New York Official Reports

Unreported Disposition
Slip Copy, 74 Misc.3d 1209(A), 2022 WL 433672 (Table), 2022 N.Y. Slip Op. 50089(U)

***1** S & M Bronx Inc., Plaintiff(s),
v.
Mosholu Petrol Realty LLC, Defendant(s).

Supreme Court, Bronx County
Index No. 815023/21E
Decided on February 14, 2022

CITE TITLE AS: S & M Bronx Inc. v Mosholu Petrol Realty LLC

ABSTRACT

Landlord and Tenant
Yellowstone Injunction
Motion was denied where application was made after expiration of cure period precipitated by commercial tenant's failure to procure liability insurance for premises as required by lease.

S & M Bronx Inc. v Mosholu Petrol Realty LLC, 2022 NY Slip Op 50089(U). Landlord and Tenant—Yellowstone Injunction —Motion was denied where application was made after expiration of cure period precipitated by commercial tenant's failure to procure liability insurance for premises as required by lease. (Sup Ct, Bronx County, Feb. 14, 2022, Gomez, J.)

APPEARANCES OF COUNSEL

Counsel for Plaintiff: Ginsburg & Misk
Counsel for Defendant: Wenig Saltiel LLP

OPINION OF THE COURT

Fidel E. Gomez, J.

In this action for declaratory judgment and a permanent injunction, plaintiff moves seeking a Yellow Stone Injunction tolling the period within which to cure the breach of the lease between the parties, which was triggered by defendant's Notice to Cure, dated October 28, 2021[1]. Plaintiff avers that because it is diligently attempting to cure the breach in question - the lapse of insurance coverage required by the lease - a Yellowstone Injunction is warranted to preserve the status quo, namely its valuable leasehold. Defendant opposes the instant motion asserting that because plaintiff fails to demonstrate that it has the ability to cure the breach in question, the instant application should be denied.

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

The instant action is for declaratory judgment and a permanent injunction. The complaint alleges that pursuant to a lease dated May 15, 2014, plaintiff took possession of the premises located at 3276 Jerome Avenue, Bronx, NY 10488 (3276). Defendant is 3276's landlord and plaintiff operates a gas station and convenience store at the instant premises. In 2020, as a result of an error, 3276 became uninsured. The foregoing was not discovered until April 15, 2021, when a claim resulting in a lawsuit was made against the parties from someone claiming to be injured at 3276. As a result of the foregoing, on October 4, 2021, defendant served plaintiff with ***2** a notice, alleging that by failing to procure general liability insurance for 3276, plaintiff breached the terms of the lease. Thereafter, on October 28, 2021, defendant served plaintiff with another notice, which indicated that the lease would be terminated and demanding that plaintiff vacate the premises within three days. Plaintiff contends that it has been and continues to attempt to cure the foregoing breach by searching for an insurance policy to retroactively cover the period of time for which 3276 had no insurance. Plaintiff also claims that the notices served by defendant are improper under the terms of the lease. Based on the foregoing, plaintiff seeks a permanent injunction tolling the cure period and enjoining defendant from terminating the lease. Plaintiff also seeks a declaratory judgment, declaring, *inter alia*, that it has not breached the lease.

STANDARD OF REVIEW

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 Yellow Stone 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 Injunctions 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 [1 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 ***3** 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, NY, LLC*, 66 AD3d 528, 529 [1st Dept 2009] ["The motion court found, after a hearing, that plaintiffs had not previously and continuously maintained ***4** 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]).

Discussion

Plaintiff's motion seeking a Yellowstone Injunction is denied. Saliently, the record evinces that the instant application was made after the cure period prescribed in the relevant lease expired, thereby warranting denial of the instant application. In addition, even if the instant application is deemed timely, the record establishes that despite plaintiff's efforts, months after being served with the notice apprising it of its breach it has been unable to procure insurance covering 3276 for the period in question. Accordingly, plaintiff has not, cannot and will not, cure the breach in question.

In support of the instant application, plaintiff submits an affidavit by Minas Derjangocyan (MR), plaintiff's president, who reiterates the allegations in the complaint. MR further states that since acquiring the instant leasehold, it has spent $100,000 in improvements to 3276. Pursuant to the terms of the lease, when it took possession of the premises in 2014, plaintiff purchased liability insurance covering 3276 and naming defendant as an additional insured. Unbeknownst to plaintiff, however, the broker never renewed the policy in 2020, but nevertheless continued to issue certificates of insurance evincing that 3276 was insured. On October 4, 2021, defendant served plaintiff with a Notice of Intention to Terminate Lease, which alleged that plaintiff breached the lease by failing to procure insurance for the year 2020. Thereafter, on October 28, 2021, defendant served plaintiff with a Notice to Quit, demanding that plaintiff vacate 3276 on or before November 5, 2021. MR states that the first notice served on plaintiff was a defective Notice to Cure under the lease and that instead, the second notice, requiring that plaintiff vacate the premises on or before November 5, 2021 was the Notice to Cure pursuant to the lease.

