plaintiffs' application had been timely made, as Plaintiffs had not served the signed Order to Show Cause upon Defendant until December 7, 2021, after the cure period set forth in the Notice. While it is true that a motion or order to show cause is deemed made when served (CPLR § 2211; *Aqeel v Tony Casale, Inc.*, 44 AD3d 572, 572 [1st Dept 2007]), here, the fact that service of the signed Order to Show Cause was made after the cure period is not fatal. Plaintiffs' application was timely made, as it was brought prior to the expiration of the cure period set forth in the Notice (*See Barsyl Supermarkets, Inc.* at 547 ["Here, the notice of termination (which that court deemed to be a notice to cure) dated May 31, 2007, indicated that, based on the tenant's failure to comply with the prior demand for an estoppel certificate, the landlord intended to terminate the lease on June 29, 2007. Thus, the landlord provided the tenant with 30 days notice of termination, in satisfaction of

Defendant's opposition does not raise an issue of fact or law warranting a denial of Plaintiffs' motion. Addressing the first alleged default, Defendant does not dispute that Plaintiffs obtained and provided it with the requisite work permit (Affidavit of Ramamohan Bommareddy, p. 2). However, Defendant maintains that it did not give approval for the work that was done and that Plaintiffs did not put in two meters, as required. Defendant also argues that Plaintiffs owe additional security for altering the electric (Affidavit of Ramamohan Bommareddy, p. 2-3; Defendant's Exhibit E). As for the second alleged default, Defendant argues that Plaintiffs never created a ConEdison account in their name, and as a result, it has been paying Plaintiffs' ConEdison bill. Defendant also argues that it has never prevented ConEdison from accessing the Premises (Affidavit of Ramamohan Bommareddy, p. 2; Defendant's Exhibit D). As for the third alleged default, Defendant argues that the Premises was rented to Plaintiffs to be used as a hardware store and a 99 cent store. Mr. Bommareddy asserts that since there was a deli nearby that already sold food and drinks, he advised Plaintiffs that they should not sell food or drinks. He also asserts that he wrote in the clause prohibiting the sale of food and drinks onto the Lease before the parties initialed and signed the Lease (Affidavit of Ramamohan Bommareddy, p. 1-2; Defendant's Exhibit A). These arguments do not negate Plaintiffs' showing of entitlement to a Yellowstone injunction. Defendant does not argue that Plaintiffs are not willing to remedy the alleged defaults, that they have not made any efforts to remedy the alleged defaults, or that the alleged defaults are incurable. Defendant merely argues that Plaintiffs have not fully cured all alleged defaults. However, Plaintiffs are not required to demonstrate that they have fully cured all alleged defaults on a motion for a Yellowstone injunction.

Rather, Defendant's arguments merely raise issues of fact regarding the underlying issues. The Court need not determine the merits of these underlying issues at this juncture, as it is not

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the minimum 10-day notice period required by the lease. *Inasmuch the tenant commenced this action on June 25, 2007, and simultaneously sought the Yellowstone injunction, the motion for Yellowstone relief was timely*"] [emphasis added]; *Gap, Inc.* at 550 [holding that plaintiffs demonstrated their entitlement to a Yellowstone injunction because they showed, *inter alia*, that they *requested* injunctive relief prior to the termination of the lease]; *JT Queens Carwash, Inc.* at 1090; *King Party Center of Pitkin Ave., Inc. v Minco Realty, LLC*, 286 AD2d 373, 375 [2d Dept 2001] ["King's *failure to move for a restraining order before the cure period expired* resulted in an irrevocable lapse of the time to cure and divested the Supreme Court of its power to grant a Yellowstone injunction"] [emphasis added]; *Terosal Properties, Inc. v Bellino*, 257 AD2d 568, 568 [2d Dept 1999] [holding that plaintiff had demonstrated its entitlement to a Yellowstone injunction because, *inter alia*, it established that "it timely moved for injunctive relief prior to the expiration of the cure period and termination of the lease"]). Moreover, the Court signed the Order to Show Cause before the end of the day on November 30, 2021, and in so doing, stayed the cure period by issuing a temporary restraining order.

necessary to the determination 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). Moreover, since there are issues of fact as to whether Plaintiffs are responsible for curing the third alleged default, a Yellowstone injunction must be granted to maintain the status quo until there is a determination on the merits (*Audthan, LLC v Nick & Duke, LLC*, 181 AD3d 503, 503 [1st Dept 2020]).[8]

Accordingly, Plaintiff's motion is granted.

It is hereby

ORDERED that Defendant, its agents, servants, officers, directors, and employees, are enjoined from interfering with Plaintiffs' exclusive right of use and occupancy of the store located at 3593 Third Avenue, Bronx, NY 10456 a/k/a 492 East 168th Street, Bronx, NY 10456, and from interfering with Plaintiffs' exclusive right to occupy said premises, and from commencing any proceeding to dispossess or to evict the Plaintiffs or any individual/entity associated with Plaintiffs from the premises, during the pendency of this action and until further order of the Court; and it is further

ORDERED that any time of the Plaintiffs to cure any alleged violation of the parties' lease agreement, as well as any termination of the lease agreement, is stayed, during the pendency of this action and until further order of the Court; and it is further

ORDERED that the parties appear for a virtual **Preliminary Conference** on **June 13, 2022, at 2:00 p.m.**; and it is further

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

This constitutes the Decision and Order of this Court.

Dated:
5/4/22

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

[8] The Court notes that Defendant makes a number of other arguments (such as Plaintiffs' failure to obtain insurance), which are irrelevant to this motion, as they do not concern the alleged defaults listed in the Notice. The Court has not considered those other arguments.