Plaintiff submits the lease between the parties, dated May 1, 2014, which indicates that it is between plaintiff and defendant. The lease is for the occupancy of 3276, a premises with a gas station, a convenience store, and a Dunkin' Donuts, leased to a co-tenant. The term of the lease is 15 years. Paragraph 12.01 requires that plaintiff procure

> for the benefit of Landlord . . . comprehensive policies of general liability insurance . . .[s]uch policies shall name Landlord . . . as 'additional insured' . . . protect[ing] Landlord, Tenant . . . against any liability occasioned by any occurrence on or about the Demised Premises or any appurtenances thereto . . . [s]uch policies shall be written by a good and solvent insurance company satisfactory to Landlord, in the single limit amount of S1,000,000.00/$2,000,000.00 and a $2,000,000.00 umbrella policy; and property damage in an amount no less than S350,000.00 for all buildings, canopies, structures and improvements on the Property.

Paragraph 28.01 of the lease, governing the breach by plaintiff of any of the lease terms, states

> If any one or more of the following events . . . shall occur . . . [i]f default shall be made by Tenant in the performance of or compliance with any of the other covenants, agreements, terms or conditions contained in this Lease, and such default shall continue for a period of five (5) days after written notice thereof from Landlord to Tenant, provided, that if Tenant proceeds with due diligence during such five (5) day period to cure such default and is unable by reason of the nature of the work involved, to cure the same within the said five (5) days, its time to so do shall be extended for an additional period not to exceed the time necessary to cure the same, provided, however, that such extension of time shall not subject Landlord or Tenant to any liability, civil or criminal, and the interest of Landlord in this Lease of Demised Premises shall not be jeopardized by reason thereof.

Plaintiff submits a notice, served upon it by defendant titled Notice of Intention to Terminate the Lease. The notice is dated October 4, 2021 and apprises plaintiff that it has failed to comply with, *inter alia*, paragraph 12.01 of the lease, requiring that plaintiff purchase and keep liability insurance coverage for 3276. The notice reproduces the foregoing section of the lease and further states that defendant has been sued in Supreme Court, Bronx County for an accident at 3276 and that despite requests as early as June 2021, plaintiff has failed to provide evidence of insurance coverage. The notice indicates that if the foregoing breach is not cured by October 13, 2021, defendant will terminate plaintiff's tenancy.

Plaintiff submits another notice served upon it by defendant titled Notice of Quit. This notice is dated October 28, 2021 and indicates that based on plaintiff's failure to cure the breaches within the Notice of Intention to Terminate the Lease, unless plaintiff vacated 3276 within three days, defendant intended to commence a summary proceeding to have plaintiff removed from the premises.

Based on the foregoing, plaintiff fails to establish entitlement to a Yellowstone Injunction. First, contrary to plaintiff's assertion, the instant application was made after the cure period prescribed by defendant's Notice of Intention to Terminate the Lease expired, such that it fails as a matter of law.

To be sure, where the proponent of Yellowstone Injunction fails to move for injunctive relief prior to the expiration of the relevant cure period, a court has no power to grant it (*First Natl. Stores* at 637; *T.W. Dress Corp.* at 900; *Norlee Wholesale Corp., Inc.* at 470; *Health 'N Sports, Inc.* at 885). Here, although the first notice served by defendant was not denominated as a Notice to Cure, it was nevertheless a notice compliant with the case law on this issue and was also compliant with the terms of the lease. Accordingly, the foregoing notice was a Notice to Cure.

The purpose of a Notice to Cure is to

> specifically apprise the tenant of claimed defaults in its obligations under the lease and of the forfeiture and termination of the lease if the claimed default is not cured within a set period of time

(*Fimtrucks, Inc. v Express Industries and Terminal Corp.*, 127 AD2d 509, 510 [1st Dept 1987]; *see* *542 Holding Corp. v Prince Fashions, Inc.*, 46 AD3d 309, 311 [1st Dept 2007]; *Westhampton Cabins & Cabanas Owners Corp. v Westhampton Bath & Tennis Club Owners Corp.*, 62 AD3d 987, 988 [2d Dept 2009] ["A notice to cure that forms the basis for a petition initiating a holdover proceeding must set forth sufficient facts to establish grounds for the tenant's eviction, and inform the tenant as to how the tenant violated the lease, as well as the conduct required to prevent eviction"]. A notice to cure must be unequivocal and unambiguous (*Greenfield v Etts Enters.*, 177 AD2d 365, 365 [1st Dept 1991]; *Garland v Titan W. Assoc.*, 147 AD2d 304, 310 [1st Dept 1989]). Accordingly, "[t]he standard for determining if a preliminary notice is sufficient is one of reasonableness in view of the attendant circumstances" (*D.K. Property, Inc. v Mekong Restaurant Corp.*, 187 Misc 2d 610, 611 [App Term, 1st Dept 2001]; *see Oxford Towers Co., LLC v Leites*, 41 AD3d 144, 144 [1st Dept 2007]).

Here, although not titled a Notice to Cure, the Notice of Intention to Terminate the Lease, dated October 4, 2021, clearly and unambiguously apprises plaintiff that it had breached the lease, why it had breached the lease, that it needed to cure the breach and that the failure to do so by October 13, 2021, would result in the termination of the lease. Accordingly, contrary to plaintiff's position, the Notice of Intention to Terminate the Lease was a Notice to Cure, which required that plaintiff cure the breach alleged - the absence of insurance - no later than October 13, 2021.

The Notice of Intention to Terminate the Lease is also compliant with the terms of the instant lease as per paragraph 28.01 of the lease, governing notice upon a breach of the lease, and extended the time to cure as provided by the lease by an additional five days.

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 ***5** 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 v Nappa*, 46 NY2d 560, 565 [1979]).

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 NY*, 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, with regard to the instant Notice to Cure, paragraph 28.01 clearly and unambiguously states that in the event of a breach, which continues for a period of more than five days after plaintiff is apprised of the breach in writing,

> if Tenant proceeds with due diligence during such five (5) day period to cure such default and is unable by reason of the nature of the work involved, to cure the same within the said five (5) days, its time to so do shall be extended for an additional period not to exceed the time necessary to cure the same, provided, however, that such extension of time shall not subject Landlord or Tenant to any liability, civil or criminal, and the interest of Landlord in this Lease of Demised Premises shall not be jeopardized by reason thereof.

Accordingly, under the express terms of the lease, defendant had the right to serve a notice upon ***6** plaintiff, apprising plaintiff of the breach alleged, giving it five days to cure, and extending that five day period for "an additional period not to exceed the time necessary to cure the same," unless the defendant, by such extension would be subjected to liability.

On this record, the Notice of Intention to Terminate the Lease served upon plaintiff gave plaintiff 10 days (From October 4, 2021 to October 13, 2021) to cure a longstanding breach, and as per the lease, provided no further extension because the nature of the breach, a lapse of insurance coverage, would expose defendant to civil liability. Indeed, here, defendant had already been sued, such that the risk it sought to avoid in the

lease had, as a result of plaintiff's failure to procure insurance coverage, become a reality.

Accordingly, there is absolutely no basis for plaintiff's assertion that the Notice to Quit served upon it was actually the Notice to Cure under the instant lease. As a result, the time to cure the instant breach expired, without any toll, on October 13, 2021. Plaintiff did not file the instant application, seeking a temporary restraining order (TRO), until November 4, 2021, approximately 18 days after the period to cure had already expired. Accordingly, the TRO could not toll the cure period since it had expired. Axiomatically then, there is no unexpired cure period capable of being tolled by a Yellowstone Injunction.

Assuming, *arguendo*, that the instant application had been timely made, it would nevertheless fail because it is clear that plaintiff cannot cure the breach in question.

Again, where the breach of a lease cannot be cured, an application for a Yellowstone Injunction must be denied (*Bliss World LLC* at 401; *Kyung Sik Kim* at 529; *Grenadeir Parking Corp.* at 314). Here, MR states that, that plaintiff has engaged in a myriad of activities to cure the breach, such as attempting to have the lapsed policy reinstated and attempting to purchase a new policy with retroactive coverage to include the period in question. It is clear, however, that those attempts have and will continue to be futile. To be sure, the instant application was made on November 4, 2021 and since then, through February 10, 2022 (four months later), when the parties appeared for a virtual conference, plaintiff has been unable to cure the instant breach. Indeed, at the foregoing conference, plaintiff, by counsel, stated that no one is willing to issue a policy covering the period in question, which is the only way to cure the breach. As such, inasmuch as 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), here, plaintiff cannot meet the last prong of the foregoing list of prerequisites. Accordingly, while the Court recognizes the adverse impact this may have on plaintiff, the instant motion is denied for this additional reason. It is hereby

ORDERED that all stays be hereby vacated forthwith. It is further

ORDERED that all parties appear for a Preliminary Conference on June 6, 2022 at 10am. It is further

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

This constitutes this Court's decision and Order.

Dated : February 14, 2022

Bronx, New York

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HON. FIDEL E. GOMEZ, AJSC

FOOTNOTES

1 On this record, it is clear and undisputed that the year on both the Notice of Intention to Terminate the Lease and the subsequent Notice to Quit is actually 2021, not 2020 as indicated on those documents. Hereinafter, the Court will refer to these documents as dated in 2021 and will refer to all deadlines therein as expiring in 2021.